Dated 10 March 2021

Consultation response

in relation to the Cabinet Office's consultation on "Transforming Public Procurement"

Trowers & Hamlins LLP
3 Bunhill Row
London
EC1Y 8YZ
t +44 (0)20 7423 8000
f +44 (0)20 7423 8001
www.trowers.com

trowers & hamlins

1 Introduction

1.1 Trowers & Hamlins is an international law firm with offices throughout the UK, Middle East and Far East. We advise a large number of clients across the private, public and third sectors on contentious and non-contentious public procurement matters. We have a deep understanding of the regulatory environment, as well as practice and custom in this area.

1.2 We also have one of the largest public procurement teams in the UK, and our clients range from private sector developers to central and local government, housing associations, contractors, consultants and investors. We have been ranked as one of the top tier practices in this area for over a decade.

1.3 We are market leaders in this field, and are committed to the development and recognition of public procurement as a strategically important area of law and practice.

1.4 Throughout the consultation period, we have been conducting discussions with our clients and contacts, as well as engaging in ongoing conversations with Cabinet Office in order to understand and feed in practical as well as legal insights into the proposals and response. We have held seminars and round-table events in order to curate views from our public and private sector clients and to gather insights from them which have been invaluable. Where appropriate, our response has been informed by the feedback and comment from those events. Unless otherwise attributed, the views expressed in this report should, however, be considered as our own.

2 Further information

2.1 For further information please contact one of the Trowers & Hamlins' Public Procurement Team listed below, or your usual Trowers & Hamlins' contact.

Rebecca Rees
Head of Public Procurement
t +44 (0)20 7423 8021
e rrees@trowers.com

Lucy James
Head of Procurement Litigation
t +44 (0)20 7423 8776
e ljames@trowers.com

Scott Dorling
Partner
t +44 (0)20 7423 8391
e sdorling@trowers.com

Helen Randall
Partner
t +44 (0)20 7423 8436
e hrandall@trowers.com

Lucy Doran
Partner
t +44 (0)20 7423 8265
e ldoran@trowers.com

Amardeep Gill
Partner
t +44 (0)121 214 8838
e agill@trowers.com

Mark Robinson
Partner
t +44 (0)121 214 8824
e mrobinson@trowers.com

Katie Saunders
Partner
t +44 (0)161 838 2071
e ksaunders@trowers.com

Charlotte Clayson
Partner
t +44 (0)20 7423 8087
e cclayson@trowers.com

Dan Butler
Partner
t +44 (0)161 838 2116
e dbutler@trowers.com

Paul McDermott
Partner
t +44 (0)20 7423 8043
e pmcdermott@trowers.com

Louis Sebastian
Senior Associate
t +44 (0)121 214 8836
e lsebastian@trowers.com

Michael Rhode
Senior Associate
t +44 (0)20 7423 8262
e mrhode@trowers.com

Jamie De Souza
Senior Associate
t +44 (0)121 214 8847
e jdesouza@trowers.com

Rajveena Sangha
Associate
t +44 (0)121 214 8835
e rsangha@trowers.com

Henna Malik
Solicitor
t +44 (0)20 7423 8636
e hmalik@trowers.com

Edward Rees
Solicitor
t +44 (0)20 7423 8684
e erees@trowers.com

John Forde
Managing Associate
t +44 (0)20 7423 8353
e jforde@trowers.com

Victoria Thornton
Senior Associate
t +44 (0)20 7423 8322
e vthornton@trowers.com

Stuart Brown
Associate
t +44 (0)20 7423 8143
e spbrown@trowers.com

Ellie O'Sullivan
Associate
t +44 (0)161 838 2117
e eo'sullivan@trowers.com

Julian Jarrett
Solicitor
t +44 (0)20 7423 8649
e jjarrett@trowers.com

Dylan Milner-Stopps
Solicitor
t +44 (0)20 7423 8446
e dmilner-stopps@trowers.com

3 General comments

3.1 Introduction

3.1.1 As a general comment, we welcome this consultation on the Cabinet Office's proposals for a post-Brexit transformation of public procurement law.

3.1.2 A robust and fit-for-purpose regulatory system for procurement is essential to ensure that "UK Plc" is open for business and remains a safe and secure place for suppliers and business to invest and spend their money.

3.2 Centralisation of procurement law

3.2.1 We congratulate the Cabinet Office on the considerable amount of work that has been put in this Green Paper within very short order. Nevertheless, it seems to us that the Green Paper represents a re-orientation of the regulatory regime, rather than a transformation of the legal rules. Woven throughout the proposals are principles and practices that will underpin the policies/serve the purpose of central government procuring entities. There are numerous examples in the Green Paper of solutions to problems and these are welcomed but we would suggest are perhaps not faced so much by sub-central authorities and any suggestions of suboptimal practice are, in our experience, not due to the competence or skill of the procuring entity, but practical "work-arounds" created by contracting authorities due to the current procurement rules not fitting the wider regulatory landscapes of sub-central authorities.

3.2.2 A number of proposals in the Green Paper retain the setting of the policy, principles and practice of procurement law in England within central government. A concern might be that this would involve a risk of long term uncertainty from a macro- economic viewpoint, turning procurement law into a political football, with principles "enshrined" in the National Procurement Policy Statement at risk of change should there be a change of government and statutory guidance issued on an iterative basis. Any ensuing uncertainty and politicisation of procurement rules would run the risk of adding cost, time and bureaucracy into procurement processes.

3.2.3 We would suggest that what might be regarded as a centralised emphasis of some of the Green Paper proposals runs the risk of impeding achievement of the government's levelling up policy objectives locally for sub-central contracting authorities in England. We strongly encourage further local consultation with sub-central authorities.

3.3 Format of the new rules

3.3.1 The proposed move away from "hard law" to "soft law" instruments is also a concern for our clients. Again, this transition has been seen by some as a shift that allows central government more opportunity to amend procurement legislation without the level of scrutiny required to amend primary or secondary legislation: making it easier to amend the procurement rules to reflect political aims and objectives.

3.3.2 A number of our clients have also queried whether such a transition would mean that they will be able to exercise their discretion when considering whether to comply with such "soft law".

3.3.3 Further, a number noted that whilst one of the stated aims of the Green Paper is to get rid of 350+ regulations, it is unlikely that individual procurement officers will notice a reduction once they have adopted the correct set for their particular procurement. Further, if the remaining rules are spread across a number of different formats, including: primary legislation, secondary legislation, the National Procurement Policy Statement, statutory guidance, non-statutory guidance and case-law, then the requirements on the individual procurement officers will simply be dispersed over a much wider landscape of relevant legislation and guidance.

3.3.4 Finally, we query whether the "simplification" of procurement law will bring significant tangible benefit or "cashable" savings to contracting authorities/bidders: good and efficient procurement practice depends on a clear and comprehensive rules-based system. Procurement is, by its very nature, an administrative process. The simplification/reduction of the number of rules does not, by itself, increase flexibility or streamline or speed up procurement practice. In fact, the reduction of rules may well introduce a "lacuna" into the procurement legislative framework that may inhibit the very flexibility that the proposals wish to promote. It seems to us that "simplification" and "flexibility" are often two opposing agendas that cannot be easily balanced in the same legislative framework and we are not too sure that the proposals, as currently drafted, will result in either a simplified legislative framework or one that, overall, increases the flexibility that contracting authorities feel that they have in implementing the systems.

3.4 **Guidance**

3.5 The Green Paper recognises the need to upskill and train procurement officers in order to ensure that the flexibility and commerciality enabled by the new rules is taken advantage of. We would note that in order for such guidance to be of practical use for procurement officers, we would recommend as follows:

3.5.1 The guidance should be available for all contracting authorities, bidders and advisors via a direct and free platform (cf. current advice on the Social Value Model which is only available as part of the Government Commercial Function training site and not accessible without an account);

3.5.2 The guidance should provide reasons and reasoning and an overall context that aids interpretation;

3.5.3 The guidance should be clear and concise to avoid confusion or misinterpretation/misapplication by contracting authorities, bidders and advisors across England;

3.5.4 The guidance needs to be detailed so that it provides a useful guide to clients/contractors alike and can be applied practically and consistently by contracting authorities;

3.5.5 The guidance needs to be drafted for both central and sub-central government authorities and we would recommend that sub-central government authorities are consulted ahead of the guidance being produced to ensure that it is fit for purpose.

3.5.6 The guidance should cover both new tools and provisions AND those existing provisions that will be carried over from the existing regime (eg valuation of contracts, "Teckal" exemption etc.)

4 Omissions from the Green Paper proposals

4.1 There are a number of provisions in the current Public Contracts Regulations 2015 that are not mentioned in the Green Paper (eg Regulation 12 and the "Teckal" and shared services exemptions, Abnormally Low Tenders, thresholds and valuation of contracts etc.). We have presumed that this is because they will remain as currently drafted and be transferred across in their entirety to the new procurement regime.

4.2 There are a few issues arising in the elements of the existing regime that have not been addressed in the Green Paper that merit further consideration. For example:

4.2.1 **Abnormally Low Tenders:** it would be useful to clarify in the forthcoming legislation as to the extent of a contracting authority's obligation to investigate a suspected abnormally low tender and whether it is allowed to accept an abnormally low tender. The current position seems to be inconsistent with the Government's drive towards value-led procurement and the need for procurement to secure safe and quality outcomes.

4.2.2 **Below threshold contracts:** we note PPN 11/20 (see below for further comments) but the current Part 4 of the Public Contracts Regulations 2015 does not provide a coherent and proportionate approach to the procurement of below-threshold contracts. For example, Regulation 111 prohibiting the use of Selection Questionnaires for below-threshold contracts has the effect of putting SMEs and VCSEs under much more burden and expense when bidding for public sector contracts by obliging them to submit a fully-priced bid before they are aware of whether they have qualified to bid for the contract (eg they have the required financial robustness and technical capacity).

Instead, the below-threshold contract regime should be underpinned by the principle of proportionality: Selection Questionnaires are not *per se* a barrier for SMEs and VCSEs to public sector procurement, but disproportionately long SQs/disproportionate requirements set out in the SQs (re turnover/experience/financial requirements etc.) are - and Part 4 has not solved the latter by simply prohibiting the use of SQs for below-threshold contracts.

4.2.3 **Leaseholder consultation**: Housing associations (subject to the procurement rules since 2004) and local authorities are obliged to follow two sets of rules when procuring goods, works or services, the cost of which needs to be recharged to leaseholders pursuant to the terms of their leases. Currently the leaseholder consultation requirements do not marry up with public procurement legislation very well. The interface between procurement and leaseholder consultation causes a lot of confusion in the sector and adds a significant amount of time to be added to a procurement timetable (approx. 6 months).

