PROCUREMENT BILL

Submission of written evidence to the Public Bill Committee

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1. INTRODUCTION

1.1 The public procurement rules are key to many of our clients and we have been taking a keen interest in the proposed replacement of the Public Contracts Regulations 2015 ("PCR 2015") since the publication of the Transforming Public Procurement Green Paper.

1.2 We act for numerous contracting authorities, particularly in the local government and social housing sectors in the UK. These include local authorities, organisations that are subsidiaries of local authorities and registered providers of social housing. For these contracting authorities, it is important that no unnecessary barriers are put in the way of the efficient letting of contracts.

1.3 We also act for suppliers to contracting authorities in the leisure, hospitality, and health and social care sectors. For these suppliers, it is important that contracts are let in a way that is transparently fair and they are given a fair opportunity to challenge significant breaches of the public procurement rules, together with effective remedies where that challenge succeeds.

1.4 Since the Procurement Bill was published on 11 May 2022, we have been reviewing its content, including the Explanatory Notes that accompany it. And thee updated versions of these. We are monitoring the Bill's passage through Parliament. We submitted some commentary to the Public Procurement Reform Group as the Bill was being debated in the House of Lords in which we highlighted a few key observations arising from our review from a legal perspective. This was with the aim of informing the promoters of the Bill, the discussion of the House and assisting the legal analysis of the Bill's provisions. We are issuing this paper as an updated version of that commentary based on the latest version of the Bill. Our intention is to provide constructive and supportive criticism of the Bill to help iron out some of the practical and drafting issues that we have identified in our consideration of the Bill.

1.5 This paper has been prepared on behalf of Anthony Collins Solicitors LLP by Steven Brunning and Andrew Millross, both Partners who specialise in public procurement, with input from colleagues:

- Steven is a member of the Public Procurement Research Group at the University of Nottingham and is in the final stages of completing a PhD examining the application of the PCR 2015 to the set-up and operation of framework agreements.
- Andrew is the author of a practical guide to the EU procurement rules published by the National Housing Federation and several other NHF procurement and contract management books written specifically for the housing sector.

1.6 If there are any questions about this paper, please contact either Steven or Andrew as follows:

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1.7 We trust that you will find the feedback below helpful. We would be very happy to talk through our comments and provide further inputs if required. It is reassuring to see that the Bill is receiving significant scrutiny in the House and we remain hopeful that the issues below and those highlighted by other commentators will be addressed as the Bill progresses through the legislative process.

2. DEFINITION OF CONTRACTING AUTHORITY (CLAUSE 2)

2.1 The term 'contracting authority' is retained from the PCR 2015. However, the current definition of 'the state, regional or local authorities, bodies governed by public law or associations formed by one or more of them' is absent from Procurement Bill.

2.2 Instead, a contracting authority is now defined as a 'public authority' (other than in relation to utilities contracts) which itself is defined as a person that is:

(a) wholly or mainly funded out of public funds including the NHS, or

(b) subject to public authority oversight,

and does not operate on a commercial basis (subject to clause 2(9) of the Bill).

Clause 2(4) gives some examples of factors to be taken into account to determine whether a person operates "on a commercial basis". This appears to reflect some but not all the principles established in case law that currently apply when determining whether a contracting authority meets the definition of a "body governed by public law". It is noted that the list in clause 2(4) is not exclusive which creates some uncertainty. We can think of many other factors that might be used to argue that a person is operating on a commercial basis and therefore is not a regulated entity. We understand that the Government is keen to move away from EU-derived language and employ language that is distinctively different. However, we are concerned that the replacement of some terms such as "bodies governed by public law" (that have been subject to a significant amount of clarification through case law) with new ones with different definitions attached to them will create a lot of uncertainty for those trying to interpret their meaning. We hope that the guidance to be issued will clarify the application of these factors. The status of institutions such as universities is particularly problematic. Under the current law, universities generally need to assess whether they fall within the definition of a "contracting authority" at the beginning of each financial year by determining whether more than 50% of their funding derives from public financing.[1] The current regime is unsatisfactory as universities may fall in and out of the regulated environment from year to year. It is not clear whether a similar test will be

[1] Pursuant to C-380/98 R. v HM Treasury ex p. University of Cambridge

required under the new regime – we think this would be a missed opportunity to correct this unsatisfactory position.

2.3 Clause 2(3) defines 'public authority oversight' as when the person is subject to the management or control of one or more public authorities or a board more than half the members of which are appointed by one or more public authorities. What degree of "management or control" will suffice to demonstrate this oversight requirement and does this test differ from the "management supervision" test under PCR 2015? This will need to be clarified to avoid this point ending up in the courts for interpretation.

2.4 We understand from the Cabinet Office that there is no intention to alter the current coverage of contracting authorities from the PCR 2015. Unless more clarity is provided on key basic points such as the definition of a contracting authority, we are concerned that the Bill could generate more litigation for the courts to resolve rather than less. This could lead to creating both uncertainty for the public sector (with the consequent increase in legal costs) and a consequential strain on public sector resources in responding to challenges.

