

THE PROCUREMENT ACT 2023: NAVIGATING THE NEW SERVICE PROCUREMENT LANDSCAPE

with Kieran McGaughey

28th February 2024 | 10:00AM

With the implementation of the Procurement Act 2023 on the horizon, this session will explore specific themes related to the Act, including early transition challenges and the shifts in approach we can all expect.



Shaun Toner

Customer Engagement
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Consultant Solicitor &
Procurement Law Trainer



The Procurement Act 2023: Navigating the new procurement landscape

**Matrix webinar
28th February 2024**

**Kieran McGaughey,
Consultant Solicitor**

Introduction...



Kieran McGaughey
Consultant solicitor | Providing legal advice and training on procurement law | Director & National Lead for Procurement Law at Lawyers in Local Government (LLG)
Newcastle upon Tyne, England, United Kingdom · [Contact info](#)

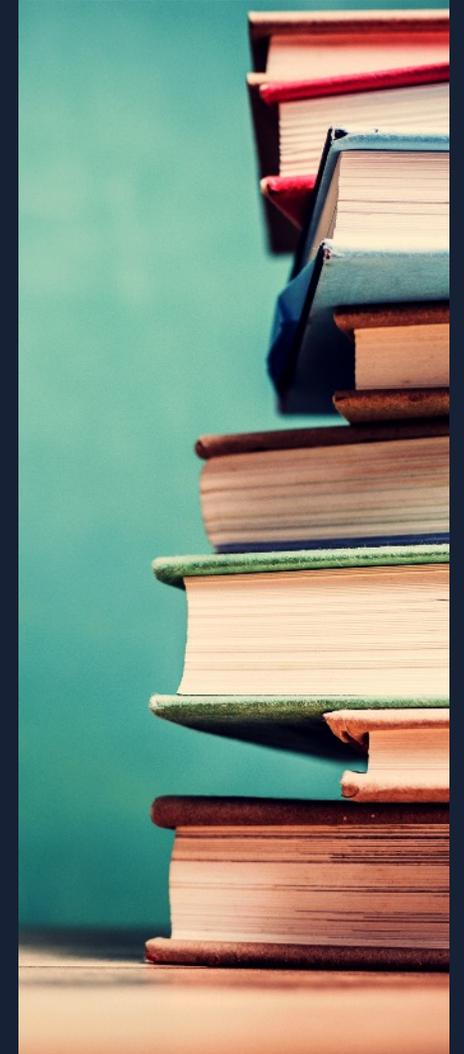


Northumbria University

**Kieran McGaughey,
Consultant Solicitor**

Housekeeping

- Please put yourself on mute – thank you!
- Questions are very welcome
- Question responses and copy of slides will be circulated post event



**Kieran McGaughey,
Consultant Solicitor**

What is the Procurement Act?

- New, domestic UK procurement law
- Biggest change to public procurement this century
- Will replace the existing regulations (derived from EU) including the Public Contracts Regulations 2015
- Became law on 26th October 2023
- **BUT** not yet in force – “business as usual” for now! However, you do need to start preparing....

Parliamentary Bills

[UK Parliament](#) >  > [Parliamentary Bills](#) > Procurement Act 2023

 [Bill feed](#)

Procurement Act 2023

Government Bill

Originated in the House of Lords, Session 2022-23

Last updated: 27 October 2023 at 10:26

Procurement law of the future – all in one place...

Existing regs:

Public Contracts Regulations 2015 (PCRs)

Utilities Contracts Regulations 2016 (UCRs)

Concessions Contracts Regulations 2016
(CCRs)

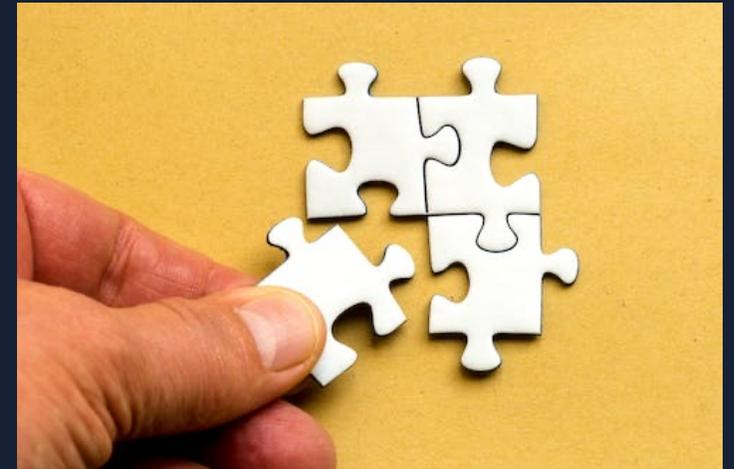
Defence and Security Public Contracts
Regulations 2011 (DSPCRs)

Future rules:

The Procurement Act 2023....

...or not...

- The Procurement Act 2023
- The Procurement Act 2023 (Miscellaneous Provisions) Regulations 2024
- The Procurement (Transparency) Regulations 2024
- Guidance issued under the Act
- The National Procurement Policy Statement*
- Public Services (Social Value) Act 2012*
- Internal contract procedure rules* - Other guidance*
- Case law* - Provider selection regime (for healthcare procurements)*
- General public law principles (judicial review)*



*each already applicable for current procurements

**Kieran McGaughey,
Consultant Solicitor**

- **Simpler rules post Brexit?**
- **But...** the Act alone is still 137 (!) pages long (A4)
- **You don't need to know the new rules inside out...**
- **But** helpful to
 - (i) understand the key areas; and
 - (ii) be able to spot when further support/legal advice will be needed



Procurement Act 2023

CHAPTER 54

Explanatory Notes have been produced to assist in the understanding of this Act and are available separately

**Kieran McGaughey,
Consultant Solicitor**

A woman with dark hair tied back, wearing a white collared shirt, is speaking. The background is a bright window with white curtains.

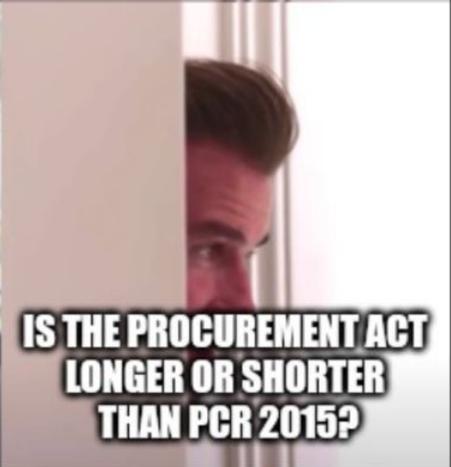
**THE NEW PROCUREMENT
RULES ARE SIMPLER**

A man with short brown hair and a beard is peeking from behind a white wall. He is looking towards the camera with a neutral expression.

