dated 30 January 2023

Trowers & Hamlins LLP

Submission of written evidence to the Public Bill Committee in relation to the Procurement Bill

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1 Introduction: Trowers & Hamlins LLP

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 legislative and 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 evidence has been informed by the feedback and comment from those events. Unless otherwise attributed, the views expressed in this evidence should, however, be considered as our own.

2 Executive Summary

2.1 Public procurement is an extremely complex process. With this in mind, the Procurement Bill needs to cover the spectrum of different public sector purchasers, procuring anything from windows to hospitals to missile systems. Transforming how we undertake procurement in England is ambitious and ultimately constrained by our membership of the World Trade Organisation's Agreement on Government Procurement and the UK-EU Trade and Co-operation Agreement. Transformation also depends on the capability and capacity of procurement professionals within the public sector and this is generally seen to need to be improved.

2.2 The Procurement Bill is technically complex and detailed. It will also be supported by secondary legislation; as well as statutory and non-statutory guidance. At present, we therefore have an incomplete legislative landscape. This is problematic for two reasons:

2.2.1 A significant amount of the transparency regime will be brought forward under secondary legislation. Contracting authorities are unable to ascertain the costs and resource required to implement these obligations and the overall efficacy of the transparency aspirations cannot be confirmed until the relevant secondary legislation is published.

2.2.2 There are a number of provisions under the current Public Contracts Regulations 2015 that procurement professionals rely upon on a day-to-day basis (for example, abnormally low tender provisions, rules around means of proof and evidence for compliance with selection criteria). It is unclear as to whether these will be addressed in secondary legislation or guidance. Their absence will create uncertainty and confusion unless clearly addressed in the new legislative regime.

This will lead to additional cost (for repetitive legal advice) and/or a more risk-averse approach being taken by procurement professionals. Clear provision and/or guidance should be provided on which elements of the current legislation are not being taken forward into the new legislative regime.

2.3 The language and terminology of the Procurement Bill is significantly different from the copy-out approach of the (European Directive-derived) Public Contracts Regulations 2015. We appreciate that this must be the case given that the new Procurement Bill is now subject to all the relevant statutory drafting conventions. Nevertheless, some provisions in the Procurement Bill (for example clause 72) are particularly difficult to read and understand. In the absence of accompanying guidance, it is likely that the Bill will cause uncertainty and confusion (particularly in the short term once in force) and that procurement professionals will adopt a more risk-averse approach to interpreting its provisions.

2.4 The transparency agenda is welcomed, but we are concerned that the expense required to put this into practice may outweigh the anticipated benefits, particularly to Small and Medium Enterprises (SMEs) and new bidders in the public sector.

2.5 In our view, policy considerations should not be included in the text of the Bill. "Horizontal" or "secondary" policies such as net zero and social value should be confined to the National Procurement Policy Statement. This will ensure the dynamism of procurement policy and allow the Procurement Bill to remain relevant to the entire public sector, whatever it is procuring.

2.6 The increased emphasis on flexibility under the Bill needs to be put in tension with an effective enforcement regime in order to avoid facilitating (intentionally or otherwise) poor or discriminatory procurement practices and decisions by contracting authorities. The failure to push forward court reforms and the current/developing jurisprudence of the Courts may well impact on compliance levels and bidder confidence in the entire post-Brexit procurement system. For example, the recent decision in *Braceurself* (which we now understand is being appealed) held that the contracting authority had breached the procurement rules and that breach had deprived the bidder of winning the contract. Notwithstanding, the court declined to award damages to the aggrieved bidder.

2.7 In our view, the Procurement Reform Unit, with its current level of investment and staffing is unlikely to provide sufficient oversight or output to guide and/or improve procurement behaviours across the public sector.

2.8 Opportunities to improve procurement practice by legislating against the most harmful evaluation model (which prioritises lowest price over quality, regardless of weightings) have not been incorporated into the Procurement Bill. Given the public sector's heavy reliance on lowest price tendering (whether combined with a quality score or not), it is likely that a compliant procurement process will still result in poor value for money for the public sector.

