

Legal 500

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United Kingdom

Public Procurement

Contributor

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This country-specific Q&A provides an overview of public procurement laws and regulations applicable in United Kingdom.

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United Kingdom: Public Procurement

*"Complex contracts" refers to contracts including: where the needs of the contracting authority cannot be met without adaptation of readily available solutions; contracts involving design or innovative solutions; where prior negotiation is required before a contract can be awarded due to particular circumstances related to the nature, the complexity or the legal or financial make-up of a contract or because of risks attaching to these circumstances; and where technical specifications cannot be determined with sufficient precision with reference to established technical standards, references or specifications.

1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL).

The UK is an independent member of the WTO Government Procurement Agreement ("GPA"). The UK is a party to the UK-EU Trade and Cooperation Agreement ("TCA").

The TCA sets out a framework of rules for trade in public procurement based on the GPA rules, but brings into its scope several areas that are not covered by the GPA, such as utilities procurements and telecommunication related services.

The UK is also party to other international trade agreements ("ITA") which contain public procurement provisions which provide for the extension of rights of equal treatment to operators from the relevant trade partner countries.

The public procurement obligations contained in the GPA, TCA and ITA have been implemented in the UK through secondary legislation. This makes amendments to the existing public procurement regulations that currently apply in all of the UK jurisdictions (England and Wales, Northern Ireland and Scotland). These regulations implemented the EU public procurement package of directives made in 2014 and will, in the most part, be replaced by the Procurement Act 2023, which now has a delayed go live date of 24 February 2025. These regulations and their replacement are referred to in response 2 below.

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements? In addition to any central government procurement regime please address the following: regulated utilities procurement regime (e.g. water, gas, electricity, coal, oil, postal services, telecoms, ports, airports), military procurements, non-central government (local, state or prefectures) and any other relevant regime. Please provide the titles of the statutes/regulations that regulate such procurements.

Central government, sub-central bodies and other public sector bodies are required to carry out a regulated public procurement procedure in respect of contracts for works, services and/or supplies valued above a certain financial threshold (further details of the threshold, see response 3).

In England and Wales and Northern Ireland, such contracts are subject to the Public Contracts Regulations 2015. In Scotland they are subject to the Public Contracts (Scotland) Regulations 2015. In addition, in Scotland, the Procurement Reform (Scotland) Act 2014 ("the 2014 Act") covers, inter alia, procurement for health/social care services, sustainable procurement duties and community benefit requirements in procurement. The Procurement (Scotland) Regulations 2016, secondary legislation made under the 2014 Act, make further provisions regarding regulated contracts, dynamic purchasing systems, and general and specific duties.

In England procurement of National Health Services healthcare services is now subject to the Health Care

Services (Provider Selection Regime) Regulations 2023.

The Defence and Security Public Contracts Regulations 2011 apply to defence and national security matters although some defence-related contracts are exempt from this regime such as intelligence activities.

The Utilities Contracts Regulations 2016 govern the award of public contracts awarded in the utilities sector (water, gas, electricity, coal, oil, postal services, telecoms, ports, airports) in England and Wales, and Northern Ireland. In Scotland, the equivalent regulations are the Utilities Contracts (Scotland) Regulations 2016. In these regulations, "utilities" are either public sector entities entrusted with the delivery of a utility service or private sector enterprises operating such services on the basis of a special or exclusive right.

All public sector authorities (including utilities) which are subject to the public procurement regime are required to comply with the Concession Contracts Regulations 2016 when procuring concessions. A concession is a contract where the consideration comprises (in whole or in part) the right to charge a third-party for the provision of the service or work, combined with an element of risk transfer. In Scotland, the concessions rules are implemented by the Concessions Contracts (Scotland) Regulations 2016.

The Procurement Act 2023 received royal assent on 26 October 2023 and will replace the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011. Whilst the Act will apply to English, Welsh and Northern Irish contracting authorities, the Scottish Government has chosen not to adopt the new regime and so devolved Scottish authorities are excluded and the Scottish procurement regulations will continue to apply. The Procurement Act 2023 will now come into force on the delayed go live date of 24 February 2025 and will apply to public procurements that are commenced after this date.