BE HONEST!

The woman is speaking, looking slightly to her right. Her mouth is open as if in the middle of a sentence.

I AM BEING HONEST!

The man is peeking from behind the wall, looking directly at the camera.

**IS THE PROCUREMENT ACT
LONGER OR SHORTER
THAN PCR 2015?**

The woman is speaking, looking towards the camera with a serious expression. Her hands are clasped in front of her.

**LONGER... WITH TWO SETS
OF REGULATIONS...AND
GUIDANCE TOO...**

The man is peeking from behind the wall, looking down and slightly to the side.

THANK YOU

Procurement law reform: what is expected to happen, and when?

Timeline for change:



**Kieran McGaughey,
Consultant Solicitor**

**What are some of the key changes
from the current regime?**

**Kieran McGaughey,
Consultant Solicitor**

Principles versus objectives:

Principles (current regime)	Objectives (new regime)
Equal treatment	Delivering value for money
Non-discrimination	Maximising public benefit
Transparency	Sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions
Proportionality	Acting, and being seen to act, with integrity.

Principles

- Goodbye “equal treatment”
- Hello “same treatment?”

“In carrying out a covered procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment.”

“If a contracting authority considers that different treatment is justified in a particular case, the authority must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage.”

Other key changes:

- Greater transparency obligations – more notices!
- Increased scope (contract management phase now more regulated by procurement law)
- New language and new terminology
- Certainty versus flexibility? The new competitive flexible procedure

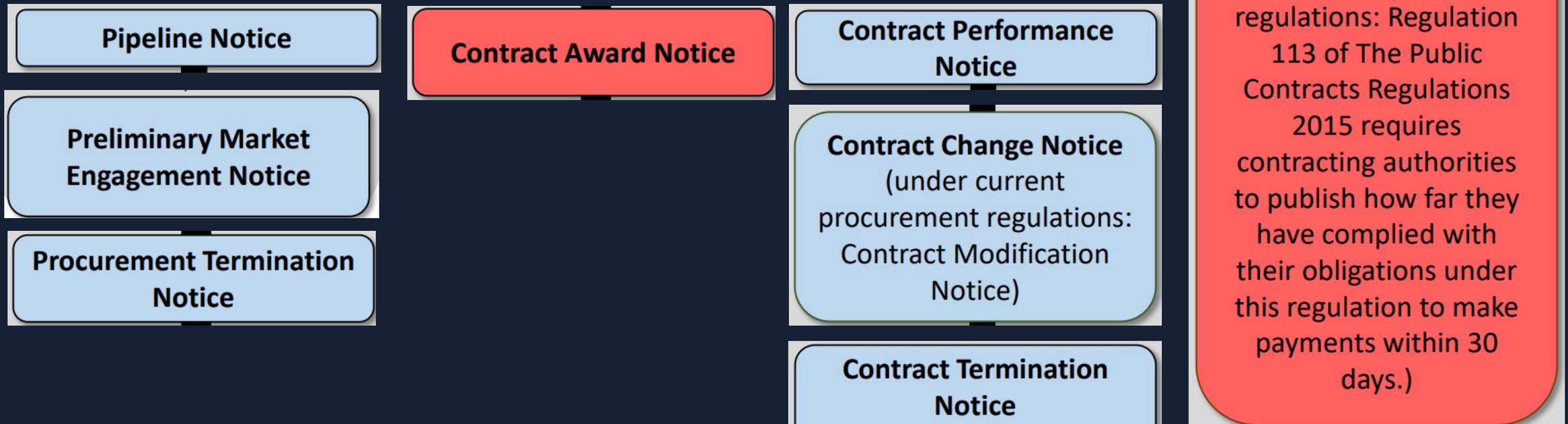


**Kieran McGaughey,
Consultant Solicitor**

Some of the new notices...

- **Mandatory notices in Red**

- **Notices required in certain circumstances in Blue**



Payment's compliance notices (Under current procurement regulations: Regulation 113 of The Public Contracts Regulations 2015 requires contracting authorities to publish how far they have complied with their obligations under this regulation to make payments within 30 days.)

Source: Procurement Bill: Notice flowchart (gov.wales)

**Kieran McGaughey,
Consultant Solicitor**

Reserving below threshold contracts to local suppliers

Section 17 of the Local Government Act 1988 currently prevents this for Councils as a “non-commercial matter”:

"the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors"

Under the new regime, for below threshold contracts a council would be able reserve participation in a procurement to only those suppliers based within the borough



**Kieran McGaughey,
Consultant Solicitor**

Duty to consider barriers for SMEs....

Authority must –

- (a) **have regard** to the fact that SMEs may face particular barriers to participation, and
- (b) consider whether such barriers can be removed or reduced.

- This is a new requirement

- Unlike most of the rules we will discuss today
 - this applies to **below** threshold contracts too (but **not** for schools)



**Kieran McGaughey,
Consultant Solicitor**

Key performance indicators (KPIs)

“Before entering into a public contract with an estimated value of more than £5 million” the Authority **must** set and publish at least three key performance indicators (KPIs) in respect of the contract.

Does not apply in the following scenarios:

- frameworks
- concessions and utilities
- **light touch contracts**
- “if the contracting authority considers that the supplier’s performance under the contract could not appropriately be assessed by reference to key performance indicators”



**Kieran McGaughey,
Consultant Solicitor**

New procurement procedures

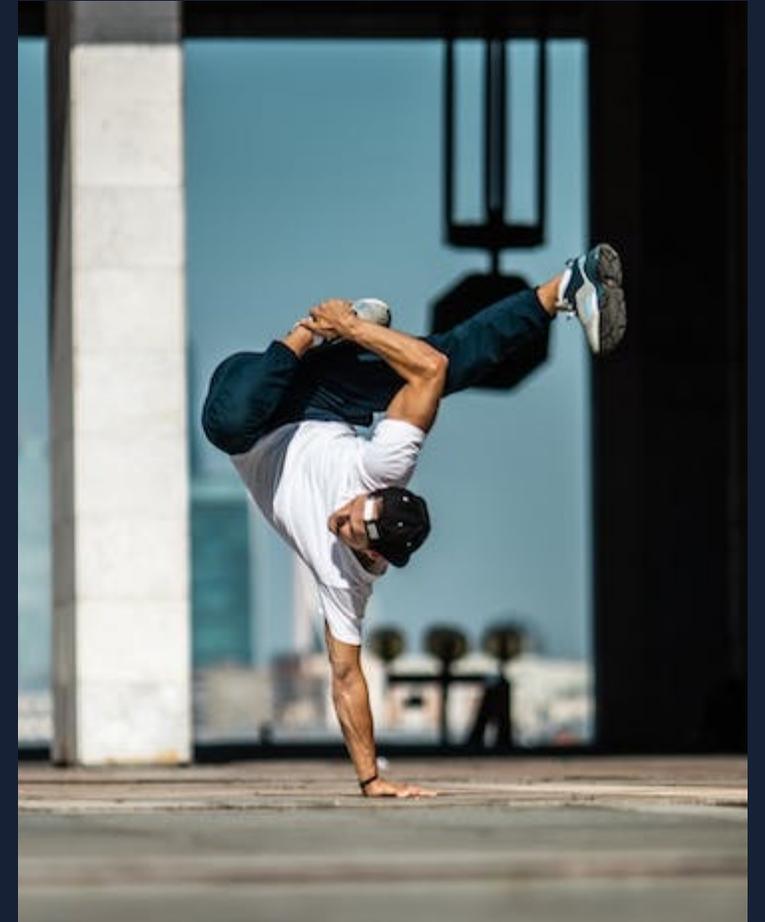
2 competitive procedures under the Act:

1. The open procedure
2. The new competitive flexible procedure:

DIY? Design it yourself....

"site visits, supplier presentations, being able to offer a variant bid to demonstrate additional innovation, working closely with the contracting authority to develop requirements and the use of funded bids."

Cabinet Office January 2023 update



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Consultant Solicitor**

The new competitive flexible procedure (1)

- Whilst no overarching duty of proportionality, it applies here:

“A contracting authority **must** ensure that the procedure is a **proportionate** means of awarding the public contract, having regard to the nature, complexity and cost of the contract”

Procurement Act 2023

- Can refine award criteria if have said you might in the tender docs

- Similarities to the light touch regime? Will it see greater uptake of the flexibility?

- Further guidance awaited



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Consultant Solicitor**

The new competitive flexible procedure (2)

Three steps to success?

1. Tell the market what you're going to do
2. Do it
3. Tell them you've done it!

(true for the current regime also, and awards outwith the competitive flexible procedure)



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Consultant Solicitor**

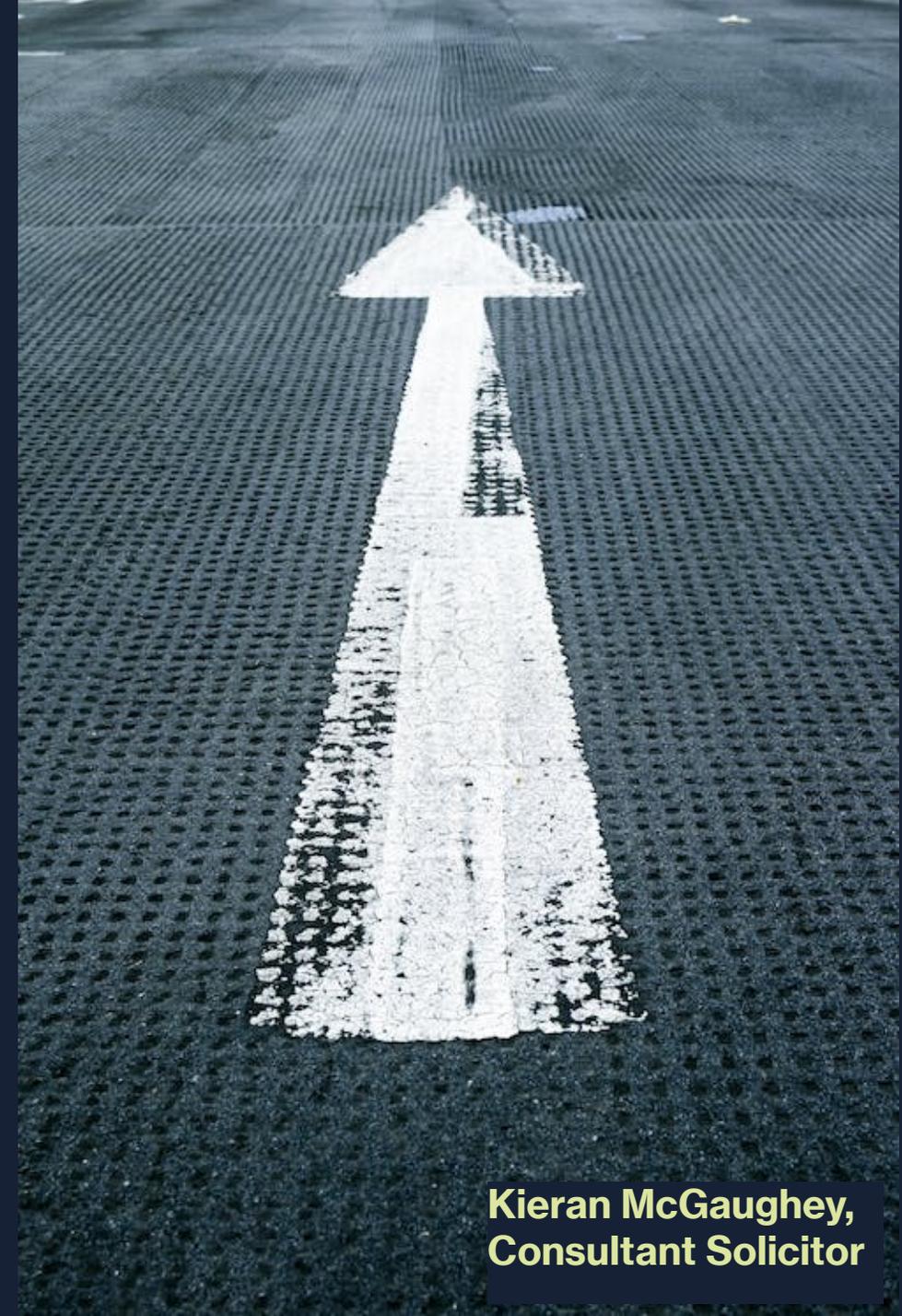
Direct awards

- The Act provides slightly increased ability to direct award, including at the direction of a Minister of the Crown if considered necessary to:

“protect human, animal or plant life or health, or protect public order or safety”

- Would have been helpful in the pandemic (hopefully won't be needed in future!)

- Still needs to be “necessary”



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Consultant Solicitor**

Direct awards

- Will remain the exception rather than the rule!

