

Procurement Bill - introduction

Rebecca Rees, Partner – Head of Public Procurement

10 June 2022

Public Procurement Reform: the context

- Brexit opportunity:

*"this country is being freed from many **bureaucratic** and **process-driven regulations** that stifled our country and businesses for many years"*

- *"The Bill will reform the UK's public procurement regime, making it **quicker, simpler, more transparent** and better able to meet the UK's needs, while remaining compliant with our international obligations"*

- *"It will introduce a new regime that is based on **value for money, competition and objective** criteria in decision-making"*

- *"It will create a **simpler and more flexible** commercial system that better meets our country's needs", and*

- *"it will more effectively **open up public procurement to new entrants** such as small businesses and social enterprises, so that they can compete for and win more public contracts"*

Lord True, second reading of the Procurement Bill (Wednesday 25 May 2022)

Government Reform: time-line

- Transforming Public Procurement: December 2020
- Consultation – over 600 replies
- Government Response: December 2021
- Procurement Bill included in Queen's Speech
- Published: 11th May 2022
- Introduced into the House of Lords: already had second reading- (25th May 2022)
- Due to take 9 months (ish) to make its way through Parliament/Regulations in parallel
- Receives Royal Assent: approx. March 2023
- 6 month "Go Live" period – L&D programme etc
- September 2023 – "in force"

Procurement Bill – simplified?

- 13 Parts
- 11 Schedules
- Secondary legislation to follow
- Statutory/non-statutory Guidance
- National Procurement Policy Statement
- Significant ***stylistic and linguistic*** differences in terminology
 - Post-Brexit reform
 - Government interpretation of current rules
 - Mistakes?
 - Brevity at the expense of clarity?
- Divergence from Scottish procurement system (and NI/Wales to a certain degree)

Procurement Bill – simplified?

- Only a partial view of the legislative framework
- Secondary legislation to follow:
 - Approx. 25 clauses in the Bill that reserve powers to "an appropriate authority" to make regulations for a wide range of further detail:
 - amend thresholds
 - Transparency requirements (form and content of notices)
- Will these be consulted upon?
- Currently some significant omissions:
 - Abnormally low tenders
 - E-procurement tools
 - Variant bids
 - Life-cycle costing
- National Procurement Policy Statement to be published again (updated: Covid-recovery?)

Some concluding thoughts

- Is the Procurement Bill transformational or just more of the same?
 - GPA as a base-line plus FTA obligations
 - A number of the benefits could have been achieved under the old rules:
 - Transparency/open contracting principles
 - SME access
 - MAT approach to evaluation
- Risk of creating further barriers to SMEs

Are we risking the creation of a democratic deficit in our future approach to public procurement?

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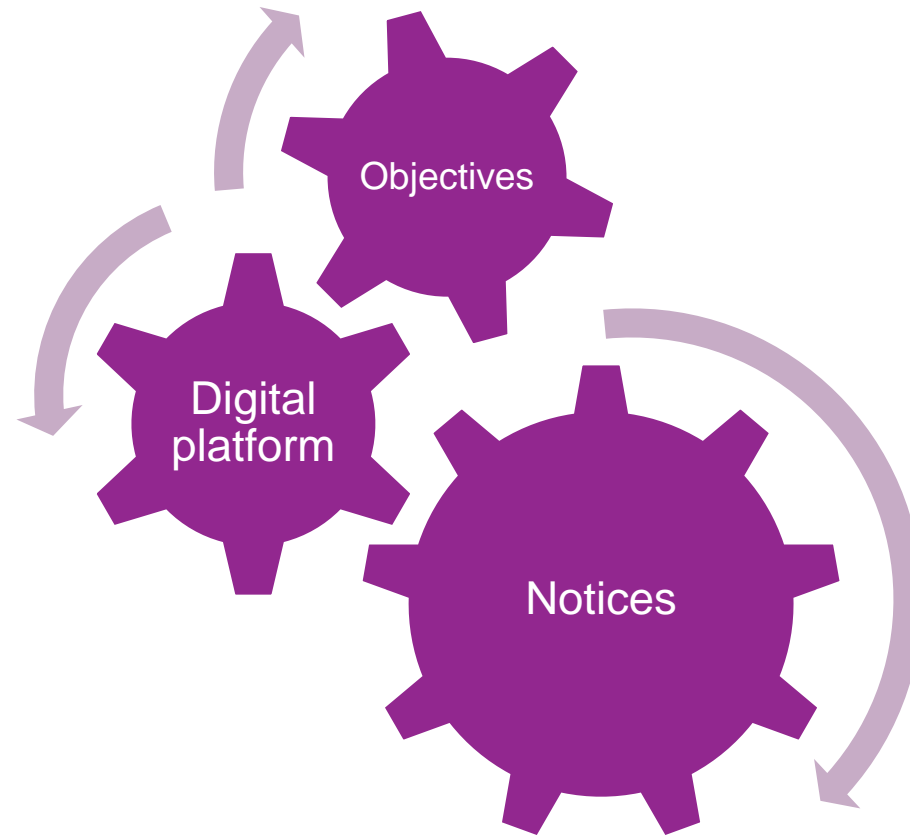
Transparency in the new procurement regime