3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction? Does the financial threshold differ depending on the nature of procurement (i.e. for goods, works or services) and/or the sector (public, utilities, military)? Please provide all relevant current thresholds in your jurisdiction. Please also explain briefly any rules

on the valuation of a contract opportunity.

Yes. The financial thresholds that are applicable to public procurements commenced on or after 1 January 2024 are set out below. For the purposes of determining whether the relevant procurement regulations apply these thresholds are inclusive of VAT (where applicable), save in Scotland where a contract's value should be estimated exclusive of VAT however for the purpose of determining whether the Procurement Reform (Scotland) Act 2014 applies.

The Public Contracts Regulations 2015 & Public Contracts (Scotland) Regulations 2015

Supplies & Services (except subsidised services contracts):

Central government bodies: £139,688 (see list in relevant legislation)

Rest: £214,904 (mainly sub-central entities)

Subsidised services contracts:

All bodies: £214,904

Works (including subsidised works contracts):

All bodies: £5,372,609

Light Touch Regime for Services:

All bodies: £663,540

The Utilities Contracts Regulations 2016 & Utilities Contracts (Scotland) Regulations 2016

Supplies and Services:

All sectors £429,809

Works:

All sectors £5,372,609

The Concession Contracts Regulations 2016 and Concessions Contracts (Scotland) Regulations 2016

Concession contracts £5,372,609

The Defence and Security Public Contracts Regulations 2011

Supplies and Services:

All sectors £429,809

Works:

All sectors £5,372,609

Procurement Reform (Scotland) Act 2014

Regulated Contracts:

Public contract (other than a public works contract)
£50,000

Public works contract £2,000,000

The different regimes set out methods for the calculation of the value of a contract opportunity (see for example Regulation 6 in the Public Contracts Regulations 2015). The methods are broadly similar across these regimes. They include the following rules:

- the estimated value of the contract is to be calculated based on the total amount payable under the contract, including any form of option and any renewals envisaged;
- the valuation method must not have been selected with a view to deliberately circumventing the procurement regime;
- the procurement must not be subdivided with a view to circumventing the procurement regime;
- where a proposed work or provision of services may result in multiple separate lots, account must be taken of the total estimated value of all lots.

Schedule 1 of the Procurement Act 2023 uses the thresholds set out above and so secondary legislation would be needed to change the existing thresholds.

4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.

In England and Wales, a procurement regime applies to procurements by public sector bodies (but not utilities) with a value above £12,000 (for central government bodies) or £30,000 (for other public sector bodies) unless certain limited exceptions apply.

The procurement procedure is more flexible than the standard process set out under the various regulations.

In Scotland, there are more detailed rules for public sector bodies set out in the Procurement Reform (Scotland) Act 2014 and Procurement (Scotland) Regulations 2016. These apply to works contracts between £2m and supplies / services contracts between £50,000 and the

respective thresholds for works and supplies / services set out in the Public Contracts (Scotland) Regulations. The position is slightly more prescriptive than that in England and Wales.

5. For the procurement of complex contracts*, how are contracts publicised? What publication, journal or other method of publicity is used for these purposes?

All complex contract opportunities that are valued above the financial thresholds set out in response 3 are required to be published in the UK's Find a Tender service which is an e-notification service.

Following publication on Find a Tender, above threshold contracts must also be advertised in Contracts Finder (under the Public Contracts Regulations 2015) or in Public Contracts Scotland (under the Procurement (Scotland) Regulations 2016). Equivalent national databases are Sell2Wales and eTendersNI/eSourcing NI.

The Procurement Act 2023 will create a new central digital platform for suppliers to register and store their details so that they can be used for multiple bids, and see all opportunities in one place.

6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders? If there are differences in methodology between different regulated sectors (for example between how a utility might undertake a regulated procurement procedure and how a government department might do so), please summarise those differences.

