TRANSFORMING PUBLIC PROCUREMENT

Our response to the Green Paper

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INTRODUCTION

The public procurement rules, mainly the Public Contracts Regulations 2015 ("PCR 2015"), are key to many of our clients. We act for numerous contracting authorities, particularly in the local government and social housing sectors in the UK. These include local authorities, organisations that are subsidiaries of local authorities and registered providers of social housing. For these contracting authorities it is important that no unnecessary barriers are put in the way of the efficient letting of contracts.

We also act for suppliers to contracting authorities in the leisure, hospitality, and care sectors. For these suppliers, it is important that contracts are let in a way that is transparently fair and they are given a fair opportunity to challenge significant breaches of the Regulations, together with effective remedies where that challenge succeeds. For minor breaches, the suppliers we work with generally take a pragmatic approach and recognise that there is a public interest in allowing contracting authorities to let contracts without challenge in these circumstances.

This response to the consultation has been prepared on behalf of Anthony Collins Solicitors LLP by Andrew Millross, Partner, with input from colleagues. Andrew is the author of a practical guide to the EU procurement rules published by the National Housing Federation and several other NHF procurement and contract management books. If there are any questions about our response Andrew can be contacted on:

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OVERVIEW

Until recently there has been some divergence between the policy of seeking to use the public procurement Directives to open-up markets across the EU, through the imposition of strict procurement procedures, and the policy of increasing efficiency and effectiveness in procurement.

We therefore welcome this initiative from the Government comprehensively to review and revise the public procurement rules. We think that there are lots of good ideas in the Green Paper and we support many of them.

We like the idea of a single set of Regulations governing procurement but do not think that the proposals go far enough here. We would encourage Government to consolidate all the legislation identified in Chapter 2 into the new procurement rules.

We support the reduction in the number of procedures as long as the competitive flexible procedure is freely available for all procurements and subject to a higher tendering threshold for SoSS (or "Part B") procurements.

We support the proposals that contracting authorities should have greater scope to carry out financial due diligence on suppliers and that prior poor performance should be able to be considered to a much greater degree than at present.

However, we have reservations about setting out general procurement principles in legislation. We consider greater clarity is needed over the meaning of "most advantageous tender" and we have real concerns over the level of bureaucracy the "transparency" proposals seem to involve and the significant administrative burden this will place on contracting authorities.

Particularly in the area of challenges, a fair balance needs to be struck between the interests of contracting authorities and suppliers. Contracting authorities must not be so afraid of a challenge (in terms of either the costs or delay involved in dealing with challenges) that they do not take advantage of procurement flexibilities that are open to them. Suppliers need to have effective remedies available at a reasonable cost if they have not been treated fairly.

We also want to raise the question of whether it is appropriate for registered providers of social housing to continue to be regarded as contracting authorities. Whilst we recognise that the definition of body governed by public law is unchanged in the GPA, we do wonder whether it is time to depart from the definition of "management supervision" in *Commission v France*[1], especially in the light of the reforms to the regulation of registered providers to take them out of the "public sector" for the purpose of national statistical purposes. In effect the extent of "management supervision" over registered providers is not markedly different from that exercised by the Charity Commission over registered charities. We would therefore invite the Government to review this and, if considered appropriate, issue guidance that registered providers no longer need comply with the public procurement rules.

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1 *Commission v French Republic* Case C-237/99

SPECIFIC RESPONSES

1. CHAPTER 1: PROCUREMENT THAT BETTER MEETS THE UK'S NEEDS

1.1 General comments

The proposed procurement regime set out in the Green Paper clearly exhibits two main themes:

- for there to be greater central government control over procurement processes; and
- to make it harder and less beneficial for unsuccessful tenderers to change procurement processes.

In our view, neither of these will result in an improvement in procurement practice, and we comment on the details of this in the paper below. Despite this, there is much to applaud in the proposed changes and with some of the changes there is the opportunity to make procurement even better.

We welcome the new regulatory framework being founded on the principles expressed in the Green Paper. However, we would wish to see those principles being used to guide what is included in the new legislation, rather than being set out in the legislation itself.

We also recommend that the principle of proportionality is included in those principles, so that contracting authorities should not be faced with the risk of challenge for minor breaches of the new regulations and suppliers should be given the opportunity to put right minor omissions from their tenders along the lines set out in Regulation 56(4) PCR 2015.

It is worth noting that the proposals do not involve any simplification or clarification of the rules on things like:

- the classification of activities as works, services or supplies - which could do with much more clarity around things like "single element" renewal programmes and where they are installation (works) with the supply being incidental or whether they are "supply and fit" (supply) with the fitting being "incidental"[2];
- the valuation rules – which are unnecessarily complicated in terms e.g., of how services and supplies contracts lasting over 4 years are valued[3];
- when works contracts and supply or services contracts are "objectively separable"[4];

[2] Definition of "public supply contract" in Regulation 2(1) PCR 2015

[3] Regulation 6(17) & (18) PCR 2015

[4] Regulation 4(2) PCR 2015

- the aggregation rules – which are completely impenetrable now they refer to "*a proposed work resulting in contracts being awarded in the form of separate lots*" (e.g., are separate planned maintenance contracts in adjoining areas let by the same contracting authority separate "works" or part of the same "work"[5], what is "*a proposed provision of services*"[6], and are a series of architects' appointments on different sites services contracts that are "*regular in nature*"[7]);
- the rules on excluded contracts, particularly in relation to what are now called *"public services contracts for the acquisition or rental of land*"[8]; and
- the rules preventing payment of the Living Wage to be made a contractual obligation in cases such as *Ruffert*[9] and *Regio Post*[10] (the current status of which is unclear post Brexit).

These areas all add considerable complexity to the procurement rules. Some of these have been made more complicated by the changes in PCR 2015 to implement the 2014 Directive. For example, the reference to "*similar services*" in PCR 2006 was reasonably clear but the reference to "*a provision of services*" makes it very difficult to assess whether separate services contracts are part of the same "provision of services" or a different "provision of services" even though they may be for similar services.

Unless these areas are included in the review and simplification agenda, the new procurement rules will still be more complex than they could be, resulting in unnecessary expense and confusion in contracting authorities trying to understand and apply them.

1.2 **Question 1: Do you agree with the proposed legal principles of public procurement?**

Setting out general principles in legislation is a particularly "European approach". The "UK approach" is usually to set out in the legislation exactly what contracting authorities are required to do rather than general principles they must follow.

For example, in relation to "integrity", the usual UK approach would be to set out exactly what contracting authorities must do to avoid conflicts of interest, prevent corruption, protect supplier confidentiality (within the context of what the rules on "transparency" require) and act professionally. The EU approach would be to set out the general principle of integrity and leave contracting authorities and the courts to work out what that requires in practice.

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5 Regulation 6(11) PCR 2015

6 Also Regulation 6(11) PCR 2015

7 Regulation 6(16) PCR 2015

8 Regulation 10(1)(a) PCR 2015

9 *Dirk Rüffert v Land Niedersachsen*, Case C-346/06

10 *RegioPost,* C-115/14

The UK approach leads to greater certainty (and therefore less cost) for contracting authorities and suppliers, particularly in a legal jurisdiction where court decisions are based heavily on previous case law than from working from first principles.

