10 March 2021

Response by the UK Procurement Lawyers' Association on the "Transforming Public Procurement" Green Paper

PART A - INTRODUCTION

Overview of The Procurement Lawyers' Association

The Procurement Lawyers' Association (or PLA) is an organisation which exists to bring together all procurement lawyers working within the field of EU procurement law (whether private practice or in house, public or private sector, solicitor, barrister or academic, based in the UK or elsewhere). We now have over 350 members and continue to grow.

The PLA is intended to act as a platform to represent, promote and strengthen procurement law expertise. The PLA's 3 purposes are to provide:

(a) An external collective voice, e.g. in order to respond to consultation exercises

(b) A forum for in depth discussion and debate about key procurement law issues, and

(c) Training and know-how

The PLA aims to represent, promote and strengthen procurement law expertise in a number of ways, including through in-depth discussion of procurement law issues.

Development of this Response

In December 2020, the PLA established a Working Group to consider how the PLA should respond to Cabinet Office's "Transforming Public Procurement" Green Paper ("Consultation"). All PLA members were invited to join this Working Group as they wished. The Working Group formed Sub-groups in order to focus member contributions on particular legal matters and to ensure that consideration was given to the Green Paper in its entirety.

In line with the aims of the PLA, the Working Group considered legal aspects of the proposals in the Consultation, drawing on the collective legal expertise and experience of members. As such, this Response does not contain the legal opinion of any individual member, nor of any firm or organisation with which a member is associated.

The consultation seeks responses on a range of policy proposals and this Response does not express the personal view of any individual member, nor of any firm or organisation with which a member is associated, on UK Government policy.

General Observations

As a preliminary point, it is a concern that there a number of references to the UK government issuing "guidance" on changes to the procurement rules. In our experience, "guidance" can be widely interpreted, and unless it is very clearly drafted it can lead to both increased uncertainty and risk. Where possible the new rules should be formalised in statutory legislation, to promote legal certainty from both a public authority and supplier perspective, although we appreciate that this will need to be balanced against the increased flexibility offered by the proposals. Furthermore, it would be beneficial if such guidance was issued to the UK as a whole to avoid different jurisdictional approaches, unless absolutely necessary.

We would also note that while increased transparency has clear benefits to both the public and private sector, care should be taken that such transparency does not result in deliberate or inadvertent exchange of commercially sensitive information which could breach the competition rules: for example, a public database could potentially be used as a conduit for suppliers to disseminate sensitive information, creating a risk of 'hub-and-spoke' type infringement.

PART B - RESPONSES TO SPECIFIC QUESTIONS

CHAPTER 1 – GENERAL PRINCIPLES (INCLUDING POTENTIAL "REVIEW" UNIT)

"The Government proposes establishing a new unit, supported by an independent panel of experts, to oversee public procurement with powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities…" (Paragraphs 44 – 46)

1 QUESTION 1: DO YOU AGREE WITH THE PROPOSED LEGAL PRINCIPLES OF PUBLIC PROCUREMENT?

1.1 We agree that with the proposal to adopt of over-arching principles, both to promote good practice and provide an effective yard-stick against which to ask whether certain practices or behaviours meet expected standards. It is also important in our view that this jurisdiction is seen as a fair, values-driven and well regulated market for national and international trade post-Brexit.

1.2 We note that some of the proposed principles are carried over from existing Regulation 18 principles (transparency and non-discrimination directly match existing principles). These are concepts with which suppliers and contracting authorities will already be familiar.

1.3 We note that proportionality, which is an existing principle, is no longer proposed but we consider that this is often a useful benchmark for authorities and suppliers alike to differentiate between different actions appropriate for different procurements. What is proportionate in one procurement may not be proportionate in another procurement. It is possible however that the revised principle of "fair" treatment is intended to incorporate proportionality as well. We support the adoption of a "fair" treatment principle as authorities and suppliers will be used to what is simply a feature of usual market competition at play and what behaviours are unfair in that they distort usual market forces.

1.4 Authorities are familiar with the concept of value for money but at present that is as part of the evaluation of tenders, rather than a general principle.

1.5 The wider principles of integrity and public good are not unusual concepts, and plainly resonate well with the objectives of public procurement. There is a risk however in our view that the concept of public good open to very wide interpretation which may be problematic for some authorities and expose them to a greater risk of judicial review of their commissioning intentions.

1.6 Our overriding observation regarding any general principles is that it may take time for the principles to settle, and potentially some litigation to establish judicial precedent.

2 QUESTION 2: DO YOU AGREE THERE SHOULD BE A NEW UNIT TO OVERSEE PUBLIC PROCUREMENT WITH NEW POWERS TO REVIEW AND, IF NECESSARY, INTERVENE TO IMPROVE THE COMMERCIAL CAPABILITY OF CONTRACTING AUTHORITIES?

2.1 We agree that there may be merit in establishing such a unit, but it would be beneficial to work through the implications of how such a service would operate alongside a formal route of challenge. Would the service be a free service which users could make a complaint to on an anonymous basis, which has the power to require the production of information and documents and power to make binding decisions? Would the service have injunctive, prohibitory and mandatory powers? If the service were to have powers to intervene in an ongoing procurement process this may necessitate the service also having powers to pause a process in order to ensure any review is meaningful. The service may therefore be better suited to reviewing complaints about systemic issues or issues relating to procurements "after the event", as if the service has powers to intervene and remedy an ongoing procurement process, this moves the service onto a far more complex judicial footing.

2.2 It is not clear what is meant by power to intervene to improve the commercial capability of contracting authorities. Is this just central guidance, or does this entail working with individual authorities? There may well be benefit in a central body being able to provide guidance on a specific basis and/or training if appropriate to promote good practice.

2.3 The previous Mystery Shopper service was found useful on the occasions where a supplier was unable to pay the court fees associated with a formal challenge and/or where a supplier wished to remain anonymous. It also provided some benefits in identifying systemic issues and/or practices that could be improved. Such investigations could be used to inform future guidance issued by the Cabinet Office to ensure that best practice is promoted.

2.4 An issue which arose with the Mystery Shopper service was the extent to which a complainant could be assured that its complaint would be actioned and "taken on" by the Service. It would be necessary to set clear guidance as to the threshold/eligibility criteria for complaints being investigated.