The Standard Selection Questionnaire is commonly used in most of the UK. In Scotland, the Single Procurement Document is used. Procurements that are subject to the Utilities Contracts Regulations 2016 do not have a standardised document.

Typical grounds for the selection of bidders include:

- the candidate's financial standing;
- the extent to which the candidate has sufficient past experience in delivering similar contracts for the relevant works, services and/or supplies;
- whether any of the mandatory or discretionary grounds for exclusion apply.

The typical grounds for the selection of bidders will remain the same under the Procurement Act 2023.

7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so, what are those grounds of mandatory exclusion? Are there any notable features of how this operates in your jurisdiction e.g. central registers of excluded suppliers? Does your jurisdiction specify discretionary grounds of exclusion? If so, what are those grounds of discretionary exclusion?

Yes, there are a number of grounds for mandatory exclusion in all of the regulations applicable in the UK (as set out under response 2). They include convictions for serious offences such as bribery, corruption, fraud, money laundering, dealing with the proceeds of drug trafficking, tax evasion.

All of the regulations also contain discretionary grounds of exclusion. These include insolvency, grave professional misconduct, conflicts of interest, distortion of competition, significant or persistent deficiencies in the performance of a substantive requirement of a previous public contract that have led to early termination of the contract, damages or other comparable sanctions.

Where any of the mandatory or discretionary exclusion grounds apply, a candidate may provide evidence to the contracting authority that it has taken measures sufficient to demonstrate its reliability despite the presence of an exclusion ground. This is known as "self-cleaning" and the candidate shall prove that it has:

- paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The contracting authority has the discretion to determine if the evidence is sufficient. If it does not consider the evidence sufficient and the contracting authority decides to exclude the candidate, the contracting authority must provide a statement of reasons to the candidate for its decision.

Under the Procurement Act 2023 the grounds of mandatory and discretionary exclusion are generally similar to the existing regime with the addition of competition law infringements and national security grounds. There will be a five year time limit which applies to both mandatory and discretionary exclusion grounds. There will also be a central debarment list to which a Minister of the Crown may add an excluded or excludable supplier.

8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures. Please include a timeline that includes the key stages of the process, including an estimation for the total length of the procedure.

A complex contract would usually be procured using the competitive dialogue procedure ("CD") or the competitive procedure with negotiation ("CDN"). The key stages of the process and relevant minimum time limits that are applicable in these procedures are set out below.

Stage	Minimum time period
The contracting authority is required to advertise the opportunity using the UK's Find a Tender e-notification service using a contract notice.	N/A
Interested candidates submit a request to participate by returning a completed Standard Selection Questionnaire ("SSQ").	30 days from either (i) the date on which the contract notice is sent or in respect of the CDN only (ii) where a prior information notice is used the date on which the invitation to confirm interest is sent.
The contracting authority evaluates the responses to the SSQ in line with specified selection criteria and may reduce the number of candidates to go through to the next stage but this cannot be less than 3 suitably qualified candidates.	No minimum time period but contracting authorities must build the necessary time into the programme.
The contracting authority issues an Invitation to Tender ("ITT") to bidders.	N/A
Initial tenders are submitted.	30 days from the date on which the ITT is sent in the case of the CDN. This can be reduced to 10 days in certain circumstances.
Negotiations/dialogue takes place. This can include a number of meetings and stages - there is no prescribed approach. Interim tender submissions can be invited. Bidder numbers can be reduced at the end of each stage if this is set out in the procurement documents.	No minimum time period but the ITT negotiation/dialogue stage usually takes a minimum of 6 months depending on the number of stages and meetings.
Final tenders are requested and evaluated in line with the award criteria specified in the procurement documents and the contract is awarded on the basis of the most economically advantageous tender.	No minimum time period but contracting authorities must build the necessary time into the programme for evaluation.
Once final tenders have been submitted and the preferred bidder has been identified, under CD the final tender can be clarified, specified and optimised if requested by the contracting authority but this cannot involve changes to essential aspects of the tender where such changes are likely to distort competition or have a discriminatory effect. No further negotiations are permitted under CDN following submission of final tenders.	No minimum time period but contracting authorities must build the necessary time into the programme.
Award of contract and standstill period observed before contract entered into.	10 calendar days from the date on which bidders are notified of the outcome.

