



trowers & hamlins



Presentation — January 2021

# Transforming public procurement – Green Paper on reforms to public procurement law after Brexit

Pioneering — Bahrain — Construction — Public sector — Energy — Real estate — London — Tax — IT — Dubai — Manchester — Connecting — Knowledge — Pragmatic — Malaysia — Exeter — Thought leadership — Housing — Agile — Creative — Connecting — Private equity — Local government — Manchester — Environment — Focused — Islamic finance — Projects — Abu Dhabi — Corporate finance — Passionate — Teamwork — Employment — Regulation — Procurement — Expertise — Specialist — Planning — Investment — Committed — Delivery — IT — Governance — IP — Corporate — Infrastructure — Value — Development — Private wealth — Oman — Governance — Birmingham — Corporate finance — Dynamic — Pensions — Dispute resolution — Insight — Banking and finance — Arbitration — Diverse — Regeneration — Care — Communication



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A large, glowing blue and green Earth is centered in the background, set against a dark space with scattered stars. The Earth is framed by a thin white rectangular border.

# “Transforming Public Procurement”

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# Overview

1. Background and timetable
2. General themes of the Green Paper
3. Award procedures with a public solicitation of tenders
4. Procedures without a public solicitation, including urgent procurement
5. Exclusion
6. “Commercial tools”
  - Framework agreements; DPS; qualification systems
7. Further reading/information





# 1. Background and timetable

- From end of transition period (11pm 31 Dec 2020) UK not subject to EU procurement law





# 1. Background and timetable

- However, the UK is still subject to the WTO's Government Procurement Agreement (GPA)
  - This requires most contracts covered by the Directives to be open to the EU and other trading partners, with transparent award procedures and remedies
- This limits scope for reform





# 1. Background and timetable

- Current procurement Regulations based on the Directives (Public Contracts Regulations 2015 etc) continue to apply *until repealed and replaced*
  - Case law interpreting these rules will also still largely apply
  - Avoids disruption until long-term reforms are done and ensures compliance with the GPA
- TUPE and other EU-based regulations also continue to apply unless and until repealed



# 1. Background and timetable

## Some changes as from New Year's Eve under:

### **The Public Procurement (Amendment Etc.) (EU Exit) Regulations 2020 – SI 2020 No 1319**

- Amends Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016

### **The Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020 - SI 2020 No 1450**

- Amends Defence and Security Public Contracts Regulations 2011



# 1. Background and timetable

- Obligation to publish in Find a Tender rather than EU's Official Journal for procedures launched from 11pm 31<sup>st</sup> December 2020
  - The Regs call it the “UK e-notification service”
  - Action Note PPN 8/20 23 November 2020:  
<https://www.gov.uk/government/publications/procurement-policy-note-0820-introduction-of-find-a-tender>





# 1. Background and timetable

- Other changes e.g. reports to Cabinet Office etc rather than European Commission
- Continuing award procedures (or awards under frameworks and DPS) continue to apply old rules
  - e.g. award notices in Official Journal



# 1. Background and timetable

- Green Paper, Transforming Public Procurement, Dec 2020
  - Focus Groups
  - Procurement Transformation Advisory Panel (PTAP)
- Closing date for general consultation March 10<sup>th</sup> 2021
- New legislation?





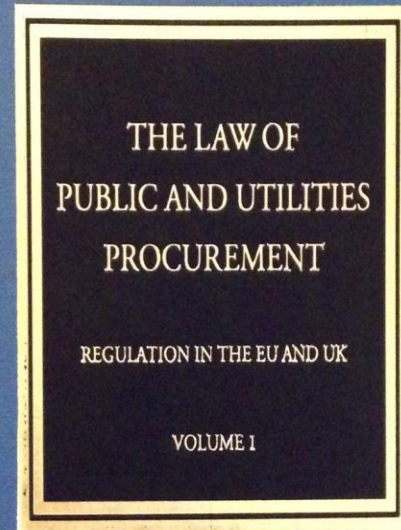
# 1. Background and timetable

- EU-UK Trade and Cooperation Agreement
  - <https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-857-F1-EN-ANNEX-1-PART-1.PDF>
- Places some further limits (in addition to the GPA) on possible reforms e.g.
  - Some further utilities covered
    - Gas and heat sector; plus private utilities in the sectors the GPA covers + gas and heat
  - Obligation generally to use electronic means
  - Applies EU rule that should not ask for evidence of qualifications etc until have won contract (unless needed e.g. to select suppliers to tender)
- Implemented by European Union (Future Relationship) Act 2020