3 QUESTION 3: WHERE SHOULD THE MEMBERS OF THE PROPOSED PANEL BE DRAWN FROM AND WHAT SANCTIONS DO YOU THINK THEY SHOULD HAVE ACCESS TO IN ORDER TO ENSURE THE PANEL IS EFFECTIVE?

3.1 If such a panel is established, we consider that the panel could be drawn from members of the legal profession (either retired or part-time) and/or experienced public procurement professionals, depending on the remit and scope of the panel, as this would ensure that the members have the right training to approach complaints against the legal/professional backdrop, and are also likely to have the required drafting and interactions skills.

3.2 On the assumption that the panel's purpose is to address systemic issues and issues of practice (rather than to intervene in on-going procurements) we consider that appropriate sanctions would include requiring senior leadership within a contracting authority to engage with the review process and implement any recommendations, together with the power to impose civil financial penalties in the event that the recommendations are not implemented.

CHAPTER 2 – A SIMPLER REGULATORY FRAMEWORK

4 QUESTION 4: DO YOU AGREE WITH CONSOLIDATING THE CURRENT REGULATIONS INTO A SINGLE, UNIFORM FRAMEWORK?

4.1 There is some sympathy with the comments at paragraph 54 of the Green Paper in that it is not clear that the considerable exercise of consolidation would deliver significant benefits compared to delivering reforms through the existing structure of four separate regulations. Contrary to paragraph 54, arguably the "main argument against a set of consolidated regulations" is not the time and effort it would require to integrate the regulations, but the following considerations (among others):

4.2 if you produce one single set of rules to be followed in every regulated procurement (regardless of sector), you could erode important distinctions that have evolved between the different regimes, which may have significant disadvantages for sectors that use the more flexible UCR, CCR and DSPCR rules.

4.3 For example, the UCR has a separate and distinct objective to the PCR. The objective of the UCR (which relates to the EU's concerns about exploitation of 'exclusive rights' by non-contracting authority utilities, which are otherwise privately-owned entities, and the opening up of markets to non-UK suppliers) is clearly reflected in the first and second recitals of the Utilities Contracts Directive 2014 (which refers to the results of the Commission staff working paper of 27 June 2011) as follows:

> "*Utility operators were brought under the public procurement regime on the grounds that, because they enjoy monopoly or special and exclusive rights, they could not be presumed to have the incentives to procure efficiently. Consequently, they run the*

risk of engaging in preferential procurement and failing to offer foreign suppliers the opportunity to compete for their custom".

4.4 This objective underpins many of the differences between the UCR and PCR, which should be retained in any reforms of the legislation.

4.5 if one set of rules is produced "with sections that contain unique rules for utilities, concessions, and defence and securities procurements" (which may mean exemptions and caveats embedded into each rule for different sectors, or a list of different rules for each sector), there is a risk of making it significantly more difficult for authorities and bidders to understand which rules to follow. The Green Paper (paragraph 52) refers to "reducing legal uncertainty", but potentially there is a risk of introducing significantly more uncertainties into the rules in the attempt to oversimplify them.

4.6 There are however clear benefits in reforming the regulations so as to remove inconsistencies between parallel provisions and reducing uncertainty (in particular in relation to the DSPCR, which has not been updated since 2011), but arguably these benefits could be achieved even if the current structure of four separate regulations were preserved.

4.7 If the Government were to adopt a common set of main rules, we welcome the suggestion in paragraph 55 of the Green Paper that this would be based on the "greater flexibilities of the UCR and CCR", rather than the PCR. However, even if the Government adopted common rules that were more flexible than the current PCR but far more stringent than the current rules for all other sectors, the "familiarisation costs" (referred to in paragraph 55) of switching to one common set of rules, with the current approach which appears to be 'levelling up' rather than 'easing up', may be substantial and long lasting across all sectors, including the public sector, and may compromise the quality of procurements while commercial teams adjust to the rules.

4.8 As an alternative, the Government could produce one common set of rules for the majority of regulated procurements relatively easily by:

4.8.1 removing privately-owned utilities from the scope of regulated procurement;

4.8.2 producing a single set of rules based on the PCR that apply to (a) contracting authorities as defined by the PCR, (b) defence bodies, and (c) utilities that are also contracting authorities, based on the original Utilities Directive 90/531;

4.8.3 use appropriate thresholds to exclude all but high value concessions from the rules; and

4.8.4 exclude those defence procurements from the rules which can't be openly competed for reasons related to national security.

4.9 This potentially would remove the need to set out detailed exemptions within each rule (noting that defence procurements relating to national security would need to have a separate set of rules, either in separate legislation or in a separate section). We recognise that the UK Government has not announced or consulted on any intention to remove privately-owned utilities from the scope of the rules, and indeed it appears from the TCA that some privately-owned utilities have consciously been brought back into the rules by the UK and EU when they would otherwise (under the GPA) have been excluded. The utilities sector would welcome consultation from the Government on whether there is a continued need to regulate the procurement activities of privately-owned utilities, given that the UK utility market has always operated very differently to that of other EU Member States.

5 QUESTION 5: ARE THERE ANY SECTOR-SPECIFIC FEATURES OF THE UCR, CCR OR DSPCR THAT YOU BELIEVE SHOULD BE RETAINED?

5.1 At a high level, we consider that the following key features should be retained:

5.2 **Flexibility for utilities and concessions** – Further to paragraph 55, we welcome the suggestion that the common rules would be derived from the more flexible UCR, rather than requiring utilities and concessions to adopt more stringent rules. In particular, we encourage the retention of very light touch regulation currently applied to concessions in the CCR, in recognition of the fact that the concessions market is naturally exposed to competition and market forces, and so does not need to be stringently regulated (other than in relation to very high value concessions);

5.3 **Exemptions for the defence secto**r – if the DSPCR is consolidated into one set of rules, there are obvious reasons why any procurements that relate to matters of national security must be exempted, or for which direct awards (without a mandatory standstill period) should be permitted. For example, the exemptions in Regulation 7 DSPCR would need to be preserved, as would the overarching exemption previously derived from Article 346 TFEU, now derived from the TCA;

5.4 **Thresholds** – the utilities, defence and concessions sectors are used to working with much higher thresholds than are used by contracting authorities in the PCR. Higher thresholds are a useful tool in ensuring that regulated procurement procedures are used only where they add value;