The European approach does give greater flexibility to the government to update the practical compliance requirements through guidance, but guidance does not have the same effect as law. Particularly in areas such as conflicts of interest, we consider the clarity given by enshrining the requirements in clear legislative provisions is important for contracting authorities, so they know exactly what is required of them.

We find it curious that a Government that has pursued Brexit specifically to be able to set their own rules in areas such as procurement has so swiftly adopted such a European approach to legislation.

If the legislation is to set out general principles, it should also set out the status of those principles. Will suppliers be able to bring a procurement challenge if a contracting authority breaches one of the principles, without breaching any other substantive requirements? What priority will there be between the principles? There is an obvious conflict between transparency, in relation to tendered prices, and fairness to suppliers, who may well be disadvantaged in future procurements by their tendered prices being disclosed in a current procurement.

In relation to the principles themselves, we have the following comments

- **Public good:** It is not clear from the paper exactly what is meant by "public good" and how it interfaces with "social value". There is a risk that is could be regarded as whatever the government at the time decides to call it. For central government institutions (currently "in scope organisations") requiring them to have regard to what the Government deems to be the public good may be appropriate. However, this would be better achieved through guidance than legislation,

  For other contracting authorities such as democratically elected local authorities and devolved administrations, schools and colleges and contracting authorities such as registered providers of social housing, many of whom will be charitable, this national guidance may not comply with their democratic mandates or charitable objectives.

  Making "public good" a principle of procurement also involves procurement rules looking to control what is procured rather than how things are procured.

  If "public good" is to be set out as a principle, then we would ask that:

  - it is clearly defined in the legislation;
  - it is clarified how it interfaces with social value (which is a generally understood concept in procurement); and that
  - its priority in terms of other obligations of the contracting authority, including under charity, local government and other obligations specific to different types of contracting authority is clearly set out in the legislation.

- **Value for money:** The requirement to secure value for money already applies to most contracting authorities we work with**.** The Regulatory Framework for registered providers of social housing has a specific value for money standard. Local authorities owe a fiduciary duty to spend money wisely and are subject to audit principles of economy, efficiency, and effectiveness. Rather than having this as a "principle" of procurement, we wonder whether it would be preferable to replace the concept of "most advantageous tender" with "best value for money" as the basis for contract awards (as to which see below);
- **Transparency:** There is already significant legislation requiring transparency. The authors of the Green Paper clearly do not consider this to be adequate, otherwise they would not be proposing an increase to this. The advantages of transparency need to be set against the need to protect the integrity of the procurement processes, avoid collusion and secure value for money through tenderers not seeing each other's prices before the tender submission deadline. Post procurement there are tensions between transparency and protecting supplier confidentiality over prices, intellectual property, and specific solutions to protect the integrity of future procurements. What is needed here are clear rules rather than setting out general principles that are likely to encourage challenges by suppliers seeking to protect their confidential information and competitors seeking its disclosure;
- **Integrity:** Again, this needs further definition in terms of concrete obligations rather than general principles if the Government wants to avoid the courts determining whether a contracting authority has breached this requirement, and what should be the consequences of this for a procurement;
- **Fair treatment of suppliers:** Again, whilst the principle of treating suppliers fairly is uncontentious, we are concerned at the implications for contracting authorities in setting this out as a general principle rather than including provisions within the new public procurement rules that secure that suppliers are treated fairly.
- **Non-discrimination:** The position is similar in relation to non-discrimination. Whilst the Government must clearly legislate to comply with its obligations under the WTO GPA and EU/UK Trade and Co-operation Agreement, we would recommend that the Government does so by imposing clearly defined obligations on contracting authorities rather than through establishing general principles. If non-discrimination is to be set out as a procurement principle, the application of this principle to below threshold contracts needs to be clarified. This is particularly given that just before last Christmas the Government issued PPN 11/20 which specifically encourages contracting authorities to discriminate based on the location, size and profit motivations of their suppliers.

In summary, therefore, we do not support the proposal to set out general principles in the new procurement rules. To do so would create legal ambiguities and increase opportunities for challenges. Instead we would encourage the Government to draft clear and precise legislation that embeds these principles in a clear set of rules that contracting authorities and suppliers to them are able to understand and comply with.

1.3 **Question 2: Do you agree there should be a new unit to oversee public procurement with new powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities?**

The real question, which the Green Paper does not answer is whether the scope of this new unit is intended to cover just central Government and "in scope" organisations or whether it is intended to apply to all contracting authorities.

If it is intended to apply to all contracting authorities, then we would question the need to set up a further regulator to oversee procurements by organisations such as local authorities and registered providers of social housing. Both these types of organisations are subject to duties to secure value for money and may be subject to action (from auditors, in the case of local government) or from the Regulator of Social Housing (in the case of registered providers of social housing).

There is still a role for a unit, in the model of the OGC/CCS, that offers guidance and template documentation to improve public procurement. However, if the new body is to have regulatory functions and powers of intervention, we would question the need for such an organisation.

If (despite our views) there is to be a new unit with the ability to intervene in the procurement process of a contracting authority, this should be limited to situations where the contracting authority is in substantial or persistent breach of the new public procurement rules. It should not includes subjective conditions such as a "failure to act commercially" or a "failure to take account of the public good otherwise this would give central Government an inappropriate power to intervene in the procurement processes of contracting authorities that are and ought to be subject to democratic control or charitable duties rather than central government control.

1.4 **Question 3: Where should the members of the proposed panel be drawn from and what sanctions do you think they should have access to in order to ensure the panel is effective?**

If there is to be a panel with the power to issue guidance then we would expect its membership to include experts in procurement from within the public sector itself, those from advising the public sector (both procurement advisers, legal advisers and technical advisers), academics (e.g. Prof Sue Arrowsmith), CIPS and some (but by no means a majority) members with experience in private sector procurement. The main benefit of the panel could well be in acting as the "champion" of good procurement to those responsible for producing the legislation and guidance for public sector procurement, rather than as a "guidance issuing body" itself.

The Green Paper suggests that the new unit should have the power to issue improvement notices. This raises the obvious questions as to what powers the unit will have to enforce those notices and what sanctions will apply for non-compliance.

The term “improvement notice” has echoes the health and safety regime where a failure to comply with an enforcement notice is both a criminal offence and can lead to regulatory action. Neither is an appropriate remedy for breaches of the public procurement rules. Without sanctions for non-compliance, though, a contracting authority will simply be able to ignore an improvement notice, should they choose to do so. However, the application of sanctions to contracting authorities, particularly in terms of restricting spending, seems to us to be completely inappropriate for certain types of contracting authority outside of central government.

In the case of local authorities, a significant proportion of their spending will be to discharge statutory duties. If the central government procurement unit restricts this spending, then the authority will be in breach of these duties and potentially subject to claims from individuals and ombudsman investigations. What is needed here is support to help contracting authorities spend money better, not a power to prevent the authority spending the money at all.