3 Context of evidence

3.1 It is important to state from the outset that awarding public contracts under the current regulatory regime is extremely complex. First, both public and private interests are involved; and second, interests aimed at the national and local level differ, including those on a regional and devolved basis. Further complexities arise as public authorities seek to purchase goods, works and services on the basis of the "most advantageous tender", while also considering horizontal policy objectives such as achieving net zero and social value.

These horizontal objectives are extremely varied and will often conflict with each other at a local/national level but also within a public authority's own delivery programme. If horizontal objectives are included in an ambitious change or transformation agenda, this is likely to add a significant amount of cost into the contract.

3.2 Given this complexity, it is understandable that the Government wants to provide as much *flexibility* and *simplicity* within the new legislative structure. The Transforming Public Procurement policy objectives appear to have been drafted to reduce the complexity of procurement exercises by trying to simplify the regulatory regime: hence slogans of *"bonfires of red-tape"* and "*unleash the potential of public procurement".* It is evident from the Procurement Bill that the new regime strips back the number of rules and increases the margin of discretion within which procurement professionals are free to craft and conduct a procurement procedure. However, this approach is likely to create further issues:

3.2.1 "Procurement done properly" relies, more than ever under the Procurement Bill, on the capacity and capability of the procurement professionals purchasing the works, services and supplies; and

3.2.2 The procurement process can be run in a *legally compliant* manner but ultimately fails to produce the desired result or the *Most Advantageous Tender*. There are numerous examples of UK procurement decisions where wrong choices have been made and the best tender has not been selected (ferry contracts, cladding contracts, ongoing awards to Carillion, and numerous less high-profile cases). In our view, there are a number of examples where the new legislation could be amended within the scope of the GPA, that would effectively "pierce" the margin of discretion possessed by a contracting authority and improve procurement outcomes for the public purse.

3.2.3 The evaluation and selection of winners and losers is crucial and the most litigated stage in a procurement process. The Procurement Bill provides little guidance on the evaluation of contracts, with further guidance still to be produced. The clear steer provided by the current legislation (e.g., provision for life cycle costing, examples of award criteria that can be adopted) have been removed from the text of the Procurement Bill. In our view, these provisions should be reinstated, and further guidance on evaluation should be incorporated into the Bill. Further, legislative provisions that could have been adopted (which would prohibit the use of the most harmful price evaluation models for contracts that focus on quality and safety) to prevent such catastrophic failures such as the collapse of Carillion and the Grenfell Tower fire, have been rejected during the Bill's reading in the other place.

3.3 Finally, the Procurement Bill has been drafted and championed on the basis that *daylight is the best disinfectant*, with transparency being highlighted as one of the key objectives underpinning the legislation. The assumption is that procurement practice will improve if procurement professionals know from the outset that all of their procurement documents and decisions are to be published via a central electronic platform and subsequently scoured and scrutinised by disappointed bidders. Whether transparency is the best vehicle for efficacy and compliance is commented upon below.

3.4 Our evidence includes commentary on a number of the Bill's clauses (at section 8) but otherwise confines itself to general principles enshrined in (or absent from) the Bill.

4 Policy considerations in the Procurement Bill

4.1 We are aware that, as the Bill has made its way through the other place, a substantial amount of discussion and lobbying has been focussed on the requirement to recognise net zero, social value and ethical outcomes/inputs and criteria on the face of the Procurement Bill. In our view, this should be avoided, if at all possible.

4.2 We acknowledge that procurement will always be used to advance national industry and interests. Nevertheless, having streamlined numerous legal regimes into one set of legislation, the Procurement Bill now covers the entire public sector: from large central governments with immense annual budgets, to the smallest charitable housing associations and district councils, as well as universities and NHS Trusts. The social value or net zero carbon requirements of one authority may therefore not be the same as or bear any relation to the requirements of other contracting authorities – for example, the social value requirements of a local authority is likely to be more place-based than that of the Ministries of Justice or Defence. To that end, flexibility and overall efficacy of the legislative framework should be preserved by retaining a clear separation between *policy* and *law.*

4.3 Post-Brexit, procurement policy resides within the National Procurement Policy Statement and Procurement Policy Notes. This is not only because of the breadth of policy and contracting authorities the relevant provisions need to cover, but also because policy around (eg) social value, net zero targets, recovery from Covid-19 is likely to change with any subsequent changes of Government. Changes within the current government administration have also resulted in policy changes – for example, the emphasis on "social value" changed to "value for money competition", which subsequently changed to "economic growth". To this end, secondary legislation or guidance allows such policy aims to develop over time and be amended without the procedural hurdles that any change to the Procurement Act will require.