5.5 **Regulated activities in the utilities sector** – the UCR only regulates the activities of privately-owned utilities that are set out in Regulations 9-14 UCR. If privately-owned utilities were to be included wholesale, such that all their procurements were caught, this would be a significant step change. Such a change would ignore the fact that privately-owned utilities are private businesses with activities outside of their regulated licence undertakings (i.e. generally referred to as non-regulated activities by the relevant economic regulators) and would make them no different from public bodies for procurement purposes, further eroding the objective of the UCR (as referred to above);

5.6 **Qualification Systems** – the utilities sector currently enjoys and values the Qualification System Notice (QSN) for engaging with the market. The fundamental benefits of the existing QSN procurement process are many and any new proposals should not discard this system, but rather consider how these benefits can be retained as they are, or incorporated into the proposed DPS+ system. EU countries are permitted to operate under a QSN system which is a more flexible regime and may put the UK utilities sector at a competitive disadvantage compared to EU counterparts;

5.7 **Long closed frameworks** – the Green Paper proposes (at paragraph 151) that closed frameworks be permitted for up to 4 years. There are legitimate reasons why longer framework agreements are required in the utilities and defence sectors. For example, framework agreements in the utilities sector are often tied to funding cycles that last longer than 4 years (for example, water utilities are funded in 5 year cycles known as asset management periods (AMP), and are regularly required by their economic regulators to establish delivery arrangements that straddle more than one AMP to ensure delivery of prescribed customer value). In the defence sector, there are often commercial and technical reasons why longer frameworks are required. Both sectors would be likely to find it very difficult if restricted to procuring closed framework agreements for a maximum of 4 years;

5.8 **Mandatory exclusion criteria** – privately-owned utilities should not be required to apply some of the exclusion criteria (PCR Reg. 57) as would appear to be proposed. To do so would be to require these private enterprises to enforce government policy effectively as instruments of government;

5.9 **Technical specifications** – specific definitions that relate to the utilities and defence sectors would need to be included in the consolidated regulations.

CHAPTER 3 – USING THE RIGHT PROCUREMENT PROCEDURES

6 QUESTION 6: DO YOU AGREE WITH THE PROPOSED CHANGES TO THE PROCUREMENT PROCEDURES?

6.1 Largely yes, in summary, we agree that the competitive dialogue procedure, the competitive procedure with negotiation, the innovation partnerships procedure and the rules around Design Contest could be merged into one clear simplified procedure which permits negotiation; subject to our observations below. We do not however believe it would be helpful to remove the Restricted Procedure for the reasons also set out below.

6.2 In our experience Contracting Authorities struggle to understand the difference between the Competitive Dialogue Procedure and the Competitive Procedure with Negotiation; and indeed the difference between this latter procedure and its predecessor, the Negotiated Procedure; which remains in the Utilities Contracts Regulations 2016. Certainly, if the multiple procurement regulations are to be merged into one comprehensive set of Regulations then it would be sensible to create one clear, flexible procedure where negotiation with bidders is appropriate.

6.3 We also recommend removing the current barriers to its use under regulation 26(4) of the PCRs. Contracting Authorities should have the discretion to choose the right procedure for their procurement having regard to its value, complexity, their own knowledge of the relevant market and also their in-house skills and resources. If an Authority considers that negotiation is appropriate for a specific procurement then this should be considered a commercial decision and it should not generally be the role of the Court to take a different view (in the absence of manifest irrationality etc.).

6.4 However, we do have concerns regarding two aspects of the proposals which risk "throwing the baby out with the bath water":

6.4.1 The first is the proposal to remove the Restricted Procedure as a standalone procedural option.

6.4.2 The second relates to how the specific legal issues unique to research, development and design contracts will be acknowledged and dealt with within the new flexible procedure if the innovation partnership and design contest procedures are to be dispensed with.

6.5 **The Restricted Procedure (Regulation 28 of the PCRs):** As the paper acknowledges, the majority of public procurements in the UK are undertaken pursuant to either the open or restricted procedures. In our view, this is not the case because of fear of the more flexible procedures or lack of skills. It is because the majority of procurements are not complex, they are routine and do not call for negotiation or innovation. For most procurements, authorities know what they want and they understand that they can obtain it for a good price on their own terms. These procedures are easy to understand for both parties and relatively quick compared with a negotiated procurement. While the private sector may be frustrated that they are not able to negotiate; that is rarely to the detriment of innovation or the public purse for many types of purchase.

6.6 Between the two simpler procedures historically the Restricted Procedure was often preferred. The Open Procedure was considered only suitable for the most basic of simple or supply contracts. Over recent years, the government has chosen to prioritise and require the use of the open procedure for a greater number of procurements in order to speed up procurement, but this has not always been successful or appropriate and the Restricted procedure continues to be popular; and for good reason.

6.7 The benefits of the Restricted Procedure are the ability to down-select *before* subjecting bidders to preparing costly tenders. This is welcomed by both public and private sector in reducing the competition, bidding costs and the number of tenders to be evaluated. Any practical issues with a tender are usually discussed and resolved through the clarification process without risk of unfairness or legal challenge. Crucially, the Restricted Procedure gives the Authority legislative support the Authority believes it should not and need not negotiate. It prevents game playing by bidders who are less incentivised to introduce new conditions once they are the "preferred bidder". This procedure is a useful middle way between the open and flexible/negotiated procedures; which is necessary for a great many

procurements where setting an expectation that negotiation will be permitted is not in the best interest of the Contracting Authority but the open procedure is too simplistic.

6.8 While a tender process under the proposed "flexible" procedure could certainly be structured like a restricted procedure (as the Authority could state at the outset it is not prepared to negotiate) - why re-invent the wheel? Such a procedure is simple, necessary and appropriate for a great many procurements and the template already exists and is well understood. If the procedure is removed it would need to be replaced and explained as an option within guidance on the flexible procedure in any event. Contracting Authorities are best placed to make this choice and would need to do so at the outset of a procurement in any event.

6.9 Moreover, if the Restricted Procedure is retained alongside a new flexible negotiated procedure without limitations on when each may be used then maximum choice and flexibility is achieved. All of the advantages argued in Chapter 3 the Green Paper will be obtained and innovation can be achieved through use of the new flexible procedure - but without any of the risks highlighted in paragraph 69. The risks highlighted in paragraph 69 in our view are likely to arise as a result of what Contracting Authorities may see as the removal of an existing choice and its replacement with uncertainty and a pressure to negotiate or come up with a unique approach when there is no need to do so. Indeed the Green Paper admits that the proposal would only be successful with significant upskilling and new guidance; which would appear to be a risky approach when there is no obvious reason to do so.