In the case of registered providers of social housing, many of these contracting authorities will be charities and some of them registered charities. If these kinds of organisations are to continue to be contracting authorities, then it is inappropriate for a central government unit to have the power to restrict expenditure by them in furtherance of their charitable purposes. Fairly recently, the government took steps to ensure that registered providers of social housing were not considered to be part of the public sector for the purposes of the public borrowing. The introduction of a power to restrict the expenditure of registered providers may well be the kind of central government control that may lead to the Office of National Stastifics reconsidering whether they are part of the public sector again. If there is to be regulatory control over procurement by these organisations it would be much better to give this regulatory oversight to the Regulator of Social Housing rather than creating a new central government regulator.

In conclusion, therefore, we do not consider that there is a justification for the proposed new unit to act as a regulator over contracting authorities that are not “in scope”.

2. CHAPTER 2: A SIMPLER REGULATORY FRAMEWORK

2.1 General comments

We welcome this proposal, but we consider that it does not go far enough. We would want all legislation that is directly relevant to public procurement to be together in a single set of Regulations. This will promote simplicity, standardisation and ensure that legislation that it buried away in other provisions (such as the SBEE Act) are not overlooked for those responsible for procurement processes.

2.2 Question 4: Do you agree with consolidating the current regulations into a single, uniform framework?

Yes, but we do not think that the proposals go nearly far enough. By retaining the legislation listed in the table at paragraph 49, the government is missing an opportunity to create an integrated and comprehensive procurement framework.

The dangers here are illustrated amply by PPN 11/20. This recommends the reservation of below threshold contracts to suppliers from the local area. However, it fails to mention that for local authorities this would place them in breach of section 17 Local Government Act 1988. This appears to be an oversight as we do not think a point as crucial as this would deliberately have been omitted. Had the procurement legislation all been in the same place, we do not think that section 17 would have been overlooked in that PPN.

We would also invite Government to consider repealing section 17 Local Government Act 1988. Local government ought to be free to act ethically in its procurement processes, for example in terms of taking account of the terms on which the workforce is employed (without having to demonstrate that this is necessary in order to secure best value). In PPN 11/20 the Cabinet Office encouraged contracting authorities to consider whether to reserve below-threshold contracts for particular types of contractors (VCSEs and SMEs) and for suppliers based in a particular area. This is currently prohibited by s17 Local Government Act 1988, other than where necessary secure social value for services contracts (but not contracts for works or supplies).

The proposals in relation to “public good” and the obligations in the Public Services (Social Value) Act 2012 are clearly linked. Having two separate pieces of legislation covering similar subject matter and both imposing slightly different obligations both increases the legal burden on contracting authorities and leads to interface issues. There is no justification for continuing to restrict the Public Services (Social Value) Act 2012 to services. In the same way that the rules for utilities and concessions are being consolidated into the new public procurement regime, government should include this legislation in the consolidation and consider extending this to works and supplies contracts. This is clearly appropriate for works contracts. In relation to supplies contracts the social value may be more in terms of environmental benefits, but since the obligation in that Act is simply to “consider” what social value should be secured, this does not pose any difficulties.

Given that it is intended to cover both the public and private sectors, there may be justification for dealing with late payment in other, bespoke, late payment legislation.

Other than this we would recommend that of the legislation identified, to the extent that it is to be retained, should be consolidated into a single set of procurement regulations.

2.3 **Question 5: Are there any sector-specific features of the UCR, CCR or DSPCR that you believe should be retained?**

The more the integration and commonality between the regulations governing the different sectors, the greater the simplification of the procurement system.

The only justification for having different rules applying to different procuring entities (eg utilities) and contract types (eg concessions) is to take advantage of the flexibilities that exist now but which might be lost if the Regulations are integrated based on the "lowest common denominator". The integration should not lead to any loss of current flexibility since this would be contrary to the Government's objective (which we support) of giving contracting authorities as much flexibility as possible within the constraints of the Treaties the UK has signed up to.

3. CHAPTER 3: USING THE RIGHT PROCUREMENT PROCEDURES

3.1 General Comments

We welcome the desire to simplify the available procedures and to move much closer to the approach set out in the GPA. We agree that there is no benefit in retaining the innovation partnership and design contest procedures.

3.2 Question 6: Do you agree with the proposed changes to the procurement procedures?

A key question that the Green Paper doesn't answer is whether the competitive flexible procedure is to be available for all procurements or whether, like CPN and CD at the moment it is to be available only in certain circumstances. If it is not to be freely available in all procurements, then it is essential that the restricted procedure is retained. If it is going to be available for all procurements, then there is no need to retain the restricted procedure, since the competitive flexible procedure has enough flexibility within it to be run as a restricted procedure.

We welcome the additional flexibility allowed within the proposed competitive flexible procedure. However, we do wonder whether the flexibility allowed in this procedure may give rise to concerns over whether a procurement run under this procedure is sufficient to establish "market value" for the purposes of the new subsidy control (State aid) rules.

3.3 Question 7: Do you agree with the proposal to include crisis as a new ground on which limited tendering can be used?

Yes, as long as "crisis" is clearly defined and not limited to circumstances that are relevant just to central Government or to situations defined by central Government as "crises".

3.4 Question 8: Are there areas where our proposed reforms could go further to foster more effective innovation in procurement?

It is important to distinguish between innovation in procurement methods and processes and innovation in what is being procured.

Innovation in what is to be procured is to be encouraged. This should be contrasted with innovation in procurement methods, which could lead to inconsistencies of approach and remove the benefits of standardisation that the Green Paper is seeking to encourage the public sector towards. The Government should not see innovation in procurement methods as something necessarily to be promoted but should give the right level of flexibility over procurement processes.

One innovation that it would be good to re-introduce is the procurement of a "team" for a project that generally requires a level of collaboration than a series of parallel procurement exercises. This used to be available under the Public Works Contracts Regulations 1991 for public housing scheme works contracts which provided that,

> *"where the size and complexity of the scheme and the estimated duration of the works involved require that the planning of the scheme be based from the outset on a close collaboration of a team comprising representatives of the contracting authority, experts and the contractor, a contracting authority may, except as indicated in the following paragraphs, depart from the provisions of these Regulations insofar as it is necessary to do so to select the contractor who is most suitable for integration into the team."*

We suggest that this provision should be re-introduced and extended to all public infrastructure works projects. The benefits of doing so would be that the contracting authority could run a single procurement to build a team of specialists required for that project – and could consequently result in a great degree of innovation. This would also open-up some of the more collaborative procurement methods advocated in the Construction Playbook, such as alliancing. The ability to select the best team for a project rather than the most advantageous tender from each of the potential project participants who have no history of working together is essential to the effectiveness of these kinds of procurement methods.

3.5 **Question 9: Are there specific issues you have faced when interacting with contracting authorities that have not been raised here and which inhibit the potential for innovative solutions or ideas?**

Contracting authorities that are statutory bodies corporate are often under legal duties to deliver services and/or meet needs and much of their procurement is directed to meeting these needed. However, they can often be hindered from doing this as effectively as possible by the procurement processes that they choose to follow.

In the social care sector, for example, Care and Support Statutory Guidance issued under the Care Act 2014 provides guidance on market shaping and commissioning of adult care and support (Chapter 4). This must be adhered to within any preliminary market consultation and procurement exercise undertaken by a local authority with social services functions. The evaluation of contracts must be undertaken with regard to this guidance, especially in connection with price, as much as quality.