3. PROCUREMENT OBJECTIVES (CLAUSE 12)

Public benefit and social value

3.1 We note that various amendments were tabled by members of the House of Lords to this clause at the readings on 4, 6, 11 and 13 July 2022, wanting to clarify what was meant by 'public benefit' and to seek changes to the then clause 22 of the Procurement Bill regarding award criteria. The concept of social value (economic, social and environmental well-being, and, depending on preferences, cultural well-being and other varieties) was promoted by some as warranting explicit recognition, building on the ground-shifting (for England) Public Services (Social Value) Act 2012. Others, however, were of the view that explicit reference to maximising social value is unnecessary and would be duplicative on the basis that this is already embraced by reference to "maximising public benefit".

3.2 As one minister reflected, 'public benefit' is a well-established concept in charity law. But it is not a variation on a theme of social value and does not necessarily include social value. It is in fact relevant to the meaning of 'charitable purpose' which is the test that every charity must meet. 'Charitable purpose' means any purpose that falls within section 3(1) of the Charities Act 2011 and is for the public benefit (under section 4 of the same Act).

3.3 As set out in Charity Commission guidance on the key features of the 'benefit' and 'public' aspects, if a consistent approach to 'public benefit' is adopted, this will mean that for every procurement, a contracting authority will have to consider the following questions:

- Is the purpose of the procurement beneficial and how is this to be evidenced?
- Can it be established that the benefit of the procurement is not outweighed by any detriment or harm that it causes?

- Does the procurement benefit the public or a sufficient section of the public?
- Might the procurement give rise to more than an incidental personal benefit and, if so, how can the procurement be re-designed so this is not the case?
- Has regard been had to the importance of maximising the public benefit in carrying out the procurement?

3.4 If a contracting authority does not consider these items, it will have failed to take into account a relevant consideration. For a contracting authority that is subject to public law, this will be a factor in determining whether they have discharged their duty to act reasonably in accordance with *Wednesbury* principles. This could open up the risk of a judicial review challenge, as well as any potential challenge that may be available for a breach of the Procurement Act.

3.5 This compares unfavourably with the more straightforward position in Scotland, where the Public Contracts (Scotland) Regulations 2015 and sibling regulations are being retained. There, the radical and new duty to 'have regard to public benefit' will not exist. Instead, the relevant affirmation of 'social value' is principally to be found in regulation 67 relating to contract award criteria. In identifying the most economically advantageous tender based on the best price-quality ratio, the criteria linked to the subject matter of the contract may comprise or include:

- 'Quality, including technical merit, aesthetic and functional characteristic, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions'.

3.6 This identical to regulation 67(3)(a) of the existing Public Contracts Regulations 2015.

3.7 So, social value and innovation will still be explicitly referenced in the regulations being retained in Scotland, but replaced by the more nebulous concept of public benefit (with its charity law overtones in England).

3.8 The equivalent clause 23 (award criteria) of the Procurement Bill has no such clarity – it contains no reference to 'quality' let alone what might be the criteria for ascertaining 'quality', except possibly in the distinct arena of 'a light touch contract' (clause 23(6)). And certainly, there is no mention of 'social, environmental and innovative characteristics'.

3.9 So, far from clarifying that price, cost and other economic factors are not to be dominant considerations in public procurement under the Bill, the absence of the language that is retained in Scotland puts at risk the mandate to embrace social value, and indeed quality at all in the rest of the UK.

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3.10 We note the recent insertion of the requirement for a contracting authority, when carrying out a covered procurement, to:

(a) have regard to the fact that small and medium-sized enterprises may face particular barriers to participation, and

(b) consider whether such barriers can be removed or reduced.

3.11 This is a welcome addition but it is not clear how far this duty extends, particularly with regard to the removal of any barriers to SME participation that are identified. This is perhaps an example of where an express reference to applying the proportionality principle could be beneficial. A "duty to consider" can be difficult to enforce in practice. We suggest that this duty could be strengthened by specifying in more concrete terms what steps a contracting authority must undertake to satisfy thus duty. If this duty is not more clearly defined (either in the Bill or guidance), it will be difficult to enforce in practice and may not result in any changes to contracting authority behaviours.

National Procurement Policy Statement (Clause 13)

3.12 We note the new obligation on the Government, prior to publishing the National Procurement Policy Statement (NPPS), to have due regard to the principles of public good, value for money, transparency, integrity, fair treatment of suppliers and non-discrimination. These are familiar concepts some of which overlap the list of objectives that contracting authorities must have regard to when carrying out a covered procurement under the Bill. We note the NPPS must now also include certain strategic priorities including meeting climate change reduction and environmental targets, meeting requirements set out in the Public Services (Social Value) Act 2012, promoting innovation amongst suppliers and minimising fraud, waste or abuse of public money. However, a significant drawback to these additions is that the duty of contracting authorities to have regard to the NPPS is not enforceable under the Bill. Any claims in respect of perceived failures of contracting authorities to have regard to the NPPS would most probably need to be brought by way of judicial review therefore. The threat of judicial review may not be enough to drive better behaviours for contracting authorities in terms of applying the principles set out in the NPPS. Based on the existing NPPS, the NPPS is unlikely to be overly prescriptive and itself is likely to be couched in language relating to a duty to "have regard to" rather than containing any concrete obligations.

4. FRAMEWORKS (CLAUSES 44-47)

General Comments

4.1 The Green Paper consultation undertaken by the Cabinet Office did not consult in detail on the procedures and rules applicable to the set up and operation of framework agreements or the wider commercial issues being experienced in practice when using this commercial purchasing tool. Its focus was mainly on the Government's proposals to introduce a new 'open framework' option with multiple joining points and a maximum term of eight years.