Further, the requirement to consult leaseholders on individual procurements mean that joint or consortium-led procurement is incompatible with the consultation regime. For example, nominations must be sought when requested by leaseholders, but contracting authorities cannot add the nominated contractor to a pre-existing framework (eg let by a central purchasing body in order to secure efficiencies etc.) so this conflicts with the procurement rules. We would suggest a process is included for call-off from frameworks that simplifies what is required, and allows a flexible approach to be able to add nominated contractors to the framework agreement, or alternatively to remove this requirement for nominations when using a framework agreement that has been let by a housing-focussed central purchasing body adopting quality and safety award criteria/value-for-money principles.

4.2.4 **Development Agreements**: we note that Cabinet Office did not seek to codify any of the UK-led case-law on development agreements and public works contracts. We agree with this approach. We are mindful of this extremely complex, fact-specific area of law and do not think that it is suitable for codification. On this point, we would request that the previous OGC guidance is refreshed and updated to take into account the few cases we have had on this issue since its publication, so that statutory guidance or similar is provided in order to help contracting authorities navigate these issues.

5 Below threshold rules set out in PPN 11/20

5.1 We are currently unsure how the principles set out in PPN 11/20 fully align with the UK's obligations under the WTO's Government Procurement Agreement.

5.2 We are also concerned about the practical impact that PPN11/20 will have on place-based procurement requirements of a number of our clients. We act for numerous housing associations, local authorities and NHS Trusts - all of whom are anchor institutions in the communities they serve. These contracting authorities often seek to use below-threshold contracts to enhance the life opportunities provided to the citizens within their areas of impact and influence. Nevertheless, these areas are not often split along "county lines" and even local authorities share services with other local authorities for services that cannot be slotted into a single county or ward.

5.3 Given this, the proposals under PPN 11/20 are unlikely be seized upon by those contracting authorities acting across more than one county and, in fact, may make a less hyper-localised approach (eg a contract opportunity open to those bidders operating out of any one of a number of countries) more difficult to justify in light of the approach under PPN 11/20.

5.4 We do, however, support the emphasis on supporting opportunities to structure procurements to enable SMEs and VCSEs access to public sector opportunities. We hope that the new legislation will allow sub-central government authorities the flexibility of approach to allow them to continue to define, articulate, measure and report the impact of their work to include SMEs outside of the Social Value Model set out in PPN 06/20.

6 Interaction between Green Paper and social value in public procurement

6.1 We would encourage greater clarity on the future direction the government envisages in relation to social value in procurement. We can see that social value is woven throughout

the Green Paper (reference to the National Procurement Policy Statement, proposals to conversion to MAT instead of MEAT, the underpinning of principle of public good etc.) and yet many clients commented on its absence as a stand-alone concept. This perception is, it seems to us, problematic and one that needs to be addressed in the subsequent legislation and supporting guidance.

6.2 It is well established, we believe, that the inclusion, evaluation and measurement of social value in procurement is inconsistent at best. The changes to the UK procurement law framework presents a rare opportunity to consider how to embolden contracting authorities to structure their procurements so as to deliver increased positive social value outcomes, beyond the present limited requirement for contracting authorities to "consider" the inclusion of social value matters in service contracts. We note that the Social Value Model set out in PPN 06/20 is now mandated to be used for procurements undertaken by "in-scope" organisations from 1 January 2021. There is also a mandated 10% award criteria weighting. This PPN is not mandated for all contracting authorities, however, and we would ask that this is not extended further to other contracting authorities for the following reasons:

6.2.1 The Social Value Model is overly prescriptive. By setting out model award criteria, sub-criteria, reporting metrics, outcomes, answers etc., the Social Value Model risks promoting a "tick-box" mentality to the inclusion of social value.

6.2.2 It also focusses on outputs "numbers of FTE...", "percentage of...". etc., rather than focussing on outcomes and impact. This prompts unhelpful behaviours and a focus on numbers, rather than impact or an approach to valuation that helps change and drives the social value delivery of contracting authorities forward.

6.2.3 It is not place-based (although there is a limited ability for contracting authorities to add to the social value outcomes and tweak the award criteria to allow for more local priorities to be used). Given that social value is about changing and improving the lives of individuals and given further that sub-central contracting authorities often have place-based procurement objectives, this overly-prescriptive approach is more likely than not to stifle innovative and nimble approaches to the achievement of social value outcomes.

6.2.4 There are a number of alternative established valuation models that are established and HM Treasury Green Book-compliant. For example, in the housing sector, the Social Value Bank and Wellbeing Valuation created by the Housing Associations Charitable Trust and Simmetrica-Jacobs, is well used, understood and embedded in the housing sector's social value narrative. It enables housing associations to drive social value through their procurement activity.

6.2.5 Given this, many of our clients are adamant that PPN 06/20 should not be mandated across the public sector and that alternative measurement models and tools should be acknowledged in any subsequent PPN or guidance.

6.2.6 We would also note that it would be useful to comment further on social value and how a sustainable procurement duty can be implemented by the wide variety of different contracting authorities that comprise the public sector in England once the National Procurement Policy Statement has been published.

7 Price evaluation and MAT

7.1 We note that the Green Paper has included a particular focus on the on move from "MEAT" to "MAT", and has considered the ability for contracting authorities to use evaluation criteria which are not necessarily limited to assessing MAT from their own perspective. We also note that the Green Paper has considered the option (in certain, limited, circumstances) to include contract award criteria which are not necessarily linked to the subject matter of the contract to be awarded. The Green Paper does not, however, include detail on the setting of those evaluation criteria, nor has it gone into the detail of individual contract award criteria and the requirements currently set out in regulation 67 of the Public Contracts Regulations 2015.

7.2 It seems to us that this is an opportune moment for the Government to consider the role that price plays in the procurement process, and to legislate (or provide stronger guidance) in line with the comments that are already included in the Outsourcing and Construction Playbooks. In particular, we note that in Scotland the existing procurement regime does not allow for award on the basis of price/cost alone (see regulation 67(1)(b) of the Public Contracts Regulations (Scotland) 2015), and we would urge the Government to consider replicating such an approach in the future regime. In fact, we would propose that the Government goes further in that we would advocate a prohibition on the use of relative pricing models that have the effect of "lowest price tendering" for complex construction projects (where we regularly see the damage that can so often accompany poor price evaluation practice).

7.3 Trowers & Hamlins LLP has been working with key stakeholders in the housing sector (including housing providers, consultants and other lawyers) to consider the impact of "lowest price tendering" and relative price evaluation models, and we have produced a White Paper looking at possible alternatives to evaluating price across the housing sector (which is accessible **here**).

7.4 This is an area of particular concern in the construction of safe residential buildings, and is a concern that was noted by Dame Judith Hackitt in her report "Building a Safer Future, the Independent Review of Building Regulations and Fire Safety". We have already discussed this with Dame Judith Hackitt in her role as chair of the Industry Safety Steering Group (the **ISSG**), and the ISSG has given its support to the ideas and proposals that are explored in the White Paper.

7.5 In any event, the suggested approach to price evaluation is akin to the approach that is already set out in the Outsourcing Playbook and the Construction Playbook, but in order for such significant change to occur, we believe that it needs to be underpinned by legislative measures.

8 **Responses to consultation questions**

Question number	Question	Response
Chapter 1: Procurement that better meets the UK's needs		
1.	Do you agree with the proposed legal principles of public procurement?	The Green Paper appears to be heavily focused on central government, and there are a substantial number of proposals which do not seem relevant to sub-central contracting authorities (including local authorities and housing associations). We query therefore whether it is appropriate to list national strategic priorities as the first principle and what message that sends by demoting value for money to the second-ranked principle. We also note that the principle of proportionality (a key component of the procurement regime) seems to be missing from the Green Paper and feedback from our clients and discussions in our roundtable events suggest that contracting authorities broadly agree that proportionality should be retained as a key principle of public procurement. In general, it is considered that the absence of proportionality and the inclusion of the proposed transparency principles will result in huge costs and extra red tape for sub-central contracting authorities (such as housing associations and local authorities).
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 idea of a procurement oversight unit is sound, although where it sits in Government, who runs and staffs it and what it is tasked to do will dictate its utility and effectiveness. For example, those who run and staff the unit should have experience on both sides of the public and private sector fences, as well as having central and sub-central government procurement experience. Further, the purpose and the *modus operandi* of the oversight unit also needs to be carefully considered. Either it is: - fulfilling the task required under our FTAs, akin to the role of the Commission pursuant to Article 226 of the Treaty (which is a task that will need to be fulfilled and it seems to us that the UK Courts are not in a position to fulfil that task); or - it is acting as an enhanced Public Procurement Review Service ("Mystery Shopper") in terms of investigating claims of poor procurement practice and issuing findings/improvement notices etc.; or - it is used as a first port of call by contracting authorities seeking (eg): guidance as to the best practice to adopt; advice

		on how to improve procurement practice; or an initial view on the interpretation of guidance or PPNs etc. It is unlikely that the procurement oversight unit could undertake all of the above roles. For example, it may be unrealistic to ask contracting authorities to pro-actively approach the unit with queries or requests for second opinions on a procurement approach of procurement document if they run the risk of being investigated or their procurements halted/intervened in if the unit takes issue with what it is shown. Finally, a number of our sub-central contracting authority clients have expressed concern in the event that the unit is sited in the Cabinet Office with other central government departments being directed to intervene where directed (it is unclear how enforcement or liaison with sub-central government authorities would be undertaken: would it be direct with the Cabinet Office or would (eg) MHCLG be directed to liaise with local authorities and housing associations under investigation?)
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?	We would recommend that the unit is drawn from a variety of sectors (including the public, private and voluntary sectors) and includes a broad diversity of experts representing various professional disciplines, including procurement, legal, finance, ICT, customer service, strategy and communications. The members should comprise competent and experienced procurement professionals as well as procurement lawyers with significant transactional experience. We cannot comment on what sanctions should be available, given that the overall purpose and *modus operandi* is unclear at this time. It seems to us that there would be a benefit in the unit publishing examples of best practice they find across the sectors, rather than simply investigating and publicising areas of non-compliance or poor procurement practice.
Chapter 2: A simpler regulatory framework		
4.	Do you agree with consolidating the current regulations into a single, uniform framework?	Yes, this does seem like a good idea, particularly with regard to the Concessions Contracts Regulations, which does not seem to justify its own regulations in the first place. The consolidation of the Utilities Regulations and the Defence Regulations may be more problematic, given that the sectors' approaches to procurement are established, and both have unique features to them that may make consolidation of the rules more complex and less intuitive (for example, the utilities rules on coverage, as well as the greater flexibilities that exist under the Utilities Regulations regarding qualification lists, framework agreements etc.) We do note that the significant divergence between the Green Paper proposals for public contracts procurement and the NHS