For example, paragraph 4.31 of the Statutory Guidance states:

> *"When commissioning services, local authorities should assure themselves and have evidence that contract terms, conditions and fee levels for care and support services are appropriate to provide the delivery of the agreed care packages with agreed quality of care. This should support and promote the wellbeing of people who receive care and support and allow for the service provider the ability to meet statutory obligations to pay at least the national minimum wage and provide effective training and development of staff. It should also allow retention of staff commensurate with delivering services to the agreed quality and encourage innovation and improvement. Local authorities should have regard to guidance on minimum fee levels necessary to provide this assurance, taking account of the local economic environment. This assurance should understand that reasonable fee levels allow for a reasonable rate of return by independent providers that is sufficient to allow the overall pool of efficient providers to remain sustainable in the long term."*

Care providers encounter numerous procurements that do not fully implement the Care Act 2014's statutory guidance.

It would be sensible for the new consolidated procurement legislation and accompanying guidance to recognise the existence of these statutory duties on contracting authorities. The procurement guidance issued alongside the new procurement rules should highlight this guidance specific to particular types of procurement and remind contracting authorities that of the need to comply with it.

Similarly, service providers encounter procurements in which the commissioning authority fails to provide timely clarification on issues raised over things like, for example TUPE information. This makes it difficult to submit accurate tenders, particularly where the tenderer is a voluntary, community or social enterprise or SME and cannot afford to "get it wrong". It would be helpful for the guidance to cover good practice in tendering, including exactly what is expected in terms of transparency in practice.

3.6 **Question 10: How can government more effectively utilise and share data (where appropriate) to foster more effective innovation in procurement?**

We would question the extent to which contracting authorities that are not part of central government should be required to do this. If there is to be any such data sharing it should be on a voluntary basis in relation to contracting authorities that are not part of central government or even, in some cases, part of the wider public sector.

To facilitate such sharing, it may be necessary to amend Regulation 21 PCR 2015 or create a specific permission to share such data.

Where such data includes personal data it may also be necessary to amend the Data Protection Act 2018 to create a specific basis for such data sharing as it may not necessarily be possible to bring it within the "legitimate interests" basis of processing, given that the interests are those of wider government rather than the contracting authority itself.

3.7 **Question 11: What further measures relating to pre-procurement processes should the Government consider to enable public procurement to be used as a tool to drive innovation in the UK?**

Regulation 40 PCR 2015 should be replicated and amplified in any new consolidated procurement legislation. Contracting authorities are sometimes reluctant to undertake preliminary market consultation as fully as they should to achieve a good procurement outcome. In particular, the engagement with experts (including, where appropriate, local communities) is not often recognised as a permissible part of this exercise.

The 2020 Green Book review encourages analysis that builds in wider societal impact as well as climate change in project appraisal processes. We suggest that encouragement to do so might be reflected in the matters to which authorities are required to have regard, as is the case currently under the Public Services (Social Value) Act 2012 (but ideally extended to works and supplies contracts and consolidated into the revised public procurement rules, as we have suggested above).

3.8 **Question 12: In light of the new competitive flexible procedure, do you agree that the Light Touch Regime for social, health, education and other services should be removed?**

The accession to the GPA gives an opportunity to restore the distinction between Part A and Part B services that existed under the Public Contracts Regulations 2006, with the residual category being Part B services.

For procurements of Part B services that are not covered by the EU-UK Trade and Co-operation Agreement ("**TCA**") contracting authorities can be relieved of the need to submit a contract notice to Find a Tender Service ("**FaTS"**). This would mean that they would just need to submit a contract award notice and would have significant flexibility to choose the most appropriate provider for these services.

In the TCA we note that the Government has taken advantage of the higher tendering threshold for "Part B services" to which GPA coverage is extended. We would encourage Government to make use of this flexibility it has won in the TCA negotiations and set a higher tendering threshold for these services, as it is permitted to do.

4. CHAPTER 4: AWARDING THE RIGHT CONTRACT TO THE RIGHT SUPPLIER

4.1 General Comments

The ability to take account of a wide range of factors in the selection of tenderers and the award of contracts is at the heart of effective procurement.

The case of *Lianakis*[11] created an artificial distinction between the selection and award stages, which should be removed. In deciding which tenderers to select to invite to tender, contracting authorities ought to be able to assess a tenderer's indicative proposals for delivering the contract. In awarding contracts, contracting authorities ought to be able to assess things like the health and safety record of tenderers, their approach to climate change and how well they have delivered other similar contracts.

4.2 Question 13: Do you agree that the award of a contract should be based on the "most advantageous tender" rather than "most economically advantageous tender"?

A very similar term, "most favourable tender" was considered in the case of *Beentjes*[12]. The court said that this was permitted only to the extent that it allowed the contracting authority to determine the most economically advantageous tender "based on objective criteria" and without any "element of arbitrary choice". In effect, the court was saying that it did not see much difference between the phrase "most favourable tender" and "most economically advantageous tender"; both had to be determined according to objective criteria set out in the contract documents. The same could be said for the phrase "most advantageous tender".

The objective of this proposed change seems to be to get away from perceived restrictions (from use of the word "economically") that stop contracting authorities having regard to appropriate considerations. These restrictions are more perceived than real, though. There are plenty of opportunities to take non-financial considerations into account in procurement and plenty of encouragement not to award based on lowest price. It is usually perceived budgetary pressures, rather than the procurement rules, that lead to price featuring too strongly in tender evaluations.

The removal of the word "economically" from the test would potentially give a contracting authority the ability to ignore price altogether and determine "advantage" based on totally different considerations and without regard to price. It also opens up the prospect of evaluating price according to how close a tenderer's price is to the average of prices tendered or to a pre-defined price determined by the contracting authority. We are not sure that the ability to exclude price altogether from an evaluation is what government is really intending here, especially as value for money is such an important consideration when considering public and quasi-public sector expenditure.

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11 *Lianakis v Dimos Alexandroupilos*, C-532/06,.

12 *Gebroeders Beentjes BV v. State of the Netherlands* Case 31/87.

If the objective of this change is simply to allow a greater range of non-price considerations to be evaluated, then we wonder whether it would be better to use a completely different term altogether. The concept of "value for money" is generally well understood. There are explicit obligations on many contracting authorities to secure value for money. As well as a "money" aspect, the phrase includes a "value" aspect. This can be drawn widely and include "valu"e in terms of things like reducing climate change or economic and social development. We would therefore encourage government to adopt a completely new term along these lines which does not bring with it the "baggage" of the EU phraseology.

Whatever term is used, the key will be the basis on which the detailed award criteria are set. For central government procurements, this should be by reference to overall strategic objectives for the procurement as set out in the Green Book review[13] (in relation to which see our response to question 11 above). For local government, this will be in accordance with their democratic mandate. For registered providers this will be in line with how their Boards decide to deliver their (often charitable) objectives.