4.4 To conclude, the Procurement Bill should be seen as the legal framework as to how procurements are carried out and should be value- and policy-neutral to the greatest extent possible. In contrast, the key ("horizontal" or "secondary" or "policy") aims, outcomes and outputs to be achieved through procurement should be confined to the more flexible National Procurement Policy Statement and guidance. In our view, there is no risk that such objectives will be ignored or forgotten if allocated "soft law" status. If anything, they are more likely to be dynamically developed and incorporated into individual procurements if they are explained in helpful guidance and templates.

5 Transparency and enforcement

5.1 The burden of transparency versus its benefit

5.1.1 As noted in section 2, one of the Procurement Bill's aims is to increase and improve the transparency of procurement procedures and decisions. We understand that the transparency ambitions of the Government are such that key information across the entire life-cycle of a contract will be published on a central digital platform. Even if confined to larger contracts, the amount of information is likely to be significant. Most of the transparency obligations are likely to be included in secondary legislation which has not been published for consultation.

5.1.2 The proposed transparency agenda will add a significant amount of cost and resource into the procurement process, with no corresponding evidence that this

will lead to better procurement habits, or more effective enforcement. As an example of the increased burden: currently there are two notices per procurement that are compulsory: the Contract Notice and the Contract Award Notice. This will increase, as a minimum, to 4 or 5 notices per procurement under the new regime. This does not seem, on its own, to be significant, but we have been informed by clients that the overall transparency agenda will require at least one additional procurement assistant to be employed simply to comply with the enhanced obligations. This will therefore add significantly to the administration burden and cost of a procurement process.

5.1.3 The proposals will result in a significant amount of information and data being uploaded into the public sphere. The perusal and analysis of this data is likely to be confined to professional transparency organisations, aggrieved bidders and politically motivated third parties with an axe to grind. By contrast, smaller organisations such as SMEs are unlikely to have the resources required to review this information. The amount of information that each contracting authority is obliged to upload is also, for the ordinary bidder, likely to *reduce* visibility: is the SME bidder trying to find a single piece of information likely to be able to find it – or will it not be able to see "the wood for the trees"?

5.2 Effective enforcement

5.2.1 Finally, it is our experience that the best disinfectant in terms of procurement compliance is not sunlight, but the threat of swift and effective enforcement via judicial challenge. This was also recognised by the UK Government in its Transforming Public Procurement Green Paper, where it indicated that the current court procedures would be updated and improved to ensure that procurement cases could be heard within an expedited timescale, saving time and money. However, as the required court reforms (supported by 100% of the clients we surveyed and interviewed post Green Paper) have not yet been implemented, this means that the new regime will be missing one of its key processes for ensuring effective enforcement. Further, with most procurement lawyers supporting the idea of a Procurement Tribunal (which would speed up the resolution of procurement claims and reduce the legal costs involved significantly), a key procedural aspect aimed at ensuring that procurement exercises comply with the rules, is absent from the current reforms .

5.2.2 When considered in light of the recent procurement decisions handed down by the Courts of England and Wales, the lack of court reform and an effective Procurement Tribunal moving forward may risk reducing the deterrent effect of a procurement challenge for contracting authorities and / or achieve the anticipated time and costs savings. For example, in the recent case of *Braceurself,* the Court lifted the automatic suspension, held that there was a breach of the Public Contracts Regulations 2015 and agreed that the breach had led to the claimant not winning the contract, but then declined to award damages, leaving the claimant without a remedy. Whilst successful overall, the contracting authority had to defend its process involving significant time and cost. For the bidder, it would also have benefitted from a swifter process. *Braceurself* might be an extreme example but nevertheless demonstrates how a lengthy court process favours neither side ultimately, irrespective of the outcome.