## 2. General themes

- Despite its title, the Green Paper is about transforming public procurement *law*, not public procurement



Third Edition

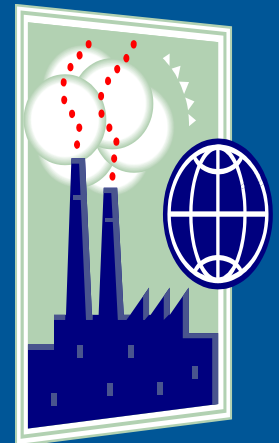
Professor Sue Arrowsmith



## 2. General themes

### Objectives

- Not just to open markets but e.g. value for money, “the public good”, integrity
- Legislation to list objectives
- Why this matters
  - E.g. thresholds for light regime
- Notable omission – efficiency of the procedure e.g. VAR case





## 2. General themes

### *Single and uniform set of rules*

- *Single set of rules*

- To replace Public Contracts Regs, Utilities Regs, Concessions Regs, Defence Regs
- But *not* other existing procurement legislation
  - E.g. Local Government Act 1988; Public Services (Social Value) Act 2012



## 2. General themes

### *Single and uniform set of rules*

- *Uniform set of rules*
  - Uniform procedural rules for all sectors – including for concessions and light regime
  - Some different ..... (Will go in special sections of the Regulations)
    - Thresholds? (defence? utilities?)
    - Exclusions?
    - Other provisions e.g. for defence?



## 2. General themes

### **Significantly simplified legislation, plus extensive guidance**

- Emphasis on simplification in the Ministerial Foreword
- Single and uniform regime
- Two award procedures only
  - With “detailed” guidance on use, including examples and case studies
- Simplified rules on selection
  - Including removing list of permitted evidence





## 2. General themes

### Significantly simplified legislation, plus extensive guidance

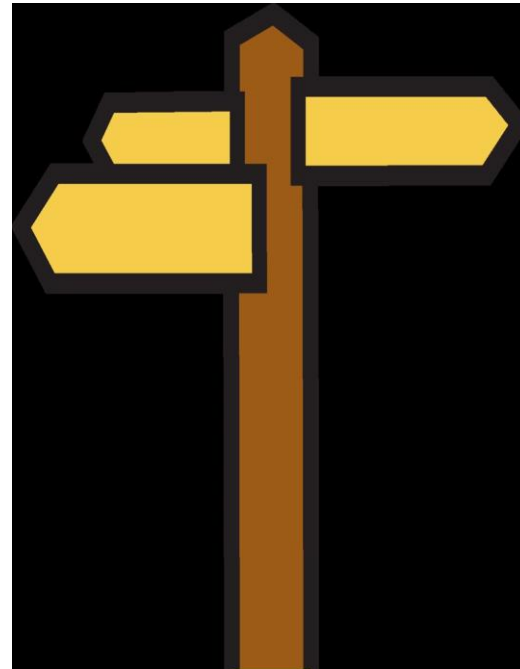
- Simplification of award criteria provisions in PCR reg.67?
- But little simplification of exclusion list?
- Proposed new provisions on framework agreements *add* complexity (without any benefits)
- Other provisions?