4.3 **Question 14: Do you agree with retaining the basic requirement that award criteria must be linked to the subject matter of the contract but amending it to allow specific exceptions set by the Government?**

No. We would favour the opportunity for contracting authorities to link the award criteria to a much wider range of circumstances including the ethical conduct of the tenderer or their carbon footprint. It is time that the public sector should be given the same freedom to link the award of contracts to the nature of the tenderer as well as to the quality of their tender that the private sector has. There is an opportunity to drive an agenda of ethical, socially responsible and environmentally sustainable progress amongst contractors delivering to the public sector.

The government has already started to do this by encouraging the consideration of supply chain payment in the selection process. However, this is a crude "pass/fail" tool. If these considerations could be taken into consideration at award stage, then contracting authorities can move towards contracting with the most ethical, socially responsible and environmentally sustainable contractors, balancing this against the quality of their proposals and value for money they are tendering to deliver. Again, this would help embed individual procurements within the overall strategy of the contracting authority as set out in our response to question 13 and, for central government, as recommended in the Green Book review.

If, despite the above comments, this requirement is to be retained, we would recommend that any exceptions are set out in the new public procurement rules. Government can then be given the power to create new ones, but not (other than through legislation) to take away the flexibilities it has given.

13 https://www.gov.uk/government/publications/final-report-of-the-2020-green-book-review.

4.4 **Question 15: Do you agree with the proposal for removing the requirement for evaluation to be made solely from the point of view of the contracting authority, but only within a clear framework?**

This really depends on the nature of the "clear framework" and clearly links to the previous question. In most cases contracting authorities will award contracts based on their own perspective and this is entirely appropriate.

As long as this proposal is simply "permissive" we have no real problems with it. However, any requirement on contracting authorities to have regard to considerations that are not relevant to their own objectives and point of view are problematic, particularly for contracting authorities such as local authorities or registered providers of social housing.

4.5 **Question 16: Do you agree that, subject to self-cleaning, fraud against the UK's financial interests and non-disclosure of beneficial ownership should fall within the mandatory exclusion grounds?**

Any kind of fraud should be a ground for mandatory exclusion.

If it is managed centrally and it is straightforward to "self-cleanse" by disclosing beneficial ownership, making the non-disclosure of beneficial ownership a ground for mandatory exclusion is reasonable. However, it may place a difficult burden on sub-central contracting authorities if they have to determine whether beneficial ownerships have been adequately disclosed. In this case, this may be better as a discretionary exclusion (along similar lines to "grave professional misconduct").

4.6 **Question 17: Are there any other behaviours that should be added as exclusion grounds, for example tax evasion as a discretionary exclusion?**

The current grounds of discretionary exclusion are generally wide enough. The areas the Government seems to be looking to add (eg tax evasion) are already covered by the "grave professional misconduct" category.

However, we do question whether the limit of 3 years for discretionary exclusions, with the risk of a contracting authority being challenged if they consider "self-cleansing" to be insufficient, is a sufficient deterrent to tenderers.

We would favour a longer exclusion period (for both mandatory and discretionary ineligibility) with an absolute discretion on contracting authorities to decide whether to accept self-cleansing (rather than risking a challenge if the contracting authority considers it is "not sufficient").

4.7 **Question 18: Do you agree that suppliers should be excluded where the person/entity convicted is a beneficial owner, by amending regulation 57(2)?**

Yes – as long as this information is readily and instantly available to a contracting authority from a central Government database.

4.8 **Question 19: Do you agree that non-payment of taxes in regulation 57(3) should be combined into the mandatory exclusions at regulation 57(1) and the discretionary exclusions at regulation 57(8)?**

The fact that this question is being asked illustrates how far these proposals are driven by a central government agenda. It is not the task of many of the contracting authorities we represent to enforce the payment of taxes to central government.

The non-payment of taxes is a lot less nefarious than some of the things (eg support for oppressive regimes) that some of our clients are not even allowed to consider in their procurements. If the non-payment of taxes is to be a ground for exclusion, it should be a discretionary exclusion. In addition, section 17 Local Government Act 1988 should be repealed and all contracting authorities, including local authorities, given an express (discretionary) right to exclude suppliers for unethical behaviour generally.

No distinction should be made between the non-payment of taxes and other forms unethical behaviour. If central government then wants to elevate the importance of the non-payment of taxes in their own procurements, they can do so. This would leave local authorities able to prioritise the non-payment of business rates or such other unethical behaviour, as determined by their democratic mandate.

4.9 **Question 20: Do you agree that further consideration should be given to including Deferred Prosecution Agreements as a ground for discretionary exclusion?**

There is already a discretionary right to exclude tenderers for “grave professional misconduct” and we would have thought that the circumstances leading to the DPA would usually fall within this. On this basis we are not sure why it is considered necessary to create this additional ground.

If there is to be a specific right to exclude for a DPA, this would also potentially undermine its attractiveness of companies deciding whether to accept a DPA.

4.10 **Question 21: Do you agree with the proposal for a centrally managed debarment list?**

Yes, as long as Government is prepared to “stand behind” the list. In the same way that compensation is payable to those affected by Land Registry or Companies House errors, the same protection should be given to those relying on the list.

This could be to a contractor who has wrongly been included in the list.

Equally it could be to a contracting authority, where a potential tenderer has wrongly been omitted from it or has remained on it after circumstances have occurred that ought to have led to their removal from it.

4.11 **Question 22: Do you agree with the proposal to make past performance easier to consider?**

Definitely; but the proposals should go much further. The Green Paper proposal is simply to use past performance as a "pass/fail" test. As well as this, contracting authorities should be able to use past performance:

- as a "scored" question when deciding which of the tenderers that meet the minimum selection standards to invite to tender; and
- as part of the award criteria, where greater marks can be given to tenderers who have delighted their existing customers sufficiently for those customers to give them excellent references.

Clearly this will involve enabling contracting authorities to give fair and honest references for their existing contractors without fear of those contractors taking action against them. Contracting authorities will need to be able to give confidential references on the performance of their contractors to other contracting authorities which are exempt from the disclosure requirements of either the proposed transparency agenda or, for those contracting authorities to which it apples, the Freedom of Information Act 2000 provisions.

4.12 **Question 23: Do you agree with the proposal to carry out a simplified selection stage through the supplier registration system?**

This can only cover part of the selection process. Having a central repository to manage things like mandatory and discretionary eligibility and for uploading accounts and relevant certificates (e.g. Gas Safe, SSIP etc) clearly makes sense. However, the technical and professional requirements for different contracts may be very different.

Contracting authorities must continue to be free to carry out whatever assessments of the technical and professional ability and, where appropriate, economic and financial standing of tenderers.

4.13 **Question 24: Do you agree that the limits on information that can be requested to verify supplier self-assessments in regulation 60, should be removed?**

Definitely; particularly in relation to financial information. Contracting authorities should have access to all information that may be relevant.

On the financial side, this should include the ability to undertake credit reference agency checks and to ask for management accounts, cashflow statements and all kinds of appropriate financial information.

In relation to non-financial issues, this should include the right to take references from clients as to the quality of a tenderer's performance (beyond just being able to consider whether the tenderer can provide references to establish "sufficient experience").

5. CHAPTER 5: USING THE BEST COMMERCIAL PURCHASING TOOLS

5.1 General Comments

This is the most disappointing area of the Green Paper. What is needed is a much wider range of commercial tools for contracting authorities to engage with their suppliers in the most appropriate way commercially.