Charlotte Clayson, Partner, Dispute Resolution and Litigation,
Commercial Litigation

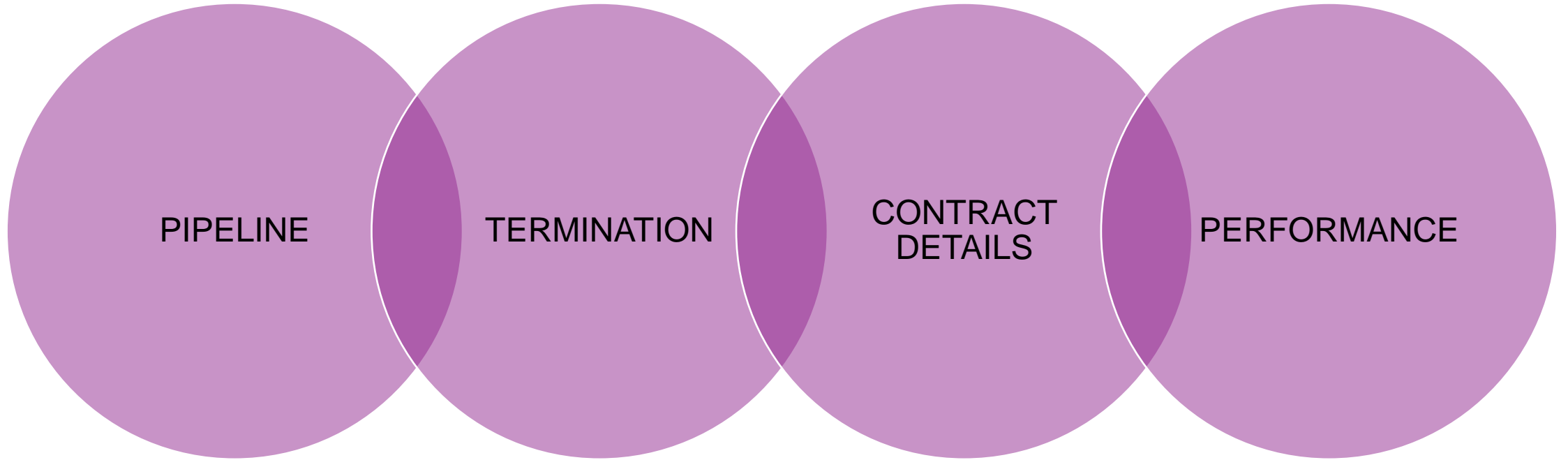
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“ We propose embedding transparency by default throughout the commercial lifecycle from planning through to procurement, contract award, performance and completion.”