## 2. General themes

### **Significantly simplified legislation, plus extensive guidance**

- Quality of guidance will be crucial





## 2. General themes

### Use of familiar concepts, rules and terminology where appropriate

- “New” regime presented as “consolidating” (para 51) with significant amendments
- Same structure for regs
- “Flexibilities” of utilities and concessions, while recognising familiarity with PCRs
- Direct retention of “open procedure”, exclusions etc
  - Plus framework agreements and DPS – but are they the same concepts as at present?
- “New” procedures of “competitive flexible procedure” and “limited tendering”

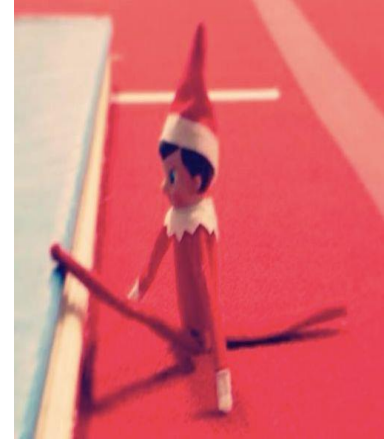




## 2. General themes

### A rebalancing of interests

- Green Paper emphasis on:
  - Flexibility, including to make commercial decisions
    - Competitive flexible procedure
    - Extension of dynamic purchasing systems
  - Social value e.g.
    - Proposed National Procurement Policy Statement
    - Centralised debarment
  - Reduced procedural burdens
- Needs to be followed through in case law
  - Thus need to state efficient procedure as an objective

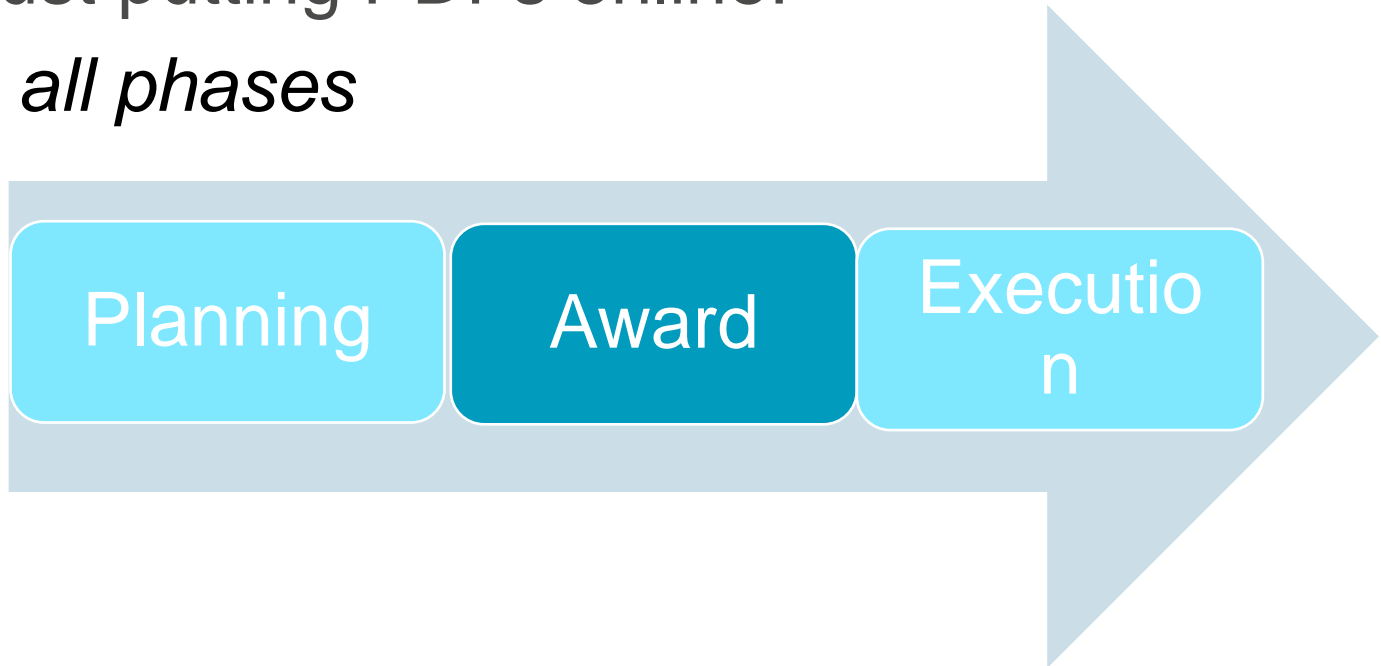




## 2. General themes

### An open contracting approach

- *Systematic gathering* and publication of all information/documents in *usable* form
  - not just putting PDFs online!
- Covers *all phases*