4.2 Whilst not addressed in the Procurement Bill, the Green Paper and the Government's response has confirmed that a "central register of commercial tools" will be published which will include a list of frameworks. This is aimed at bringing greater transparency to the frameworks available to contracting authorities and reducing the current duplication of frameworks. Given the sheer volume of framework agreements

currently in operation and likely difficulties that will be encountered in determining which agreements actually meet the definition of a "framework" in the Bill, this may not be an easy task.

4.3 The Procurement Bill envisages allowing increased flexibilities to be incorporated into the call-off procedures under frameworks which speaks to a lot of existing commercial practice, some of which is problematic from a value for money perspective.

4.4 The Procurement Bill does not introduce any new obligations specific to CPBs in relation to the management and operation of frameworks not does it introduce any stronger provisions to address the problem of private sector frameworks that are currently in operation in the UK. Instead of introducing tighter regulation, the provisions currently found in Regulation 37 of the PCR 2015 which, among other things, set out, at least in principle, the division of responsibilities between contracting authorities when using a framework agreement set up by a CPB, are curiously absent.

4.5 Whilst the Green Paper consultation did not provide an opportunity for a detailed review of how the current rules on framework agreements are working, the framework provisions in the Bill represent a significant relaxation of the already skeletal set of rules in the PCR 2015 and do not appear to address the difficulties that contracting authorities are grappling with in practice. Given the lack of regulation over the activities of CPBs, there is also a real risk that the "buyer beware" culture that has developed amongst the framework user community in the UK will remain and even worsen in the future.

Definition of "Framework"

4.6 The definition of a "framework" is a 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 or suppliers. There are some significant conceptual differences between this definition and the definition of a "framework agreement" in the PCR 2015 particularly in respect of the absence of any wording relating to the "purpose" of a framework being "to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.". We have witnessed an increasing number of framework agreements in recent years failing to hold substantive competitions and meaningful evaluations of tenders at the point of setting up a framework agreement (particularly in relation to price). This trend looks set to continue under the new definition which can result in the establishment of closed markets under frameworks that allow direct awards without any substantive assessment of key award criteria at the appointment stage. Under the Procurement Bill, it will be permissible to set up a framework of suppliers where only a "pricing mechanism" is set out in the framework agreement.

4.7 In practice, we have also seen many frameworks set up recently that allow non-contracting authorities to access them. The PCR 2015 provide that the procedures for awarding call-off contracts under a framework agreement can only be applied "between those contracting authorities clearly identified for that purpose in the call for competition or the invitation to confirm interest and those economic operators party to the

framework agreement as concluded". Non-contracting authorities are therefore not permitted under the PCR 2015 to use framework agreements. Whilst the procurement activities of non-contracting authorities are not subject to the PCR 2015 and therefore are not at risk of any legal claims being brought under them, allowing non-contracting authorities to use a framework agreement raises several fundamental issues from a legal perspective. By opening up the use of a framework agreement in this way, it is unlikely that the estimated requirements of such non-contracting authorities are considered when calculating the estimated value of the framework agreement (as the contracts of non-contracting authorities are not governed by the PCR 2015 and therefore so do not need to be considered). The real value of the supplies or services to be procured through the framework agreement is therefore very unclear. As well as raising transparency issues, this has implications for applying the rules on aggregation and may also affect the way in which economic operators seeking a place on the framework agreement price their tenders. If a mix of contracting authorities and non-contracting authorities are permitted to use a framework in practice, this creates a regulated and non-regulated environment when using the same commercial purchasing tool. This may lead to poor behaviours and ultimately the abuse of the framework procedures as non-contracting authorities who would not need to comply with the PCR 2015 could adopt very flexible call-off methods which could impact on framework supplier behaviours when dealing with the contracting authorities using the framework agreement. The opening up of framework agreements to non-contracting authorities could also go some way to explain the high-level, ultra-flexible call-off procedures that are now incorporated in some framework agreements. Allowing non-contracting authorities access to a framework agreement that is closed and restricted to a small group of suppliers may also raise competition law issues and have wider distortive effects on the relevant market. The prospect of selective private sector organisations taking advantage of commercial purchasing tools set up and run using public funds may also be problematic from a subsidy control perspective.

4.8 Whilst the definition of a "framework" refers only to the future award of contracts "by a contracting authority" to the supplier or suppliers, for the above reasons, we consider it necessary to clarify that non-contracting authorities should not be able to use frameworks if indeed that is what is intended.

Award of "below threshold" contracts from frameworks

4.9 Under the PCR 2015, 'contracts based on a framework agreement' have to be awarded following the rules on frameworks in Regulation 33 irrespective of their financial value. This makes sense since, for aggregation purposes, a contracting authority is required to consider the maximum estimated value of 'all the contracts' envisaged over the term of the framework. Every call-off award is therefore regulated rather than just those individual call-offs that have a value above the relevant financial threshold for triggering the PCR 2015. Otherwise, a contracting authority could easily divide the call-offs into above and below-threshold contracts to avoid the application of the rules.