6.10 In summary we would propose that three competitive procedures should be available: the single-stage open procedure without negotiation; a two-stage procedure without negotiation (the restricted procedure); and a two-stage procedure with negotiation (the new flexible procedure).

6.11 **Innovation Partnerships and Design Contests:** In respect of the removal of these two procedures we acknowledge that they are little used and understood and the issues they are seeking to address do not necessarily warrant having their own procedures. There is no reason why the new flexible procedure could not accommodate such procurements; although it will be necessary in our view to include some bespoke provisions which tackle the issues unique to each (which the Green Paper does not acknowledge).

6.12 **Design Contests:** Firstly Design Contests are only subject to the regulations at all if they are to lead to a public services Contract or have a prize or payment to participants (Reg. 78). This should remain the case.

6.13 Where the Regulations do apply the Design Contest itself and any subsequent public services Contract are currently treated as two separate procedures; not as one. Section 8 sets out the procedure for the initial Design Contest only; whereas a public services Contract which results from a Design Contest is treated as a justification for negotiation without prior publication i.e. a new procedure under Regulation 32. This makes little sense and there is no reason why both the Design Contest stage and negotiation of the subsequent contract with the winner could not be treated as a single procurement process using the new flexible procedure.

6.14 However due to the unique nature of design competitions over artistic works there are some specific issues that would need to be excepted which are not appropriate for the general procurement of Public Works, Supply or Services contracts in our view:

6.14.1 as now, designs should continue to be considered anonymously to ensure the winner is successful on the merits of the design only;

6.14.2 price/value for money should not be a mandatory part of any evaluation criteria i.e. the same rules around evaluation should not apply; and

6.14.3 the “jury” (i.e. evaluators) currently need not score against criteria but can simply produce a report ranking the projects. This should also be retained given the artistic nature of design.

6.15 **Innovation Partnerships:** In respect of the innovation partnerships procedure, this is little understood and it is often assumed it is limited to use for research and development in the field of technology after which a product may be supplied by the developer to the funder (admittedly because the Commission referred to the procedure often in terms of this sector). But this is not the case and the procedure is, in theory, also available for use in design and build contracts to remedy a very real legal issue which has emerged from case law.

6.16 The best way to describe the benefits of the procedure is by reference to “two stage tendering” construction projects, under which a partner is appointed on the basis of a contract for initial project management and design work only and only if the first contract is deemed to be successfully completed the parties will finalise negotiations for and enter into the second stage of the contract for the delivery of the actual works. Public bodies have often been put off using two-stage tendering as the second negotiation may be some time after the award of the contract to the successful tenderer and this is considered to give rise to procurement challenge risk on the basis that the terms of the delivery/works contract could not have been tested in competition because the parties would not know its subject matter or cost until the winner of the first competition completed its initial innovative design work.

6.17 Problematic case law on this point includes the oft cited *Henry Bros* case from Northern Ireland under which it was found that appointing a builder on the basis of management fees alone was not satisfactory in evaluating the costs of the actual build – actual costs had to be tested (clearly not easy in two stage tendering); to the *Edenred* education services case in which the Court found the original competition had to have evaluated in some way the provider’s ability to provide any future services for those services to be capable of being provided during the term of the contract.

6.18 In short, if you have no idea what you are buying until the winner of the competition has completed the first stage of the contract it is very difficult to prove you convincingly tested and evaluated the key aspects of the delivery part of the contract in the first competition (whether that is a new innovative building or new innovative technology). Regulation 31 was the EU Commission’s way of providing the exception to the general rules. It was designed to permit innovative procurement in the same way that the government is seeking to promote it with this consultation.

6.19 However this has been rather missed in the UK and there has been a reluctance to embrace Regulation 31. It is perhaps not surprising that this has been the case; the recitals to the Directive also focused on technology with only passing reference to works and regulation 31 is unhelpfully drafted. The only provisions which tell us its true objective are regulations 31(9) and (10). The rest of Regulation 31 deliberately mirrors the Competitive Procedure with Negotiation as explained in the recitals to the Directive.

6.20 We would propose therefore that within the new flexible procedure there is specific sub-section covering “innovative” procurements, which acknowledge that for certain types of procurements there will be two stages of contract; a development or design stage and a later delivery contract. A post-award negotiation of the delivery contract with the successful bidder is expressly permitted - provided that the overall requirements as set out in the original procurement are complied with (as per Reg. 31(9) and (10)).

6.21 If this were to be accompanied with helpful guidance in respect of the wider uses for this exception we believe many of the frustrations with the current procedures would be relieved (particularly in the construction industry).

7 QUESTION 7: DO YOU AGREE WITH THE PROPOSAL TO INCLUDE CRISIS AS A NEW GROUND ON WHICH LIMITED TENDERING CAN BE USED?

7.1 We agree that in principle to the introduction of "crisis" a new ground on which limited tendering could be used, primarily given the degree to which Regulation 32 has been tested due to the current pandemic. However, this new provision will need to address some of the shortfalls which have come to light when trying to apply Regulation 32 in a situation such as COVID-19 where the "extreme urgency" or "crisis" has been prolonged and ever changing. The issues COVID has given light to (and which could be helpfully dealt with under a new "crisis" provision) are:

7.1.1 What constitutes "extreme urgency" so as to not permit a compliant procurement exercise – what is a reasonable period of time for a "compliant procurement exercise" during a national crisis where resources are low and what resources there are, are deployed to dealing with the crisis itself;

7.1.2 How is the test of foreseeability to be applied to a crisis which evolves over a significant period of time? Can the baseline for unforeseeability be "re-set" as the crisis evolves? What would be the test in this case?;

7.1.3 What is a reasonable length of a contract to pass the test of an award being "insofar as strictly necessary" in an unforeseeable crisis situation? How should a contracting authority balance this requirement with what could be an unpredictable/volatile event?

7.2 Furthermore, clear guidance would be needed as to when it was appropriate to rely on "crisis" as a route or "extreme urgency" as the current proposals, in terms of the definition of "crisis" are clearly still covered by what could be an "unforeseeable event" which gives rise to a risk that parties could adopt the process that best suits their commercial needs at the time.

7.3 It is however clear that provision should be made for direct awards for emergency contracts (however that may be defined) under any new legislation. However, absolute clarity is required on what constitutes an unforeseen emergency or a catastrophic event, giving rise to situations where only one provider can supply the good/service.