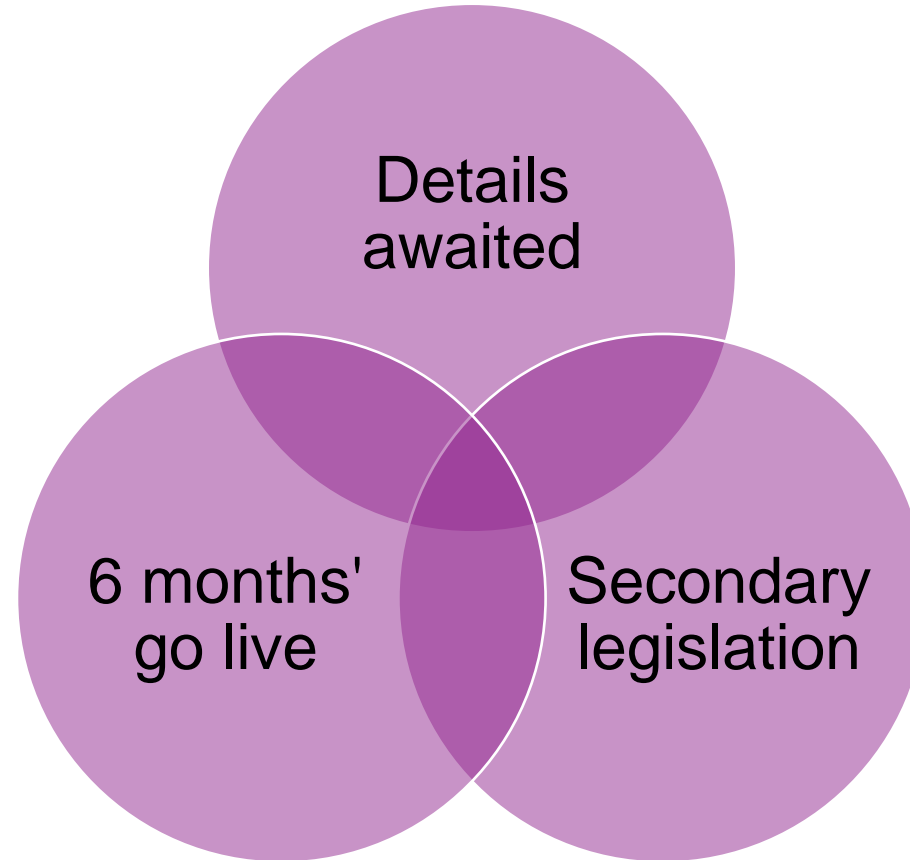
How will transparency be embedded?



Notices



What next?



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National Procurement Policy Statement

Louis Sebastian, Senior Associate, Corporate Commercial

10 June 2022

National Procurement Policy Statement

- Process – Section 12 of the Procurement Bill
 - Minister may publish statement of strategic priorities
 - Consultation before publication
 - Lay before Parliament
 - Comes into force after 40 days if Parliament does not reject it
 - Minister to keep NPPS under review
- Contracting authorities must "have regard" to the NPPS
- Does not apply to:
 - Private utilities
 - Framework or Dynamic Market call-offs
 - Devolved arrangements in Wales (section 13) or Northern Ireland

What is the NPPS?

- Trailed in the December 2020 Green Paper
- Procurement Policy Note 05/21 (effecting 3 June 2021)
- Sets out key priorities for public sector procurement
 - Social Value
 - Commercial and procurement delivery
 - Skills and capability for procurement

What is the NPPS?

- **Social Value**
 - Creating new businesses
 - Tackling climate change
 - Supplier diversity (SMEs, VCSEs, etc)
 - Local social value priorities
- **Commercial and procurement delivery**
 - Improving VFM through procurement best practice and contract management
 - Publishing procurement pipelines
 - Collaborative procurement
- **Skills and capability for procurement**
 - Internal skills for effective procurement
 - Benchmarking of procurement practice against comparable organisations
 - Increased use of suitable operating standards

Implications of Section 12

- **Puts the NPPS on a statutory footing**
 - Likely to be drawn into procurement challenges
 - Additional grounds for Judicial Review?
- **Additional workstreams**
 - Training
 - Benchmarking
 - Social value policies/monitoring

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Contract Modifications – Procurement Bill 2022

Amardeep Gill, Partner, Corporate Commercial

10 June 2022

The Current Landscape – Regulation 72

72(1)(a) – permits variations, regardless of value where the CA has provided for the scenario in the procurement in clear, precise and unequivocal review clauses subject to certain conditions.

72(1)(b) – allows for additional services, works for supplies by the original contractor where they were not included in the original procurement but it is not possible to make a change due to economic or technical reasons or such change would cause duplication of costs, subject to price not exceeding 50% of the original contract value.