4.10 The Bill envisages a fundamental change to this position. The Explanatory Notes to the Bill clarify that whilst the definition of a 'framework' provides for the future award of 'contracts', the remainder of the provisions on frameworks only applies to the award of 'public contracts' under frameworks. This means that frameworks will be able to be used to procure below-threshold contracts without having to apply the rules in the Bill. Whilst this may seem like a welcome relaxation of the rules, the aggregation rules in the Bill still require the value of a framework to be based on the estimated values 'of all the contracts' that have or may be awarded in accordance with the framework. This seems somewhat illogical and may lead to some poor practices such as the deliberate disaggregation of contracts let under frameworks to fall beneath the radar of the rules. We are not convinced that the anti-avoidance provisions in the Bill will be strong enough to prevent this.

4.11 We believe that a better approach would be to retain the current position under which all contracts let through a framework have to be let in accordance with the rules for frameworks.

Framework value

4.12 The absence of the word 'maximum' when referring to the 'estimated value of the framework' in clause 45(5)(c) of the Procurement Bill is conspicuous. The information required to be included is generally framed in rather loose terms and indicates that more flexibility may be allowed under the new regime. If contracting authorities will be required to state the "maximum estimated value" of the framework then we think this should be an explicit requirement in the Bill.

4.13 The reference to a 'mechanism for determining the price payable' appears to acknowledge that determining 'price' at the set-up stage of a framework is a difficult task in practice. Clear guidance will be needed to explain what elements must be present in such pricing mechanisms. We anticipate that secondary legislation issued under the Bill will also need to clarify what information needs to be inserted in tender notices for framework agreements.

Supplier levy

4.14 The Bill clarifies that a framework may provide for the charging of fixed percentage fees to framework suppliers based on the estimated value of a call-off contract. In our response to the Green Paper we recommended preventing framework providers from charging these kinds of fees. The framework market in the UK has grown rapidly in the last few years which had led to the commercialisation of frameworks and dramatic variances in the percentage rebates charged by CPBs. The rebate model can result in behaviours that are not in keeping with ethical public sector purchasing as CPBs, including the Crown Commercial Service, are motivated to generate as much spend as possible through their frameworks to support their business models.

4.15 We recognise that a political choice has been taken to legitimise the charging of such fees and this is directly contrary to our views expressed in response to the Green Paper. However, the Government's response to the Green Paper consultation

indicated that any charges recovered should be 'proportionate and used solely in the public interest'. This condition has not made its way into the Bill. No reason has been provided for this.

4.16 If the charging of supplier fees is to be legitimated as proposed in the Bill, we would encourage the inclusion of this provision which the Government said in the Green Paper response it would include.

Single supplier frameworks

4.17 Unlike the PCR 2015, there are no specific rules about how to make call-offs under single supplier frameworks. We consider that the absence of such rules may lead to further abuses of the single-supplier framework model (e.g., the proliferation of "neutral vendor" frameworks that have emerged in recent years).

Direct awards

4.18 As for the conditions for making direct awards, it is no longer required to set out 'all the terms' in the framework, just the 'core terms'. The Explanatory Notes provide that 'core terms' mean key terms such as deliverables, standards, charges, pricing mechanisms, warranties, termination rights, etc. As for choosing which supplier to make a direct award to, the framework must set out an 'objective mechanism' for choosing the supplier.

4.19 Under the PCR 2015, contracting authorities need to apply 'objective conditions' to select a supplier. Whilst this may just reflect a change in language, it does seem to speak to commercial practice in the UK whereby a wide range of direct call-off 'mechanisms' such as online filtering tools have emerged and are being used widely (and often somewhat subjectively) to make direct call-offs. It is also not clear whether the use of such objective mechanisms will need to comply with the rules on 'award criteria'. It would be helpful if the Bill could address these areas of uncertainty rather than waiting for the courts to have to do so.

Mini-competitions

4.20 With regard to running mini-competitions under frameworks. the Government's response to the Green Paper stated that contracting authorities will need to evaluate the mini-competition on the same basis as was applied for the award of the framework, including the evaluation criteria, but that more detailed terms such as detailed sub-criteria within an existing criterion can be used if desired. We note the recent insertions in the Bill which mean that the permitted award criteria in a mini-competition will be limited to one or more of the award criteria used to award places on the framework, albeit those award criteria may be refined. This raises the question as to what is meant by 'refined'. The new drafting is unlikely to challenge the current practice of using very high-level award criteria (i.e. "price" and "quality") to appoint suppliers to a framework. The revised explanatory notes to the Bill simply provide that this 'prevents the use of new or different award criteria or substantially altered award criteria'.

4.21 We note the recent insertion of the provisions allowing "conditions of participation" to be applied at the call-off stage if the contracting authority is satisfied that the conditions are proportionate. It is not clear whether these conditions can differ from those that applied at the award of the framework itself however and if so, to what extent. We consider very clear guidance is required here to ensure that selection criteria is not applied at the call-off stage that could undermine the selection of suppliers that were appointed to the framework at the appointment stage.

Open frameworks

4.22 The new open framework regime actually provides less flexibility than is possible under Regulation 33 PCR 2015, due to the requirement that each framework iteration under an open framework has to be on 'substantially the same terms'. A series of frameworks under the current law would not be so restricted, as the terms of each framework could be updated each time a new framework is let. If the rules on open frameworks remain as currently drafted, we are not convinced that they will offer sufficient practical benefits over alternative options of a series of closed frameworks or a dynamic market. A better option would be to retain closed frameworks but permit a mechanism which allows new suppliers to be added to the existing framework suppliers. This would create genuine flexibility.

Liability for framework misuse

4.23 There is a provision in the PCR 2015 (Reg 37) which apportions liability for breaches between CPBs and contracting authorities using frameworks, depending on the stage of the procedure they conduct themselves.