7.4 We would suggest that provisions could be included (or retained) which confirm that:

7.4.1 contracting authorities may not use these types of procedures when a contract can be awarded in time and, and that they must plan ahead (situation permitting);

7.4.2 Contracting authorities must continue to prove that the possibility for shortening the time for tendering was not viable within their audit trails, whether that be within their Regulation 84 Reports (presuming that the Green Paper intends to retain these reports) or their Contract Award Notices. Contracting authorities must be mandated to keep sufficient records and ensure they can clearly justify their rationale, and a mandatory report to an independent review body might be considered where contracts have been awarded in this way;

7.4.3 The following provision: "The successful tenderer should not (…) be replaced by another economic operator without reopening the contract to competition," should contain an exception in the circumstances of "urgency" or "crisis"; and

7.4.4 Transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the "United Nations Convention Against Corruption" (similar to Article 18(1) of the EU directive) should continue to apply to situations of "urgency" or "crisis".

7.5 One option which could be explored is notification of such awards to an Independent Review body of any contracts awarded without competition prior to them being concluded. Those notifications can then be assessed as to whether an unlawful decision has been made and intervention is necessary.

7.6 The review body must however have the ability to impose penalties that are effective, proportionate and dissuasive, for example, imposing fines on the contracting authority or shortening the contract.

7.7 The review body must have discretion to balance all relevant factors, including seriousness of infringement, behaviour of the contracting authority and extent to which the contract remains in force.

7.8 Any review proceedings must be timely and time-bound in light of the urgent nature of contracts in these circumstances.

7.9 There would need to be a route to appeal via the courts.

8 QUESTION 8: ARE THERE AREAS WHERE OUR PROPOSED REFORMS COULD GO FURTHER TO FOSTER MORE EFFECTIVE INNOVATION IN PROCUREMENT?

8.1 **Procurement is one part of Public Service Commissioning:** The question, in relation to public services, should be how to foster innovation in Commissioning to promote better public services, with innovation in Procurement as one part of that subject.

8.2 **Creating conditions for a Purpose-driven approach, to replace a predominant process-driven approach:** With reference to Paragraph 83 of the Green Paper, required "innovation" in public services and facilitating innovation in the Commissioning and Procurement of public services is substantially about replacing a predominant process-driven approach with a purpose-driven approach.

8.3 The Government is clear, in BEIS's December 2020 publication "Complying with the UK's international obligations on Subsidy Control: guidance for public authorities" that the European Union's competition law regime of state aid was "developed to support the EU's single market". That is equally true of the EU's public procurement regime. As this purpose no longer applies, procurement may be applied directly, instead, to a more precise purpose of contributing to the effective commissioning of best value public services (and the effective procurement of public works, services and supplies). Recognising this different legal starting point may open new ways to innovation, re-setting base assumptions about how procurement should work.

8.4 A purpose-driven approach would also help address some of the most problematic misinterpretations of procurement rules, such as:

8.4.1 discussion with providers outside formal procurement process necessarily risks unequal treatment, when it is the basis of informative consultation;

8.4.2 contract variation is not possible except in the narrowest circumstances, when that is a matter of scope definition and flexibility is essential in public service provision;

8.4.3 a unique supplier proposition requires a full procurement process, when uniqueness means no market and uniqueness can be simple market-tested by a public opportunity notice – a "voluntary ex-ante transparency", or "VEAT" notice under the current regulations;

8.4.4 that procurement's main focus needs to be risk of challenge, when reasonable and thorough professional action may be confidently and robustly defended and the fear of challenge has generated the tactic of challenge, further distorting best value procurement; and

8.4.5 formal marking systems are mandatory, even, artificially, for intangible aspects of a bid, such as parts of quality and social value assessment, when the reasonable professional application of a qualified assessment team may equally meet a proper objectivity standard.

8.5 **Creating conditions for a fundamental transformation in the interpretation, application and implementation of the Procurement regulation:** In relation to public procurement in general, the real, extremely serious problems with procurement are not about the legislative framework and rules, they are about a process-led, risk-averse, narrowly-focussed culture in procurement interpretation, implementation and application, including through procurement teams not being integrated with client teams and legal and finance teams being equally remote from client teams.

8.5.1 This culture entrenches the status quo and is the greatest barrier to improvement, reform and innovation in public procurement.

8.5.2 New public sector training initiatives for procurement teams, in relation to new regulations will not address this fundamental issue.

8.5.3 Without fundamental cultural change a new version of procedural regulations will not foster more effective innovation in the commissioning and/or procurement of public works, services or supplies.

8.6 **Providing for innovation through multi-sector, multi-stakeholder collaboration and partnership and capacity, infrastructure and ecosystem development:** With reference to Paragraphs 84, 91 and 92 of the Green Paper, the Government should recognise that public services, works and supplies are not delivered within pure markets, where competition, profit maximisation, equity-investor returns and the competition-law legal discipline of procurement are considered the sole, or primary drivers of efficiency.

8.7 Public services need to: provide full coverage within a locality, region, or nation; with sufficient and preferably high-quality standards; with consistency, sustainability, continuous improvement and long-term development; optimising the use of public sector and wider resources.

8.8 In practice many Commissioners are focussed on developing progressive, partnership-style models for public services, where the drivers are: purpose; collaboration; relational engagement, long-term development and public socialised value, as opposed to the market-theory drivers of: profit; competition; transactional engagement; short-term contracts and private individualised value as a proxy for public value.

8.9 "Social Value", which is now an established phrase in procurement, should, in relation to public services, be understood in this inherent, profound sense of adopting public benefit missions and actively mobilising all available resources, through symbiotic multi-sector, multi-partner collaboration, to realise true "Public Value". "Social Value", or "Public Value" is the essential purpose of public services, not an additional consideration. If properly applied, it would lead to "Social Value Imperatives" in public service procurement, so that the pre-qualification requirements for every supplier is a dedication to the purpose of the relevant public services and a demonstrable commitment, capability and quality standard. This could extend to a rebuttable presumption that extractive profit, as opposed to reasonable, business sustaining surplus, is inconsistent with purpose-driven service delivery and further to collaborative open-book analysis of cost, resource and reasonable price.

8.10 **Supplier Initiation: develop and promote procedure specifically to facilitate supplier, or other stakeholder, initiation of innovation in public services:** One base assumption about procurement that should be corrected, is that the initiation of innovation in public services comes from the public sector.