## 2. General themes

### An open contracting approach

Allows analysis and monitoring by organisers *and* other stakeholders e.g.

- Indicators of collusion
- Assess value through price data
- Know and manage contractors
- SME access
- Better planning and drafting
- Relating planning to performance
- Market can develop tools to improve procurement



## 2. General themes

### An open contracting approach

- For more information see:

<https://www.open-contracting.org/>





## 2. General themes

### An open contracting approach

- Green Paper Chapter 6
- Commitment to “transparency by default”  
= pro-active publication of contract information  
*through whole cycle*
  - Exceptions e.g. commercially confidential information to be determined by Freedom of Information Act exemptions; guidance to be issued
- Data to be published using Open Contracting Data Standard
  - Ensures is accessible and usable





## 2. General themes

### **An open contracting approach**

- Timetable in due course
- Will take resources and commitment



# 3. Procedures with a public solicitation of tenders

<b>Procedures with a public solicitation – Green Paper</b>	<b>Procedures with a public solicitation – current</b>
Open procedure	Open procedure
Competitive flexible procedure	Restricted procedure
	Competitive procedure w. negotiation
	Competitive dialogue
	Negotiated procedure w. call for comp
	Innovation partnership
	Light regime procedure
	Concessions procedure
<b>Procedure without public solicitation - Green Paper</b>	<b>Procedure without public solicitation - current</b>
Limited tendering	Negotiated procedure without prior publication/call for competition



# 3. Procedures with a public solicitation of tenders

## Competitive flexible procedure

- Available for all entities for all types of procurement
- Allows (almost?) anything that is possible under all existing procedures
  - E.g. can conduct it like a restricted procedure, competitive dialogue etc
  - Means dialogue possible in *all* procurements (provided specified in advance)

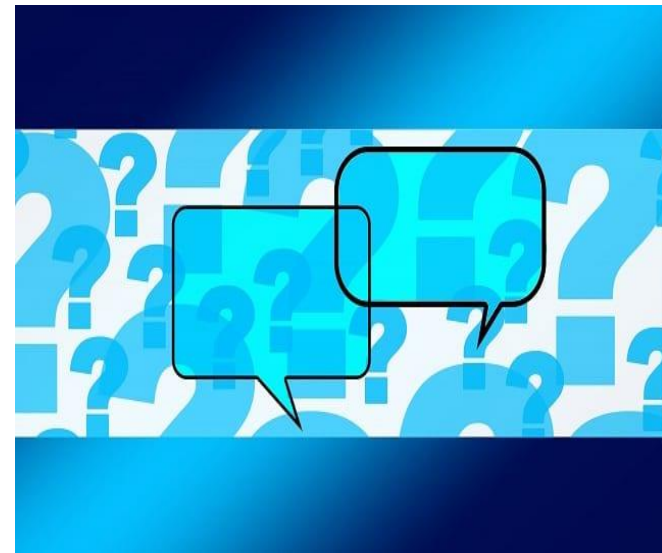




# 3. Procedures with a public solicitation of tenders

## Competitive flexible procedure

- Public advert
- Invite limited number of suppliers *or* allow all to participate
- Choose winner based on most advantageous tender – can have single tender or more than one tender to do this, and pre and post tender discussions – *or even just discussions?*
- At any chosen point, apply qualification/exclusion tests