		Supplier Selection consultation for healthcare commissioning will diminish the effectiveness and potential benefits that this consolidation will have. This is particularly relevant for those clients and advisors who procure contracts in the health and social care sector, who will now have to consider two significantly different procurement regimes. In addition, some of our clients have suggested that the Green Paper could go further in its consolidation exercise - for example, is there scope for the Public Services (Social Value) Act 2012 to be "swept up" into the wider public procurement regime, so that the obligations vis-à-vis social value are all enshrined into the same legislative framework as the procurement rules (rather than sitting alongside the procurement regulations in separate legislation and guidance)? Finally, as noted above in our "General Comments" section, the Green Paper proposals of moving to a more soft-law focus and the introduction of a National Procurement Policy Statement will mean that the relevant remaining rules are spread across a wider range of formats, making them more difficult to navigate. This move is likely to render any consolidation exercise fairly academic, particularly as the potential for "less rules spread over a wider landscape" may mean that procurement officers have the same number of rules to read but dispersed over a number of formats, forming a less cohesive/coherent body of regulation than currently exists.
5.	Are there any sector-specific features of the UCR, CCR or DSPCR that you believe should be retained?	We have set out below some high level proposals for sector specific features that we believe have a place in any future regime: • Flexibility for utilities and concessions – we welcome the suggestion that the common rules would be derived from the more flexible Utilities Regulations, as it would be problematic to require Utilities to adopt more stringent rules than those currently in place; • Exemptions for the defence sector – if the Defence Regulations are to be consolidated into the single set of rules, it will be imperative that the new regime retains certain exemptions for procurements which relate to matters of national security (including those exemptions currently set out in regulation 7 of the Defence and Security Public Contracts Regulations 2011, and the overarching exemption set out in the EU-UK Trade and Cooperation Agreement); • Thresholds – the current differences in thresholds for the Utilities Regulations, Concession Regulations and Defence Regulations should be retained as these sectors can benefit from higher thresholds (ensuring that regulated procedures are used only when they add

		value); • Qualification Systems – the Qualification System Notice (**QSN**) used by the utilities sector provides several benefits to the sector and should be preserved (either in their current form, or as part of the proposed DPS+ regime); • Long closed frameworks – as alluded to in our response to Question 26, there are legitimate reasons why frameworks which exceed four (4) years are required in the Utilities sector (for example, where frameworks are tied to funding cycles which exceed a four (4) year term; and • Mandatory exclusion criteria – our understanding of the Green Paper's proposals is that it is intended that privately-owned utilities would be required to apply all of the mandatory exclusion grounds (as currently set out in regulation 57 of the Public Contracts Regulations 2015). This would have the effect of putting private entities in the position of enforcing government policy and, for this reason, we would suggest that there are specific exemptions to the application of the mandatory exclusion grounds in the Utilities sector.
Chapter 3: Using the right procurement procedures		
6.	Do you agree with the proposed changes to the procurement procedures?	Yes, we agree that the move to three procedures (open, limited and competitive flexible procedures) will potentially increase flexibility going forward. Nevertheless, we anticipate that the public sector will need guidance and reassurance in the early stages to ensure that they take advantage of the changes and do not revert back to the safer "tried and tested" routes that they have previously followed. More detailed guidance will be required to understand what some of the requirements are and what flexibilities are permitted under the proposed procedures. We would suggest that template "exemplar" procedures are drawn up as examples of how processes can be structured going forward, to encourage a move away from the traditional mind-set. We currently understand that the second stage of the competitive flexible procedure can be structured in a variety of different ways: from one end of the spectrum, it can be a constructed like a simple Restricted Procedure: eg a "take it or leave it" tender with no negotiation; at the other end of the spectrum, it could be run like an Innovation Partnership, taking bidders through R&D stages to create an innovative work or service. It could even be used as a Light Touch regime process. Nevertheless, there was a significant amount of confusion expressed by our clients/during the round tables as to where the flexibility existed under the competitive flexible procedure and how it should be used. On this basis, guidance

		will be key. It was also noted by a number of clients that they would prefer that the Restricted Procedure remain as a stand-alone procedure, alongside the CFP, which could be converted into a two-stage process that allows engagement with the market-place on an iterative/negotiated basis etc. so simply replaces the Competitive Dialogue/Competitive Procedure with Negotiation/Innovation Partnerships and Design Contest. Finally, thought needs to be given as to what will be permitted after final tenders with the competitive flexible procedure. Currently negotiation post preferred bidder is only permitted with competitive dialogue (see Regulation 30(20) of the Public Contracts Regulations 2015). It is an opportunity and flexibility that contracting authorities want, but it often results in bidders trying to withhold their commercial positions until the very last moment, in fear of being marked down in earlier evaluation stages. This can lead to unfairness in the process for those bidders who were more transparent and puts the unwary client at a significant risk of a failed procurement if it fails to deal with such negotiations in a fair and transparent manner.
7.	Do you agree with the proposal to include crisis as a new ground on which limited tendering can be used?	We agree that there should be more clarity on what can be done in an emergency scenario as the current rules are not clear. We would be interested to see what the timescales are for a contracting authority who is seeking a ruling from the Minister of Cabinet Office as to whether their circumstances amount to a "crisis". If this is a lengthy process does the requirement for a ruling undermine the urgent nature of the request? Can a contracting authority proceed with a limited tendering process whilst waiting for a ruling? How will the Minister of Cabinet Office decide what comprises a "crisis". Will the information that is used to reach an opinion be available as well to contracting authorities in order to assist them in deciding whether they should seek a ruling or not? We also note the transparency requirements providing that it will be mandatory for a contracting authority to publish a notice whenever the decision is made to award a contract under the limited tendering procedure. Given the tight time-scales envisaged for the limited tendering process in a crisis, we note discussions are ongoing about when this notice should be published and whether there should be any sanction for not publishing such a notice. We have discussed this with the Cabinet Office during the consultation period, and our suggestion is that although automatic suspension would be excluded from the list of relevant remedies, the 30 day time limit for a challenge would not start running until such a notice was published: this is in line with the rationale behind the publication of notices and the overall transparency agenda and may act as a sufficient deterrent to encourage swift publication

		of the required notice.
8.	Are there areas where our proposed reforms could go further to foster more effective innovation in procurement?	We do not think that there is a requirement to legislate for innovation but to encourage more contracting authorities to seek it in responses and allow for it in their evaluation criteria. To this end, we would recommend that Government provides more case studies, examples and guidance as to how innovation can be encouraged/secured at each stage of a procurement process.
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?	The biggest inhibitors to innovation in our experience are uncertainty as to how innovation can safely be tested and evaluated in the process, how you can progress innovative ideas without being in breach of bidder confidentiality provisions and a fear that if you don't know exactly what you want then it will be an expensive and lengthy process.. To fully harness innovation, more guidance and training should be given to contracting authorities and reassurance that they will not be in breach of the rules if they do encourage innovative responses. There is a delicate balance between encouraging innovative responses and maintaining a robust process and an objective set of evaluation criteria. It may be that more detailed guidance on the use of variant bids in this area could encourage contracting authorities to seek more innovative responses. We would recommend that the benefit of soft market testing and bidder engagement pre-procurement is emphasised in guidance on fostering more effective innovation. Early engagement with potential bidders, stake-holders and the client allows contracting authorities to have a better understanding of the relevant market-places; what potential innovation exists in them; and how the specification/award criteria can be sculpted to allow the effective evaluation of innovative solutions within the context of the overall competition. Early appreciation of the opportunities will lead to a much more effective procurement process, rather than leaving it all until the procurement has commenced and bidder engagement is limited to the rules of the procedure.
10.	How can government more effectively utilise and share data (where appropriate) to foster more effective innovation in procurement?	We agree with the proposals set out in paragraph 91 and would support the development and use of multiple supplier collaborative solutions as tools/ effective means by which to develop innovative solutions.
11.	What further measures relating to pre-procurement	It is clear through instructions we receive and through comments made at our round-tables that contracting authorities remain nervous about what they can and cannot do in respect

	processes should the Government consider to enable public procurement to be used as a tool to drive innovation in the UK?	of market engagement pre-procurement. It is our view that the new rules should encourage significant pre-market engagement. This can encourage contracting authorities to adopt new ways of approaching projects and new ideas to be secured through the procurement process. If a contracting authority rushes into a procurement either expecting the process to produce a preferred solution for it OR with too rigid a mind-set, it is often too late to then drive innovation through the process in any meaningful or compliant manner.
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?	We agree that it would not make sense to have a separate regime for Light Touch services once the new procedures are introduced. The historic reason for separating these services out into a less regulated process was that such services lacked cross-border attractiveness and their exclusion from the full procurement regime did not distort any established markets within the "Union" or the "Common Market". Given that we are now outside of the EU and have recast our procurement principles in light of value for money etc., it makes little sense to preserve the distinction between light touch and fully-regulated services. That said, we understand that the intention is to abolish the Light Touch threshold (currently £663,540) and not to have a separate category for these services, instead, all services would be subject to the much lower services threshold. This is a radical move which will bring a large number of contracts within the remit of the new procurement rules. This will mean that a large number of organisations which currently do not have to competitively tender will have to find the time and money to do so and will have to bring in resources to guide them. A number of SMEs also provide such contracts and will now have to bid for them which will have a big cost and time implication. Given the above rationale, we would support the abolition of the Light Touch process of awarding contracts, but we would want the Light Touch threshold to remain, so as not to significantly disrupt the current market, particularly as many of the health and social care services covered by the Light Touch regime are procured in parallel with the commissioning of healthcare services - which are likely to be subject to a much less regulated regime. To abolish the Light Touch thresholds in light of the potential reforms to NHS procurement would put social care services on a completely different footing and create significant timing and competition differences across the linked needs.