72(1)(c) provides another means to alter the contract where the need for change was not foreseeable by the CA;

72(1)(d) deals with the replacement of the original contractor due to a merger or insolvency, subject to certain conditions;

72(1)(e) allows for modifications that are not substantial which is further delineated in Regulation 72(5) which allows for de minimis modifications of less than 10% of the original value for services/supplies and 15% for work and Regulation 72(8) which articulates what is deemed to be substantial.

Green Paper Proposals

Permit amendments to be made in cases of crisis or extreme emergency;

Reorder Regulation 72 to make it clearer;

Turning the Presetext limbs in Regulation 72(8) on their head;

Publish contract amendment notices, replacing the need for VEATs;

Standstill would apply to those contracts where an amendment notice is required except in the cases of crisis or extreme emergency;

Limit the amount payable under an existing contract that needed to be extended where a suspension arose.

The New Regime – Permitted Modifications

Non- Substantial Modifications

Below Threshold Modifications

Permitted Modifications in Schedule 8

Section 70 – Contract Change Notices

Section 71 – Voluntary Standstill

Section 72 – Implied Termination Rights

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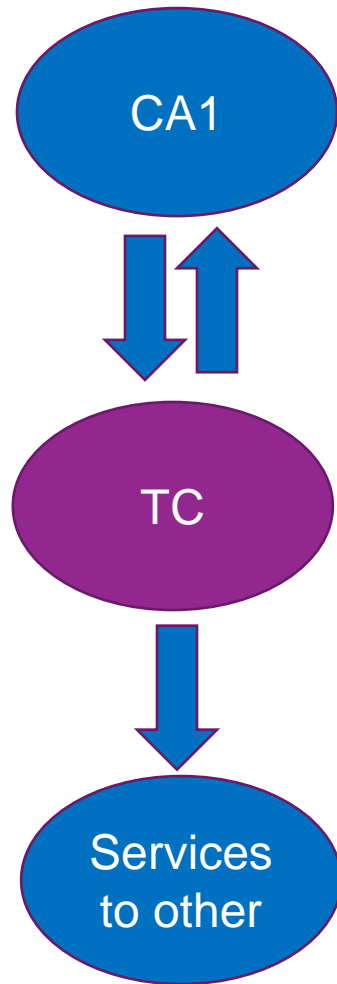
Shared Services and the "Teckal" exemption