# 3. Procedures with a public solicitation of tenders

## Competitive flexible procedure

- Can use in an “open” form
- So unlike current rules, allows an award phase involving discussions (e.g. outline proposals) *before* any qualification process





# 3. Procedures with a public solicitation of tenders

## Award criteria

- Change in language, but without substantive change:
  - From MEAT to MAS – to clarify that non-economic factors relation to the goods, works or services can be considered
  - To remove reference to “from the point of view of the contracting authority” – to clarify that matters of interest beyond the CA concerned can be considered (where otherwise within the authority’s legal powers)
- Still must be linked to the subject matter of the contract
  - But limited exceptions will be allowed *when centrally authorised*



## 4. Procedure without a public solicitation of tenders

### Limited tendering – grounds for use

- Will be largely unchanged from current grounds for using a negotiated procedure without prior publication
- These include cases of extreme urgency where:
  - Is due to events that were not foreseeable; and
  - Urgent circumstances not attributable to contracting authority; *and*
  - Time limits for other procedures (including accelerated procedures) cannot be complied with



## 4. Procedure without a public solicitation of tenders

### Limited tendering: grounds for use

- New explicit ground for a “crisis” (as per the defence and security rules):

“an event which clearly exceeds the dimensions of harmful events in every day life and which substantially endangers or restricts the life or health of people”

- Applies where the urgent procurement is needed to protect health, public order, etc in the crisis







# 4. Procedure without a public solicitation of tenders

## Limited tendering: grounds for use

- Crisis to be declared by Cabinet Office
- Removes usual conditions for urgency ground; gives certainty
- Goes along with some greater safeguards for use of limited tendering: see later slide





# 4. Procedure without a public solicitation of tenders

## Limited tendering - procedure

- Single source procurement



- Competition (without a public notice)
  - *Limited tendering (like current negotiated procedure without prior publication) does not have to be a single source procedure, even in urgent cases*
    - e.g. Italy, Hungary, UNCITRAL Model Law



# 4. Procedure without a public solicitation of tenders

## Limited tendering - procedure

- Proposals for:
  - Guidance on considering competition between several suppliers
  - Specific requirement to keep a record on reasoning for not using competition
  - Exclusion from risk of automatic suspension to encourage competition





## 4. Procedure without a public solicitation of tenders

### Limited tendering - procedure

- Proposal for *mandatory ex ante* notice when intend to use limited tendering giving justification
  - MEAT rather than VEAT?
- A 10-day standstill requirement will also apply
  - *except* in cases of crisis/urgency
- Will facilitate challenge to unjustified use
- Will protect against ineffectiveness (but not damages)



# 5. “Commercial Tools”



DYNAMIC  
PURCHASING  
SYSTEMS (DPS)



FRAMEWORK  
AGREEMENTS



QUALIFICATION  
SYSTEMS



## 5. “Commercial Tools”

### General points

- Framework agreement proposals may reduce, not increase, flexibility - and add unnecessary complexity
  - May be some added flexibility in some ways but intention not clear
- Green Paper material is not clear what changes are intended with DPS and qualification systems
  - Not an adequate basis for consultation



## 5. “Commercial Tools”

### Framework agreements

- “Closed framework agreement” – up to 4 years *only*
- “Open framework agreement” – up to 8 years
  - Open to new suppliers at various points (at least annually if longer than 4 years)
  - *But existing suppliers must recompete* (with old or new tenders) on frameworks where supplier numbers are limited – so is just a series of short framework agreements, *which is already possible*



## 5. “Commercial tools”

### Framework agreements

- One effect is to preclude stable framework of more than four (three?) years – reducing flexibility for all entities (including utilities)
- Allowing new suppliers under closed frameworks that have a limited number of suppliers adds nothing to what is already permitted
  - It is just a series of short frameworks
- Makes the rules unnecessarily complex





## 5. “Commercial tools”

### Framework agreements

- Is there also an intention to allow framework agreements with unlimited numbers of suppliers?
  - Not the intention of the current rules, although this is often how they are operated



## 5. “Commercial tools”

### Dynamic purchasing systems

- To be called “DPS-plus”
- Proposal to extend to *all* type of purchases (not just standard purchases)
- Call-offs will be competitive flexible procedure
- No charges other than for suppliers who win contracts
  
- Will the procuring entity need to invite *all* registered suppliers?