A typical CD or CDN procedure will take a total estimation of around 12 months, but it is not unusual for it to take longer. Throughout the process bidders must be treated in compliance with principles of equal treatment, non-discrimination and transparency to ensure that no bidder has an unfair advantage over others.

Under the Procurement Act 2023, a typical procedure for a complex contract will be known as a competitive flexible procedure. This is designed to be less prescriptive than the current regime and allows the contracting authority to formulate the process as it considers appropriate as long as it is a proportionate means of

awarding the contract, having regard to the nature, complexity and cost of the contract.

9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured. (For these purposes, please assume the contract in question exceeds the relevant threshold for application of the procurement regime by less than 50%)

A relatively low value contract would either be procured using one of the Open or Restricted procedures, or a framework established by the Crown Commercial Service (and other national, regional or local buying consortiums).

The stages of an Open and Restricted procedure together with minimum time limits are as follows:

Stage	Minimum time limit
The contracting authority is required to advertise the opportunity using the UK's Find a Tender e-notification service using a contract notice.	N/A
Restricted procedure only - interested candidates submit a request to participate by returning a completed Standard Selection Questionnaire ("SSQ").	30 days from either (i) the date on which the contract notice is sent (ii) where a prior information notice is used the date on which the invitation to confirm interest is sent. This can be reduced to 15 days in the event of a state of urgency.
Restricted procedure only - the contracting authority evaluates the responses to the SSQ in line with specified selection criteria and may reduce the number of candidates to go through to the next stage but this cannot be less than 3 suitably qualified candidates.	No minimum time period but contracting authorities must build the necessary time into the programme.
The contracting authority issues an Invitation to Tender ("ITT") to bidders.	N/A
Tenders are submitted	Open - 35 days from the date on which the contract notice is sent, or 30 days if tenders are accepted electronically, or 15 days from such date where a qualifying prior information notice was used or there is a state of urgency. Restricted - 30 days from the date on which the ITT is sent or 25 if tenders are accepted electronically. This can be reduced to 10 days where a qualifying prior information notice was published or there is a state of urgency.
Tenders are evaluated in line with the award criteria specified in the procurement documents and the contract is awarded on the basis of the most economically advantageous tender.	No minimum time period but contracting authorities must build the necessary time into the programme for evaluation.
Award of contract and standstill period observed before contract entered into.	10 calendar days from the date on which bidders are notified of the outcome.

Under the Procurement Act 2023, a relatively low value contract would be procured using the new single-stage tendering procedure, known as the open procedure. This will be very similar to the Open procedure described above.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?

Best practice is considered to be contained in the various playbooks available to contracting authorities.

In England, the Cabinet Office has published various Playbooks (the Sourcing Playbook, Digital, Data and Technology Playbook, Construction Playbook and Consultancy Playbook) which set out best practice on service delivery, technology construction procurement

and consultancy procurement respectively, and expectations on how contracting authorities and suppliers should engage with each other. This guidance must be followed by central government departments, their executive agencies and non-departmental public bodies, but may be used as best practice in the wider public sector too. In Scotland, the Procurement Journey is intended as a single source of guidance and best practice, and intended to help manage supplier, authority and stakeholder expectations.

There are also public procurement policy notes published and updated by Cabinet Office from time to time that are applicable to central government departments, their executive agencies and non-departmental public bodies, but may be applied in the wider public sector too.

The Cabinet Office has also created what is intended to be a comprehensive learning and development package to support stakeholders in the public sector operating within the scope of the new public procurement regime (i.e. under the Procurement Act 2023) and to assist those stakeholders to understand what is changing from the current system.