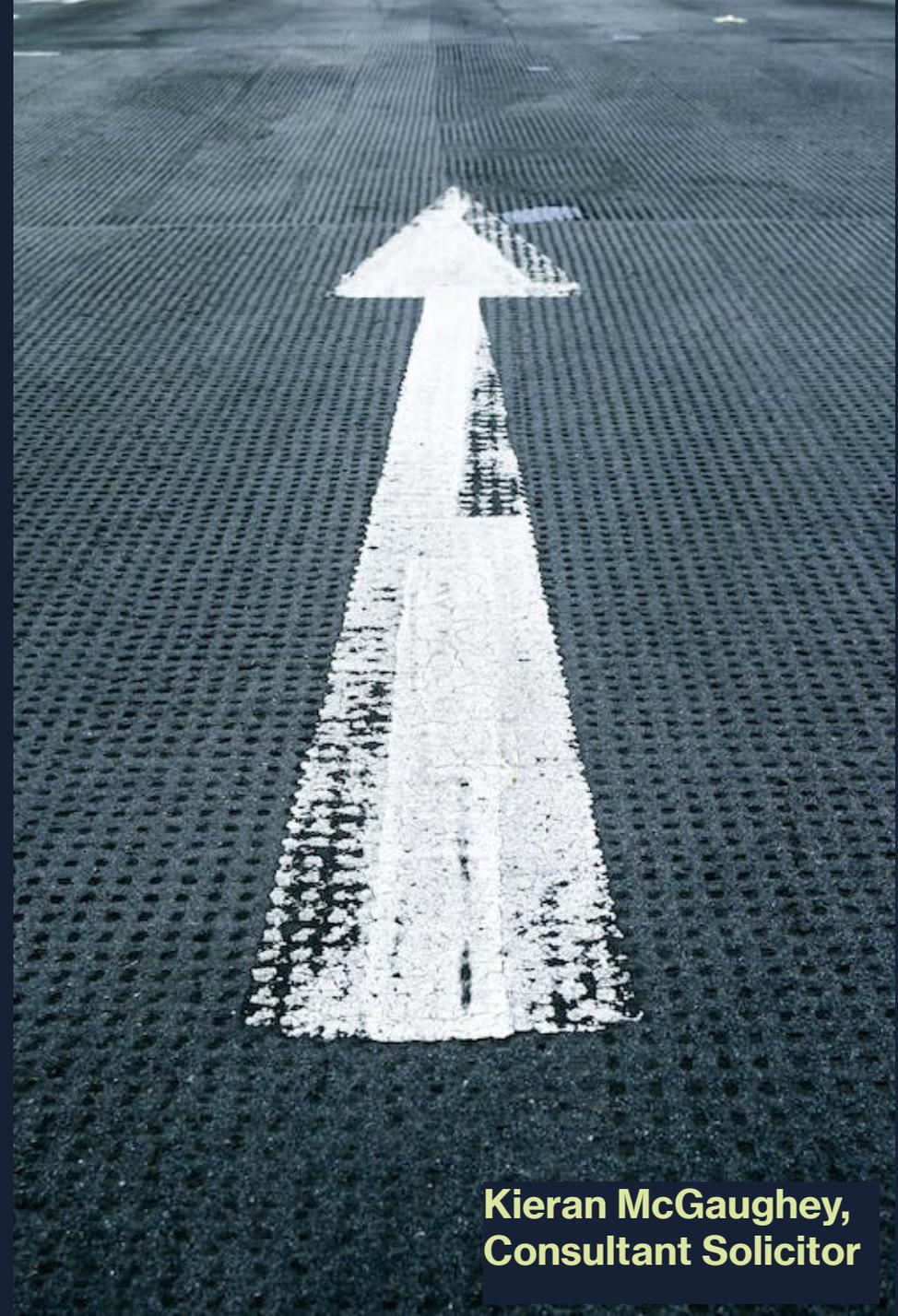
- Most likely direct award scenarios possibly:

1. **Difference or incompatibility**

Award to existing supplier which is intended as an extension to, or partial replacement of, existing supply in circumstances where—

(a) a change in supplier would result in the contracting authority receiving goods, services or works that are different from, or incompatible with, the existing goods, services or works, and

(b) the **difference or incompatibility** would result in disproportionate technical difficulties in operation or maintenance.



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Consultant Solicitor**

Direct awards

2. User choice contracts

3. Urgency

Where the supply is strictly necessary for reasons of extreme and unavoidable urgency, and

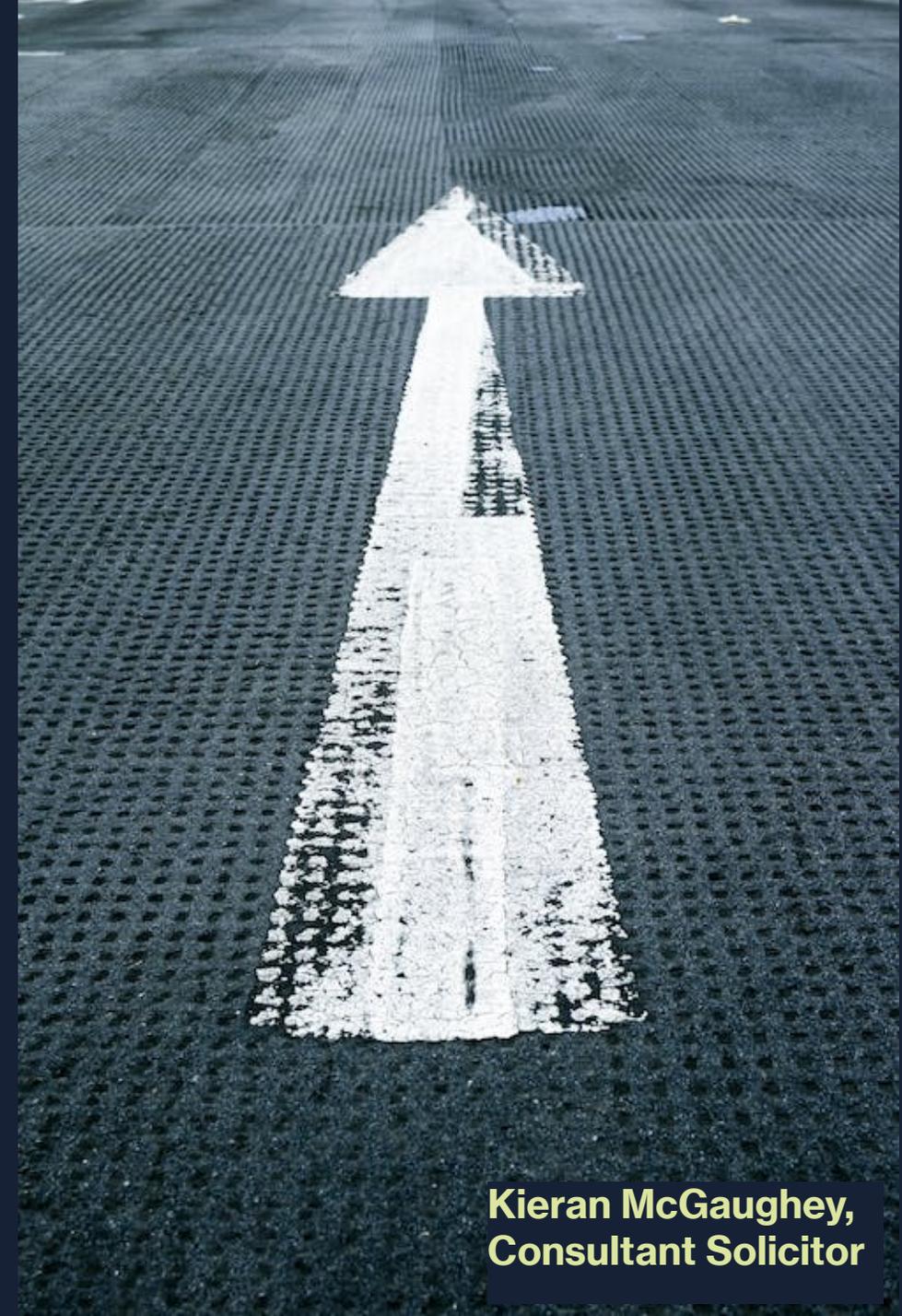
(b) as a result the public contract cannot be awarded on the basis of a competitive tendering procedure.