## 5. “Commercial tools”

### Qualification systems

- Currently apply only to utilities
  - Other than where DPS applies (DPS is a type of qualification system under which *all* registered suppliers must be invited)
- Are lists of interested (or qualified) suppliers
- Utilities can use the lists to:
  - Make a call for competition (no further call needed)
  - Identify and choose which suppliers to invite
    - In fact *must* limit to those on the list



## 5. “Commercial tools”

### Qualification systems

- DPS-plus will replace qualification systems
- *If* all registered suppliers must be invited under a DPS-plus then qualification systems cannot operate as at present (i.e. with invitation issued only to suppliers on an advertised list)
- But if that is *not* the case, it means DPS-plus have become like utilities’ qualification systems, meaning that the utilities qualification system concept is extended to all entities



## 6. Exclusions

### Mandatory exclusions

Largely as now (for convictions of certain offences) but proposals to:

- Extend “fraud” exclusion to fraud against UK interests
- Extend exclusions to where the beneficial owner has been convicted (and exclude from procurement where do not state this)
- Confer power for Government to add new exclusions





## 6. Exclusions

### Mandatory exclusions

- Problems for procuring entities:
  - Finding out about convictions, especially of directors
  - Applying self-cleaning defence etc
  - Risk of challenge from excluded party or competitors
- Other problems:
  - Duplication of work and inconsistency with entity-based approach
  - Reluctance to convict (deferred prosecution agreements)
    - “regulator backfiring”
  - Ineffective as deterrent



## 6. Exclusions

### Mandatory exclusions

- Solution? “The Government will investigate the feasibility of a centrally managed debarment list”
  - Between now and new procurement regs?
- Problems include:
  - Resources
  - Complexity of dealing with associated companies and persons
  - Getting information on foreign suppliers
  - Reluctance to prosecute: explicit integration needed of policy of criminal law and procurement law



## 6. Exclusions

### Discretionary exclusions

- Largely to be kept as now (with Govt power to add new ones)
  - Better to simplify into gross misconduct ground (general exclusion), and exclusions relating to specific procurements (e.g. conflicts of interest)
- Addition of discretionary exclusion for deferred prosecution agreements
  - But this is *evidence* of behaviour, not behaviour as such
- Central debarment list may cover some discretionary exclusions?





## 6. Exclusions

### Discretionary exclusions: past performance

- Currently:
  - Exclusion where significant or persistent deficiencies leading to early termination, damages or comparable sanctions
  - Can also exclude for absence of technical capacity
- Proposals:
  - To remove the requirement for early termination from the exclusion
  - To introduce centralised database of performance information and requirement for contracting authorities to submit information (including possible “threshold” for applying exclusions)



## 7. Further reading/information

Sue Arrowsmith, *Transforming public procurement law after Brexit: early reflections on the Government's Green Paper*, Working Paper, SSRN:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3749359](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3749359)

Sue Arrowsmith, *Constructing rules on exclusions (debarment) under a post-Brexit regime on public procurement: a preliminary analysis*, Working Paper, SSRN:

<http://ssrn.com/abstract=3659909>

Sue Arrowsmith, *Reimagining public procurement law after Brexit: seven core principles for reform and their practical implementation*, Working Paper, SSRN:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3523172](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523172)

(Part 1) and

<http://ssrn.com/abstract=3672421> (Part 2)



## 7. Further reading/information

Webinar 14<sup>th</sup> January:

<https://www.achilles.com/event/reform-of-the-public-procurement-law-after-brexit/>



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A photograph of the Earth from space, showing the curvature of the planet and city lights at night. The sun is visible on the horizon, creating a bright glow. The background is a dark starry sky.