Lucy Doran, Partner, Real Estate, Investment and Development

10 June 2022

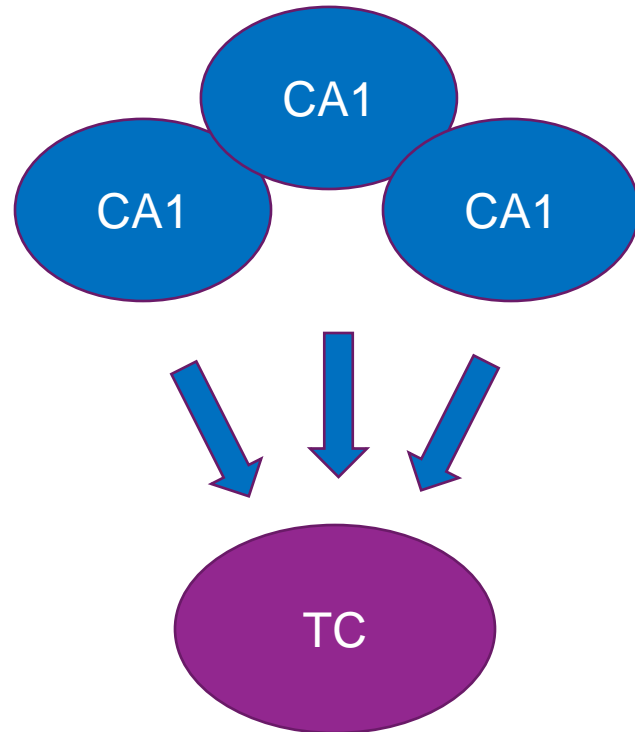
The Current Position

Teckal – basic model



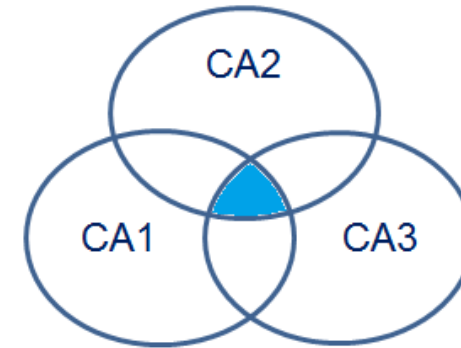
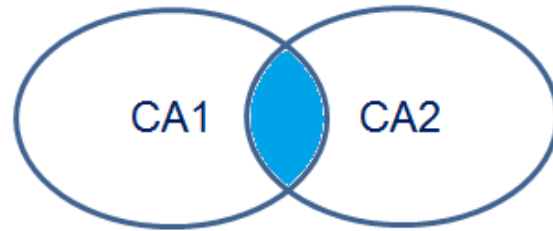
- In-house company established predominately to provide services to the contracting authority
- Must satisfy the following conditions:
 - CA1 exercises a “control” over Teckal entity similar to that which it exercises over its own departments
 - More than 80% of the activities of the Teckal entity must be for CA1
 - No direct private capital participation in the Teckal entity
- “Control” means exercising a decisive influence over both strategic objectives and significant decisions
- CA1 can provide services to Teckal entity without a procurement process

Teckal – joint control



- Joint control by two or more CAs
- Conditions must still be met but:
 - More than 80% of the activities of the TC can be across all of the CAs
 - Must demonstrate “joint control conditions”
- Joint control conditions
 - Decision making body of TC must be composed of representatives of all the participating CAs
 - The CAs jointly exert decisive influence over the strategic objectives and significant decisions of the TC
 - The TC does not pursue any interests which are contrary to those of the participating CAs

Shared services



- Often referred to as the “Hamburg Waste” exemption
- Contractual relationship
- Must meet the following conditions:
 - Must establish or implement cooperation with the aim of ensuring public services they have to perform are provided with a view to achieving common objectives
 - Governed solely by considerations relating to the public interest
 - The CAs perform on the open market less than 20% of the activities concerned

Position under the Procurement Bill

Teckal

- "Vertical arrangements"
- A contract between a contracting authority ("A") and –
 - (a) a controlled person in relation to A, (**Typical Teckal**)
 - (b) another contracting authority ("B") in relation to whom A is a controlled person (**Reverse Teckal**), or
 - (c) another controlled person in relation to B (**Sibling Teckal**)
- "controlled person"
 - Subsidiary undertaking within meaning of S1162 Companies Act 2006
 - No other person other than the authority exerts a decisive influence on the activities of the person (directly or indirectly)
 - No shares held directly other than a public authority; and
 - More than 80% of activities carried out for the contracting authority or other controlled persons
- **Where is joint Teckal??**

Shared Services

- "Horizontal Arrangement" means an arrangement -
 - (a) Entered into –
 - (1) with the aim of achieving objectives that the authorities have in common in connection with the exercise of their **public functions**;
 - (2) solely in the public interest;
 - (b) in which no more than 20 per cent of the activities contemplated by the arrangements are intended to be carried out other than for the purposes of the authorities' public functions
- What does "public functions" actually mean?

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Procurement Tools- What's changed

Katie Saunders, Partner, Projects and Construction

10 June 2022

Dynamic Markets

- New DPS
- No cap on numbers of suppliers
- Excluding suppliers
- Fees
- Notices

Framework Agreements

- " *contract between a contracting authority and one or more suppliers that provides for the future award of contracts by a contracting authority to the supplier/ suppliers*"
- Direct awards
- Mini competitions
- Fees
- Maximum Term 4 years unless longer term can be justified due to nature of goods/ services/works
- Excluded suppliers

Open Frameworks

- Ability to award successive frameworks
- At least 2 suppliers
- New award on substantially the same terms and take place once during first 3 years and then at least one further award in the next 5 years = 8 years
- No direct award of successive framework unless special case- ie overriding public interest
- Can re-admit existing suppliers onto the framework- different criteria apply depending on whether the number of suppliers is limited or not.