11. Please explain any rules which are specifically applicable to the evaluation of bids.

The evaluation of bids takes place on the basis of the most economically advantageous tender. This is assessed from the point of view of the contracting authority and is identified on the basis of price or costs and may include the best price-quality ratio assessed on the basis of criteria that is linked to the subject-matter of the contract to be awarded.

The regulations set out examples of what the criteria may include, such as:

- quality, including technical merit, accessibility, design for all users, social and environmental characteristics;
- organisation, qualification and experience of staff assigned to perform the contract where the quality of staff can have a significant impact on the level of performance of the contract;
- after-sales service and technical assistance, delivery conditions and period of completion.

Cost can take the form of a fixed price to allow bidders to compete on quality alone. Award criteria must not confer an unrestricted freedom of choice on the contracting authority and they must ensure the possibility of effective competition.

The award criteria and any weighting used must be set out in the tender documents so bidders know in advance how they will be assessed. Weightings can be expressed as a range with a maximum spread but where weighting is not possible for objective reasons the contracting authority can set out award criteria in descending order of importance.

There are further rules on life-cycle costing and the treatment of abnormally low tenders (see response 12).

Under the Procurement Act 2023 a contracting authority will award the contract on the basis of the most advantageous tender through a competitive tendering procedure. The term "most advantageous tender" is defined by the contracting authority, taking into account its satisfaction with the tender meeting the authority's requirements and excelling in the assessment based on the criteria the authority uses to evaluate bids.

The Procurement Act 2023 sets out examples of what the criteria may include, such as:

- any aspect of goods, services or works are to be produced, traded or other stage in their life-cycle;
- how or when those goods, services or works are to be supplied;
- the qualifications, experience, ability, management or organisation of staff where those factors are likely to make a material difference to the quality of goods, services or works being supplied;
- price, other costs or value for money in all the circumstances.

In the UK most procurement challenges concern bid evaluation. Key principles guiding the courts' evaluation of those challenges include:

1. Equal treatment: notwithstanding the wide margin of discretion available to contracting authorities, the principle of equal treatment requires that comparable situations must not be treated differently, and authorities must not act arbitrarily.
2. Proportionality: authorities must strike a sensible balance so as to avoid rejecting bids where errors/ambiguities are easy to resolve via correction/clarification.
3. Transparency: good records must be kept of bid evaluation (e.g. evaluator/moderator notes) so authorities can justify their bid assessment and scoring.

Courts will interfere if there is a manifest error (i.e. the decision is unreasonable or irrational) and this is a high bar. In the event of manifest error, the courts will re-score

and assess the materiality of the error (e.g. whether it would have changed the outcome of the award decision).

12. Does your jurisdiction have specific rules for the treatment of bids assessed to be "abnormally low" for the purposes of a particular procurement (i.e. a low priced bid, significantly lower than any other bid or a bid whose pricing raises questions of sustainability/viability over the contract term)? If so, is there a definition of what "abnormally low" means and please can you provide a short summary of the specific rules?

Where a tender appears to be abnormally low, the contracting authority shall require the tenderer to explain the price or costs it has proposed. The explanations may relate to specific reasons including the technical solutions chosen, the originality of the work, services or supplies proposed or the economics of the manufacturing process.

Whilst the regulations do not define what "abnormally low" means, UK case law has clarified that this must encompass a bid that is low (almost invariably lower than the other bids) and the bid must go below and beyond anything that might legitimately be considered normal in the context of the procurement. It is therefore a matter for a contracting authority's discretion and the court has indicated it will only intervene in an authority's assessment of what is abnormally low if it considers there has been a manifest error.

There is no general duty on an authority to investigate whether every bid is abnormally low – it is only required to investigate those bids it suspects are abnormally low and intends to reject. The contracting authority may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed.

Under the Procurement Act 2023 the contracting authority has the right to disregard a tender where the price is considered to be abnormally low but before it does so the supplier has to be given reasonable opportunity to demonstrate that it is able to perform the contract for the price offered to the contracting authority's satisfaction. If it does so the contracting authority may not disregard the tender.