Chapter 4: Awarding the right contract to the right supplier		
13.	Do you agree that the award of a contract should be based on the "most advantageous tender" rather than "most economically advantageous tender"?	We understand that the amendment of the reference to Most Economically Advantageous Tender (MEAT) to Most Advantageous Tender (MAT) will align the terminology in the Regulations with the Government Procurement Agreement. Further, it will emphasise the ability of a contracting authority to award a contract on criteria other than price and other more easily measured criteria, such as social value. In our experience with public sector bodies, the concept of MEAT is widely understood, and has been defined extensively in the UK courts, with reference to European case law decisions. We disagree with the statement in paragraph 100 that "*the prescriptive nature of the regulations in what and when evaluation criteria can be considered can restrict buyers' ability to secure the best outcomes*". The Regulations as currently drafted provide contracting authorities with a broad margin of discretion to select criteria that are appropriate for their contracts, and provide a number of options for assessing value for money including whole-life costing. In our experience, contracting authorities are fully aware of their ability to consider social value and environmental considerations when awarding contracts, and apply these criteria regularly to their procurement exercises. The Public Services (Social Value Act) 2012 further requires contracting authorities to consider social value as part of the procurement of any public services contract, which again has been widely adopted in the public sector over a wide variety of contracts (not just services contracts). The broad approach allowed by the Public Contracts Regulations 2015 appears to be conceded in paragraph 101 which states that the changes "would be about reinforcing and adding clarity rather than changing scope". In our view, this clarity would be welcomed, but this could be achieved by the promised "accompanying guidance". As noted above in our General Comments, we would also welcome recommendations (or legislation) from Government to contracting authorities about prohibiting/moving away from lowest-cost price assessments, which encourages the "race to the bottom" described in the Hackitt Review on Building a Safer Future. The Government's endorsement of alternative models for assessing price would be an effective way of changing procurement practice, and a counter-balance/complementary message to the emphasis on non-economic quality/delivery criteria being able to be taken into account. Converting to MAT will need to be accompanied by clear guidance that notes that all existing and relevant case-law touching on the relevant issues of MEAT will continue to apply.

		We would caution, however, that the message can go too far the other way too – and that, as stated in the *Harmon Facades* case, "price is the starting point". We would therefore recommend that the ensuing procurement legislation makes it clear that MAT must always include price and that an award of a public contract or framework agreement cannot be made on the basis of quality or technical delivery requirements alone. Instead, the list of award criteria must always include price or the contracting authority can adopt a financial budget or position, where a given price becomes a "wrapper" for the entire procurement. In such a scenario, the evaluation can then be undertaken on quality alone.
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?	In our view, the requirement that award criteria must be linked to the subject matter of the contract is an essential part of the regulatory framework for public procurement. It is particularly important for ensuring the current procurement principles (currently in Regulation 18 of the Public Contracts Regulations 2015) around treating bidders fairly and without discrimination (principles that we understand will be carried forward into the new rules), as it restricts contracting authorities from considering criteria that are subjective or based on favouritism or bias. It seems to us that to allow specific exceptions set out by the Government to be incorporated into award criteria runs the risk of sub-central contracting authorities being obliged to take into account policies or other Government priorities that have scant relevance to the project or the contracting authority's objectives. Given this we would hope that any specific exceptions need only be incorporated into a contracting authority's award criteria on a discretionary, rather than a mandatory, basis. Further, any specific exceptions should be capable of amendment or "tweaking" by the contracting authority to make it relevant and proportionate to the delivery location and size/value of the contract. At present, under the Social Value Model 06/20, such amendment is very limited and difficult to justify and we would not want the same approach to be adopted here in a way that limits innovation and speed of process. Paragraph 105 states that "providing this flexibility would allow the future regulatory regime to influence, to a far greater extent, how suppliers act on such national priorities across their business". This point will need to be considered in terms of what the Government's proposed national priorities are, and we would need further guidance about these policies are likely to cover. We note that a number of our public sector clients are concerned that the current principles of procurement may be

		appropriated by central Government to meet political imperatives that may not be in the best interest of the wider (sub-central) public sector.
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?	As with Question 14, the requirement that MEAT is considered from the perspective of the contracting authority is an essential part of ensuring that tender assessments are carried out fairly and transparently and without discrimination. It is good procurement practice that any award criteria are clear and comprehensible, and that bidders should be able to understand how an award decision has been reached. The requirement to consider MEAT from the perspective of the contracting authority is also a useful reminder for contracting authorities that bidders have the right to challenge procurement processes considered to be in breach of the Regulations, and so to structure and justify tender assessments from the point of view of the bidders. The references in 108 and 109 to taking account of the "wider impact" of a tender are very vague, and in our view could be misinterpreted easily. For example, a contracting authority could use this as a justification to award a contract to a bidder on the basis that that bidder was already undertaking similar works for a neighbouring contracting authority, even where the bidder did not demonstrate MEAT for the new contract being procured. If the Government wished to implement this reform, the guidance would need to be extremely clear about how "wider impact" is defined and applied, and this should not have the effect of cutting across the proposed procurement principles of fairness, transparency and non-discrimination.
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?	We agree that fraud against UK institutions should become a mandatory exclusion event, subject to further guidance from the Government as to when this exclusion should apply. We do not agree that failure to disclose beneficial ownership should be a mandatory exclusion event. There may be a number of reasons (including human error) as to why a bidder does not disclose its beneficial ownership. In our experience, most contracting authorities undertake independent assessment of a bidders' governance and ownership interests using publicly available databases, so the beneficial ownership of a particular bidder can be easily identified. Automatically excluding a bidder who fails to provide this information seems unduly onerous, and could have the effect of excluding bidders who would otherwise be suitable candidates. We suggest limiting any mandatory exclusion to where a bidder has intentionally tried to conceal information about its beneficial ownership, and otherwise allow contracting authorities to make this a discretionary exclusion ground.

17.	Are there any other behaviours that should be added as exclusion grounds, for example tax evasion as a discretionary exclusion?	Our public sector clients have suggested that this could be extended to include environmental offences and collusion. Additionally, it seems to us that it would be more appropriate for tax evasion to be included within the mandatory exclusion grounds, rather than the discretionary exclusion grounds. Regulation 57(1) of the Public Contracts Regulations 2015 sets out the various mandatory exclusion grounds which all concern criminal liability and conviction for various criminal offences. Given that tax evasion (in its broadest sense) is an umbrella term used to describe criminal conduct which results in incorrect tax treatment, it seems to us that it is more in keeping with the themes of the mandatory and discretionary exclusion grounds for tax evasion to form a separate mandatory exclusion ground. That being said, further guidance would be needed to clearly set out what constitutes tax evasion for the purposes of the exclusion ground. For example, would this only include substantive tax fraud offences set out in statute, or would it also encompass the common law offence of cheating the Revenue (which we note was formerly included in regulation 57(1)(e) in respect of fraud affecting the European Communities' financial interests, but has since been revoked by regulation 6(38)(a) of the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020, and is the subject of Question 16 to the Green Paper). Additionally, the Government should consider whether criminal liability for the Corporate Criminal Offence (**CCO**) set out in the Criminal Finances Act 2017 should also be grounds for exclusion, whereby a company or partnership commits an offence if it fails to prevent an associated person from facilitating tax evasion. Unlike the mandatory exclusion grounds, the discretionary exclusion grounds set out in regulation 57(8) of the Public Contracts Regulations 2015 do not relate to criminal liability, but instead address behavioural issues which raise concerns as to an economic operators suitability (but which fall short of criminal conduct). We would suggest that it is in keeping with the behavioural aspects of regulation 57(8) for aggressive tax avoidance (rather than tax evasion) to fall within the scope of the discretionary exclusion grounds. Arguably, this is already covered by the discretionary exclusion ground in regulation 57(8)(c) on the basis of "grave professional misconduct, which renders its integrity questionable", but further guidance would be needed as to what level of tax avoidance would fall within the meaning of this exclusion (for example, does this only pertain to repeated tax avoidance, or (for example) to schemes that have

		been found to be tax avoidance following referral to the General anti-abuse rule (GAAR) panel?). Finally, there has been much scrutiny of recent procurement practice in the response to the COVID-19 pandemic, and there has been a particular focus on the issue of "profiteering". We would commend the inclusion of an additional discretionary exclusion ground whereby a contracting authority who can demonstrate that an economic operator has made excessive or unfair profits in public contracts awarded in response to an emergency (or crisis) is permitted to exclude that economic operator. Again, it seems to us that this ought properly to fall within the ambit of regulation 57(8)(c) on the basis of "grave professional misconduct" and, in the event that the Government is not minded to include a new exclusion ground along these lines, further guidance will be necessary to confirm whether this would be an acceptable use of the discretionary exclusion ground at regulation 57(8)(c)..
18.	Do you agree that suppliers should be excluded where the person/entity convicted is a beneficial owner, by amending regulation 57(2)?	In principle yes, though it would be helpful to have more guidance as to the Government's proposed definition of "beneficial owner".
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)?	Our understanding of Regulation 57(3) is that bidders who are in breach of obligations for payment of taxes shall be excluded automatically from a procurement procedure, and that the contracting authority is not required to verify the bidders' status with reference to external information sources. If this exclusion ground was to be moved into Regulation 57(1) or 57(2), contracting authorities would first be required to verify the bidder's status before being able to exclude them. This is probably a more robust approach, as it will require the contracting authority to justify by objective means why the bidder is being excluded. However, given that many contracting authorities do not have sufficient time or resources to undertake independent verification of bidders' convictions, this requirement would be made much easier if contracting authorities could have access to a centrally managed debarment list that is updated regularly.
20.	Do you agree that further consideration should be given to including DPAs as a ground for discretionary	Whilst there may be some merit in giving further consideration to the inclusion of DPAs as a discretionary exclusion ground, the Government will need to ensure that it considers various risks that this might present, as well as how this would operate in practice. Firstly, consideration will need to be given to the approach to

