



# Getting the right contract terms under the Procurement Act

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# (Re)introduction...



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# Today's Agenda

## 1. Why does it matter?

- The role and importance of contract terms
- Some key battleground areas, with examples

## 2. Below-threshold contracts

- Calculating value accurately
- Common characteristics of buyer and supplier terms
- Negotiation starting points
- Practical tips

## 3. Above threshold contracts

- Available templates
- Clauses to update for the Procurement Act
- Practical tips



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# Getting the right contract terms – why does it matter?

Has your authority ever:

- Had a supplier bump their prices up?
- Had a supplier introduce new charges which weren't in the original quote?
- Forgot to cancel a contract leading to it automatically rolling over?
- Received poor service but had limited rights under the contract to do anything about it?
- Wanted to terminate a contract early but faced significant cost penalties for doing so?

^ These examples illustrate why getting the right contract terms is vitally important.

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# Getting the right contract terms – why does it matter?

- The contract establishes the rules of the relationship, including the roles and responsibilities of each party
- Suitable contract terms will protect the authority's interests
- Can help to ensure legal compliance – for example prompt payment obligations
- Suitable contract terms will also help avoid bidders:
  - (a) Declining to bid;
  - (b) "Pricing up" for risk; and/or
  - (c) Attempting to negotiate terms post-deadline

# Key battlegrounds...

- **Liability caps**
- **Indemnities**
- **Intellectual property rights**
- **Termination rights**
- **Price increases**
- **Automatic renewals**



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# What is a **liability cap**?

- A liability cap is a standard term of many commercial contracts. It limits the parties' maximum potential exposure to each other.
- The cap only becomes an issue where something goes wrong. For example, where the supplier breaches the terms of the contract and causes your authority loss. If that loss exceeds the liability “cap” then your authority would need to meet the excess itself.

## Example:

ABC Council enters into a contract worth £1 million. Liability is capped at £2 million. The supplier breaches the contract, causing the Council loss.

- If the breach causes the Council £1 million of loss, the supplier would have to pay the **full** amount (i.e. it is **below** the cap)
- However, if the breach causes the Council £3 million of loss, the supplier would only have to pay **£2 million** (i.e. to the level of the liability cap)

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# Setting the cap... (1)

- Setting the liability cap is a commercial decision for the procuring service. In deciding what liability cap is appropriate, they should consider:
- **What could go wrong** in this particular contract – what are the risks?
- **How much** might it cost the authority where those risks materialised?
- **How likely** are those risks to occur?
- Taking account of the above factors, **what is the overall level of risk?**

# Setting the cap... (2)

## Example:

- If satisfied that the overall risk is low/acceptable then you may be willing to have a lower liability cap. If you consider the overall risk is high however, then you would want a higher cap. Example scenarios:

**Low cap acceptable:** A £5,000 contract to provide tables for the authority's offices. It's difficult to see how loss to the authority could significantly exceed the £5,000. So a liability cap of say £10,000 (twice the contract value) may be suitable.

**High cap required:** The authority pays a consultant £20,000 to advise on a potential restructure of a department. If their advice was wrong, the authority could subsequently face unfair dismissal/discrimination claims etc from employees made redundant. The potential losses here could far exceed the £20,000 paid for the advice, so a cap of twice the contract value (£40,000) would be insufficient. This will be true in the context of other professional advisors, to varying degrees.

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# What is an indemnity?

- The purpose of an indemnity is to put the innocent party back in the position it was in **before** the loss or damage occurred.
- So say, for example's sake, your authority pays a provider £1million under a contract. The provider then breaches that contract, causing your authority losses of £2million.
- Under a suitably drafted indemnity clause, the provider would then be required to reimburse the authority the £2million.
- Take care with the interplay between indemnities and liability caps. For example, in the case above, if liability was capped at the contract value, and the indemnity clause was **subject** to the cap, the authority would only be reimbursed **£1** million. Indemnities should sit **outside** the liability cap – otherwise it defeats the purpose (as above).

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# Common indemnities

- You could provide that the supplier indemnifies you for **any** breach, but this is not standard and likely to be considered onerous/offputting by suppliers
- More common is a narrow range of indemnities covering identified key areas
- For example common indemnities may cover topics such as:
  - Intellectually property rights
  - TUPE
  - Data protection breaches etc.

# 1. Below-threshold contracts...

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# What are the new thresholds?