13. Please describe any rights that unsuccessful bidders have that enable them to receive the

reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder. Are regulated procuring bodies required to provide these reasons for their award decision before awarding the contract in question?

Prior to awarding the contract in question, contracting authorities are required, in normal circumstances, to provide unsuccessful tenderers with a notice of the decision to award the contract that sets out:

1. The criteria for the award of the contract;
2. The reasons for the decision, including the characteristics and relative advantages of the successful tender, the scores of the successful tenderer and the tenderer that receives the notice;
3. The name of the successful tenderer; and
4. The date on which the 10 day (changing to 8 working days under the Procurement Act 2023) standstill period (which commences on the date of sending the notice, and prior to the expiry of which the contract cannot be entered into) will end.

The precise level of information to be set out in the notice has often been raised as an issue by unsuccessful tenderers, who frequently seek additional information from contracting authorities.

14. What remedies are available to unsuccessful bidders in your jurisdiction? In what circumstances (if any) might an awarded contract be terminated due to a court's determination that procurement irregularity has occurred?

Once the contract has been entered into, the only available remedy is damages, unless the conditions for ineffectiveness are met (see further below).

For the most part, the goal of unsuccessful bidders in pursuing a procurement challenge is to become the successful bidder for the contract, rather than to pursue a claim for damages. For that reason, and to avoid damages being the only available remedy, unsuccessful bidders who wish to pursue a procurement challenge will issue proceedings prior to the expiry of the 10 day (changing to 8 working days under the Procurement Act 2023) standstill period (see response 13 above). The result of proceedings being issued prior to the expiry of the standstill period is that an automatic suspension on entering into the contract takes effect, and that

suspension remains in place until lifted by the court (or the proceedings come to an end). Where a procurement challenge is brought prior to entry into the contract, the court will consider whether damages or setting aside the award is the most appropriate remedy.

The remedy of ineffectiveness may be sought once the contract has been entered into, with the effect that prospective obligations under the contract are cancelled. The remedy is not discretionary and if any of the grounds are satisfied, the court must generally make a declaration. The various grounds for ineffectiveness include where a contracting authority awards the contract without complying with the relevant rules on standstill or suspension.

15. Are public procurement law challenges common in your jurisdiction? Is there a perception that bidders that make challenges against public bodies suffer reputational harm / harm to their prospects in future procurement competitions? If so, please provide brief comment. Assuming a full hearing is necessary (but there are no appeals), how much would a typical procurement claim cost: (i) for the defendant and (ii) for the claimant?

Public procurement challenges for high-value contracts are not uncommon. However, many of those challenges are not pursued to a final hearing. In particular, and as mentioned above, most unsuccessful bidders pursue challenges with the ultimate aim of achieving the award of the contract. Often, when it becomes clear during the course of legal proceedings that the likely remedy will be damages only, unsuccessful bidders choose to bring the proceedings to an end.

The extent of reputational damage from challenging decisions is less than might be expected; in the event unsuccessful bidders have a good basis on which to commence a procurement challenge, it is very likely that their commercial reasons for doing so (e.g. the significant value of the relevant contract) will outweigh any concerns regarding reputational issues and the challenge will be issued in the courts.

Depending on the complexity of the claim, costs up to and including a full hearing of the procurement challenge for each party could be in the region of £200,000 to £1m+. Costs will be comparatively lower in Scotland (but unlikely to be less than £200,000).

16. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case). Please summarise the key stages and typical duration for each stage.

Distinct from many other areas of litigation, procurement challenges may well be expedited, e.g. where the contract has not been awarded and there is therefore substantial time pressure to conclude the proceedings, and where it is reasonable in the circumstances for the parties to be ready for a final hearing on an expedited basis. In expedited proceedings, the challenge should reach a final hearing in matter of months (well under a year).

If the hearing is not expedited, it may well take at least a year, and up to around 18 months to reach a final hearing.

Broadly speaking, the initial stages of the process are the issue of the Claim Form followed within 7 days by the Particulars of Claim (which set out the basis for the challenge in detail). The Defence is required to be filed within 28 days of the service of the Particulars of Claim (if an Acknowledgment of Service is filed within 14 days of the Claim Form). Procedural steps to be completed thereafter, and prior to a final hearing, include disclosure and witness evidence.