For example, local authorities and registered providers wishing to enter into "package deals" with developers often have to compete for land that the developer owns or controls. The only basis on which the developer is prepared to sell the land is if they are awarded the construction contract for the development. The current rules do not "fit" this scenario, since they assume that the contracting authority is in a position to invite tenders, rather than itself having to compete. Since there is no obvious procurement route for this under the current rules, the only option is to rely on the negotiated procedure without advertisement, using the developer's ownership of the land as a "technical reason" why it is not possible to contract with any other party. However, it is not universally accepted that this gives a compliant procurement route under PCR 2015. In fact this argument was challenged by the Commission in *Quedlingberg*[14] although the challenge was ultimately discontinued since the build was complete before the challenge was heard.

In construction, there is an increasing focus on long-term relationships and the Construction Playbook[15] promotes this. Setting up long-term strategic partnerships within the existing framework agreement arrangements is not straightforward. The correlation between an initial price tended to get onto a framework and the contract sum for developing a specific site is at best tenuous. The archetype prices may be able to be fixed, but the site abnormals will always be site specific

The *Henry Bros* case[16] makes it difficult to justify two-stage tendering as being compliant with PCR 2015. We would invite the government to overturn that case in the new regulations.

Before proposing new procurement routes, it would be helpful for government to consult contracting authorities on the issues they currently find difficult in relation to compliance with PCR 2015. This may give further information on the range of alternative procurement routes that may be needed and the scope that the new rules should allow for them.

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14 *Quedlingburg* Infringement Proceedings IP/09/437.

15 https://www.gov.uk/government/publications/the-construction-playbook

16 *Henry Bros (Magherafelt) v DoE Northern Ireland (No 2)* [2008] NIQB 105

In relation to paragraph 156 of the Green Paper, we have concerns over whether the proliferation of buying club frameworks for a wide range of contracting authorities to use is in the best interests of contracting authorities or suppliers to them.

There seems to us to be a fundamental conflict of interest where a buying club charges contractors and suppliers on the framework a fee (usually of a proportion of the price payable under each call-off contract) for contracts called off from that framework. This approach means that it is in the interests of the provider of the framework to maximise the amount payable under contracts called off from under it. It also means that there is a hidden cost being paid by contracting authorities using the framework, since the contracts and suppliers on the framework need to recover these costs through the prices charged to contracting authorities under the call off contracts.

It would be better to prohibit this hidden levy (as seems to have been the Commission's intention in preventing any charges being levied on DPS suppliers before or during the period of validity of a DPS[17]). This would mean that all the costs of setting up and running a "general" framework would need to be met by the contracting authorities setting up and using the framework. This would be a fairer approach, encourage framework providers to minimise the costs of running frameworks and remove the conflict of interest inherent in the current arrangements.

5.2 **Question 25: Do you agree with the proposed new DPS+?**

As stated by Professor Sue Arrowsmith in her commentary on the Green Paper[18] the proposals do not contain sufficient detail to form a proper basis for consultation. From what has been said of the proposals, though, they do not really add anything to what is currently available under PCR 2015.

Many contracting authorities use a DPS for works, services and supplies which go well beyond what could properly be described as "commonly available purchases". We have seen DPS for construction work, social care, and even legal services.

One of the issues several our clients in the care sector face is the inappropriate use of dynamic purchasing systems to drive down prices for care provision. Making DPS' more widely available therefore has risks that they will be inappropriately used for services which require a more complex evaluation than is appropriate for a DPS.

A key limitation on the usefulness of current DPS' is the need to invite and evaluate tenders from all suppliers on the DPS that are capable of meeting the contracting authority's requirement. It would be helpful for contracting authorities to be able to invite tenders from a smaller selection of DPS suppliers, with the selection being made through some objective selection criteria.

17 Regulation 34(29) PCR 2015

18 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3749359

5.3 **Question 26: Do you agree with the proposals for the Open and Closed Frameworks?**

The proposals offer nothing in addition to the current rules. If a closed framework needs to be opened up to reprocurement at some time within the eight years, and the existing suppliers on that framework are not guaranteed a place after that reprocurement, this is no different from letting two consecutive four-year frameworks.

If an eight year framework is to be opened up to competition, this should result only in the inclusion of additional providers onto the framework rather than the removal of those who were successful when it was first tendered.

6. CHAPTER 6: ENSURING OPEN AND TRANSPARENT CONTRACTING

6.1 General Comments

We are concerned at the high volume of notices that it is proposed that contracting authorities will need to publish and the excessive bureaucracy that this will involve. One of the stated aims of the Green Paper is *"to deliver the best commercial outcomes with the least burden on the public sector"*(our emphasis).

This part of the proposals fails markedly to deliver that stated objective. The sheer volume of mandatory notices will place a huge burden on contracting authorities. The volume of information contracting authorities will need to produce and potentially have checked by their legal team would be significantly increased from what is required now. We wonder why the Government is proposing to go down this route, given that it is not required by the GPA, TCA or any of the other trade treaties the government has entered into.

6.2 Question 27: Do you agree that transparency should be embedded throughout the commercial lifecycle from planning through procurement, contract award, performance and completion?

The proposals seem to be a bureaucratic nightmare and will amount to a "compliance paperchase" for contracting authorities. They will result in tenderers being overloaded with unnecessary information, and potentially unable to work out what is a tender opportunity and what is simply information about forthcoming procurements or procurements where they have already missed the deadline for tendering.

Tenderers need to know what tender opportunities they can bid for in sufficient time to be able to put in their best tender. They don't need lots of information about procurements that are coming up in the future. Still less do they need reams of information about procurements that have been concluded. What tenderers really need is proper feedback, so they know why either they were excluded from a tender process before the award stage or they were not successful at the award stage.

6.3 Question 28: Do you agree that contracting authorities should be required to implement the Open Contracting Data Standard?

It is overly optimistic to suggest that contracting authorities will easily be able to implement the Open Contracting Data Standard. We do not believe that many sub-central contracting authorities will have the resources or capacity to implement this, especially as the nation emerges from a pandemic-led recession and public sector expenditure is likely to be squeezed by the government. There may be capacity for contracting authorities to enter data into proforma notices in machine readable form, as with the simap website, but only for a significantly more limited number of notices than is being proposed. The question then arises as to how this information will be stored and analysed.

It will be a very significant (and potentially costly) project for government to design and construct the IT infrastructure necessary to take advantage of all this machine-readable data, and there are likely to be many better uses for taxpayers' money.

If this project is to go ahead, we suggest that it is shelved for at least 5 years until government has had an opportunity to assess the feasibility of setting up the IT infrastructure required (having already done some of this in a more limited way – see below) and undertaken a cost benefit analysis for this broader proposal.

6.4 **Question 29: Do you agree that a central digital platform should be established for commercial data, including supplier registration information?**

Yes. The Commission tried to promote a similar approach with e-Certis and ESPDs for similar reasons. However, but this was not promoted within the UK and failed to take off in England. In construction, Constructionline fulfils a similar function.

One of the issues with these platforms are the costs for suppliers to join. Any such platform should be free for suppliers and contractors to join, with the costs being met by central government.