8.11 A huge problem for progressive, innovative public benefit suppliers is that entrenched procurement culture provides no systemic focus on the facilitation of supplier/stakeholder initiation.

8.12 Typically, if there is public authority interest in an innovative supplier proposal, the proposal is artificially channelled into a procurement procedure, as if it had a public sector starting point. Among other problems, this confuses intellectual property principles.

8.13 Innovation Partnership can be applied to the situation and the principles of joint-venture can sometimes be recognised as applying. Also, VEAT and PIN procedures can help establish the absence of a notional competitive market.

8.14 However, to promote innovation in public services, a clear procedural means of a public authority recognising and engaging with supplier/stakeholder innovation would be a major advance on current procurement practice in public services.

8.15 This may have particular application, in public services and beyond, in relation to data and technological innovation.

8.16 This issue also illustrates the need for a flexible system not led by Government, or public authority directive control of valid policy considerations and approaches. Public authorities should be seen as and see themselves as facilitators of bottom-up innovation.

8.17 **Innovation by creating the conditions for public services to be better organised and better delivered**: Innovation in public services and procurement does not need to come from new ideas. Many examples of good practice arise from positive, creative application, within the existing procurement regime. The issue is to remove cultural barriers to such examples becoming systemic.

8.18 As a general observation we consider that the "competitive flexible procedure" proposed in the Green Paper will give buyers maximum freedom to negotiate with suppliers and innovate. However, there will be significant familiarisation costs for already stretched contracting authority budgets. Therefore, there is a high likelihood that buyers will simply revert to traditional procurement methods thus curtailing innovation. Also, it will be key to see what "training and detailed guidance for contracting authorities" is provided along with future "case studies" in accordance with paragraph 70 of this Green Paper.

8.19 The proposed reforms could go further in promoting innovation by enabling contracting authorities to review and make post-contract amendments to contracts so that innovation can be considered in variations to contracts. This would allow innovation to be at the forefront of public sector procurement throughout the life cycle of contracts and would achieve the market-centric approach to procurement legislation that Lord Agnew describes in his Foreword to the Green Paper.

8.20 Furthermore, allowing contracting authorities to enter into commercial partnerships with bidders that are able to produce cutting edge technological solutions, could assist bidders such as SME's to commercialise products that deliver on scientific and technological leadership. This could take the form of bidders producing a first stage development of a product in accordance with an output based specification and moving onto the second stage if the contracting authority approves the prototype. If successful, and commercially viable a commercial agreement can be made such as using the product royalty-free.

8.21 Innovation hubs could be utilised to facilitate multiple contracting authorities and potential bidders coming together to develop ideas and innovate in the areas of science and technology. These hubs could become a separate route to procurement that sit outside of the three procurement procedures detailed in the Green Paper. They would support cross market collaboration to advance wider public policy aims such as tackling climate change through green technology.

9 QUESTION 9: ARE THERE SPECIFIC ISSUES YOU HAVE FACED WHEN INTERACTING WITH CONTRACTING AUTHORITIES THAT HAVE NOT BEEN RAISED HERE AND WHICH INHIBIT THE POTENTIAL FOR INNOVATIVE SOLUTIONS OR IDEAS?

9.1 As detailed above, arguably procurement is being led by process rather than purpose. To summarise many of the arguments set out in our response to question 3;

9.2 The distinctive issues in relation to the commissioning/procurement of public services are not being recognised;

9.3 Procurement is being applied with systemic rigidity and with a lack of proportionality (despite that being a fundamental procurement principle) and risk aversion;

9.4 Collaboration and partnership are not being recognised as socio-economically efficient, in relation to public services, in contrast to entrenched assumptions about the sanctity of market-theory;

9.5 The public benefit sector is egregiously undervalued and its variety and potential for establishing and supporting public benefit ecosystems is generally misunderstood;

9.6 The procedure for innovation as per the Innovation Partnership is not used;

9.7 There is no recognised supplier initiation process; and

9.8 There is recognised process for facilitating consortia, co-operation and collaboration between complementary suppliers.

9.9 We have identified a lack of purposive and practical focus in Public Service Contracts.

9.9.1 25 years ago, Public Service Contracts were being described in public forum as "dysfunctional". The same basic models are still used and generally now with only a secondary priority, because of the procurement process overlay.

9.9.2 Public benefit providers of public services have been particularly ill-served, without leverage to address problems, including: the imposition of standard terms and conditions without the mutual benefit of mutuality; risk averse emphasis on legal protection, rather than practical engagement and delivery; unilateral rights to vary; inappropriate intellectual property assignments; and assumptions that full cost recovery payment is not necessary, despite other contractual aspects still being commercially transactional.

9.9.3 Public Service Contracts designed as relational, collaborative, practical working relationships agreements would be less problematic and more productive.

10 QUESTION 10: HOW CAN GOVERNMENT MORE EFFECTIVELY UTILISE AND SHARE DATA (WHERE APPROPRIATE) TO FOSTER MORE EFFECTIVE INNOVATION IN PROCUREMENT?

10.1 The PLA has considered this question and agrees with the overall objective. We do not have particular suggestions to make although would be willing of course to contribute further to the question as it develops.

11 QUESTION 11: WHAT FURTHER MEASURES RELATING TO PRE-PROCUREMENT PROCESSES SHOULD THE GOVERNMENT CONSIDER TO ENABLE PUBLIC PROCUREMENT TO BE USED AS A TOOL TO DRIVE INNOVATION IN THE UK?

11.1 **We believe there should be a strong emphasis on:**

11.1.1 pre-procurement investigation and analysis of actual need, possible approaches to responding to the need (including but not limited to procurement) and possible public authority and other stakeholder resources available for the purpose;

11.1.2 pre-procurement consultation with end-users/beneficiaries, client stake-holders, the relevant community and provider perspectives on the procurement need;

11.1.3 pre-procurement consideration of an approach focussing on: preventative action; integration with other service areas and other public authorities; social/public value maximisation in line with public authority strategy; and long-term progressive development;

11.1.4 development of a procurement strategy;

11.1.5 involvement of procurement, legal and finance teams at the beginning of the implementation of the procurement strategy;

11.1.6 pre-procurement potential provider engagement to inform the drafting of the procurement specification and contract.

12 QUESTION 12: IN LIGHT OF THE NEW COMPETITIVE FLEXIBLE PROCEDURE, DO YOU AGREE THAT THE LIGHT TOUCH REGIME FOR SOCIAL, HEALTH, EDUCATION AND OTHER SERVICES SHOULD BE REMOVED?