	exclusion?	self cleaning that would be available for contracting authorities who are subject to DPAs. The Green Paper suggests that the measures to demonstrate self-cleaning would be similar to the measures required to be taken under a DPA (for example, internal investigations, strengthening of compliance function, dismissal of staff etc.). We would suggest that, in practice, contracting authorities may face difficulties in assessing whether such measures are effective and sufficient to discharge the self-cleaning provisions (in particular, we envisage this being more difficult for smaller sub-central contracting authorities). Additionally, there is some risk that companies who are subject to a DPA may end up being penalised twice for the same conduct (for example, if the requirements for self-cleaning are more onerous than the conditions in the DPA). If DPAs are to be included as a discretionary exclusion ground, there will need to be further guidance to the use of the exclusion ground (and the application of the self-cleaning provisions) so as to ensure consistency of approach across all contracting authorities.
21.	Do you agree with the proposal for a centrally managed debarment list?	We agree with this in principle. We note that the majority of our public sector clients rely on bidders self-certifying that they do not meet the mandatory and discretionary exclusion grounds set out in Regulation 57, and that very few contracting authorities have the time or resources to undertake independent checks to verify bidders' self-certified responses, especially in relation to fraud, money laundering or tax evasion offences. A centrally managed debarment list of "banned" contractors would be a useful tool for contracting authorities to identify those bidders who have given inaccurate responses and/or attempted to conceal details of past offences in response to selection questions. According to feedback, many of our clients lack sufficient experience and expertise to be able to evaluate whether a bidder's self cleaning strategies are sufficient to correct a wrongdoing, so it would be more appropriate to have this process managed and adjudicated by the Crown Commercial Service or an equivalent Government organisation. Our public sector clients have raised a number of questions in relation to this proposal, including: • Will there be a charge for accessing the debarment list? • Will economic operators from outside of the UK be included in the list? • Will SMEs be included in the list? • How will the Government manage any shortfalls in provision of services in industries where there are a

		limited number of suppliers?
22.	Do you agree with the proposal to make past performance easier to consider?	**Assessing past performance** Considering a bidder's past performance as an exclusion ground is inherently problematic, as it is often unclear whether poor performance on a previous contract is relevant to the award of another contract. The fact that a bidder has had a prior contract terminated does not necessarily mean that its performance on another contract will be poor, especially where the bidder has taken steps to improve its performance and working practices. It is generally very difficult for contracting authorities to establish a convincing argument that a bidder's prior termination will adversely affect its performance on the new contract, which makes this an extremely difficult exclusion ground to rely on without risking an objection or a legal challenge from the affected bidder. Further, a number of clients admitted that it was down to their lack of or poor contract management that the relevant information around poor performance was not captured and therefore whilst actual performance was poor, they did not have the evidence-base to support a contractual claim or a termination event. This practical admission should be noted in the event the proposals around KPI performance and monitoring are pursued. The advantage of the current wording is that this exclusion ground is limited to prior termination or the award of damages (though there is some ambiguity over the meaning and potential scope of "or other comparable sanctions" which could be clarified). This means that contracting authorities have a (mostly) clear marker as to what justifies a bidder being excluded, and there is less ability for potential abuse of this rule. That said, the existence of this rule means that many contractors are extremely reluctant to accept fault-based contract terminations, on the basis that this will affect their ability to bid for future public sector contracts, and so are more likely to challenge a contract termination and/or to agree a confidential "no fault" settlement with the client so as to avoid having its contract record tarnished. We are concerned that if this rule is liberalised to include poor performance without the application of sanctions under the contract terms, the assessment around whether to exclude will become more complex as potentially more factors will be relevant, particularly around what constitutes a "significant" deficiency in performance", and whether this deficiency is sufficient to argue that the bidder would perform poorly under a new contract that may have very different performance requirements. We note that the Government has promised guidance to help contracting authorities understand when a bidder may be excluded, but in our view this will unnecessarily

		complicate what is already an extremely difficult assessment. We would prefer that the exclusion continues to be limited to termination or levying of damages, and that further guidance be provided about the meaning of "comparable sanctions". If the Government is intent on extending this to cover poor performance not leading to termination, we recommend that clear and comprehensive guidance is provided to assist contracting authorities in making these assessments and to avoid unfair or biased misapplication of this discretion. **Which contracts should be considered** As currently worded, Regulation 57(8)(g) refers to "a prior public contract, a prior contract with a contracting entity, or a prior concession contract", so technically any previous contract can be considered as a potential exclusion ground, even where the terminated contract was with another contracting authority and/or is unrelated to the contract being procured. As such, this rule is potentially unfair on larger multi-disciplinary contractors, as a terminated contract in one area of the business may have a detrimental effect on their ability to bid for contracts in other areas. If contracting authorities are allowed to consider poor performance on any contract entered into by any bidder as a potential exclusion ground, this would potentially make tender assessments more complex and more open to misinterpretation and dispute. We are also concerned about the potential for these rules to be abused by contracting authorities who simply do not wish to work with certain contractors and so rely on details of a prior termination to exclude them unfairly. With this in mind, we recommend that any discretion to exclude a bidder is limited to previous contracts (i) entered into between the bidder and the contracting authority procuring the new contract; and (ii) which are of a similar type or subject matter to the new contract. **Making contract performance data publicly available** Whilst we are broadly supportive of the Government's proposals in paragraphs 126 and 127, we acknowledge that it would be extremely complex and costly to make contractor performance data publicly accessible via a central database. The time and resources required to set up and administer such a database will be considerable, and this will add another level of administrative complexity to contract management in the public sector. This will be particularly onerous on contracting authorities who are not currently required to publish such contract information, as this will require a considerable time and cost investment on their part. It is likely that contractors will be resistant to publication of their performance information, and this would require a total renegotiation of commercial contracting between clients and

		their contractors, particularly around exchanges of information and performance assessment. Publishing this data is also highly likely to make performance assessment a more fraught and contested process. For example, contractors may be unwilling to agree ambitious or aspirational performance measurement terms for fear that these will be too difficult to attain, and will want to avoid potential publication of poor performance data that may affect their chances to bid for future contracts. Contractors may also be reticent to take on difficult contracts or failing contracts for fear that the complexities of such contract will damage their overall performance scores. It is also unclear how the Government would be able to set a consistent set of thresholds for past performance, given the extremely wide range and types of contracts that are procured in the public sector. It is also unclear how contracting authorities would be expected to apply performance data from previous contracts to the ones they plan to procure, especially when the previous contracts are for different work/services types and have different contractual performance requirements. Many of our public sector clients have expressed concern about the increased administrative burden that this requirement will involve, and that additional resources will be needed to enable contracting authorities to effectively manage their contracts and provide the performance data required. It will create a secondary industry, comprising those responsible for editing and preparing data for upload and those tasked with trawling it to spot potential breaches or other flaws etc.
23.	Do you agree with the proposal to carry out a simplified selection stage through the supplier registration system?	The Government's proposals in paragraph 130 to allow basic supplier information to be submitted via a central registration system are welcome and would significantly reduce cost for bidders. Since 2015, the Regulations have provided for bidders to submit information via the European Single Procurement Document (Regulation 59) and via e-Certis (Regulation 61). In our experience, the take-up of these facilities in the UK was not implemented, and as they have not been endorsed or widely promoted by the Crown Commercial Service, many contracting authorities are unaware of their function. However, we note that use of CCS's standard Selection Questionnaire is widely used across a number of practice areas, as are a number of industry-produced standard databases that are aligned with the PAS-91 Pre-Qualification Questionnaire. In our experience, clients are keen to streamline the assessment process, particularly to make procurement more accessible for smaller and less well-resourced bidders. Similarly, contractors frequently express frustration at having to provide extensive background information for each new tender exercise, so we anticipate that this proposal will be welcomed. Our public sector clients have expressed concern that, given

		the current economic climate and the higher possibility of contractor insolvency across many industries, more contracting authorities are undertaking detailed assessments of bidders at the selection stage to ensure that bidders are sufficiently financially robust to deliver the contract. There is a concern that a standardised and simplified pre-selection process, while useful for contractors, will not be sufficiently robust for more complex contracts, and will require substantial additional assessment. Our clients have also noted that there have been attempts in the past to import centralised registration systems that have not been successful, so this would require more resourcing for it to be used widely and effectively.
24.	Do you agree that the limits on information that can be requested to verify supplier self-assessments in regulation 60, should be removed?	We consider that Regulation 60 provides a very wide range of information that can be used to verify self-assessments. We would caution the Government against allowing contracting authorities unfettered ability to request information: this could lead to bidders being required to produce excessive or irrelevant information from bidders, which potentially conflicts with the Government's objectives to simplify the procurement process and ease the burden on bidders We suggest that any further information requested should be relevant to the subject-matter of the contract and doesn't otherwise breach the procurement principles.

Chapter 5: Using the best commercial purchasing tools

The assumptions set out in Chapter 5 are not universally recognised by our clients. They have indicated that they do not use the wrong tools for the wrong requirements in the wrong way because of either a mixed understanding of the deployment of the complex tools available or their complexity (see para 141). Instead, clients indicated that they use what they have available to them even though the current designs of frameworks and DPS are not fit for all the purposes for which they must be used.

Framework Agreements and DPS are included in the regulations as two simple procurement tools. Designed to procure simple supplies and services required on an iterative/regular basis, they work well when such supplies and services can be clearly defined and priced. Certainly, these are the assumptions that are reflected in the legislation.

Given that they are designed to procure simple services and supplies - their utility (and level of compliance) starts to unravel when they are used by contracting authorities to procure complex works and services (eg IT or construction works) or used by central purchasing bodies to procure works and services on behalf of other contracting authorities.

This means either (1) the new rules should provide alternative procurement tools that can be used to procure complex works or services and/or (2) current "work arounds" adopted by contracting authorities to deal with the inherent simplicity/inflexibility of the current framework and DPS rules are accepted and woven into the new rules. These include:

- Providing a template contract or contracts for the call-off terms that can be significantly amended or adapted to take into account project- and client-specific requirements
- A sifting stage on DPS and large framework agreements to allow contracting authorities to

limit the number of suppliers eligible to bid for specific call-off contracts • An acknowledgement that mini-competitions can be "back-loaded" to allow for an intra-framework competition amongst providers on project-specific risks and issues arising • The ability to award a pipeline of works and services to an individual or multiple framework contractors pursuant to a call-off without such an operating model being at risk of being categorised as a "framework under a framework". • The ability to award a framework agreement pursuant to a call-off under a DPS.		
25.	Do you agree with the proposed new DPS+?	Our understanding of the Green Paper's proposals is that this is very similar to the existing DPS regime, except under the proposals contracting authorities could hold a list of suppliers and, using the new competitive flexible procedure (in one of its many guises) can tender to all eligible suppliers. If that is correct, then we are in broad agreement with the proposed changes but would note that, in practice, the DPS+ system is still missing some "add-ons" that would assist in its use for more complex works and services (see below). . Further clarity and guidance is needed to fully understand the proposals. Experienced practitioners in the housing sector have already established DPSs in a flexible and creative way under the existing rules that reflect the proposals set out in the Green Paper. It seems to us that the proposals for DPS+ and framework agreements do not offer more flexibility than how the existing tools are already used (eg there are numerous DPS already set up for construction works, indeed – Homes England have just publicised its intention to replace its developer partner framework agreement with a DPS). Nevertheless, the existing DPS provisions are designed for simple procurements and as such are not entirely fit for purpose, and it would be useful for the proposals to expand on what DPS+ can be used to procure in detail and how the DPS+ system should be used to procure more complex works and services. If the DPS+ system is to be used to procure more complex works and services, we would recommend that the following additions are made to the proposals to ensure that the tool works in practice Short-listing: we note that the DPS+ system does not vary from the current DPS in that a contracting authority must invite all eligible suppliers to submit a bid for the contract. Given that the DPS is an open procurement system, this can mean that tens, even hundreds of suppliers are eligible to submit a bid. When procuring complex works and services, the market as well as the client would prefer to see a more limited shortlist of eligible bidders. Therefore a sifting stage - be it either a further selection questionnaire or a de-selection based on outline solutions or similar (although most of our clients would prefer the former rather than the latter) would reflect a desired route to

		market. Direct awards: there is also some uncertainty as to whether the proposed DPS+ would allow direct awards (although we assume that this is not intended). Given the intention to allow greater flexibility within the commercial purchasing tools, it would be beneficial and afford greater flexibility to consider including this within the DPS+ proposals. The use of price-only awards: in terms of complex works and services: our private-sector clients indicated that they do not like DPS awards as they often tend to be simply price-based on a reverse auction basis. This would not be a suitable approach for a client to adopt for complex works and services, where a MAT approach should be adopted. If the DPS+ is going to be available for a spectrum of works and services, we think that legislation or guidance should prohibit price-only competitions or "Dutch" auctions under its terms.
26.	Do you agree with the proposals for the Open and Closed Frameworks?	The concept for open and closed frameworks needs more exploration. The aim of the Green Paper is to provide flexibility and aid simplicity, and we do not believe that the proposals currently meet these aims. **Closed frameworks**: currently the proposals limit closed frameworks for a maximum of four years. Under the current rules, closed framework agreements are allowed for longer periods of time, "in exceptional circumstances, duly justified, particularly by reference to the subject-matter of the contract". (Indeed, some central government departments and NDPBs have used this exception to enter into framework agreements for upwards of 7 and even 20 years duration!). To this end, the proposals are less flexible than what is currently allowed and is unlikely to be welcomed by contracting authorities and bidders alike, particularly where there is no market-led reason to harden this position. **Open frameworks**: it seems to us that the concept of an open framework would in reality function as two (or more) new procurements with no benefit to either the contracting authority or bidders as to time or cost (as the refreshing of the framework after the initial three years of the term would essentially require another tender exercise). We understand that utilities want to retain eight (8) year framework agreements and would suggest that this is retained in the utilities sector and extended to the public sector. As establishing framework agreements can be resource intensive, the requirement to hold two tender processes for an open framework does not seem to provide the benefits that the Green Paper seeks. It also seems to us that the open framework agreement is more likely to result in additional red tape and bureaucracy which could hinder its flexibility.

		However, we also note that markets can change significantly during a four (4) to eight (8) year period and it may not drive best value for money to continue with a framework for this duration (even if there is an option for a "refresh" of suppliers) as areas such as technology may have developed during that timeframe. In such circumstances, however, it will be just as simple to collapse the non-performing framework and re-tender it against revised procurement documents in order to make sure that the framework agreement is up to date. Indeed, this scenario does not seem to be envisaged by the proposals - which seems to assume that the framework agreement will be opened up on the same terms and conditions each time. Additionally, our clients often find that framework operators are unable to keep their tendered rates for the full four (4) year term of a framework agreement and lose the appetite to mini-compete (with the result that the same framework operators often win call-off contracts). Contracting authorities can include review and/or benchmark clauses in their framework agreements but we would welcome proposals to keep the procurement process involved throughout the lifespan of the agreement, rather than just at the beginning. We have provided a paper (set out at the end of this paper) that explains some of our thinking around the procurement of strategic complex procurements and some potential solutions. Finally, in respect of para 156 and charging, we would note that this is one symptom of the commercialisation of the central purchasing body plus framework agreement/DPS conundrum. In addition to limiting the charges for use of a commercial tool, we would also recommend that the rules around central purchasing bodies are reviewed and current practice is taken into account when recasting them going forward. It is our experience that many central purchasing bodies have only a tenuous link to their "sponsoring" contracting authority. This means that the contracting authority does not have oversight or control over the actions and outputs of the company responsible for setting up and running the framework agreements in their name. It is this separation between contracting authority and framework provider that has resulted in the proliferation of "private sector" frameworks in the current market-place and that allows the commercialisation of the CPB/framework landscape. Fees and levies can be controlled via the means set out in the Green Paper, but if the principle behind paragraph 156 is more about trying to emphasise the existing requirement; that only contracting authorities are able to set up DPS and framework agreements; then we would recommend that it is the relationship (between the sponsor contracting authority and the framework provider) that is scrutinised and, perhaps, a test akin

		to the "Teckal" test set out in Regulation 12(1) could be adopted to preserve the quality of that relationship. We would also recommend that the relationship is declared on the central register of commercial tools. This ensures that private-sector bodies (or those with private-sector shareholdings) do not profit from providing access to the public-sector market-place.
Chapter 6: Ensuring open and transparent contracting		
27.	Do you agree that transparency should be embedded throughout the commercial lifecycle from planning through procurement, contract award, performance and completion?	In general, we agree with the proposals, although there is a difference of resource between central government and sub-central authorities that will need to be taken into account in the proposals in terms of (eg) a transitionary period of implementation or the design of the centralised platform and registers.. In reality, there is a concern that the proposals could in fact stifle the honest publication of information, and this is considered a real challenge for practitioners. On this point, we disagree with the assumption made; that bidders make spurious challenges due to the lack of information provided; it is often the presentation of the material that provides disappointed bidders with the suspicion that "something has gone on" and therefore it is not necessarily the case that the disclosure/transparency obligations will address the perceived problem. Further, not all contracting authorities are subject to the Freedom of Information Act 2000 (for example, housing associations), and there are concerns that this places an onus on those contracting authorities to publish information that they would ordinarily not be required to provide (which in turn compounds the issues around resource and competence). There is also, a risk, that a "data industry" springs up/develops further around the trawling of data for political or unrelated purposes, or with companies offering to review the data on behalf of strategic suppliers etc. The publication of "too much" data may also disadvantage SMEs and VCSEs who may lack the resources to penetrate the wall of procurement data thrown up to access the information that they need/would assist them in improving procurement techniques/accessing further opportunities.
28.	Do you agree that contracting authorities should be required to implement the Open Contracting Data Standard?	Whilst this would help to standardise what is required, the amount of information proposed is large. This may be possible for central government, but we are concerned that sub-central authorities may not be able to comply (as this could prove to be bureaucratic and costly for smaller contracting authorities). In our view, if this is implemented there will be a gap between the aspiration and competence/capacity to comply.

29.	Do you agree that a central digital platform should be established for commercial data, including supplier registration information?	We welcome the ambition for a centralised digital platform and are supportive of it. Further we are supportive of the principles set out in the Technology Code of Practice – they articulate sensible measures that should be adopted when creating a technology solution. However our concerns with a central digital platform are focussed on its proposed function, security and accessibility. Any technology solution, and especially one that will contain and host commercial information sourced from a number of parties, will need to be stress-tested prior to full operability. We would advise that during the initial stages of development and operation, limited functionality is proposed to allow the platform to be tested (in this regard the requirements of paragraph 178 are a sensible place to start – although we believe that the supplier price and performance comparison should be incorporated at a later stage). This would also allow sub-central bodies to ascertain how to interface with the platform, allowing any internal changes to their existing solutions to be resolved. We consider that given the amount of information that the platform could host, security (including protections against malware) would need to be given specific consideration. The phased rollout of the functionality of the platform, allowing it to be tested for resilience and security at each stage would be pre-requisites. In terms of the nature of the information that the platform may host in future we are concerned that much of this would introduce significant levels of administrative burden on sub-central bodies and include information that would quickly be historic without regular updates – bringing into question its value. We are also aware that not all sub-central bodies would have access to such information in the first instance, again increasing the administrative burden. Should the platform evolve to include such information sets, we would suggest they are rolled out by central government initially prior to broader compliance. Finally commercial confidentiality would need consideration – such matters as reporting KPIs may need contractual changes and may have inadvertent consequences (as explored above in relation to our "past performance" response).
Chapter 7: Fair and fast challenges to procurement decisions		
30.	Do you believe that the proposed Court reforms will deliver the required objective of a	By way of general observation, it is our view that the TCC is the appropriate forum for high value and complex procurement challenges but it would be advantageous for the challenging bidder and the defending contracting authority alike for the

	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.	challenge process to be improved, to achieve greater efficiency and save legal costs and to ensure the more effective use of pre-contract remedies, particularly in circumstances where a contracting authority may have the opportunity to address the alleged breach(es) by re-winding and re-running a stage of the procurement process. With respect to more specific observations, the proposed court reforms are set out at paragraph 197 of the Green Paper. Taking each proposal in turn: **Tailored fast track system**: in principle this would be welcome. To be effective it would require a single judge to be allocated to each claim to determine the appropriate directions from the outset and to actively case manage the claim to its conclusion. In our experience a single judge dealing with a claim creates efficiencies of court processes and resources. **Written pleadings**: in appropriate cases, a more paper based approach may be beneficial. However, where challenges involve highly contested factual disputes, a more paper based approach would not be appropriate. Further, it is not clear that the anticipated costs savings will be realised - in reality barristers will be instructed to draft written pleadings in any event. If the process remains the same, we can see the benefit of seeking to impose a limit on the length of statements of case, as is the practice in the Commercial Court. **Disclosure**: efficiencies in disclosure would be welcome. It is often a very burdensome exercise for contracting authorities but is an essential part of ensuring that the challenging bidder has a fair hearing. It is well recognised that contracting authorities are much better placed than challenging bidders to know which relevant documents exist and demonstrate a breach of the Regulations. If there is to be streamlining in the disclosure stage of litigation, its success will inevitably be dependent on the proposals for increased transparency being fully implemented and effective if there is to be a fair process. Consideration might also be given to adopting a model akin to the Disclosure Pilot Scheme, but tailored to procurement disputes. It could assist in the early identification of key issues and narrowing of the categories of documents to be searched. Further guidance regarding confidentiality rings (for example a standardised approach) would be welcomed as it can be time-consuming to put confidentiality measures in place whilst there are other urgent steps to be undertaken. **Capacity**: in principle dedicated procurement judges may be beneficial, particularly if this does have the desired effect on court capacity. We consider, however, that the specialist procurement judges in the TCC have a particular expertise and skill because of their wider commercial dispute experience which allows them to consider procurement disputes in the round, considering competing commercial and public