5.2.3 Finally, the Procurement Review Unit and its role in improving the procurement landscape appears to be understaffed and under-resourced. We understand that the number of civil servants presently allocated to undertake the role of the PRU is likely to number 11. This level of investment in a body designed to scrutinise, guide and potentially chastise will need more effective resourcing to meet its remit and avoid accusation of political favouritism or ineffectiveness. Many procurement practitioners want the PRU to act as a procurement tribunal: addressing poor procurement on an individual and impactful manner. However, this won't be possible unless the PRU is more heavily invested in and its scope/remit is set at its widest possible extent.

5.3 To conclude, the assumption of the Procurement Bill seems to be that transparency will ensure compliance with the procurement rules and produce good procurement decisions: this is by no means guaranteed.

6 Evaluation models

6.1 As noted above at section 2, a compliant tender may still produce a less than desirable, or even, an irrational result that does not fulfil the contracting authority's requirements and cannot, therefore, be described as the Most Advantageous Tender. Any procurement professional will be able to provide their own examples of where such results have befallen their professional career. It is not uncommon.

6.2 One of the most common issues that produces results different from what a contracting authority would expect is the *crafting of scoring rules*. The current procurement regulations only provide that the relative weight of each of the award criteria (and sub-criteria, where appropriate) is declared and remains unchanged during the entire procedure. Nevertheless, the current rules, the proposed provisions in the Procurement Bill and case-law only concentrate on transparency principles and confirm that as long as the contracting authority has communicated such rules to the bidders, the procurement rules have been satisfied.

6.3 In practice: this is a nonsense. *How* the evaluation criteria are applied will always spell out who wins and who loses: the scoring methodology gives meaning to the award criteria.

6.4 The Procurement Bill provides that a contracting authority must transparently declare its evaluation methodologies. However, there is no rule that places contracting authorities under an obligation to adopt a scoring methodology that allows bidders to fully understand how their bids will be assessed. For example, over 90 % of all tenders in the UK are awarded based on a relative price evaluation model.

6.5 An example of such a price evaluation method is where the lowest price submitted is allocated maximum points. All of the other (more expensive) tenders are allocated e.g. pro-rated points: reflective of how far the prices are from the lowest one. However, this creates a bidding scenario where because maximum points are allocated to the (as yet unknown) lowest price, bidders do not know before submitting their bid how their price will be scored.

6.6 This means they are unable to ascertain which of their bidding possibilities will represent the best value for money and therefore receive the highest score. Subsequently, the outcome of any procurement procedure adopting a relative model (be it for price or quality) depends on a coincidence rather than a carefully submitted tender based on the declared award criteria.

6.7 Most contracting authorities would view the adoption of such a relative price evaluation model as allowing them to achieve the required level of quality for the minimum price. This is a complete fiction. Research has shown that, with particular focus on the UK construction sector, the relative price evaluation model provides a set of rules to bidders that creates a *race to the bottom*. In other words, bidders are encouraged to submit a price that they think will win the contract (rather than what they actually need to deliver the contracting authority's requirements). Bidders tend to be cynical about playing by these rules, and rarely expect to deliver the contracted works, services and supplies for the tender price submitted. Incomplete client specifications, client variations and poorly managed contracts allow them to make this assumption. In practice, and particularly with the recent emphasis on social value and added sustainability requirements, the public sector is simply asking for *more* and expected it to be delivered at the *lowest price*.

6.8 Moreover, the use of relative price scoring by a contracting authority:

6.8.1 will often provide an unintentional price preference in an evaluation methodology that ostensibly favours quality. Research has shown that even where a contracting authority provides a quality/price weighting split of 60% quality and 40% price – the lowest price is still likely to win. Accordingly, the weightings split between price and quality is rarely determinative unless significant – and yet that is what most procurement professionals concentrate on and use as justification that they are awarding a quality-based tender. The scoring rules behind the weightings are more important and yet this is rarely grasped by procurement professionals.

6.8.2 marks the public sector as a client who does not know the price of what it wants, nor how important it considers particular differences in performance or price. Instead, it leaves it to the coincidental differences put forward by the bidders and absolutely highlights the inability of a public sector client to complete its core task: to define its needs clearly and in an absolute manner; and

6.8.3 puts an entire process at risk from a cover price or other uncompetitive tender. The introduction of such a bid can subsequently change the identity of the winning bid.