12.1 No. For all the reasons above, the distinction between public service commissioning and public authority commercial purchasing and the inapplicability of pure market theory to the former needs to be a core aspect of procurement reform.

12.2 Whilst it can be acknowledged that the Competitive Flexible Procedure could be structured to form a "Light Touch" procedure, we would argue that flexibility, transparency and proportionality should certainly be fundamental features of a procurement framework, and in light of those features, we would recommend that social, health, education and other public services do require a special focus and particular processes.

CHAPTER 4 - AWARDING THE RIGHT CONTRACT TO THE RIGHT SUPPLIER

13 QUESTION 13: DO YOU AGREE THAT THE AWARD OF A CONTRACT SHOULD BE BASED ON THE “MOST ADVANTAGEOUS TENDER” RATHER THAN “MOST ECONOMICALLY ADVANTAGEOUS TENDER”?

13.1 We note that the change proposed is of a semantic rather than substantive nature. The underlying concept would, we understand, remain the same, with the change intended to increase and encourage awareness within contracting authorities of the ability to consider criteria not traditionally considered to have an 'economic' focus.

13.2 "Most advantageous tender" does align with the definition used by GPA, and it is noteworthy that the UNCITRAL model terms identify "MEAT" and "MAT" as analogous concepts. While we agree with the central objective of increasing awareness and deployment by contracting authorities of the ability to use criteria not traditionally considered as 'economic' in nature, we consider there are (at least) two risks that would arise in a change from "MEAT" to "MAT":

13.2.1 MEAT is a well-understood concept. Introducing a change to MAT, in circumstances were the change would be semantic only, risks creating an expectation with the contracting authority and utility community that there has been a substantive change – namely the removal of the obligation to consider tender responses using criteria fundamentally rooted in the value for money of a bid. While we do not expect this would be problematic within Central Government departments with relatively sophisticated understanding and use of the Green Book, there is risk that a change to MAT could lead to an otherwise avoidable misconstruction at lower levels of government and in the utility purchasing sector.

13.2.2 The removal of 'economic' to encourage use of other (for example, social value) criteria could be seen to perpetuate the unhelpful existing narrative that those other criteria are not of ultimate economic benefit to contracting authorities and utilities.

13.3 Overall it appears that the policy objective of encouraging uptake of encouraging increased use of criteria not traditionally linked with 'economic' assessment could be achieved with lower risk by, for example, explanatory wording within the relevant definition of MEAT within the revised legislation, and with continued guidance for contracting authorities and utilities in a similar manner to PPN 06/20.

14 QUESTION 14: DO YOU AGREE WITH RETAINING THE BASIC REQUIREMENT THAT AWARD CRITERIA MUST BE LINKED TO THE SUBJECT MATTER OF THE CONTRACT BUT AMENDING IT TO ALLOW SPECIFIC EXCEPTIONS SET BY THE GOVERNMENT?

14.1 We agree in principle with this proposal, on the basis that it represents a further opportunity to improve supplier performance and drive value for money and accountability. The realities of the impact on the economy of the climate crisis and the Covid pandemic means that there will be a need for Central Government bodies to be able to influence economic behaviour if they are to meet targets (eg in respect of carbon neutrality) that the Government has set itself. This proposal could be a way of helping to achieve that.

14.2 However, we do have a number of concerns, as follows:

14.2.1 As identified in the Green Paper, the proposal carries risks in relation to the potential impact it may have on the bidder pool. In particular, removing the link to the subject matter of the contract may introduce a barrier to small businesses as the procurement may have requirements that are perceived by some bidders as disproportionate.

14.2.2 A further concern is in respect of the statutory guidance that it is intended will be published by the Government in order to set out the exceptions to the basic requirement. In our experience, "guidance" can be widely interpreted, and unless it is very clearly drafted, and the specific exceptions narrowly defined, it is likely to lead to both increased uncertainty and risk that the additional flexibility to be afforded to buyers under this proposal is abused.

14.2.3 Finally, there is a question mark as to the extent to which the proposal, if implemented, will actually make a significant difference to what is already happening in practice. Award criteria are a matter of choice for the contracting authority, and that choice already reflects the authority's views about what it considers valuable. In Abbvie Ltd v the NHS Commissioning Board1, Mr Justice Choudhury acknowledged that buyers are, in reality, already afforded a wide margin of discretion in designing and setting award criteria, a point also recognised by Professor Sue Arrowsmith, who has commented that "Since the choice of award criteria reflects the decision on what to buy, in the sense of how to allocate national financial resources between benefits such as quality of services, environmental benefits, etc., and it is not a concern of the directive to regulate these matters, it seems clear that the choice and weightings, etc. are not in principle constrained by the directive." 2

15 QUESTION 15: DO YOU AGREE WITH THE PROPOSAL FOR REMOVING THE REQUIREMENT FOR EVALUATION TO BE MADE SOLELY FROM THE POINT OF VIEW OF THE CONTRACTING AUTHORITY, BUT ONLY WITHIN A CLEAR FRAMEWORK?

15.1 "Assessed from the point of view of the contracting authority" does not prohibit the consideration of wider issues. In fact, the case law is clear "that contracting authorities are afforded a wide margin of discretion in designing and setting award criteria". This proposal is therefore a clarification of the current position rather than a change in regulations. In theory, the proposal for removing the requirement for evaluation to be made solely from the point of view of the contracting authority is supported, provided that the codification of such case law does not deviate from the accepted judicial position.

15.2 The proposal refers to a "clear framework" with guidance as to how the criteria can be objectively taken into account and assessed. It is not apparent that such guidance is necessary and could seek to hamper the broad intentions of the proposal by trying to produce a rigid statutory framework.

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[1] [2019] EWHC 61 (TCC)

[2] The Law of Public and Utilities Procurement, Volume 1, 3rd Edition, at para 7-195

16 QUESTION 16: DO YOU AGREE THAT, SUBJECT TO SELF-CLEANING FRAUD AGAINST THE UK'S FINANCIAL INTERESTS AND NON-DISCLOSURE OF BENEFICIAL OWNERSHIP SHOULD FALL WITHIN THE MANDATORY EXCLUSION GROUNDS?

16.1 This question is in two parts; whether the following should fall within the mandatory exclusion grounds (subject to self-cleaning): (i) fraud against the UK's financial interests; and (ii) non-disclosure of beneficial ownership.