(w/e from 1st January 2026)

Contract type	Current threshold
<b>Goods</b>	Central government bodies £135,018, others £207,720
<b>Services</b>	Same as above
<b>Works</b>	£5,193,000
<b>Concessions</b>	£5,193,000
<b>Light touch</b>	£663,540

**Remember – these figures are *inclusive* of VAT**

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# How do we calculate contract value?

- Rules now set out in Schedule 3 of the Procurement Act
- Guidance states that:

*“The ‘general rule’ requires contracting authorities to estimate the **maximum value payable under the contract**, taking account of any potential variables such as options to supply additional goods/services/works or options to extend or renew the contract, and sets out a non-exhaustive list of matters that could be relevant to this estimation.”*

- Note also new rule in Schedule 3 para 5 (“**Cases where estimate not possible**”) (for example duration unknown) – to be treated as **above** threshold.
- Might the above apply to, for example, software subscriptions?

# Below-threshold: contract terms

Why does it matter what contract terms you use?

Some typical characteristics...

Authority standard terms	Supplier standard terms
Pro-customer	Pro-supplier
Fixed term	May contain automatic renewal provisions
Fixed price (or limited scope for price increases, tied to an index etc)	May contain unrestricted ability for supplier to increase price
Greater protection – indemnities in the authority’s favour, high/uncapped liability	Limited protection – few/no indemnities, liability may be capped to annual fees
Will generally require a high standard of services/goods	May attempt to exclude implied terms around quality, reasonable skill and care etc
Various contractual termination rights	Limited contractual termination rights

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# Scenario 1: the *authority's* terms are the starting point



<<< Pro-customer contract terms Pro-supplier contract terms >>>

Supplier negotiation >>>



Agreed final version

<<< Pro-customer contract terms Pro-supplier contract terms >>>

# Scenario 2: the *supplier's* terms are the starting point



<<< Pro-customer contract terms Pro-supplier contract terms >>>

Agreed final version



<<< Authority negotiation

<<< Pro-customer contract terms Pro-supplier contract terms >>>

# Below-threshold contract terms

## Practical tips:

- Have a reasonable but pro-customer set of terms and conditions for below-threshold contracts.
- You may in fact have more than one version of these – for example for very low value purchases you may have a shorter form (compared to say a £100k contract)
- Aim to introduce your terms **as early as possible** in the conversation – include a copy with Requests for Quotes etc, cross-reference the terms. If there is to be a negotiation, at least aim to make *your* terms the initial starting point.
- **But...** be pragmatic! Microsoft etc highly unlikely to sign up to Happy Housing Association's terms and conditions for below-threshold contracts. Pick your battles!

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# Below-threshold contract terms

- Be proportionate. Don't spend weeks or months negotiating the terms of a low value contract - stick to the "showstoppers"
- When dealing with huge companies, report terms to your stakeholders on a "take it or leave it" basis.
- Remember that **30 day payment terms** also apply below-threshold. And remember that under the Act it's now calculated from the date the invoice is **received\***, not **approved**  
*\*unless the invoice specifies a later due date*
- Similar terms implied into some sub-contracts (see section 88)

## **2. Above threshold contracts...**

# What contract templates are out there?

- Contracts you've used in the past at your authority
- Other authorities' templates (including via Find a Tender Service...)
- Government templates (see next slide)
- Legal subscription services like *Practical Law*

# Government templates

- Model Services Contract (>£20m)
- Mid-Tier Contract (above threshold)
- Short Form Contract (below-threshold)

[See page 4 here for guidance in selecting:](#)

See also:

[PPN 013: Using standard contracts - GOV.UK](#)

