

Bids from overseas supplier under the Procurement Act 2024

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Contracting authorities cannot currently discriminate against overseas suppliers in above threshold procurements with the exception of Russia and Belarus (see Procurement Policy Note 021/22).

However, this duty not to discriminate can only be enforced with a remedy sought by parties to the World Trade Organisation's Government Procurement Agreement (**GPA**) or a Free Trade Agreement (**FTA**) with reciprocal rights of access to public procurement such as the UK-EU Trade and Co-operation Agreement (Regulations 18, 89, 90A, 90B and 91 of the Public Contracts Regulations 2015).

When the Procurement Act 2023 (the **Act**) goes live on 28 October 2024, this obligation of non-discrimination will be narrowed to domestic suppliers and treaty state suppliers, including suppliers in a GPA state (sections 89 and 90). In assessing tenders, a contracting authority will be able to disregard any tender from a supplier that is not a UK supplier or treaty state supplier, or intends to sub-contract to a non-UK or non-treaty state supplier (section 19(3)(b)). Likewise, a competitive flexible procedure may provide for the exclusion of providers that are non-UK or non-treaty state suppliers or intend to subcontract to non-UK or non-treaty state suppliers.

When making a decision to exclude non-UK or non-treaty state suppliers, contracting authorities must have regard to both the objectives and equal treatment obligations detailed in section 12 and their other general duties under the Act. Any restrictions on sub-contracting should be set out in the tender notice or tender documents. Government Commercial Function Guidance is expected to be issued on treaty state suppliers.

Contracting authorities will also need to see if the new Government enacts the Economic Activity of Public Bodies (Overseas Matters) Bill. If enacted, public bodies would be prevented from being influenced by political or moral disapproval of foreign states when making economic decisions. Decision-makers making a procurement or investment decision would need to ensure that they do not have regard to a territorial consideration in such a way as would cause a reasonable observer of the decision-making process to conclude that the decision was influenced by political or moral disapproval of foreign state conduct. Sections 19(3)(b), 20(5)(c) and 20(5)(d) of the Act would be subject to this prohibition.

PPN11/20 and the Cabinet Office Guide to Reserving Below Threshold Procurements provides that contracting authorities can reserve a below threshold procurement to UK suppliers or suppliers located in a particular geographical area.

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