Establishing this "supplier database" platform could also act as a "trial run" for any wider government database on tender processes and contract awards. In evaluating the proposals for a "contracting authority side" database, it will be important to see how well the supplier side database is managed, whether the information is always kept up to date and whether it is successful in reducing tendering costs.

7. CHAPTER 7: FAIR AND FAST CHALLENGES TO PROCUREMENT DECISIONS

7.1 General Comments

If the government's stated objective is to make the review process more accessible, the proposals in the Green Paper are unlikely to achieve it and in practice they are likely to have the opposite effect. One of the issues with the current review system is that bidders have to decide whether to challenge a process at a point at which they are still waiting to hear the result. Bidders are concerned that if they bring a challenge, this will prejudice their chances of winning the contract.

Whilst the 30-day period for challenges is reasonable, we consider that this should run from the point at which a bidder is told that they have either been excluded from the procurement process or that they have been unsuccessful. If there is to be a process for review by the contracting authority, this 30-day period should run from the point at which the contracting authority informs the bidder of its decision following the review.

As the Green Paper states, the costs of procurement challenges exclude tenderers like SMEs and charities from the possibility of obtaining redress for breaches the procurement rules. A key objective for any new proposed rules should be to make it possible for these kinds of organisations to challenge unfair procurements.

7.2 Question 30: Do you believe that the proposed Court reforms will deliver the required objective of a faster, cheaper and therefore more accessible review system? If you can identify any further changes to Court rules/processes which you believe would have a positive impact in this area, please set them out here.

Whilst some of the reforms are welcome, we don't think that they will make a substantial difference to the cost or speed of dealing with procurement challenges.

With a court issue fee of up to £10,000 and the costs of obtaining the expert Counsel that are is needed for procurement challenges, that it is only the largest contracts that are worth challenging. This leaves many tenderers without effective redress for what are sometimes flagrant breaches of the procurement rules.

In relation to the proposal to encourage proceedings to be issued outside of London, all the barristers we currently instruct on procurement challenges are based in London. The ability to issue out of London is unlikely to be taken up to a major degree, even by practices based outside London, unless procurement Counsel of the required expertise choose to locate in other court areas. However, different considerations would apply in the case of the proposed Tribunal (see below) which it would be better to establish outside London.

7.3 **Question 31: Do you believe that a process of independent contracting authority review would be a useful addition to the review system?**

Our concern about this proposal is that it may simply introduce a delay into the process in which time is crucial.

Our experience of asking for reviews of local authority procurements by Monitoring Officers has not generally made a difference to the outcome of those procurements. A purely internal process usually leads to the contracting authority seeking to justify its original decision.

Having said this, one possible advantage of a review process is that, if the time for challenge runs from the conclusion of the review, this may overcome the issue of tenderers having to decide whether to challenge before learning of the outcome of the procurement (see above).

7.4 **Question 32: Do you believe that we should investigate the possibility of using an existing tribunal to deal with low value claims and issues relating to ongoing competitions?**

We are not sure what existing tribunal the government is considering, but we would doubt that an existing tribunal, with its existing processes and procedures which are not necessarily appropriate for procurement challenges, would be a good move. However, we would support a new tribunal or process for procurement challenges. This may not necessarily need to be limited to those that are of lower value.

We wonder whether a process like adjudication for construction disputes may be worth considering here. This would offer the opportunity of a swift remedy which the parties are likely to accept in most cases. However, it would also offer the opportunity of a court decision if one of the parties is not prepared to accept the adjudication decision. A further advantage is that the Technology and Construction Court is familiar with the adjudication process, and therefore that this will be familiar to the judges in the TCC.

If a separate tribunal is to be introduced, this could be established in one or more of the main cities outside London, since it would not need the involvement of specialist Counsel. If a process like adjudication is adopted, this could take place anywhere in the country, depending on where the adjudicator is based.

7.5 **Question 33: Do you agree with the proposal that pre-contractual remedies should have stated primacy over post-contractual damages?**

Yes, because this sets appropriate balance between the availability of remedies which correct a breach and damages where the decision means that the breach it allowed to stand. It is usually (but not always) better for a contracting authority to have a procurement breach corrected than to pay damages for one that is not.

7.6 **Question 34: Do you agree that the test to lift automatic suspensions should be reviewed? Please provide further views on how this could be amended to achieve the desired objectives.**

This should depend on the availability of substantial damages for breaches of the procurement rules. If damages are limited to a percentage of tendering costs (which may be 150%, as is being proposed), the automatic suspension will become more important for tenderers.

If substantial damages are available, the current balance in favour of lifting the automatic suspension can be retained. In these circumstances contracting authorities will need to balance the desirability of entering into the contract quickly against the risk of substantial damages being payable if they are found to have breached the procurement rules.

7.7 **Question 35: Do you agree with the proposal to cap the level of damages available to aggrieved bidders?**

Not at the level proposed. The level of damages needs to achieve a fair balance between what is fair to tenderers and what it is appropriate for contracting authorities to pay if there has been a breach which is not corrected.

There are good arguments that no cap on damages is appropriate, since the damages simply compensate the tenderer for what they have lost where a contracting authority has breached the procurement rules and the breach is not corrected. If the driver for this proposal is to discourage speculative claims, then we have seen little evidence of this. In fact the situation is usually the reverse with tenderer often being reluctant to bring valid claims.

If it is decided to cap damages then for a term contract, damages could be capped at the level of anticipated profit for the first year of the contract, plus tendering costs. For project contracts, they could be capped at a percentage of the anticipated profit plus tendering costs.

There is also a clear distinction between the scenario where a tenderer has not had the opportunity to apply for pre-contractual remedies, and cases where a tenderer has had that opportunity. This should be contrasted with the situation where the tenderer has had an opportunity to apply for pre-contractual remedies but has chosen not to do so. The perverse incentive of not applying for pre-contract remedies so as to claim substantial damages should be removed from the process. Where a tenderer has not had an opportunity to apply for pre-contract remedies or the automatic suspension has been lifted, the damages should reflect the full amount of the loss suffered by the tenderer.

Capping damages may also make it harder for a contracting authority which is a local authority or a charity to settle a challenge. If the maximum amount they would pay if a claim went to trail is capped, it would be difficult to justify any decision to pay more than that amount as being in the best interests of the contracting authority.

7.8 **Question 36: How should bid costs be fairly assessed for the purposes of calculating damages?**

This is difficult, which is one of the reasons why we do not favour a damages limit based solely on bid costs. It could also be vastly different for different bidders, depending on the importance they have placed on the contract. Most of the costs are likely to be "internal costs". How tenderers value internal time (and can justify this) could mean that different bidders challenging the same contract could end up recovering significantly different amounts in damages. This cannot be an equitable solution.

7.9 **Question 37: Do you agree that removal of automatic suspension is appropriate in crisis and extremely urgent circumstances to encourage the use of informal competition?**

Only if there is a proper remedy for a tenderer who has been deprived of the opportunity to challenge the procurement. This could be in terms of either a remedy like ineffectiveness or the ability to claim substantial damages that reflect the full value of the "loss of chance" that the bidder has suffered because of being deprived of the right to challenge.