Factors to consider when choosing the right contract			
Model Services Contract	Mid-Tier Contract	Short Form Contract	Public Sector Contract or existing Framework Contract (provided by Crown Commercial Service)
A set of standard terms that may act as a starting point for negotiation on complex and/or high value services	A set of fixed core terms with modular, optional schedules for non-complex services or high value goods	A set of fixed terms for less complex, lower value goods or services	A framework contract of fixed core terms with modular, optional schedules for common goods and services
<ul style="list-style-type: none"> <li>✓ Where the Supplier is capable of carrying out the significant obligations contained within it</li> <li>✓ Acquisition of services</li> <li>✓ Where contract charges exceed £20m</li> <li>✓ Where contract poses a high financial risk to the Authority</li> <li>✓ Where failed delivery of the contract poses a reputational risk to the Authority such as critical or public facing requirements</li> <li>✓ Use of a framework is inappropriate due to high level of financial or</li> </ul>	<ul style="list-style-type: none"> <li>✓ Where contract charges exceed the relevant procurement thresholds. Can also use for below-threshold if appropriate and proportionate</li> <li>✓ Use of a framework is inappropriate due to high level of financial or supply risks or where modifications to the contract could be substantial or a framework does not exist</li> <li>✓ Where what is being delivered is bespoke or other than business as usual</li> </ul>	<ul style="list-style-type: none"> <li>✓ For the provision of non-complex goods or services.</li> <li>✓ Total contract value is below the relevant procurement thresholds (You may consider using the Short Form for some simple above-threshold procurements. See the Short Form Contract Guidance document for more details)</li> <li>✓ Where a framework does not exist for</li> </ul>	<ul style="list-style-type: none"> <li>✓ When you would prefer to use a framework contract as your route to market</li> <li>✓ For the procurement of goods or services which are common across the public sector</li> <li>✓ Where a suitable framework has been set up by the Crown Commercial Service to procure those goods or services</li> <li>✓ When the appropriate</li> </ul>

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# Government templates

- Very lengthy (!)
- Even the Short Form Contract (for below-threshold) is 88 pages long (although some of those are optional schedules)
- SME feedback in Covered Procurement Objectives guidance includes:
  - **Complex Terms and Conditions**
  - *“I’ve not got the time or resource to read through this contract. It’s out of my depth and I’d have to get a lawyer to review it if I was to bid.”*
- However, a helpful reference point perhaps? For example for justifying that your approach to particular clauses is in line with market standards
- Also a good place to source examples of updated clauses for the Procurement Act

# 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”*



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# KPIs and contract terms: top tips

- Set KPIs which are capable of objective measurement – **SMART** approach (**S**pecific, **M**easurable, **A**chievable, **R**elevant, **T**ime Bound)
- Consider specifying in the contract which level of performance will constitute a rating of “good” “approaching target” “requires improvement” etc.
- Consider whether you will need any data from the supplier (and, if so, set out requirement for them to provide this, timescales etc). Perhaps worth considering audit rights re such data (with a view to ensuring accuracy)
- Ensure KPIs are tied to contractual consequences – for example service credits, but even termination rights where performance is very poor

# Payment clauses under the Act

- The relevant 30 day period now commences from the date of **receipt** of the invoice, not the date of **approval**
- This is a change from the position under PCR 2015
- Ensure your contract terms reflect this (and that relevant internal colleagues are aware of the change, finance teams etc)
- Perhaps helpful to list in the payment clause what a valid invoice must contain



# Other implied terms in the Act

- Consider making these express contractual terms, for additional clarity:
- Section 48 (frameworks: excluding excluded/excludable suppliers from call-off awards)
- Section 78 (implied right to terminate where:
  - Authority considers contract awarded or modified in material breach of Act
  - Supplier has become excluded/excludable since award (includes associated persons)
  - Subcontractor (other than associated person) is excluded/excludable

# Other elements of the Act

- Consider referencing new transparency obligations (could potentially turn FOI clause into a general transparency clause?)
- Consider termination rights linked to the new notices. For example the contract performance notice where the authority is not satisfied with performance (and supplier has failed to improve). Ensure you have right to terminate in such cases.
- Very helpful free webinar from TLT law firm on clauses that might need amended, see here:
- [Procuring 360Webinar series -Contract Management on Vimeo](#)

# Tips for contracting...

- ✓ Involve the right people in drafting contract terms (legally qualified or equivalent experience)
- ✓ Keep standard terms under review and up to date (changes in law, new PPNs etc).
- ✓ Ensure staff know which terms to use, and where to find them. Version control is vital.
- ✓ Minimise the amount of information to be inputted each time. Ideally have it all in one place – for example a set of "Contract Particulars"
- ✓ Remember that "order forms" for a framework call-off are contracts just like any other contract. The same risks apply - don't get complacent!

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# Tips for contracting...

✓ In your ITT, consider setting out:

- That your terms and conditions will apply
- Where these can be found within the tender documents
- That there will be no negotiation
- That bidders agree by bidding they will be bound by those terms and conditions without further amendment
- That no terms and conditions advanced by bidders during the process will apply
- The potential consequences (including a right to reject them) where bidders do amend your terms and make non-compliant or caveated bids
- That the issuing of the ITT itself does not give rise to a contract

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# Tips for contracting...