		considerations. **Timescales**: we agree with this proposal, although use of the Part 8 procedure is likely to continue to be limited, given that many challenges are often fact-sensitive.
31.	Do you believe that a process of independent contracting authority review would be a useful addition to the review system?	On the face of it, this is a sensible suggestion. However, it is difficult to see what this would add to what happens in practice. Where we are instructed to defend a procurement challenge, it is often the case that an individual within that organisation who has not been involved in the procurement directly will become involved such as the head of procurement or a legal officer, and investigate matters / form a view of the merits of the challenge (although that might not be regarded as sufficiently independent) in any event. Alternatively, the contracting authority will instruct us and / or Counsel to provide an early view on the merits. In the circumstances, some contracting authorities we have discussed this with have questioned the feasibility of this approach, which could present a disproportionate burden for smaller contracting authorities (some of whom have either no or only one procurement professional within their organisation). Finally, there is a risk that requiring an independent review could result in satellite disputes / limitation arguments over the extent to which any such review "stops the clock" in respect of the 30 day time limit for issuing proceedings under the PCR. Further clarity would be welcomed on how this is intended to operate in practice..
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 repeat our observations above that it would be advantageous for there to be greater efficiencies in the challenge process and to save legal costs. This is particularly the case in respect of lower value disputes. We also observe that tribunals set up for specific claims (e.g. employment, competition) are geared to work with those types of claims. It is difficult to see how an existing tribunal could be used to deal with procurement disputes. A dedicated procurement tribunal would most likely be more effective. The TCC's effectiveness is a result of the hands on case management by judges who are sufficiently experienced in procurement disputes to deal with them. It may therefore be a better solution to develop a fast track process within the TCC.
33.	Do you agree with the proposal that pre-contractual remedies should have stated primacy over post-contractual damages?	Yes, in our experience of acting for challenging bidders, generally they want to be awarded the contract in question or to have an opportunity to win it, once the process has been rewound to address any deficiency in the process. This would also mean that contracting authorities are not in effect paying twice for the same contract. However, the effectiveness of pre-contract remedies is dependent largely on the efficiencies in

		court processes being realised. Language in the new regulations setting out this preference should contain appropriate provisos and be sufficiently flexible. However, where automatic suspension has been lifted or is not available (for example where there is a "crisis" procurement), the proposed cap on damages (see further below) is very unlikely to afford a challenging bidder a sufficient remedy.
34.	Do you agree that the test to list automatic suspensions should be reviewed? Please provide further views on how this could be amended to achieve the desired objectives.	The American Cyanamid injunction principles are well established and well understood, but equally we recognise it was not formulated with procurement challenges in mind. As to whether the test should be reviewed, this is rather dependent on the availability of pre-contract remedies and the proposed cap on damages. Both of these proposals would indicate that the "*damages are an adequate remedy*" limb of the American Cyanamid test (and which is often the basis on which automatic suspension is lifted) should be removed. In the event of a new test being applied to the lifting of automatic suspension, it is important that the new test is clear, again to avoid satellite litigation.
35.	Do you agree with the proposal to cap the level of damages available to aggrieved bidders?	For contracting authorities, this is a welcome proposal, particularly where a significant damages payment could impact on the delivery of public services. However for challenging bidders, a cap on damages where the Court has found a contracting authority has breached the PCR and caused a challenging bidder to lose out on a contract (which in some cases may be business critical) would be an inadequate and ineffective remedy where automatic suspension has been lifted or not available. It should also be noted that in practice, there are very few judgments on damages, because parties are encouraged and often do take part in alternative dispute resolution after the disclosure stage of proceedings. Therefore, whilst a claim may be stated at the outset to be in the region of £several million, settlements may in fact be reached for much lower sums. Challenging bidders still need to prove on a balance of probabilities that they would have made a profit on the contract in question and are under a duty to mitigate their loss. For example in 5 - 10 year contracts, challenging bidders could be expected to mitigate their losses through winning new replacement contracts in year 2 or 3. In the circumstances and in the absence of more judicial authorities on quantum assessments in procurement cases, there is potentially a need for more and clearer guidance on evaluating quantum at the outset of a claim. This could have the effect of managing expectations and encouraging earlier settlement discussions on both sides.

		Further and alternatively, the new regulations could also provide that any damages awarded must be proportionate, considering both the public interest and commercial considerations (loss of profit / loss of chance). This could be done by revising the 'sufficiently serious' / Frankovich rule and incorporating it into the new regulations. It is also in our view important to consider the potential unintended consequences of a cap on damages. Contracting authorities may "buy off" challenges by paying out 1.5x bid costs where it is known there has been a serious breach. Not only does this fail to remedy the serious breach, but it could be seen to allow poor practice to go unchallenged and may not be in the public interest. In turn, that could stifle competition and reduce innovation in bids. Alternatively, the offer of 1.5 x bid costs would not represent a sum sufficient to make a settlement attractive, with more cases going to trial, with the consequential risk of negative publicity where the contracting authority is unsuccessful.
36.	How should bid costs be fairly assessed for the purposes of calculating damages?	Please see answer to question 6 above. In addition, in our experience of acting for challenging bidders, their approach to calculating bid costs can vary, depending on the nature / corporate structure of their business. A "one size fits all" approach would be difficult to formulate and could lead to arbitrary decisions.
37.	Do you agree that removal of automatic suspension is appropriate in crisis and extremely urgent circumstances to encourage the use of informal competition?	In principle, yes. However, sufficient remedies would need to be available to counteract the removal of this remedy. Sufficient controls should also exist to prevent contracting authorities relying on "a crisis" when in fact one does not exist / or is a situation of its own making.
38.	Do you agree that debrief letters need no longer be mandated in the context of the proposed transparency requirements in the new regime?	We understand from contracting authorities that this is a burdensome aspect of the current procurement practice. For bidders, it is often the first occasion when they identify that there has been a breach of the PCR. This proposal is only likely to be feasible in the event that the full benefits of the proposed transparency regime are realised. As with the proposed changes to disclosure, the proposals for increased transparency in the procurement regime must be fully implemented and effective before any changes to award decision notification are made. That will require a significant amount of resource and time and contracting authorities will need to be given the requisite support to implement such measures.
Chapter 8: Effective contract management		

39.	Do you agree that: a) businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays? b) 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? c) private and public sector payment reporting requirements should be aligned and published in one place?	Paragraph 220 (Introduction) of the Green Paper states a view we share as does the first two sentences of Paragraph 221 .The Government's commitment to reduce the scale of late payment practices (long payment terms/late payments) in both the public and private sector is recognised. Further initiatives are to be welcomed therefore , However in response to the three questions posed : (a) there are issues with this proposal, in that contracting authorities should not be expected to act as quasi credit control departments of their supply chain. Matters to be addressed in such a proposal, were it to be taken forward, would include how would a contracting authority know whether a payment was simply delayed, or whether there was a valid dispute to an unpaid invoice? The (perceived) benefit may be outweighed by the additional administrative burden that could be imposed on contracting authorities were this proposal adopted. Additionally, as there is no contractual relationship between contracting authorities and sub-contractors we feel it should remain the responsibility of contractors to ensure the prompt payment of their sub-contractors ,We believe that other policy and guidance initiatives should be pursued by Government. Further we would suggest that there are other, more suitable, approaches that could be considered such as the use of Project Bank Accounts for significant/high value projects instead. There are already tools in place, and the public sector should be encouraged to consider their use in a proportionate way; (b) We think there is some merit in this proposal and the "right time" to allow contracting authorities to exercise such a right is arguably during the selection stage of a procurement process. There is also merit in looking at whether the text of Regulation 112 of PCR 2015 could be strengthened by inclusion of further rights, e.g. allowing a contracting authority during performance of the contract to call for appropriate evidence; and (c) Certainly requirements should be aligned where there will be a benefit in doing so but there would be a need to reflect and allow for each sector's sensitivities (possibly more so in the private sector) such that creating the "one place" in which such information should be deposited and then from which it is published, may be a challenging task.
40.	Do you agree with the proposed changes to	Yes. We support the view that Regulation 72 does not require a "full overhaul". Therefore the proposals set out in paragraph

	amending contracts?	229 are welcome - in particular redefining "substantial" in Regulation 72 (8) of PCR. Some restraints will need to be applied particularly to amendments made "in cases of crisis or extreme emergency" Also around matters such as scope and timescale provisions to confer sufficient flexibility would be desirable - for instance some changes to scope which appear to increase that significantly eg where the market is very small , or, equally which do reduce scope ,should be capable of being made without the need for a fresh procurement exercise. Our attached paper also explores an additional safe-harbour that contextualises the codification of *Pressetext* at Regulation 72(1)(e)/72(8) in relation to long-term and/or complex contracts
41.	Do you agree that contract amendment notices (other than certain exemptions) must be published?	Yes. Transparency, (which publication of amendment notices promotes) should be protected , wherever possible.
42.	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?	Whilst we agree with this proposal in principle, it is not a problem we see in practice and we wonder how widespread this is across the public sector? It is difficult to see how this would operate in practice – unless the proposal is that the contracting authority should be in a position to **require** the incumbent supplier (bringing a challenge) to continue to perform the current contract (or to recommence performance) on the same terms in all respects . Further clarity on this proposal would be welcome, including who would decide how much that cap on profits should be.

Trowers & Hamlins LLP
10 March 2021

Annex 1

Discussion paper on complex contracts

dated 5 March 2021

Cabinet Office

Position paper

Procurement issues arising in relation to long-term/strategic/complex construction projects

Trowers & Hamlins LLP
3 Bunhill Row
London
EC1Y 8YZ
t +44 (0)20 7423 8000
f +44 (0)20 7423 8001
www.trowers.com

trowers & hamlins

9 Introduction

9.1 This informal position paper considers issues around the current procurement practices and tools available for strategic construction projects in the context of the Government's proposed reform of the public procurement regime, including:

9.1.1 The application of the "competitive flexible procedure" adopting the steps already set out via the Innovation Partnership procedure to complex strategic construction projects;

9.1.2 The use of framework agreements when awarding complex strategic construction projects; and

9.1.3 A possible new "safe harbour" for modifications to public contracts during their term (as currently set out in regulation 72 of the Public Contracts Regulations 2015 (the **Regulations**)).