Urgency is unavoidable if it—

(a) is not attributable to any act or omission of the contracting authority,

and

(b) could not have been foreseen by the contracting authority.



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Consultant Solicitor**

Frameworks – an open and closed case...

- The Act introduces new “open” frameworks
- Traditional closed frameworks also remain



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New open frameworks

“a scheme of frameworks that provides for the award of successive frameworks on substantially the same terms”

- **8-year** term permitted (for multi-supplier frameworks)
- Award 1st framework. Must then award 2nd framework within first **3 years**.
- Must award 3rd framework within **5 years** of award of 2nd framework
- Previous framework ends when new one awarded
- Unlimited number of suppliers permitted
- Direct award of the framework typically **not** allowed



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Consultant Solicitor**

Dynamic markets (the new DPS)

- Dynamic Purchasing Systems (DPS) will be replaced with new “**dynamic markets**”
- These can be used for **anything**, unlike current regime where DPS can only be used for:
“commonly used purchases the characteristics of which, as generally available on the market, meet their requirements”
- Like a DPS, always open to new suppliers
- Unlike DPS, now able to charge fees
- All awards via competitive tender (amongst only the members of the dynamic market)



**Kieran McGaughey,
Consultant Solicitor**

Comparison table – frameworks (closed), open frameworks and dynamic markets....

	Framework	Open framework	Dynamic market
Where in the Procurement Act are the rules set out?	Sections 45 to 48	Section 49	Sections 34 to 40
Equivalent under PCR 2015?	Framework	n/a – new concept	Dynamic purchasing system (DPS)
Permitted duration?	4 years or less*	8 years**	No express limit
Open to new suppliers? If so, when?	Never	Must open at least once in first 3 years, then at least once in next 5 years	Always open
Are direct awards allowed?	Yes	Yes	No
What fees can be charged?	Fixed percentage of the estimated value of any contract awarded	Fixed percentage of the estimated value of any contract awarded	Fixed percentage of the estimated value of any contract awarded*** <u>and</u> May charge fees for obtaining and maintaining membership

* Unless authority considers “nature of the goods, services or works to be supplied” means that a longer term is required. 8 years general limit instead of 4 for defence and security or utilities frameworks

** Drafting indicates **fixed** term rather than maximum *** Not permitted on utilities dynamic markets

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Consultant Solicitor**

New exclusion grounds on past poor performance....

A discretionary exclusion ground applies to a supplier if –

- (a) the supplier has breached a relevant contract (or a court rules they have) and
- (b) **the breach was sufficiently serious** (i.e. termination, damages or settlement agreement)

A discretionary exclusion ground applies to a supplier if the supplier –

- (a) **has not performed a relevant contract to the regulated authority's satisfaction,**
- (b) was given proper opportunity to improve performance, and
- (c) failed to do so.

A discretionary exclusion ground applies to a supplier if a contracting authority **has published information under section 71(5) in respect of the supplier (information concerning either breach or poor performance)** – the new contract performance notice

“You’re barred” - The new debarment list

- Suppliers added to the list are (with limited exceptions) barred from taking part in procurements
- Government administers the list
- The list gets published
- Suppliers are added for defined period, and it must be “kept under review”
- Nightmare scenario for contractors, possibly useful for authorities – avoids suppliers you don’t want (and they are likely to challenge the government re being on the list, rather than you).



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Consultant Solicitor**

Debrief under the Act: no more standstill letters....

- Replaced by “assessment summaries”
- Losing bidders gets their own and the winning bidders’ summary
- Need for comparison gone but “detailed reasons” for scores needed
- Must tell everyone (including winning bidder/s) why they didn’t get the score above e.g.

So if a 4,6,8,10 scoring system and they scored 6, you would need to explain why they got a 6, but also why they didn’t get an 8)



Standstill – what’s changing under the Procurement Act?

- Publication of contract award notice commences standstill – not the usual debrief letter.
- Minimum period now calculated as 8 working days “beginning with” the above date
- Automatic suspension now only available for claims brought during standstill
- Standstill not required for light touch awards
- New *voluntary* standstill period for contract modifications
- Entry onto the new debarment list is subject to a standstill period



**Kieran McGaughey,
Consultant Solicitor**

Debriefing bidders: some key *differences*

Standstill letters (PCR 2015)	Assessment summaries (Procurement Act)
Bidders only receive own feedback	Bidders receive own feedback <u>and</u> that of the winning bidder/s
Obligation to provide: <i>“reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained...”</i>	Obligation will be to provide: “detailed reasons, with reference to all relevant information set out in the tender...” for scores
Need to be comparative (“relative”)	Will not need to compare bids
Required to explain the score received	Requirement will be to explain the score received, <u>and</u> why tender was not given the score immediately above

New obligations around publishing contracts

- Contracts with an estimated value of more than £5 million **must** be published
- Within 90 days from date of entry (180 days if light touch contract)
- Must also publish a **mandatory** contract details notice
- Within 30 days from date of entry (120 days if light touch contract)



Contract performance – dirty laundry ahead?

New contract performance notices –
mandatory (if you have set KPIs)

(i) To assess performance against KPIs (published at least once in every contract year); and (ii) where there has been a breach of, or failure to perform, a contract

In respect of KPIs the available rankings are:

“Good”

“Approaching Target”

“Requires improvement”

“Inadequate” or

“Other”



**Kieran McGaughey,
Consultant Solicitor**

Contract management under the Procurement Act: top tips!

- All about relationships – regular dialogue/meetings, honest conversations at an early stage

- Contract manager needs to:

- (i) have appropriate resources**
- (ii) understand their role**
- (iii) understand the key elements of the contract (including the spec)**

- Work the contract! Record keeping, notices in writing where needed etc...