6.9 It is primarily for these reasons that the use of relative scoring methods is prohibited by law in Portugal and generally described as "a nonsense" by academics expert in this area (such as Jan Telgen and Elisabetta Manunza at the University of Twente).

6.10 When Amendment 131, designed to prohibit the use of these evaluation models under the new Procurement Bill, was presented in the other place, Baroness Scott of Bybrook rejected it, noting that such an amendment would:

> *prohibit contracting authorities applying relative assessment methodologies for price, [costs or value-for-money award criteria], with the aim of preventing race to the bottom behaviour by suppliers and helping contracting authorities achieve safe, quality and value-for-money outcomes.*
>
> *The objective of the Bill is to make public procurement more flexible for contracting authorities and suppliers, not less. In deciding how to assess tenders, contracting authorities must be able to determine what is*

important to them and the best means of assessing this, in some cases, price may be more important than others and, in particular, price assessment methodologies may be more appropriate in certain circumstances. I must also stress that contracting authorities will be very aware of the need for safe outcomes and that those cannot be compromised. To reiterate we will publish guidance on assessment to help contracting authorities decide how best to assess tenders.

6.11 Relative price evaluation models would only be prohibited for price (not cost or value for money criteria). The disappointing observation is that while some contracting authorities may be able to determine what is important to them, they find it difficult to adopt any other price evaluation model than the standard relative one, due to a number of reasons, including: fear of judicial challenge and being seen to not choose the lowest price or chase savings (by cabinet members/budget holders) and therefore adopt a relative price evaluation model in order to secure aspirational delivery requirements at a bargain-basement price. This is rarely a value for money result and rarely what is delivered. Sometimes such procurement decisions cost lives.

6.12 In our view, the inclusion in the Procurement Bill of a legislative prohibition against such models would fetter a contracting authority's choice but not to the detriment of general free market principles. In any event, this would improve value for money outcomes of the individual procurements for both the contracting authority and the public purse overall.

6.13 As an alternative, guidance needs to be publicised, specific and clear. The current Construction and Sourcing Playbooks Bid Evaluation Guidance warns against using a relative price evaluation model and requires central government procurement and commercial leads to provide reasons as to why it should be adopted for a particular procurement. However, the current guidance does not provide reasoned explanations, case studies or worked examples of why relative price evaluation models should not be used. It appears that the current guidance is not understood by the professionals that are asked to use it.

7 Private Sector Frameworks

7.1 Clearly, under Regulation 11 of the current Public Contracts Regulations 2015, any Central Purchasing Body (eg an organisation in the business of carrying out procurement for or on behalf of or for the purpose of the supply of goods, works and services or works, to other contracting authorities) needs to be a contracting authority. This provision has been carried forward into the new regime pursuant to clause 1(4) of the Procurement Bill. Nevertheless, this requirement (of "contracting authority status") has not prevented a number of private sector companies and private individuals approaching “tame” contracting authorities and using them to sponsor their setting up of frameworks and DPS that the public sector can access (usually in return for a fee or other income). This means that although the frameworks are ostensibly procured in the name of the contracting authority, they are managed and exploited by the private sector company.

7.2 Under frameworks let by these private sector companies, revenue/profit is generated by the private sector company either through one, some or all of the following:

7.2.1 “Pay to play” income from contractors appointed to the framework; and/or

7.2.2 Rebate payable by contractors per call-off contract won; and/or

7.2.3 Access fees from public sector clients.

7.3 The income can often be significant and results in a significant margin (sometimes of 10-15% being added on top of the cost of the works, services and supplies being delivered). This additional cost will eventually be borne by the framework user (through paying direct fees or an additional level of overhead on the contract awarded).

7.4 There is significant objection to these private sector frameworks operating in the public sector, primarily that the income/profit generated is then in the hands of the private sector, rather than retained in the public sector, notwithstanding that this is an entirely public sector-generated and -realised opportunity.

7.5 The Green Paper proposals addressed the symptoms rather than the cause by simply requiring the transparent declaration of the fees and the obligation that all profit should be put towards the public good. Three points arise:

7.5.1 the Procurement Bill does not incorporate either of these requirements (eg that the profits are put towards the public good or transparently declared).