4.24 The Bill does not include a similar provision to this. This risks user contracting authorities bearing all the risk of legal compliance when using frameworks.

5. AWARDING CONTRACTS USING A DYNAMIC MARKET AND FEES (CLAUSES 34 AND 38)

5.1 Under the PCR 2015, the first part of the restricted procedure is used to admit suppliers to a dynamic purchasing system. The award of contracts is through a modified version of the second part of the restricted procedure, involving the issue of an invitation to tender. All suppliers admitted to the DPS must be invited to submit a tender for a specific contract. However, this can be limited by reference to the categories of works, goods or services (if any) the suppliers have been pre-qualified for. The contract is awarded based on the award criteria set out in the original contract notice for the DPS.

5.2 A dynamic market as described in the Bill is conceptually different from this. The starting point is that a competitive tendering procedure (other than an open procedure) can be limited to suppliers that are members of a particular dynamic market (or part of one). The process for admitting suppliers to a dynamic market appears to be a standalone procedure that sits outside of any competitive procedure used to award a public contract. This is very different to how a DPS works under the current rules.

5.3 Before excluding a supplier's tender in a competitive tendering process run by reference to a dynamic market, the contracting authority must consider any application for membership of the relevant dynamic market (or relevant part of it) by that supplier. There is an exception to this for 'exceptional circumstances arising from the complexity of the particular procurement'. It is not clear whether the reference to the 'contracting authority' here is to the contracting authority conducting the procurement (who would be assessing tenders) or the one running the dynamic market and managing the application process for suppliers to join. How each of these contracting authorities (where different) are supposed to liaise with each other is not clear.

5.4 As the dynamic market is not a procurement procedure by itself, a contracting authority that runs a competitive procedure by reference to a dynamic market (or part of one) could conceivably carry out another shortlisting process within its competitive procedure to reduce further the number of suppliers invited to tender. In such a case the dynamic market would be nothing more than an 'approved list'.

5.5 Under the PCR 2015, contracting authorities are prohibited from imposing any charges on suppliers prior to or during the period of a DPS. The Bill proposes explicitly to permit the charging of fees as a percentage of the estimated contract value to suppliers that are awarded a contract by reference to their membership of the market (noting that different rules on fees will apply to utilities).

5.6 This new flexibility is likely to encourage CPBs to set up dynamic markets as revenue generating tools in the same way that buying club frameworks are currently used. With a dynamic market being not much more than an approved list and with the competitive tendering procedure being carried out independently (albeit by reference to the dynamic market), we can envisage multiple different dynamic markets in competition with each other. If a CPB does not have to set out the award criteria and tender process to follow for awarding a public contract by reference to its dynamic market, the set-up and operation of a dynamic market should be very straightforward. The ability to charge fees to suppliers for this is therefore very attractive commercially for CPBs and could lead to some of the problematic behaviours we currently witness with regard to frameworks.

6. DEVELOPMENT AGREEMENTS AND PACKAGE DEALS (SCHEDULE 1 PARAGRAPH 4, SCHEDULE 2 PARAGRAPH 4 & SCHEDULE 5 PARAGRAPH 6)

6.1 Subject to what is said below in relation to Schedule 2, Paragraph 1(2), under paragraph 4 of Schedule 2, a contract is an exempted contract if it is:

> *"for the acquisition, by whatever means, of land, buildings or any other complete work"*

6.2 Under paragraph 5 of schedule 1, a "complete work" is defined as:

> "*a functioning structure that results from the carrying out of works*"

6.3 The meaning of the word "*other*" in paragraph 4 here is not clear. We are concerned that it could lead to the implication that the reference to land or buildings is limited in some way to functioning structures, otherwise the word "other" is superfluous.

6.4 As a matter of law, a building becomes part of land as soon as it is attached that land. There cannot therefore be a situation where a "complete work" is not included within the definition of land. Equally, a building (or complete work) cannot be "acquired" separately from the land on which it stands (although it can, of course, be "constructed" without there being a corresponding land transaction).

6.5 We recognise that the drafting here is intended to seek to simplify the test as to when a contract (typically a development agreement) that involves both the transfer of land and the carrying out of works is and is not a public works contract. However, we are concerned that the new drafting actually complicates the position further. It does nothing to help a contracting authority make the crucial decision of whether a procurement is needed.

6.6 A better approach may be to define an exempted land transaction as one involving the transfer of an interest in land where the authority does not exercise a decisive influence over the specification for any works that are to be carried out on that land in connection with the transfer of that land interest. Whilst there will still be "grey areas" with such a test, this would be much simpler than the proposed approach.

6.7 There will still be circumstances where the level of influence a contracting authority exercises over the specification for a particular development could be regarded as "decisive", but the contracting authority can deal with only a particular developer because of their control of the land on which the development is to take place. This arrangement is commonly termed a "package deal".

6.8 In such circumstances, the authority will need to rely on paragraph 6 of Schedule 5 as the justification for a direct award of the contract for the development to the developer that owns or controls the land on which it is to be constructed. The addition of the words "(either generally or at the specific location at which the goods, services or works are required)" at the end of paragraph 6(a) of Schedule 5 would make it clearer that a contracting authority is entitled to make a direct award in these circumstances.

