



Government
Commercial
Function

The Procurement Act 2023: Using Your Procurement as an Enabler for Future Direct Awards



A discussion paper by the
Government Commercial Function

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Introduction

1. This paper discusses one of the provisions available within the Procurement Act 2023 (the Act); making direct awards of new contracts to incumbent suppliers for additional goods, services or works which are similar to those already contracted. **Please note:** This document is a discussion paper intended to support colleagues in their commercial role and does not constitute policy or legal advice.



The Procurement Act 2023

2. Schedule 5 of the Act sets out justifications for making direct awards. Commercial Policy guidance on making direct awards can be found [here](#).
3. Whilst a number of these justifications are largely unchanged from those that existed under the previous procurement legislation, Schedule 5 paragraph 8 is a revised provision. Schedule 5 paragraph 8 allows a contracting authority to directly award new contracts for similar goods, services or works to the existing supplier **within the first five years from the award of the original contract**, so long as the original contract was awarded following a competitive tendering procedure. **Importantly, the Act requires contracting authorities to set out its intent to use this provision in the original tender notice or related tender documents.**
4. This provision would not be available in the case of a call-off contract under a framework as frameworks provide for the award of call-off contracts without a tender notice. This provision would be expected to be available in the case of advertising a procurement to be conducted under a Dynamic Market.



When might the use of this provision be appropriate?

5. The intent to use this provision might, for example, be appropriate:
 - 5.1. **Value for Money and Performance:** If it is anticipated that the original contract may perform well and it could represent better value for money to directly award a new contract rather than run a new procurement, provided it will have no impact on long term competition. A direct award on this basis might additionally support economic growth e.g by supporting continued SME and/or supply chain growth or creating/retaining jobs;
 - 5.2. **Purchasing Beyond Original Scope:** Where it is anticipated that there is likely to be a need to purchase the same or similar goods, services or works beyond what is catered for in the original contract. For example, a successful public facing service may lead to greater demand due to increased customer uptake or the opportunity to expand services into new regions. This approach might prove preferential to including a right to extend the original contract, as it could provide the contracting authority with the ability to negotiate more favourable terms;
 - 5.3. **Business Needs:** Where it is anticipated that similar goods, services or works to the ones purchased could be used to address a different business need. This might be the case where the solutions are new/innovative. For example, the exact or similar AI technology might meet an existing or newly emerging need; or
 - 5.4. **Inter-Authority Benefit:** Where it is anticipated that an additional contract could be awarded which another contracting authority could receive the benefit of, for example it they would benefit from the same or similar, goods, works or services (noting of course that careful consideration would be needed to how such an arrangement would be formalised e.g. through an MoU or horizontal arrangement¹). For example, a public safety solution for trains might be applicable to other transport sectors.
6. For the provision to be relied upon the expectation is that the contracting authority had the intention to use this provision when publishing the tender notice for the original procurement. A statement indicating this must be set out in the tender notice or any tender document for the original procurement. This does not mean that the intent has to be carried through and direct awards made. (The wording in the tender notice or associated tender documents could make this clear.)

1. As defined under the Procurement Act 2023

How do I use this provision?

7. **Good Procurement:** This provision is a useful lever in driving good commercial outcomes. It should not be used as a fallback to manage late or poor commercial decision making. If used properly, it can avoid unnecessary procurement costs and deliver value for money whilst not impacting longer term competition.
8. In addition, contracting authorities should take into account the procurement objectives set out in section 12 of the Act when including the notice in their tender notice or documents and deciding whether or not to rely on this provision. This includes, for example, the requirement to have regard to the importance of delivering value for money and sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions.
9. **Publishing Intent:** As noted above, this new provision requires contracting authorities to publish the intent to carry out a subsequent direct award in reliance on this provision in the tender notice or related documents. The provision cannot be relied upon if the intent is not set out in the tender notice or related tender documents. Contracting authorities should consider publishing additional information about their intended future procurement, to demonstrate compliance with the requirement to have regard to the importance of sharing information to allow suppliers to understand the authority's procurement decisions.
10. **Business Case Justification:** It would be good practice to state in the associated business case the reasons for including the provision. Contracting authorities will, of course, need to satisfy themselves that the goods, services or works are indeed similar. Again, it would be good practice to document this within a business case to ensure decisions are auditable.
11. **Consider Negotiation:** The use of negotiation should be considered, prior to any decision to make a direct award using this provision, with the objective of achieving an improved commercial position and value for money. For example, negotiation might lead to improved pricing, improved social value, an economic growth opportunity and/or wider benefits.
12. **Approvals and Transparency:** As with any procurement, any direct award decision under Schedule 5 should be subject to all necessary approvals. Before awarding the contract the contracting authority will also need to publish a transparency notice.