In the context of procurement challenges, the court will frequently be required to determine other contentious issues, such as in respect of the disclosure of documents and the suspension of the entry into the contract. In fact, many procurement disputes are resolved at the time of:

- i. Resolution of contentious issues regarding disclosure. Unsuccessful bidders are frequently in a position where they are unable to fully assess the strength of the basis for their procurement challenge; the contracting authority is holding all of the relevant information regarding the tender, which will frequently be deemed to be confidential/only disclosable within a lawyers' only confidentiality ring by the contracting authority. Once an unsuccessful bidder is in a position to assess properly their legal position (i.e. in light of relevant disclosure), the challenge will often be brought to an end.
- ii. The hearing of the application to lift the suspension of the entry into the contract, on the basis that if the suspension is allowed, often the contracting authority will agree to re-run the process and if it is refused, frequently the unsuccessful tenderer's only remaining remedy would be to sue for damages, which it is often disinclined to do.

In Scotland, the initial stages of a commercial action in the Court of Session, where any dispute regarding a complex contract would likely be raised, would be the preparation and signeting of the summons, followed by its service on the contracting authority. Following service, the pursuer must lodge the summons for calling in court. This cannot be done earlier than 21 days after the date of service, unless the court has shortened that period. Once the summons calls, the contracting authority has seven days to lodge defences. There should then be a preliminary hearing within 14 days after defences are lodged. Procedure after that will depend on the nature of the challenge. A challenge purely on a point of law could be disposed of within about 6 months. If the challenge involves a factual dispute, it is likely to take about 12 – 18 months for the case to be determined following proof. The commercial judge would make orders regarding the time for lodging documentary evidence and witness statements or affidavits in advance of the proof. The contracting authority will often make an application to end the automatic suspension that arises upon service of the proceedings. It is normal for that application to be made soon after service of proceedings. As in England and Wales, the outcome of that application may lead to the early resolution of the case.

17. What rights/remedies are given to bidders that are based outside your jurisdiction? Are foreign bidders' rights/remedies the same as those afforded to bidders based within your jurisdiction? To what extent are those rights dependent on whether the host state of the bidder is a member of a particular international organisation (i.e. GPA or EU)?

The available rights and remedies will be dependent on whether the relevant country in which the bidder is based is a GPA country / if that country has an ITA in place with the UK:

- i. Bidders from a GPA country have similar rights/remedies to UK bidders provided the contract they are bidding for is of a type covered by one of the GPA Schedules at the time the procurement process commences.
- ii. Where the relevant country has an ITA in place with the UK (including the TCA), the bidder will also have similar rights/remedies (so long as the procurement in question is covered by the relevant ITA).

These similar rights/remedies are generally not available in the case of below threshold procurements. However, under the TCA, and subject to limited exceptions,

contracting authorities in the UK must treat EU-owned suppliers based in the UK no less favourably in any procurement (including non-covered/below threshold procurement).

18. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract? Would such a subsidiary be afforded the same rights and remedies as a nationally owned company bidding in your jurisdiction?

Overseas-based bidders with UK subsidiaries have the same access as suppliers from the UK where the procurement falls within the scope of the GPA and/or an ITA.

UK subsidiaries (including subsidiaries of a non-UK holding company/group of companies) would be treated in the same way as a UK owned and based entity, i.e. have access to the same rights and remedies. The position could be different where the bidder is based overseas (even if it has a UK subsidiary) as the bidder's rights/remedies would then need to be assessed with reference to the country in which it is resident (see also question 17 above).

19. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues? In what circumstances will it have jurisdiction over a public procurement claim?

In practice, almost all public procurement challenges are commenced in the High Court, Technology and Construction Court, not least because its judges have specific expertise in the area and the court has developed and published a particularly relevant and helpful guidance note on procedures for public procurements cases (currently set out in Appendix H of the Technology and Construction Court Guide).