6.9 Similarly, the requirement that there are no reasonable alternatives could lead to a possible challenge risk for the contracting authority, since it may be able to buy individual properties or other developments (usually under similar conditions to the one in relation to which the "package deal" is being entered into). The addition of similar wording "(either generally or at the specific location at which the goods, services or works are required)" at the end of paragraph 6(b) of Schedule 5 would minimise the challenge risk for contracting authorities here.

7. CONDITIONS FOR EXEMPTIONS (SCHEDULE 2, PARAGRAPH 1)

7.1 We are concerned at the potential impact of Paragraph 1(2) of Schedule 2. This prevents a contract being an exempted contract where:

"the goods, services or works representing the main purpose of the contract could be supplied under a separate contract" (where that contract would not be an exempted contract)

7.2 For some of the exemptions (e.g., paragraph 18 for research and development services), this may be appropriate. However, when it is applied to other exemptions, particularly the vertical and horizontal arrangements in paragraphs 2 and 3, it has the effect of restricting these paragraphs to goods, services or works that cannot be obtained other than from an organisation controlled by the contracting authority or via shared horizontal arrangements.

7.3 If this is what is intended, then it will represent a significant narrowing of the flexibility that is currently given by regulation 12 PCR 2015. Under that regulation there is no restriction on the types of goods, services or works that can be obtained from a regulation 12 ("Teckal") subsidiary. It is the nature of the relationship alone that leads to the exemption.

7.4 Similarly, in relation to paragraph 4, this wording would prevent a contracting authority relying on this paragraph to buy properties at a specific site where there was a reasonable alternative site that the contracting authority could acquire and then advertise for a construction contract to construct properties on it. This wording therefore forces contracting authorities down a particular procurement route, rather than creating the additional flexibility that the Government has said it is looking to create through the new procurement rules.

7.5 In relation to paragraphs 10 and potentially 9, it could be argued that it is possible to procure exempt legal services through a contract that is for regulated legal services. Paragraph 1(2) of Schedule 2 would then prevent the contracting authority relying on this exemption since the services could be supplied under this regulated contract.

7.6 Similarly with employment contracts under paragraphs 14 and 15, instead of employing a person to provide services, it would be possible for a contracting authority to pay a contractor to provide those services. Should the fact that the services could be procured under a contract that is not an exempted employment contract mean that the authority is not permitted to rely on the exemption to employ an individual to provide the services but must instead contract for them?

7.7 We would be surprised if these consequences were intended. We would therefore encourage the Cabinet office to consider the removal of paragraph 1(2) as a general provision applying to all exempted contracts. This would avoid the unintended consequences highlighted in this paragraph. If it is then to be applied to specific types of exempted contract, this should be done within the paragraphs to which it is to apply.

7.8 If this is not acceptable then we would encourage Cabinet Office to disapply paragraph 1(2) to particular paragraphs of Schedule 2 (which we think should include at least paragraphs 2, 3, 4, 9, 10, 11, 12, 14, 15 and potentially others).

8. TECKAL IN-HOUSE EXEMPTION (SCHEDULE 2, PARAGRAPHS 2 & 3)

Activities test narrowed

8.1 The Bill requires more than 80% of the turnover of the subsidiary to be derived from activities carried out 'for or on behalf of' the contracting authority or authorities. In legal terms, the use of such language is usually confined to agency or representative-type relationships and does not seem appropriate for the Teckal–based, in-house co-operation arrangements which do not have any distortive effects on the market that the current Regulation 12 is designed to cater for.

8.2 This wording is a significant restriction even on the original *Teckal* test. Under *Teckal*, turnover could be included if it was derived from activities carried out 'with' the contracting authority. The current test in Regulation 12(1)(a) PCR 2015 refers to turnover derived from 'the performance of tasks entrusted to [the subsidiary] by the controlling contracting authority or other organisations controlled by that contracting authority'.

8.3 If the only turnover that 'counts' for the new *Teckal* test is limited to that derived from activities carried out 'for or on behalf' of the parent, this calls into question many common group structure and collaboration arrangements. A couple of examples illustrate this:

Example 1: Registered provider group structure

8.4 Two registered providers decide to form a group structure and form a non-asset owning parent of which they both become subsidiaries. Both providers retain their own properties but central services (finance, company secretarial, chief executive) are located in the parent.

8.5 Each registered provider will derive most of its turnover from delivering services to its own residents in properties that it owns. Given this fact, can it really be said that those activities are being carried out 'for or on behalf of' the non-asset-owning parent? If not, then each subsidiary will need to put the service level agreements it has with the parent out to tender (assuming that the amount payable for them is above the services threshold).

Example 2: Trading company subsidiary

8.6 A local authority sets up a trading company subsidiary to provide market rent new-build housing (this example would apply equally to a charitable housing association setting up a market rent subsidiary). The subsidiary derives the majority of its turnover from the 'market rents' from those properties. In this example, the subsidiary is a contracting authority (rather than a 'wholly commercial' subsidiary) since its primary function is to support the parent local authority in its 'mission' to deliver new housing with a range of tenures.

8.7 Housing management is provided by the local authority. The subsidiary would not be able to obtain those housing management services from the authority (assuming their value is 'above threshold') without running a tender process unless the income the

subsidiary derives from the market rent properties is regarded as being derived from activities carried out 'for or on behalf of' the authority. However, can this activity really be said to be carried out 'for or on behalf of' the authority when it is an activity that the authority would not be able to carry out itself without the tenancies becoming secure tenancies? There could also be an argument that the right to buy might apply because those properties are being treated as managed 'on behalf of' the authority.