7.5.2 In any event, the transparency arrangements re fees will not prevent the imposition of fees/rebates etc. and is unlikely to shame any framework providers into reducing them. In fact, we already are aware of some private sector frameworks shifting sums payable to other areas of the frameworks so that they do not have to declare them on any incoming transparency platform.

7.5.3 Further, the requirement to apply profits to the public good could also be avoided (or seemingly complied with) by ensuring that additional costs are claimed by the directors of the private sector companies to reduce "profits" to nil etc.

7.6 It seems to us that, to address the cause rather than the symptoms, it may be more advisable to look at section 1(4) and consider twinning that with the "Teckal exemption" – now incorporated into the Procurement Act as "excluded vertical arrangements" under Schedule 2, section 1(2) and (3) - in that the “tame” or sponsoring client contracting authority needs to exercise the requisite amount of control over the centralised purchasing body and there is no private participation in the shares of the centralised purchasing body.

7.7 The application of the *vertical arrangements* test or similar would help retain the centralised purchasing authorities, their activities and the income/profits within the public sector and hopefully control/reduce the relevant fees and charges and therefore the overall cost of public works, services and supplies.

8 Specific provisions of the Bill

8.1 Ending the standstill period on a non-working day

8.2 A minor point is when the mandatory standstill period will end, following the notification to all bidders of the contract award. Under the current rules, Regulation 2(4) (Definitions) helpfully notes that "where a period of time would (but for this provision) have ended on a day which is not a working day, the period is to end at the end of the next working day".

8.3 This is very useful provision for procurement practitioners and bidders alike: given that a contracting authority may enter into a contract once the standstill period has expired,

allowing the period to expire on a non-working day causes very practical problems for both clients, the successful bidder and unsuccessful bidders. This was the position before the provision was inserted – with clients and successful bidders seeking to defeat any challenges by entering into contracts on weekends and public holidays: hence why the clarificatory Regulation was included in the first place.

8.4 We understand that the Government is seeking to simplify and streamline the legislative framework, but in doing so it has removed provisions (such as current Regulation 2(4), Regulation 45 – variant tenders, Regulation 60 – means of proof, Regulation 68 – life cycle costing, Regulation 69 – abnormally low tenders) which are of considerable use and guidance to procurement practitioners. If these are to be replaced by statutory guidance, such guidance needs to be clear and precise.

8.5 **Estimated value of a public contract**

8.5.1 The definition of the "estimated value" of a public contract is an example of where a "brevity is best" approach to drafting may create unintended confusion. Under the current regime the contracting authority must estimate the value of a contract at the date the contracting authority would have sent the call for competition (above threshold) or commenced a procurement process for below threshold contracts (see regulation 6(7) of PCR 2015). The use of the words "for the time being" is problematic for the following reasons:

(a) it provides no definitive date that a contracting authority can identify as the relevant date for valuing a contract in order to ascertain whether it should be advertised or not; and

(b) For the purposes of schedule 8 and permitted modifications to existing contracts – the current regime uses the initial contract value as the starting point and this serves as a definitive, transparent and fair figure from which to apply any increase in value. Under current drafting this starting point is now the "estimated value" which is the value "for the time being" which provides no certainty as to what the appropriate date of estimation is and therefore whether a subsequent modification is therefore permitted.

8.6 **Consideration under a public contract**

8.6.1 Additionally, the value of a public contract pursuant to Schedule 3, paragraph 1 of the Procurement Bill is limited only to the amount the contracting authority could expect to pay under the contract. This significantly departs from the current position, where the value "shall be based on the **total amount payable**" (our emphasis). On our reading of the Procurement Bill, the value of a public contract only comprises the consideration to be paid by the contracting authority: it does not include any payments from third parties. This is likely to remove numerous contracts from the scope of the procurement regulations and significantly departs from the well-established principle under the current rules: see paras 45 to 57 of *Jean Auroux v Roanne,* in particular, paragraphs 53 and 54 set out:

53 Since the aim of the procedures for the award of public works contracts laid down in the Directive is precisely to guarantee to potential tenderers established in the European Community access to public contracts of interest to them, it

follows that whether the value of a contract reaches the threshold laid down in Article 6 of the Directive should be calculated from the tenderers' perspective.