- ✓ Highlight the existence of any KPIs (and the new publication rules >£5million) in the ITT – don't just bury them in a contract schedule
- ✓ Include drafting notes/guidance to assist staff. See for example earlier slides re setting liability caps
- ✓ Have capped liability to ensure your terms are bidder/SME friendly
- ✓ Have an appropriate, limited set of indemnities
- ✓ Avoid overly lengthy/complex contracts, especially for lower value contracts. For example do you need a change control procedure in a schedule, or can you just have a basic “variations must be agreed in writing” clause?

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# Tips for contracting...

- ✓ Be careful re post-tender negotiations. Remember that contracts >£5million must now be published – risk of challenge from losing bidders if they see significant changes...
- ✓ Don't be afraid to share draft contract terms during pre-market engagement – particularly for more complex/unusual arrangements
- ✓ Exercise caution when using contracts from other authorities. No guarantees that they will be up-to-date, suitable, error free etc - do your own due diligence before using.

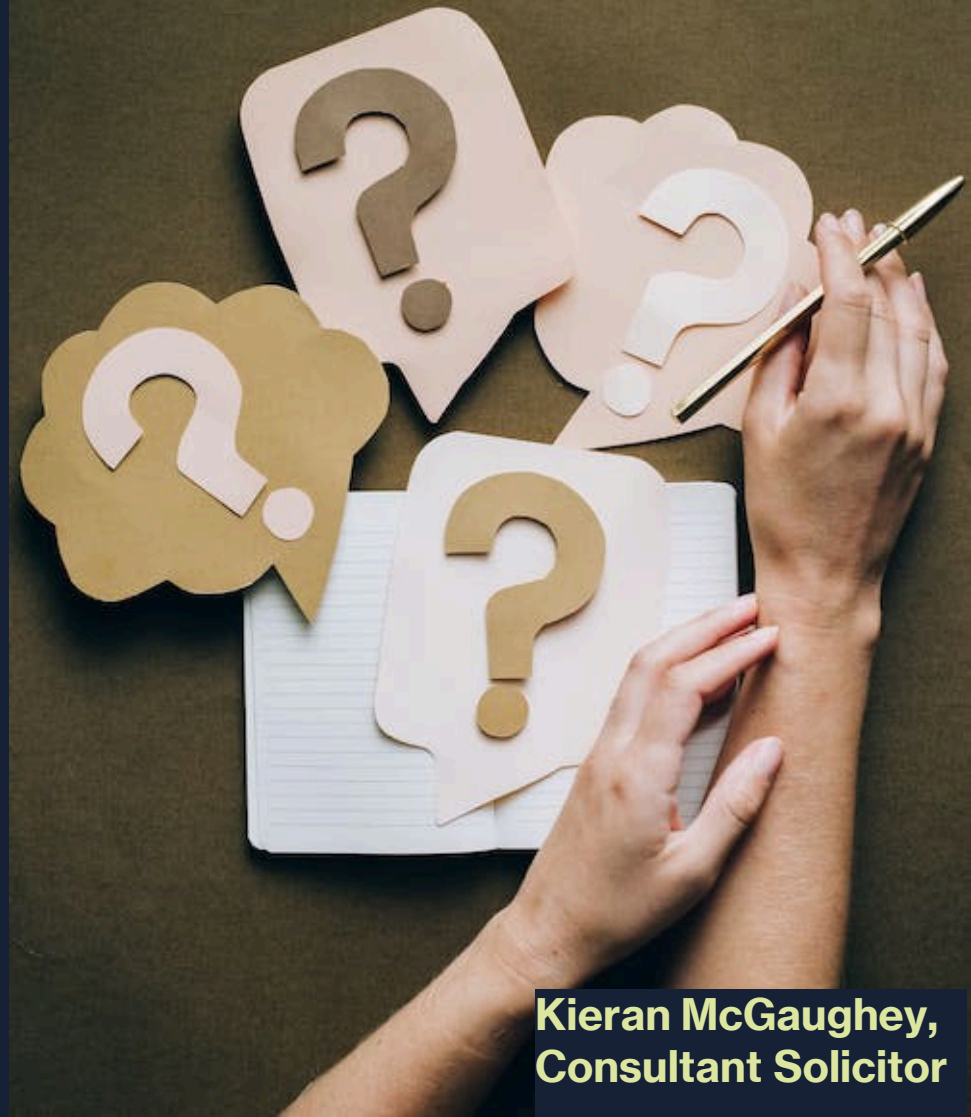
# Thank you for listening!

Feel free to keep in touch – you can connect on LinkedIn here:  
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# 3. Any questions?



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