**Thank you!**

# Chapter 7 – Fair and Fast Challenges

8 January 2021

Parishil Patel QC

# Ineffectiveness current system

- Cost
- Ability to obtain useful pre-contractual remedies
- Delay

# Proposed reforms

- Reform of court process
- Refocus redress to pre-contractual remedies
- Cap level of damages available



# Reform of court process

- Objectives:
  - quicker, cheaper and more accessible
  - decrease impact on delivery of public services
- Expedited trial active case management
- Ability for dispute determined in writing
- (Streamline) Disclosure
- Increase court capacity
- Timescales

# Two other suggestions

- Tribunal system
  - In addition to streamlining court process
- Time limited formal “independent” internal review
  - Bolster focus on pre-contractual remedies

# Refocus pre-contractual remedies

- Formally stating preference for pre-contractual remedies
- Emphasis on keeping open for bidders the possibility of obtaining the contract

# Capping damages

- Public funds must be spent effectively
  - Exposure to large and speculative damages claims for loss of profit
  - Costs of defending such claims to trial
- Proposal – cap damages to 1.5 of bid costs
- But, court power to award damages in excess (in line with principle of lost profits)
  - Effectively where no opportunity for pre-contractual remedy

# Qs

- Formal independent internal review
- Streamline court process
- Tribunal use
- Preference for pre-contractual remedies
- New test for lifting automatic suspensions
- Cap damages
- How to assess bid costs

# Brief thoughts

- Do the reforms go far enough to achieve the stated objectives?
  - address ineffectiveness of regime for SMEs?
  - will court reforms achieve reduction in costs/tackle delay?
  - how will any Tribunal system operate?



Presentation — January 2021

# Green Paper – Transforming Public Procurement after Brexit

Helen Randall - Partner

Pioneering — Bahrain — Construction — Public sector — Energy — Real estate — London — Tax — IT — Dubai — Manchester — Connecting — Knowledge — Pragmatic — Malaysia — Exeter — Thought leadership — Housing — Agile — Creative — Connecting — Private equity — Local government — Manchester — Environment — Focused — Islamic finance — Projects — Abu Dhabi — Corporate finance — Passionate — Team work — Employment — Regulation — Procurement — Expertise — Specialist — Planning — Investment — Committed — Delivery — IT — Governance — IP — Corporate — Infrastructure — Value — Development — Private wealth — Oman — Governance — Birmingham — Corporate finance — Dynamic — Pensions — Dispute resolution — Insight — Banking and finance — Arbitration — Diverse — Regeneration — Care — Communication

# Mind the Gaps!

- **Chapt 8: Effective Contract Management**  
**What does the Green Paper *not* address?**

Pioneering — Bahrain — Construction — Public sector — Energy — Real estate — London — Tax — IT — Dubai — Manchester — Connecting — Knowledge — Pragmatic — Malaysia — Exeter — Thought leadership — Housing — Agile — Creative — Connecting — Private equity — Local government — Manchester — Environment — Focused — Islamic finance — Projects — Abu Dhabi — Corporate finance — Passionate — Team v — Employment — Regulation — Procurement — Expertise — Specialist — Planning — Investment — Committed — Delivery — IT — Governance — IP — Corporate — Infrastructure — Value — Development — Private wealth — Oman — Governance — Birmingham — Corporate finance — Dynamic — Pensions — Dispute resolution — Insight — Banking and finance — Arbitration — Diverse — Regeneration — Care — Communication



# Effective contract management

- Prompt payment
  - “*Ltd visibility*” payment in 30 days happening in practice
  - Supply chain to contact CA direct
  - Stat right CA to investigate supplier’s payment of supply chain
- What about a league table of CAs’ performance on issuing POs and paying?
- Hampering business’ ability to manage weaknesses in supply chain/drawing in CA if there is a dispute between main contractor and subbie?