**Kieran McGaughey,
Consultant Solicitor**

Making changes to contracts

- Regulation 72 PCR 2015 replaced with new rules – broadly similar. Possibly slightly more flexibility to make changes (e.g. materialisation of known risk)
- This includes apparently no specific rules/limits for light touch modification (subject to any future guidance)
- But – new **Contract Change Notice** – **mandatory** when an above-threshold modification is made to a contract (**but does not apply to light touch contracts**). No publication is required if the intended modification neither increases nor decreases the contract value by 10% or less (goods or services), or 15% or less (works).



Voluntary standstill period following publication of CCN

**Kieran McGaughey,
Consultant Solicitor**

Legal challenges under the Procurement Act

- Not an area of wholesale change
- 30 day time limit still applies
- Ineffectiveness (cancellation of awarded contract) now called “set aside”
- Automatic suspension remains but only if claim issued during standstill
- Damages claims remain possible



**Kieran McGaughey,
Consultant Solicitor**

Recap...above threshold procurements under the Act...

- New competitive flexible procedure
- Lots more notices!
- Increased focus on contract phase
- Open and closed frameworks
- Greater measures to tackle poor supplier performance



Procurement Act 2023

CHAPTER 54

Explanatory Notes have been produced to assist in the understanding of this Act and are available separately

**Kieran McGaughy,
Consultant Solicitor**

Below threshold procurements under the Act...some key points

- *Generally* no selection stage permitted
- Can reserve contracts to local suppliers
- Must consider SME barriers
- Rules **don't** apply to schools
- Vast majority of Act **doesn't** apply – no principles or objectives etc.
- But authorities should remember to follow your own internal rules!



Procurement Act 2023

CHAPTER 54

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Consultant Solicitor**

What does all this mean for you?

- Period of change
- Gearing up internally over the year ahead
- Training need
- Resource implications (in particular the transparency /notice and contract management obligations)
- More flexibility in the future? Taking up those options?
- Managing customer and supplier relationships and transition

Your shopping list for implementing the Act – what things at your authority might need to change?



**Kieran McGaughey,
Consultant Solicitor**

Shopping list – things at your authority that might need to change....

- Template procurement documents (ITT etc)
- Procurement plans/policies
- Internal forms/approvals
- Contract terms
- Roles and responsibilities?
- Knowledge



**Kieran McGaughey,
Consultant Solicitor**

Getting ready for reform – top tips!

- Make that shopping list
- Assemble a team
- Involve the right people!
- Arrange training (and avail of the Cabinet Office training as a starting point)
- Subscribe to updates

(Cabinet Office, law firms, barristers' chambers etc)



**Kieran McGaughey,
Consultant Solicitor**

Getting ready for reform – helpful links

Copy of the Act:

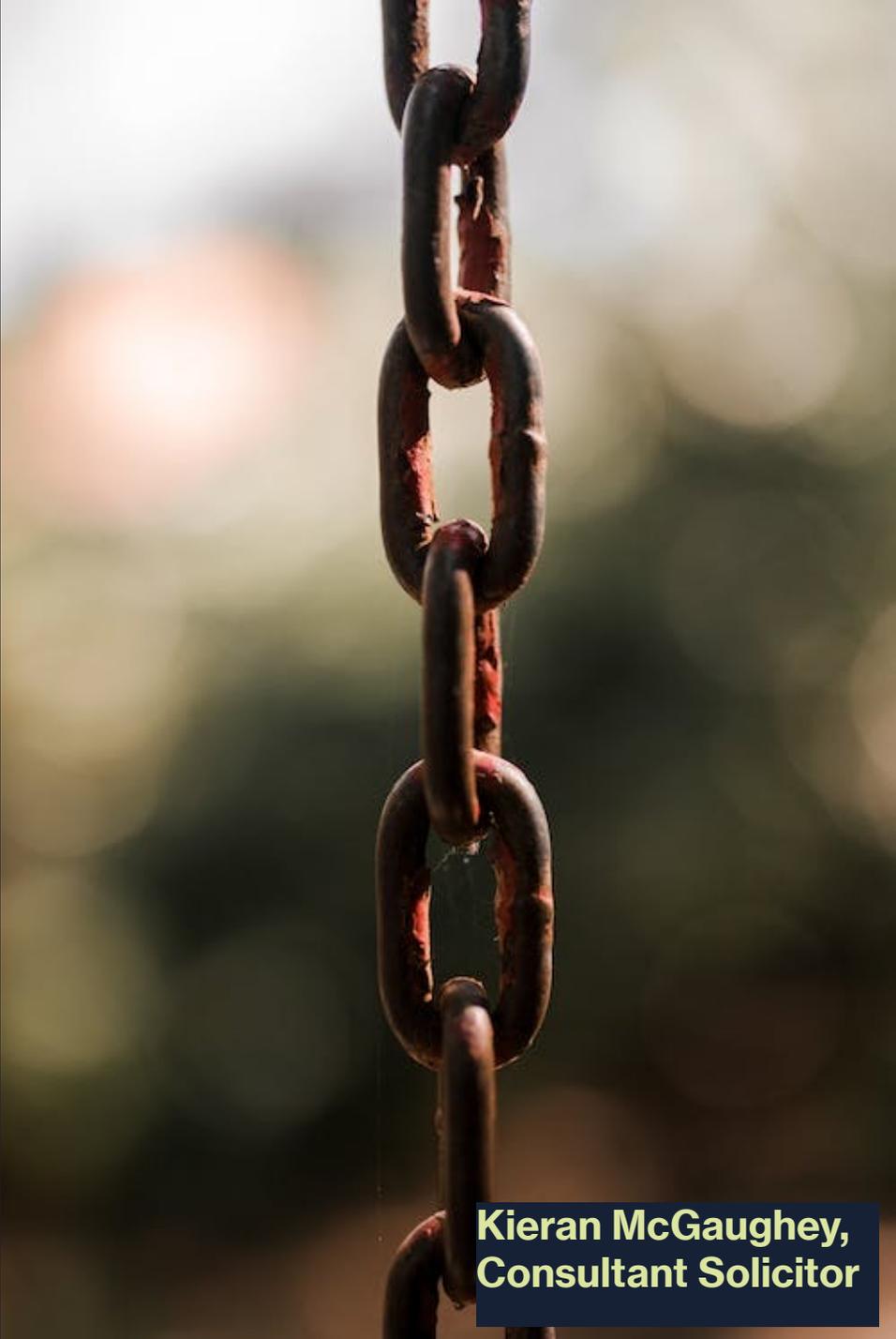
[ukpgacvr_20230054_en.indd \(legislation.gov.uk\)](#)

Government webpage for the reforms:

<https://www.gov.uk/government/collections/transforming-public-procurement>

Cabinet Office email alerts:

https://docs.google.com/forms/d/12QBPAS1T8-Fe1xHAto426O7T-T1WoqolPR29IGnWSws/viewform?edit_requested=true



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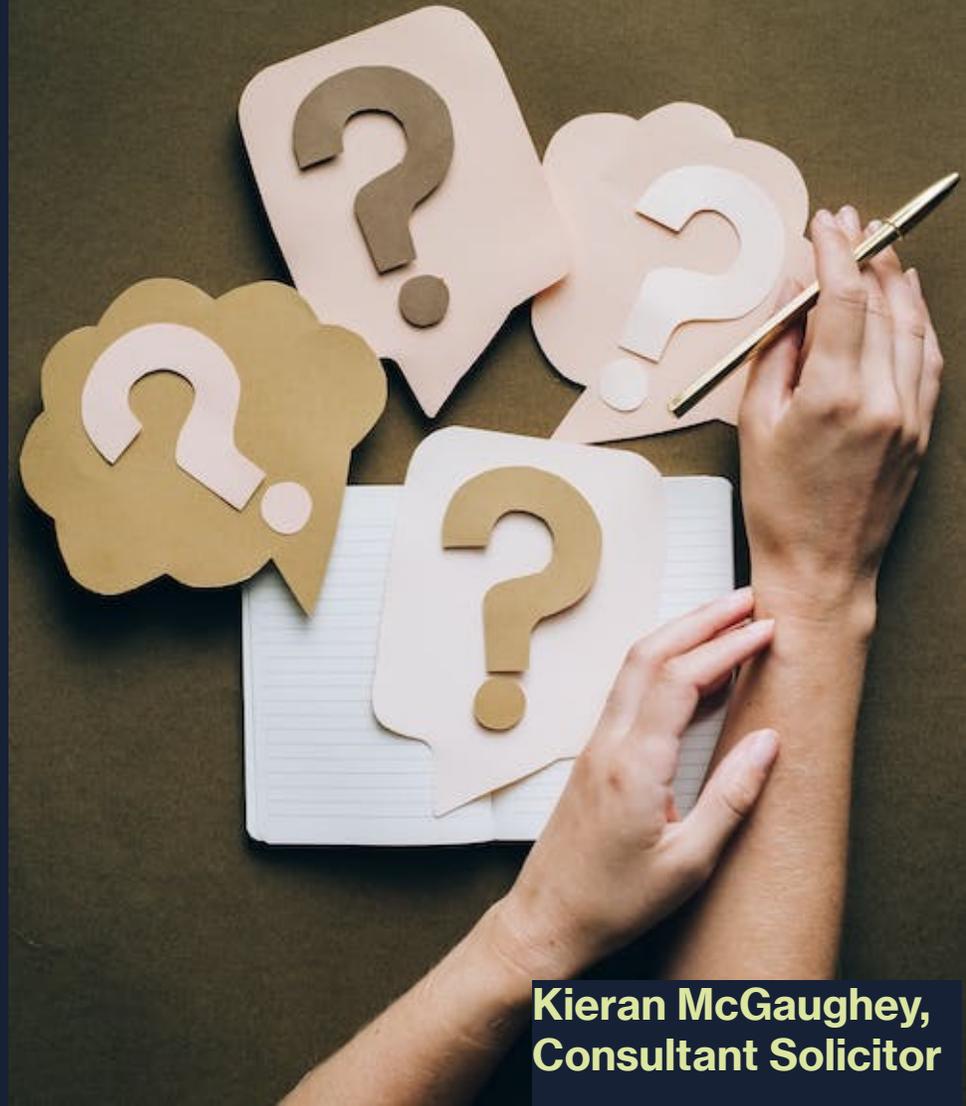
Thank you for listening!

Feel free to keep in touch – you can connect on LinkedIn here:
<https://uk.linkedin.com/in/kieran-mcgaughey-29383b66>

To have a free consultation to discuss any training needs
and get a “no-obligation” quote please contact me
Email: kieranmcgaughey@hotmail.com
or via Linked messaging (above)

Kieran McGaughey,
Consultant Solicitor

**Any
questions?**



**Kieran McGaughey,
Consultant Solicitor**

T H E
E N D



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Matrix Milestone:

Hassle-free, Compliant Procurement Route

28th February 2024

PRESENTING:

Shaun Toner
Customer Engagement Manager

teammatrix.com

Matrix Milestone Applications

Milestone may be used by any organisation with a need to procure services, including...



- Emergency services
- Local authorities Housing associations/maintenance
- SMEs
- Education centers: universities, schools, colleges
- NHS

For...

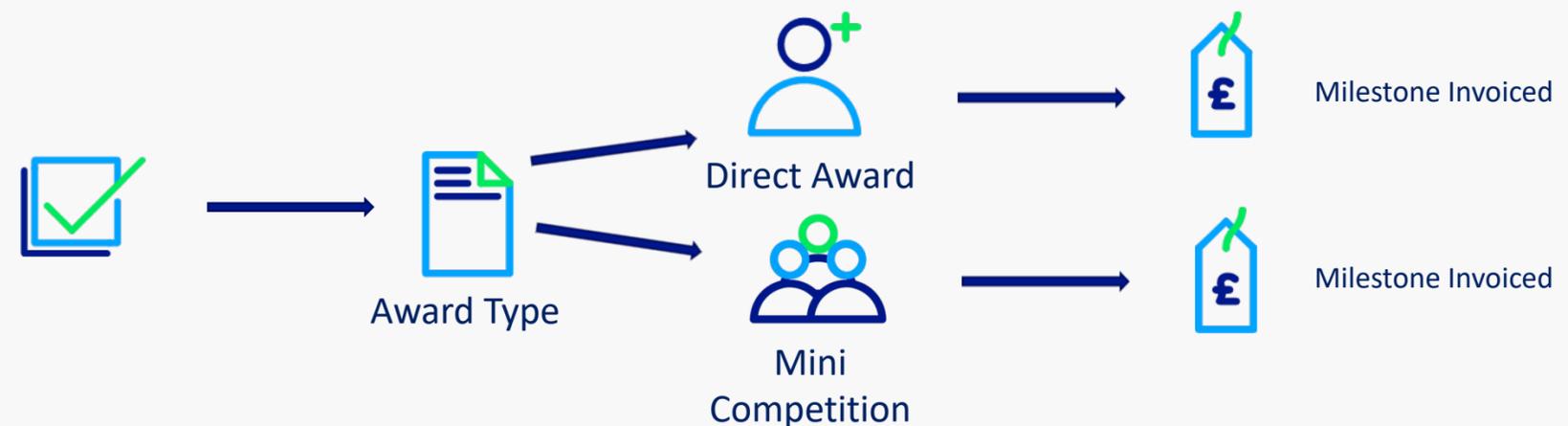
- IT and technology infrastructure projects
- Individual consultants for any need/subject area
- Construction, development, demolition, refurbishment
- Training & coaching services
- Curriculum or policy development

...and many more.