8.8 Under example 2, it is perhaps arguable that the activity of developing 'market sale' properties is being carried out 'on behalf of' the parent organisation (but recognising the risks of this). With example 1, this is much more problematic.

8.9 With both examples there would be no issue if the wording used were 'with' (as in *Teckal*) or 'in the performance of activities entrusted to' (as in PCR 2015).

8.10 This is a situation where a gratuitous and unnecessary word change from what was perfectly adequate wording in PCR 2015 could lead to real practical difficulties in the future if the Bill is enacted in its current form.

Teckal companies as contracting authorities

8.11 We note the recent addition of clause 2(9) which provides that a person that operates on a commercial basis but is, as a controlled person, awarded an exempted contract by a public authority in reliance on paragraph 2 of Schedule 2 (vertical arrangements) is to be treated as a public authority in relation to any relevant sub-contract.

8.12 At first glance, this appears to confirm the current legal position that a Teckal subsidiary is to be treated as a contracting authority (in accordance with the LitspecNet[2] case). However, the addition of the words 'in relation to any relevant sub-contract' introduces some ambiguity as to whether it will be a contracting authority for all of its activities or only some of them i.e. what is meant by a 'relevant sub-contract'? The explanatory notes to the Bill explain that this serves as an anti-avoidance mechanism, which requires that where a contract is awarded in reliance on the vertical exemption, "any sub-contract substantially for, or contributing to, the performance of that contract must be awarded subject to the procurement regime". This indicates that an entity relying on the vertical exemption is to be treated as a contracting authority itself in respect of those activities it performs on behalf of its controlling contracting authorities. Therefore, in respect of its procurement activity not associated with such activities, it will not be bound by the public procurement rules unless it meets the definition of a contracting authority itself anyway. We await clarification from the Cabinet Office on this point but if the above analysis is correct, this would be a shift from the current legal position where a Regulation 12 entity is to be treated as a contracting authority for all its purchasing activity and may create some confusion in practice.

9. REMEDIES PROVISONS (PART 9)

Extension of set-aside grounds

[2] LitSpecMet UAB v Vilniaus lokomotyvu remonto depas UAB, Case C-567/15

9.1 We note that the new 'set aside conditions' in clause 102 differ from the grounds of ineffectiveness under the PCR 2015 and have been expanded somewhat.

9.2 Significantly, clause 102(1)(f) which provides a set-aside condition where "the breach becomes apparent only after the contract has been entered into or modified)" seems very wide in scope. The Explanatory Notes give the example of where the contract notice or contract change notice did not correspond with the contract or modification that was entered into. However, it is easy to envisage how this condition may open the door to claimants seeking to expand the remedies available to them from simple damages to a more desirable set-aside order, which could form the basis of many challenges under the new regime. Whilst we would anticipate that the circumstances in which it can be shown that the breach was not known, or ought to have been known, prior to contract award or modification will be few and far between, that may not stop it being pleaded to seek a set-aside order. These expansions to the grounds for a set-aside order could increase risk for contracting authorities who let contracts in good faith, only to have the contract set aside, and to be left with no contract and a risk of legal claims from the contractor with whom the contract had been signed.

Trigger for 30-day time limit

9.3 One of the issues with the current review system is that bidders have to decide whether to challenge a process at a point at which they are still waiting to hear the result. Bidders are concerned that if they bring a challenge, this will prejudice their chances of winning the contract.

9.4 Whilst the 30-day period for challenges is reasonable, we consider that time should run from the point at which a bidder is told that they have either been excluded from the procurement process or that they have been unsuccessful, subject to having the required degree of knowledge.

9.5 We appreciate that this point is not an easy one to resolve but as the Green Paper stated, the costs of procurement challenges exclude tenderers like SMEs and charities from the possibility of obtaining redress for breaches of the procurement rules. A key objective for any new proposed rules should be to make it possible for these kinds of organisations to challenge unfair procurements.

Automatic suspension and standstill.

9.6 We note that the automatic suspension will only apply in circumstances where the proceedings were issued and the contracting authority is notified of that fact before the end of the standstill period (eight working days).

9.7 Whilst the limitation period remains at 30 days, the effect of this change to the automatic suspension is that remedies available to a claimant will be minimised if they either:

- issue proceedings after the eight working-day standstill period; or
- issue proceedings within the eight working-day standstill period yet fail to notify the contracting authority within that period.

9.8 In those circumstances, the contracting authority will be able to proceed to enter into or modify the contract in question. Unless a 'side aside condition' is made out then the claimant will only be able to pursue the remedy of an award of damages.

9.9 At first glance, this change appears to provide contracting authorities with greater certainty and confidence in letting contracts following the expiry of the standstill period and pending notification of any formal challenge. However, in practice, many tenderers request an extension to the standstill period to enable them to raise questions and concerns, and to exchange information and receive disclosure from contracting authorities within the protection of the automatic suspension. In some cases, that ultimately prevents proceedings being issued. This practice is likely to continue, regardless of the new provisions for an 'assessment summary' to be provided ahead of the contract award decision.