54 It is clear, in that regard, that, if the value of a contract is constituted by revenue from both the contracting authority and from third parties, the interest of a potential tenderer in such a contract resides in its overall value.

8.6.2 Although this case concerned development agreements, it is a valuation scenario that is relevant across the public sector over a wide variety of different works, services and supplies contracts and is generally accepted as current UK practice in determining all contract values.

8.6.3 Key paragraphs from the OGC Information Note in respect of contract valuation are:

Paragraph 17 (ref. "The Auroux case"):

The operative part of the ECJ judgment made clear that:…

For the purposes of deciding whether a contract exceeds the works threshold, the total value ***from the point of view of the tenderer*** *is the relevant figure,* ***including any sums to be received from third parties****…*

Paragraph 20(i):

That the total value should be seen from the point of view of a supplier appears to be consistent with the underlying purpose of the public procurement rules, bearing in mind that the agreement as a whole comprised a public works contract.

8.6.4 Furthermore, the current drafting at Schedule 3, paragraph 1 does not address the value of a contract **jointly** procured by 2 or more contracting authorities as it simply refers to the maximum amount "it" (eg the individual contracting authority) has to pay under the relevant contract.

8.6.5 We submit that the consideration that should be taken into account when valuing a public contract should be the total value of the opportunity to the relevant marketplace, and this should not be limited to payments that are paid directly by an individual contracting authority. It should also include any third-party payments or other income due to the supplier as a result of the public contract in question.

8.7 Reporting requirements

8.7.1 We note that there is currently no equivalent to regulation 84 under the Public Contracts Regulations 2015 in the Procurement Bill.

8.7.2 Regulation 84 sets out a requirement for contracting authorities to draw up a written report for every public contract that they award (including framework agreements and dynamic purchasing systems, and certain call-off contracts). This is a useful document that creates an effective audit trail of a contracting

authority's decision-making process in respect of a procurement procedure, and we submit that a similar report should be retained under the Procurement Bill.

9 Minimum shortlisting requirements

9.1.1 We note that there is a general ability under clause 20(4) for contracting authorities to limit the numbers of participating suppliers (generally, or in respect of specific tendering rounds or other selection processes). However, there is currently an absence of any minimum numbers who may be shortlisted at specific stages (unlike, for example, regulation 65 of the Public Contracts Regulations 2015, which sets minimum numbers who may be shortlisted following a selection process to submit a tender / participate in dialogue, depending on the procedure that is currently being adopted).

9.1.2 We submit that such minimum shortlisting requirements are an appropriate and necessary feature of competitive tendering procedures for a number of reasons:

(a) they ensure competitive tension in the procurement process, ensuring that the contracting authority can be assured of better value for money in the tenders / proposals received (i.e. they ensure that there is sufficient competition in the process, and mitigate the risk of a participating supplier increasing prices / submitting lower quality proposals where they are aware of a limited pool of competitors);

(b) they safeguard against the risk of a participating supplier subsequently withdrawing from the process, and a contracting authority being left with only one alternative supplier in the process (again, removing competitive tension which can help ensure a value for money and high-quality final proposal); and

(c) they mitigate the risk of anti-competitive and/or collusive behaviours.

9.1.3 For the reasons above, we submit that it would be prudent for the Procurement Bill to include minimum shortlisting requirements and associated caveats, where appropriate.

9.2 Access fees for commercial purchasing tools

9.2.1 We note that the Procurement Bill does not bring forward the proposals from the Government's Green Paper on Public Procurement that fees charged for accessing both framework agreements and dynamic markets should be "proportionate" and "used solely in the public interest".

9.2.2 We submit that incorporating the Government's original proposals in this regard would go some way to ensuring the delivery of the various objectives in Clause 12 (particularly 12(b) re. maximising public benefit). See section 7 above.

10 Additional information

10.1 Please contact Rebecca Rees (Partner – Head of Public Procurement (rrees@trowers.com)) or Lucy James (Partner – Head of Commercial Litigation (ljames@trowers.com)) for further evidence, should this be required.