10 Competitive Flexible Procedure

10.1 We understand that the Competitive Flexible Procedure will comprise a two-stage process (in line with the Selective Procedure under the GPA) and the second stage of the process will be adaptable, with a contracting authority having the flexibility to adopt any one of a range of "procurement tools" in order to progress the procurement and identify the most appropriate solution. This could, on one end of the spectrum, comprise a simple Restricted Procedure (eg selection followed by the submission of a tender/no negotiation). On the other end of the spectrum, the second stage could take the form of a dialogue, negotiation of an innovation partnership.

10.2 The Innovation Partnership procedure is currently set out in regulation 31 of the Regulations. In general, the procedure is not well understood across the public sector and it is rarely used in practice (possibly due to the assumption that it is limited to procurements featuring R&D or technology).

10.3 However, in theory, the procedure could also be developed for use in complex construction projects.

10.4 Through "two-stage tendering"[1], a construction partner is appointed on the basis of a contract for initial project management and design work and, only if that contract is considered successful, the parties later work up the second stage of the contract (including detailed design, risk apportionment, programme and detailed price) for the delivery of the actual works.

10.5 Contracting authorities are sometimes deterred from a two-stage tendering approach as the negotiation or progression of that second stage contract can often be some time after the contract award to the successful tenderer – this delay and subsequent negotiation/development of the solution can give rise to procurement risk on the basis that the terms of the delivery contract have not been tested in competition and/or vary substantially from the tendered opportunity.

[1] Where consultants and Tier 1 contractor selection on profit/fees/overheads and designs/other proposals (costed as appropriate) against Client brief and Project Budget. – see Mosey, "Collaborative Construction Procurement and Improved Value" Wiley Blackwell (2019)

10.6 Notwithstanding these risks, there are forms of contract (eg PPC2000) that allow for a contractualised and procedural progression from the initial appointment of the contractor to the finalisation of the (non-conditional) contract. Via a properly run process, the contracting authority can mitigate the risk of substantial change occurring during the contract development stage by ensuring that it has set out in the tender documents (that are then fed through to the contract) sufficient design and specification outputs, a price framework that underpins the subsequent development of prices, a contractual programme that obliges the parties to progress the project according to specified gateways, and (eg) other contractualised tools: risk register, performance management systems, design (and price) development process.

10.7 Nevertheless, there has been case law on this issue including *Henry Bros* (where it was considered that appointing a builder to a framework agreement on the basis of management fees alone was not satisfactory in evaluating the costs of the actual build - the actual build costs also have to be evaluated). Although not quite on point (as the case concerned the appointment to a framework rather than a contract) such decisions prompt contracting authorities to adopt a cautious approach and "gold-plate" their tender requirements. This approach undermines the efficacy and quality of award procedures for construction contracts.

10.8 The Innovation Partnership procedure can be one way of addressing this issue in a compliant manner (that is, it promotes innovative procurement, including in situations such as two stage tendering where a contracting authority cannot confirm the detailed design or price of the project until the first stage of the contract has been completed by the successful tenderer, and provides a solution).

10.9 As noted above, although the Green Paper removes the specific Innovation Partnership procedure as set out in regulation 31, it would be simple to set out clear construction-contract focussed guidance that takes contracting authorities through the Innovation Partnership process (under the label of the CFP) and links the key stages of the design and price development stages with the "intermediate targets" of the innovation partnership procedure and outlines how the client can use appropriate award criteria to secure the early appointment of the contractor and then move forward under contract to finalise the design, price and delivery details in a procurement-compliant manner.

11 Framework Agreements

11.1 An assumption under the Green Paper is that contracting authorities often use the wrong commercial purchasing tools in the wrong ways due to the rules themselves being too complex and procurement officers lacking the requisite skills and/or competence to implement the rules in a complaint manner.

11.2 In our experience, these assumptions do not underpin the reasons as to why contracting authorities in the construction and housing sectors use the wrong tools in the wrong ways. Instead, the issue (it seems to us) is that there is no commercial purchasing tool that can be considered entirely suitable/compliant for construction projects and complex works contracts. This is because the key areas of design, price, risk and timing, are necessarily project specific for individual construction projects and do not lend themselves to simplification or commoditisation.

11.3 It is very unlikely that these issues can be provided for under the original terms of a framework/DPS or pre-set terms and conditions of call-off, as they are unique to each

project/site, and it seems to us that this issue needs to be addressed either through a construction specific framework agreement (more below), or through the early involvement of contractors (i.e. awarding a contract before you have a final price and design via a contractualised two-stage process, as discussed in section 2 above).

11.4 Potential solutions or "work-arounds" already present in the market-place, include:

11.4.1 In framework agreements, the "back-loading" into the mini-competition process, of the project-specific details explained above, so as to allow contracting authorities to hold project specific discussions with framework contractors around the key areas of design, pricing, timing and risk.

11.4.2 Allowing the establishment of a framework agreement which only provides a broad outline of the terms and conditions to apply to the call-off contracts, and to allow contracting authorities to include project specific amendments for projects.

11.4.3 Allowing pipelines of construction works to be procured pursuant to a contractual arrangement that includes more than one contractor. This has colloquially been called a "framework under a framework", but the use of an alliancing contract or form of two-stage contract can turn the arrangement into more of a strategic operating model rather than a framework agreement.

11.5 We understand that more detail will need to be provided in order to address potential risks and criticisms that, in practice, these "work arounds" may well offend the key tenet of framework agreements - that contracts awarded underneath the framework should not entail substantial modifications to the terms laid down in that framework agreements, but unless a degree of flexibility is introduced into the rules governing frameworks to recognise the complex nature of these contracts, the procurement approach adopted by construction clients over decades and the work arounds currently operating in the market, then the new rules will, themselves, be subject to "work arounds" moving forward..

11.6 A solution could be to legislate for a new type of framework agreement that applies to complex construction projects (and other, similarly affected, projects) which would allow contracting authorities the flexibility to hold the required negotiations/discussions with contractors at mini-competition, along with the agreement of bespoke terms and conditions etc., thereby enabling the transparent call-off of projects within the framework structure. This approach could be backed up by the requirement for a specific transparency notice to be published when awarding a call-off under such a framework agreement).

12 Modifications to public contracts during their term

12.1 We have asked whether there could be scope to introduce a new "safe harbour" within the rules for modifications to public contracts during their term (currently set out in regulation 72 of the Regulations). This would be for changes where the required modification has not been expressed in clear, precise and unequivocal terms, but given the long-term and complex risk nature of the construction project, would be in the contemplation of an experienced construction client and/or the market in general.

12.2 As examples, such modifications could be prompted by (eg):

12.2.1 the discovery of ground contamination on site that results in significant additional cost and time delay to the project;

12.2.2 the change in tenure, density of type of housing units to be constructed due to falling market-conditions;

12.2.3 the omission of civic facilities and housing from a scheme due to changing political emphasis and/or market conditions (as was the case in *Gottlieb v Winchester*).

12.3 It is fairly common fare for long-term construction projects (eg town –centre regenerations, large infrastructure projects, phased new-build housing projects, new towns etc.) to be modified across its term, given likely changing market-conditions and cycles. All of the bidders for that contract will expect to make changes to the contract that they sign up to, including substantial changes that (eg) require them to resubmit planning applications etc.

12.4 Nevertheless, the exact nature of required modifications are unlikely to be ascertained or foreseen at the time of tender and it is our experience that contracting authorities tend to take an overly cautious approach to the application of the existing safe-harbours.

12.5 For example, when looking at the availability of Regulation 72(1)(e) (the statutory codification of the *Pressetext* ruling as per Regulation 72(8)), they tend to adopt the approach of Lang J in *Gottlieb v Winchester*, who found that a claimant *"has to satisfy the Court, on the balance of probabilities, that a realistic hypothetical bidder would have applied for the contract, had it been advertised, but he is not required to identify actual potential bidders"* (at [69]) RATHER than the codified test that a bidder "would" have applied (the slightly higher threshold as confirmed by the Court in *Edenred*). Further, the alternative and more relevant safe-harbour to these circumstances is often unavailable because of the value cap of 50% of the original value. (eg regulation 72(1)(c) which looks at amendments that are required as a result of unforeseen circumstances which a diligent contracting authority could not have foreseen (as long as the modification does not alter the overall nature of the contract, or cause an increase in price which exceeds 50% of the value of the original contract)).

12.6 The issue here is that, at the outset of a long term complex construction project, the developer and the contracting authority knows with some certainty that the contract will need to be amended at some point (given the complex nature and long-term duration of such projects). This raises an issue as, whilst the detail of the change is not foreseen at the time of tender, the fact that such a change is likely to be needed in a long term contract should/could/will have been anticipated at the outset.

12.7 In terms of casting a safe-harbour to address this type of change, the European Commission has previously given helpful consideration of this issue in its decision in the London Underground PPP case[2]. In that case, the Commission considered whether the modification of contract terms after the selection of the preferred bidder would have caused discrimination or unequal treatment. Of particular relevance, the Commission noted:

12.7.1 In this case, the principle of changes being made was known to all tenderers in advance (as these were notified through the procurement documents) – this is

[2] Decision N 264/2002

all the more important in connection with particularly complex tenders which are negotiated over a long period of time;

12.7.2 The changes in the contract in question did not change the scope and characteristics of the contract beyond what were contemplated by the procurement documents;

12.7.3 Complex infrastructure projects require a flexible approach, they are unusually innovative and complex, and it is compatible with the underlying legislation for contract details to be modified after the selection of preferred bidders without automatically vitiating the presumption that the final price is a market price;

12.7.4 **This point is further reinforced where the changes to the contracts are all factors which would have had an impact not only on the bids of the preferred bidders, but also on the bids of the non-preferred bidders if those bids had remained in the competition**; (our emphasis) and

12.7.5 In a complex and innovative infrastructure contract of this type it was reasonable to conclude a negotiation with a single preferred bidder was an unavoidable part of the process of finalising a market price for the contract.

12.8 It seems to us that an additional safe harbour could be proposed that assists construction clients and procurers of complex or long-term contracts along the lines of the highlighted text at 4.7.4 above (i.e. that the safe harbour applies to particularly complex and long term contracts, that the principle of change is acknowledge in the procurement documents, and the changes are such that the impact would have been the same if a different bidder had been identified as the preferred bidder).

13 Additional information and further discussion

We are happy to discuss the content of this note further. Please contact Rebecca Rees, Head of Public Procurement (rrees@trowers.com) or Stuart Brown, Associate in the Public Procurement Team (spbrown@trowers.com).

Trowers & Hamlins LLP

5 March 2021