9.10 Contracting authorities are not always willing to extend the standstill period, for example, where they do not consider they reasonably need to provide any further information or disclosure for the tenderer to be able to consider the merits of a potential challenge or there is an urgent need to let the contract. The reality is that eight working days will not be sufficient for some tenderers to digest the outcome, seek legal advice as to the merits of a challenge, request and receive further information/disclosure from the contracting authority and then to issue proceedings and notify the contracting authority. In the context of high-value public contracts, this may increase the likelihood of legal proceedings being issued within the eight-working day standstill period to preserve tenderers' positions and the remedies available to them. To offset this risk, contracting authorities may well adopt a longer standstill period at the outset to provide sufficient time for any aggrieved tenderer's concerns to be addressed without the time pressure of the eight working days.

9.11 Alternatively, as outlined above, tenderers who fail to trigger the automatic suspension are likely to try to argue that the new set aside condition (that the breach became apparent only after the contract was entered into or modified) applies, to seek more desirable remedies. We expect this to be an area for much 'satellite litigation' if the Bill is brought into law as drafted.

10. MODIFICATION OF CONTRACTS (CLAUSES 73-76, SCHEDULE 8)

Increased complexity

10.1 Whilst we acknowledge that the current Regulation 72 of the PCR 2015 regarding modifications to existing contracts is convoluted and difficult to navigate, clauses 73 to 76 and Schedule 8 of the Procurement Bill are much lengthier than the current set of rules. This seems to run against the aim of simplifying the law in this area.

10.2 Clause 73 introduces a replacement regime which sets out what modifications are permitted without triggering a new procurement exercise. The clause introduces a three-pronged approach, allowing contracting authorities to modify a public contract by way of:

- 'permitted modifications' listed in schedule 8;

- modifications that are not 'substantial modifications'; or
- 'below-threshold modifications'.

Review clause in contract

10.3 The modifications that are listed in schedule 8 include a number that will be familiar but to take one example, paragraph 1 permits modifications where:

(a) "the possibility of the modification is unambiguously provided for in:

(i) the contract as awarded; and

(ii) the tender or transparency notice for the award of that contract, and

(b) the modification would not change the overall nature of the contract.

10.4 The sparse drafting here is striking compared to section 72(1)(a) in the PCR 2015 which currently permits modifications only where the procurement documents provide for them in '*clear, precise and unequivocal review clauses'* and provided certain additional requirements are met.

10.5 We consider that any guidance issued will need to clarify the application of this test. Will it require a similar level of specificity as that required under the current regime and the principles set out by the Supreme Court in the Edenred[3] case.

Corporate restructuring etc

10.6 Paragraph 9 of Schedule 8 relates to transfers on 'a corporate restructuring or similar circumstances' (although it doesn't specifically mention insolvency). There are a number of other categories which will prove helpful in appropriate circumstances – including extreme and unavoidable urgency, unforeseeable circumstances (which closely mirrors the current regulation 72(1)(c)). We note, however, the introduction of a new category in paragraph 5 of the "materialisation of a known risk". We appreciate that this is intended to introduce more flexibility but this may not be palatable from a third party supplier perspective and may be a fertile ground for challenge. The drafting is also rather complex and we are not convinced that it will be invoked regularly in practice.

Substantial modifications

10.7 "Substantial modifications" are those that would:

- increase or decrease the term of the contract by more than 10% of the maximum term provided for on award;
- change the overall nature of the contract, or materially change its scope; or
- materially change the economic balance of the contract in favour of the supplier.

10.8 This means that any curtailing of the term of the contract (for example, on an agreed 'walk away' basis following a dispute with the contractor), as well as an extension to it

[3] *Edenred (UK Group) Ltd and another v HM Treasury [2015] UKSC 45*

by more than 10%, would be considered substantial. However, if this is provided for in the contract (e.g., through a break clause) this would be a permitted modification, even though it is a substantial modification, as long as it doesn't change the overall nature of the contract. We consider this likely to cause a lot of confusion in practice.

Contract change notice

10.9 Clause 74 sets out a requirement (subject to exceptions) to publish a 'contract change notice' before (no specific timescale is stated, only 'before') modifying a public contract or convertible contract. The exceptions are:

- if the modification increases or decreases the estimated value of the contract by 10% (for goods and services) or 15% (for works) or less (although the explanatory note seems to suggest that the test is whether the contract is 'below threshold' which is not the same as the test in this section);
- if the modification increases or decreases the term of the contract by 10% or less of the maximum term provided for on award; or
- the modification is to a light touch contract.

10.10 These, therefore, will be the only circumstances in which a contracting authority can modify a contract without notifying the marketplace. These circumstances would not, therefore, include a one-year extension to an existing four-year contract, even where it is provided for in the contract itself. Neither would they include the exercise of a break clause to terminate a ten-year contract at the end of year seven. This, of course, assumes that these are both treated as 'modifications' of a contract, which seems to be implied by the wording, although that is not totally clear.

10.11 This means that the exercise of options within contracts will become much more visible than under the current rules. This could lead to a regime where the sheer number of notices detailing the exercise of options (e.g., to extend contracts) will entirely obscure the important information about contracts that are being amended in ways not provided for and that suppliers might want to see. Added to this is the requirement in clause 76(2) to publish a copy of any modified contracts with an estimated value over £5 million (either before, or as a result of, the modification) within ninety days. This could lead to a regime which is bureaucratic, labour intensive, and which will only serve to create an abundance of (albeit electronic) paperwork – the very definition of creating so many trees that you cannot see the wood.

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Date: 7 February 2023