# Contract Modifications

- Proposed re-ordering of Reg.72 i.e. what a “substantial” amendment is
- Contract amendment notice instead of VEAT Notice - exemptions similar to FOIA and DPA
- Exempt from notice if less than 10% of initial contract value (15% works) / change in initial contract term less than 10% / no scope change
- 10 days standstill period unless crisis / extreme urgency

# “Overpayments”

## Reducing “overpayments” during suspension

- Reduction in profit rate where contract extension to disincentivise incumbent supplier challenge
- Bold move to define a “standard rate of profit” across sectors –impact on appetite for investment in UK? A sledgehammer to crack a nut?

# Supplier Performance Feedback

- Using performance data to incentivise continuous improvement
- Where are CAs now going to find the people and £ to resource extra contract management ?-always been difficult!

## Mind the gaps- what GP does not address (but should)

- Complete and decisive repeal of “non-commercial considerations” Pt II/s17 LGA 88
- Easier aggregation calc rules for value thresholds
- Teckal / joint Teckal / reverse Teckal and the absence of reverse Teckal for joint Teckal companies?
- Interface/inconsistencies between Teckal and BGPL definitions (esp given move from state aid to subsidy control)
- Def of “non-controlling/non-blocking” private capital in Teckal
- Clearer definition of exclusive right pursuant to law for contracts b/w CAs?
- Reserved procedure for residual service mutuals for 3 yrs- expand for all services or make exempt to encourage new SMEs/market diversity?

# What is not covered...

## Continued

- Stronger remedies for suppliers where CAs waste supplier time/ rig procurement processes in favour of incumbent / do not follow Make or Buy protocol in the Outsourcing Playbook?
- Guidance to prevent conflict b/w CAs' roles as commissioner / investor / steward of public assets?
- Legal remedies for non-compliance w Procurement Principles (eg “good management”)-ground for JR?
- Rationalisation of conflict of interest provisions before and during procurement

# Where Angels Fear to Tread...

- Some gaps in current rules not addressed in GP but this is healthy- context will always be highly fact-specific, so hazardous to legislate eg:
  - Is a development agreement/s106 agt a “PWC”?
  - When is a Co a BGPL (or not)?
- With case law developed by TCC and CA, UK lawyers won’t be trying to fit “square peg” UK facts into ECJ jurisprudential “round hole”.
- T&H will be responding to Green Paper and so should you-deadline **10<sup>th</sup> March 2021**.

## Contact



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# Using the best commercial purchasing tools

- Dynamic Purchasing Systems
- Framework Agreements
- Qualification Systems (utilities only)
- Assumptions in Green Paper:
  - Mixed understanding of deployment of tools available
  - Complexity
  - Inflexibility stifles innovation
  - Limited in the circumstance in which they [should] be used (eg DPS for commonly used purchases/simple supplies etc)
  - Frameworks cut across long-term collaborative relationships

# Proposals

- Central register of commercial tools
- DPS+ to replace DPS and qualification systems (in line with GPA “multi-use lists”)
- Two framework agreements:
  - “open” – (8 yrs): up to 3 year closed period
    - Open up at least once for longer frameworks
    - Re-advertise and assess new applicants against original criteria
    - Existing suppliers will be assessed too – on basis of previous bid or updated bid
    - Prevents lock-out v commercial burden?
  - “closed” – (4 years): “providing stability and reducing bureaucracy”

# Consultation questions:

- Do you agree with the proposed new DPS+?
- Do you agree with the proposals for the Open and Closed Frameworks?
  - *Broadening scope of DPS will reflect current UK practice*
  - *Sits uncomfortably with current Utilities QS approach*
  - *Query whether it would reduce admin burden for client?*
  - *Why 4 years for closed frameworks?*
  - *Are there alternative solutions to an “open” framework?*
  - *What is the difference between an Open Framework and 2 x Closed Frameworks?*
  - *Proposal to confirm the ability to remove suppliers for exclusion grounds: welcomed*
  - *Query proposal for direct award to “single supplier capable of meeting the requirement” – different test than current Regulation 33(8)?*

## Contact



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