There is no specialist court or tribunal in Scotland with responsibility for dealing with public procurement issues. The Court of Session and sheriff courts (i.e. the ordinary civil courts) both have jurisdiction to determine public procurement disputes. It is for the pursuer to decide in which court to raise the action. Most challenges will be raised in the Court of Session as commercial actions. This means they will be allocated to dedicated

commercial judges with experience of public procurement issues.

20. Are post-award contract amendments/variations to publicly procured, regulated contracts subject to regulation in your jurisdiction? Are changes to the identity of the supplier (for example through the disposal of a business unit to a new owner or a sale of assets in an insolvency situation) permitted in your jurisdiction?

Yes, there are rules on post-award contract amendments/variations in the UK contained in both the Public Contracts Regulations 2015 and the Public Contracts (Scotland) Regulations 2015. Post-award contracts can be varied, without triggering a new procurement process in certain specific circumstances.

Changes to the identity of the supplier are permitted in the UK as a consequence of:

- i. an unequivocal review clause contained in the initial procurement documents to allow for such a circumstance; or
- ii. a corporate restructuring event, including takeover, merger, acquisition or insolvency. The new supplier is required to fulfil the original qualitative selection criteria, and there must be no other substantial variations to the contract and the change of contractor must not be intended to circumvent the application of the procurement regulations.

Under the Procurement Act 2023, the rules on modification are very similar but will only apply to contracts awarded as a result of a competitive tendering procedure commenced after the Procurement Act 2023 has come into force (expected February 2025).

21. How common are direct awards for complex contracts (contract awards without any prior publication or competition)? On what grounds might a procuring entity seek to make a direct award? On what grounds might such a decision be challenged?

Direct awards are only available on relatively limited grounds as follows:

- no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to a procurement process

using the Open or Restricted procedure;

- the contract can only be delivered by one particular economic operator where:
 - competition is absent for technical reasons;
 - there are exclusive rights that are to be protected, including intellectual property rights,

and there is no reasonable alternative or substitute and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.

- the contract can only be delivered by one particular economic operator where the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
- there are reasons of extreme urgency brought about by events unforeseeable by the contracting authority which means that the time limits specified in the procurement regulations cannot be complied with.

Under the Procurement Act 2023, there are some additional grounds on which a direct award will be available and these include the following:

- the contract concerns the production of a prototype or supply of other novel goods or services for the purpose of testing the suitability of such services, researching the viability of producing or supplying such goods or services at scale, or other research, experiment, study or development;
- certain "user choice" contracts which are light touch services for the benefit of an individual;
- to an excluded supplier where there is an overriding public interest such as where it is necessary in order to construct, maintain or operate critical national infrastructure or to ensure proper function of a sector on which the defence, security or economic stability of the UK relies.

Additionally, a Minister of the Crown can make regulations to allow specific public contracts to be directly awarded if it is deemed necessary to protect human, animal, or plant life, health, public order, or safety.

In most cases of direct award, under the Procurement Act 2023, the contracting authority will be required to publish a transparency notice, providing information about the intent to award a contract directly. Certain exceptions, like user choice contracts, are exempt from this transparency requirement.

22. Have your public procurement rules been sufficiently flexible and/or been adapted to respond to other events impacting the global supply chain (e.g. the war in the Ukraine)?

No, the UK's procurement rules have not been sufficiently flexible to respond to all events impacting the global supply chain.

The rules are such that contracting authorities would be required to consider potential flexibility that may be needed at the start of the procurement process, for example any price escalation mechanisms to deal with increased supply chain costs/inflation and build this into the procurement documents and the contract before it is entered into.

Regarding the war in the Ukraine, the Cabinet Office issued guidance to support certain contracting authorities including central government departments and local authorities in further cutting ties with companies backed by the states of Russia and Belarus (Procurement Policy Note 01/22: contracts with suppliers from Russia and Belarus). The guidance also covers the extent to which suppliers may be excluded in new procurements where they have links to Russia and Belarus.

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