7.10 **Question 38: Do you agree that debrief letters need no longer be mandated in the context of the proposed transparency requirements in the new regime?**

This looks like it is a mainly "cosmetic" change. If contracting authorities are required to state the "reasons" for the contract (or places on a framework) being awarded to a particular suppler (or suppliers), the same care will need to be put into drafting these reasons as currently goes into drafting standstill letters.

Most standstill letters we see (and help our clients to draft) are the same for all tenderers. If they are different, they are usually based on the same template, with sections being omitted where the tenderer receiving feedback scored the same or better than the successful tenderer(s). These standstill letters usually focus on the key reasons why the successful tenderer was successful, rather than containing a forensic analysis of the reasons why an unsuccessful tenderer scored less compared to that of the successful tenderer. Despite the reference in PCR 2015 to standstill letters needing to include the "*characteristics and relative advantages*" of the successful tender(s) this approach does seem to be supported by the case law.[19] However, removing the reference to "*characteristics and relative advantages"* and replacing it with a reference to "reasons" would be a helpful clarification

[19] See *European Dynamics v Commission* Case C-629/11P

The requirement to make the “reasons” publicly available on a platform could mean that contracting authorities need to take even more care over preparing this information than they take over standstill letters now. Currently this information is sent just to tenderers on an individual basis. If it is made publicly available in future, all tenderers will be able to see it. Potentially this could increase the likelihood of challenges if this feedback on the reasons for the contract award is considered by any of the bidders not to offer a sufficient justification for the outcome of the tender process.

Contracting authorities will naturally want to avoid this. They are therefore likely to put the same, or even more, effort into getting these “reasons” right, as they do with standstill letters now. This is not necessarily a bad thing. The rigour required over standstill letters does help ensure evaluation panels do their job properly. It helps ensure that decisions are made on the basis of properly thought through and fully reasoned assessments which apply the award criteria in a way that is justifiable to each tender.

8. CHAPTER 8: EFFECTIVE CONTRACT MANAGEMENT

8.1 General Comments

The heading to this chapter is much broader than the subject matter deserves. Prompt supply chain payment and change controls are two minor (although important) aspects of contract management. Much more important are things like collaboration, checking routines (e.g. of insurances, supplier solvency), approvals (e.g. of subcontractors), monitoring (of KPIs, performance generally, complaints and "issues logs"), payment routines and dispute avoidance and resolution.

These all build on the previous stages of scoping, procurement and mobilisation, which are key to ensuring that contracts are fit for purpose, reflect strategic priorities and are capable of being managed effectively.

None of these require further coverage in the proposed procurement rules, but we mention them simply to set the proposals in this chapter in context.

8.2 Question 39: Do you agree that:

- **businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?**
- **there should be a specific right for public bodies to look at the payment performance of any supplier in a public sector contract supply chain?**
- **private and public sector payment reporting requirements should be aligned and published in one place?**

The primary duty to pay their supply chain on time should remain with the main contractor and not be passed onto the contracting authority.

Paying subcontractors direct is fraught with difficulties in terms of contractual relationships. If subcontractors are given the right to go direct to a contracting authority, there is a risk of the contracting authority potentially having to "pay twice" if the subcontractor is not justified in its payment claim.

The authority will inevitably be drawn into disputes between the main contractor and subcontractors and may have to adjudicate between the claims of the main contractor and subcontractor. The contracting authority will also need to review the terms of all subcontracts in detail. Whilst there is merit in the authority carrying out proper supply chain due diligence, this will inevitably increase the burden on main contractors and reduce their flexibility to manage their supply chain as they think fit.

We do not therefore think that there is a need for direct access by subcontractors.

Supply chain performance can be considered as part of the selection criteria for contracts and could be considered now through contractual provisions. Guidance may be beneficial on this but there is no need for legislation.

Finally, as we have said above, it clearly makes sense for public and private sector payment reporting requirements to be aligned and published in one place.

8.3 **Q40: Do you agree with the proposed changes to amending contracts?**

We would recommend extending the principles of Regulation 72 PCR 2015 specifically to permit any changes to a contract within the10% (services or supplies) or 15% (works) limits. This would involve removing the requirement that these changes are also valued less than the applicable tendering threshold.

We also wonder whether there needs to be any limit at all on decreases in the contract value, with the 10% or 15% limit being applied only to increases in contract value.

We also welcome the proposal to set out a test of what is a "substantial change" to a contract. Ideally this would be done by reference to the value limits being proposed for the revised Regulation 72. The changes that were considered in the *Pressetext* case were comparatively very minor, which has led to some fairly cautious definitions of what is a "substantial change". Setting out a new test for this in revised legislation would be very welcome.

8.4 **Q41: Do you agree that contract amendment notices (other than certain exemptions) must be published?**

This seems reasonable, as long as the exemption for "de minimis" changes is drafted sufficiently broadly to avoid placing an excessive administrative burden on contracting authorities. In many construction contracts numerous instructions and variations are issued. The exemptions from publication need to be drafted sufficiently widely so that these "normal contract administration" variations do not lead to a reporting requirement.

In relation to the reporting requirement for increases or reductions of the contract term, project contracts do not generally have a "term", with the works taking as long as necessary. In any case, we wonder whether a reporting requirement for increases or decreases in the contract term of more than 10% of the original contract term is needed at all. For most term contracts an increase of more than 10% in the term will result in an increase of more than 10% in the contract price. We do not therefore see any need to have provisions dealing specifically with the contract length, since this can be dealt with adequately through the "value limit".

8.5 **Q42: Do you agree that contract extensions which are entered into because an incumbent supplier has challenged a new contract award, should be subject to a cap on profits?**

This whole proposal is fundamentally flawed. For term contracts, there is often a TUPE transfer at the end of the contract period. Restricting extensions to existing contracts may lead to contracting authorities being faced with having to meet the costs of two TUPE transfers within a short period.

In our experience, contract extensions due to a challenge are usually done on the basis of the existing contract, rather than on the basis of a new, higher priced, contract.

Paying an existing supplier on a cost reimbursable basis provides a perverse incentive on the supplier, who may be in dispute with the contracting authority, to maximise its costs during the extension. This will maximise the amount on which profit will be payable. The rate of profit set by government may well be higher than the rate of profit assumed by the contractor in tendering for the contract. Setting a standard profit percentage for all contract types could be difficult since construction notoriously works on the basis of low profit margins.

Very few contracting authorities have the expertise to analyse actual costs effectively on a cost reimbursable basis, especially where subcontracts are on a price rather than a cost basis. If the contracting authority is to pay on a cost reimbursable basis, there is a question how far down the supply chain the contracting authority needs to go. It would be very easy for a main contractor, who is in dispute with a contracting authority to pay their supply chain artificially high prices. This strategy will also maximise the amount on which profit is payable to the main contractor.

If this proposal is to go forward, it should be limited to circumstances where it is the incumbent supplier that is challenging the results of the procurement. The costs of any extension should be limited to the lower of the amount payable under the existing contract (adjusted for inflation in accordance with the existing contract, where applicable) or the supplier's actual costs per plus profit.

Anthony Collins Solicitors LLP

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