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Risk areas in relation to evaluation and award under the new regime

**Michael Rhode, Senior Associate, Dispute Resolution and
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10 June 2022

Risk areas in relation to evaluation and award under the new regime

- Transparency – note taking and recording decisions
- Best practice – as with current regime

Risk areas in relation to evaluation and award under the new regime

- Section 11 – Procurement objectives
 - Objectives not principles
- Section 18 – Award of public contracts following a competitive procedure
 - 'May' award
 - The most advantageous tender or MAT
- Section 22 – Award criteria
 - Assessment methodology
 - Relative importance of award criteria
- Section 23 – Refining award criteria
 - Amending award criteria after bidders have been disqualified

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Remedies under the Procurement Bill

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Pre-contractual remedies - Automatic Suspension

When will it apply?

- Before entry into / modification of contract
- Proceedings commenced and contracting authority notified

When will it not apply?

- Where contracting authority is notified after the end of the relevant standstill period
- In appeal proceedings

New test for lifting automatic suspension

- Replaces *American Cyanamid* test with a public interest test

Other pre-contractual remedies

Orders

- Setting aside decision or action in respect of contract award or modification
- Requiring contracting authority to take action

Damages

- No cap on damages

Post-contractual remedies - Set Aside

When will it apply

- After contract or contract modification has been entered into
- Set aside conditions in section 94 are met
- Claimant is denied proper opportunity to seek pre-contractual remedies

When will it not apply

- Overriding public interest in not setting aside contract / modification
- Can take into account financial consequences of set aside but not costs of awarding another contract, delay or compliance with legal obligations

Other implications

- Set aside prospective only
- Damages but no provision for penalties

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Risk management under the new Regime

Dan Butler, Partner, Dispute Resolution and Litigation, Commercial Litigation

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Pressure points for Contracting Authorities

ES Evening Standard

Rishi Sunak warns next months of cost of living crisis 'will be tough'

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The Independent

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UK acted unlawfully in appointing Dido Harding to key Covid role, judges rule

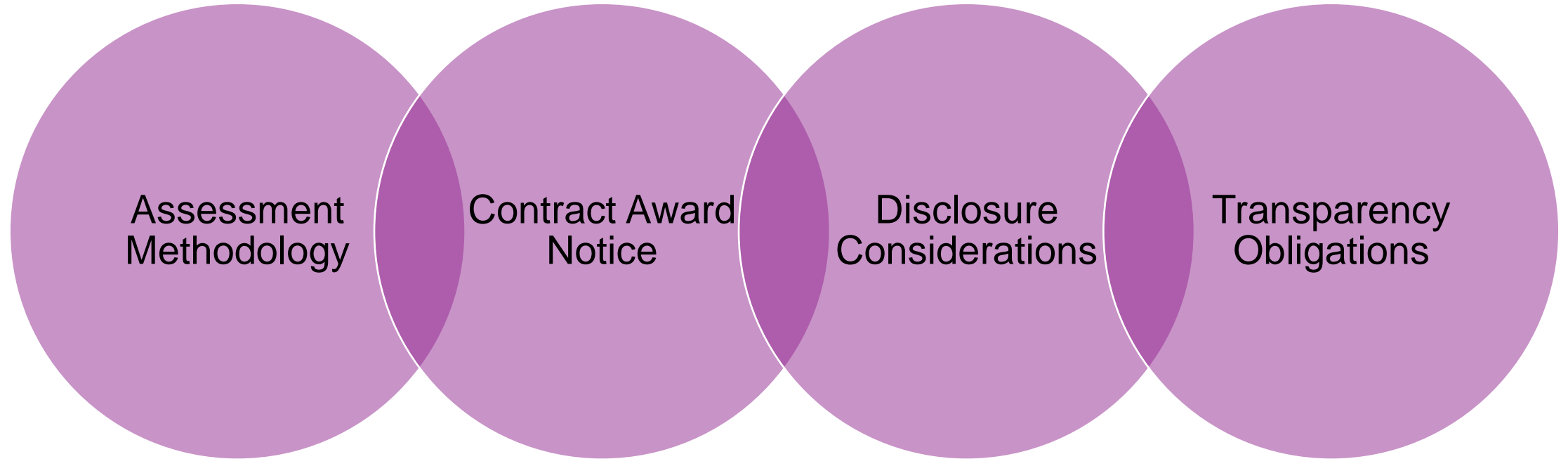
High Court finds government broke equality laws during coronavirus response

Crowdfund launched as Shrewsbury campaigners take fight to Supreme Court

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Will there be more Procurement Challenges?



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