Who are Matrix Milestone?



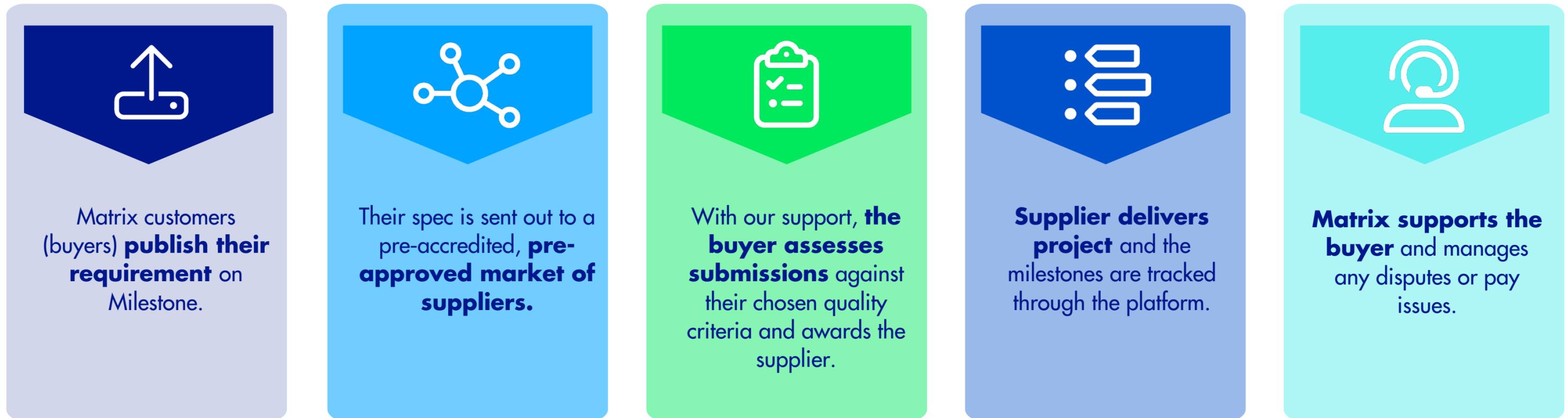
- Neutral Vendor Statement of Works Solution – A People centric solution underpinned by an intuitive technology platform
- Solution ensures compliance at all stages of IR35 along with wider risk mitigation
- All projects are milestone based, eliminating payment for non-delivered activity and budget creep
- Two routes to market via the Neutral Managed Service:



How it works



Milestone neutral vendor delivery model



In Summary

- A compliant route to market.
- All project and supplier data, processes and structure in one place.
- Intuitive dashboard providing at-a-glance overviews of real-time project data: budgets, third party procurement, milestone progress & more by day/week/month.
- Significant savings on the tender process.
- Access to a bigger pool of suppliers.
- Matrix manages, grows, nurtures and benchmarks my supplier database while I concentrate on overseeing my projects.
- I own projects after go-live, but Matrix is on hand for any supplier disputes.

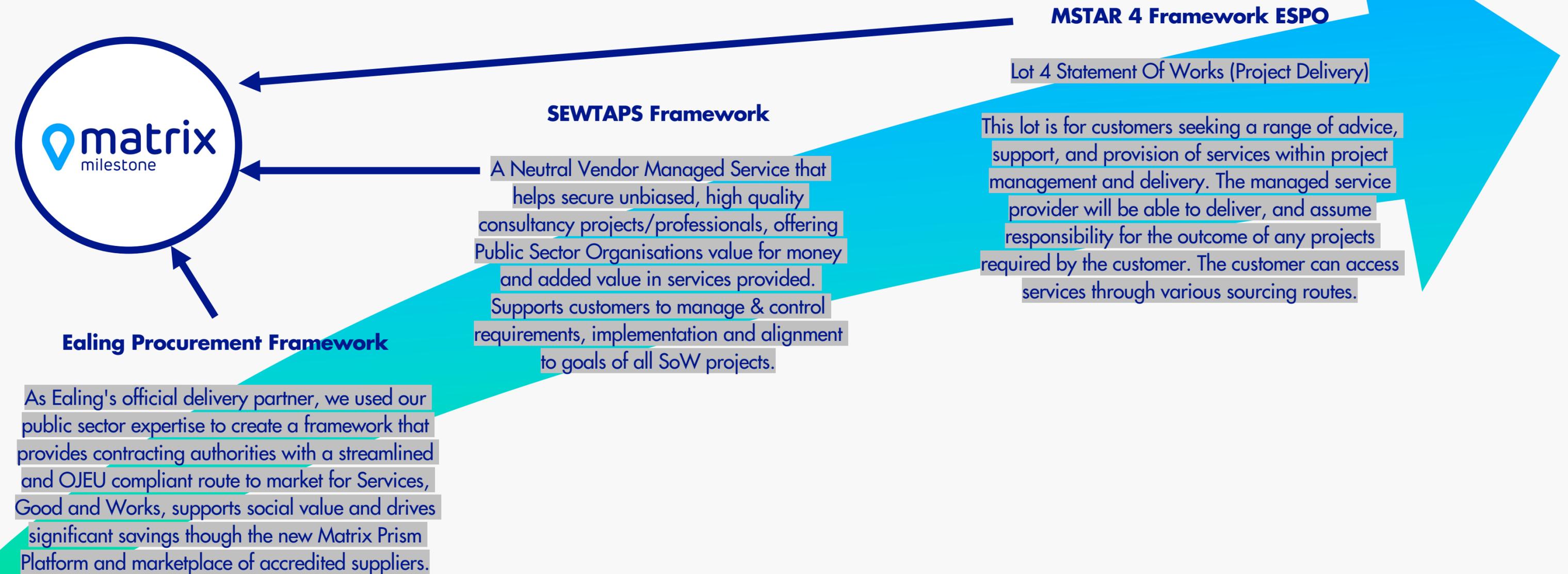


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the headaches*

Matrix Milestone Frameworks



Accessing and calling off from Matrix is via several routes.





the
Procurement
ActEXPO

12th March 2024

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21		16

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PEOPLE & SKILLS ZONE

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26	

 **Cabinet Office PAVILION**

11	09
10	08

04	05
07	06

ENTRANCE

TRANSITION & TRANSFORMATION ZONE

Market Engagement Hub

31	34
32	33

ROUTES TO MARKET – FRAMEWORKS AND DPS ZONE

50

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Thank you!



Get in touch to find out more, and ask us your questions after the event!



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