16.2 **Fraud against the UK's financial interests**: The Green Paper states that this proposal is to plug a gap as the exclusion ground referred to concerns only fraud against EU institutions. This appears to be a logical amendment to make but we would query why this change was not implemented via the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020/1319 on the basis of this logic, rather than simply removing the exclusion ground.

16.3 Otherwise, the decision to proceed with this change will be driven by policy, on which we do not comment.

16.4 **Non-disclosure of beneficial ownership**: We query whether this exclusion ground will have the intended effect, but, if it is implemented, it should include a clear and simple test for what is required to be disclosed and this test should be included in the exclusion ground/question itself.

16.5 There is a global move towards increased transparency of corporate or other legal entities, trusts or legal arrangements which have a structure or function similar to trusts. Examples of this can be seen in the Financial Action Task Force Recommendations which aim to aid enforcement of a number of policies in relation to, e.g. tax evasion, anti-money laundering, proceeds of crime, etc. We expect this to continue in a similar vein in the near future.

16.6 Therefore, requiring the disclosure of beneficial ownership is in line with current trends. However, there are a number of considerations which may dictate how this is implemented in public and utilities procurements.

16.7 The tests for what should be disclosed and what constitutes beneficial ownership varies between jurisdictions. There is also divergence on what level of transparency is required in respect of different aims. For example, since the UK has exited the European Union, its approach to DAC6 has been adjusted and other jurisdictions have followed the UK's lead. Accordingly, given the international nature of our public and utilities procurement market, any test for mandatory exclusion should be set out in a way which can be uniformly applied. This would suggest a need to set out a specific test which applies to this mandatory exclusion ground.

16.8 The tests included in legislation for disclosure of beneficial ownership are not necessarily straightforward, which is supported by comments that levels of compliance is varied. Accordingly, the test for what needs to be disclosed should be set out in a clear and simple manner, rather than referring to existing tests, which may be too detailed for the present intended purposes.

16.9 Some entities may take issue with the disclosure of beneficial ownership. Consideration should be given to how this may affect whether certain entities decline to participate in public and utilities procurements. For example, depending on the definition of "beneficial ownership" in respect of the exclusion ground, this could capture individuals with no direct economic interest or control over the entity and who may have privacy concerns in relation to such disclosure, e.g. family-owned structures. Any exclusionary effect which reduces the market of potential suppliers would need to be balanced against the policy aims of including this exclusion ground.

16.10 Linked to the abovementioned point, consideration should be given to whether responses to this question will mean that information becomes publically available (either as a matter of course or via an FOIA request). This may be a particular concern for entities where investor privacy is an issue. An increased level of publicity may deter certain entities from bidding,

having a negative effect on the market of potential suppliers and should be balanced against the policy aims of including the exclusion ground.

16.11 Lastly, our experience is that the commercial teams which evaluate such applications to participate in public and utilities procurements can be stretched and may not have the resource or knowledge to review and confirm the responses to these questions in all instances. Confirmation of responses to this question would appear to require conducting a search on ownership structures (not all information on which will be publically available). This could represent a disproportionate burden on commercial teams. In practice, responses to these questions are often taken at face value. This leads to two questions. First, it could be questioned whether this exclusion ground will deliver the intended benefit on the assumption that entities wishing to avoid disclosure will refuse to answer and this response may simply be taken at face value. Secondly, on the other end of the spectrum, we note that for similar anti-money laundering requirements there can be an expectation that there is a beneficial owner which does not always align with the reality of ownership and the legal test for what is a "beneficial owner" and this can lead to answers of "no beneficial owner" being rejected automatically. Consideration should therefore be given to situations where beneficial ownership is widely held such as in pension funds and whether the requirement to disclose beneficial ownership is proportionate and/or would mean that the result is that there is no beneficial owner in accordance with the test (e.g. if it requires a certain percentage of ownership). Therefore, implementation of this exclusion should be mindful of the risk of bids being automatically rejected for similar reasons.

17 QUESTION 17: ARE THERE ANY OTHER BEHAVIOURS THAT SHOULD BE ADDED AS EXCLUSION GROUNDS, FOR EXAMPLE TAX EVASION AS A DISCRETIONARY EXCLUSION?

17.1 This question addresses the various mandatory exclusion grounds set out at regulation 57(1) and the discretionary exclusion grounds set out at regulation 57(8).

17.2 **Tax evasion**: Whilst we do not comment as to whether tax evasion should or should not be included as an exclusion ground, it seems to us that the correct positioning of such an exclusion ground would be within the mandatory exclusion grounds set out in regulation 57(1), rather than as a ground for discretionary exclusion.

17.3 Regulation 57(1) sets out the various mandatory exclusion grounds including (for example) conspiracy, corruption, bribery, offences contrary to the Counter Terrorism Act 2008, money laundering and certain offences concerning human trafficking and modern slavery (this list is not exhaustive).

17.4 These mandatory exclusion grounds all concern criminal liability and conviction for the various criminal offences.

17.5 Given that tax evasion (in its broadest sense) is an umbrella term used to describe criminal conduct which results in incorrect tax treatment, it seems to us that it is more in keeping with the themes of the mandatory and discretionary exclusion grounds for tax evasion to form a separate mandatory exclusion ground.

17.6 That being said, further guidance would be needed to clearly set out what constitutes tax evasion for the purposes of the exclusion ground. For example, would this only include substantive tax fraud offences set out in statute, or would it also encompass the common law offence of cheating the Revenue (which we note was formerly included in regulation 57(1)(e) in respect of fraud affecting the European Communities' financial interests, but has since been revoked by regulation 6(38)(a) of the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020).

17.7 Additionally, the Government should consider whether criminal liability for the Corporate Criminal Offence (CCO) set out in the Criminal Finances Act 2017 would also be grounds for exclusion, whereby a company or partnership commits an offence if it fails to prevent an associated person from facilitating tax evasion.

17.8 **Tax avoidance**: Regulation 57(8) sets out the various discretionary exclusion grounds including (for example) bankruptcy/insolvency, grave professional misconduct, irremediable conflicts of interests, and significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract (this list is not exhaustive).

17.9 Unlike the mandatory exclusion grounds, the discretionary exclusion grounds do not relate to criminal liability, but instead address behavioural issues which raise concerns as to an economic operators suitability but which fall short of criminal conduct.

17.10 Additionally, it seems more in line with the behavioural aspects of regulation 57(8) for aggressive tax avoidance (rather than tax evasion) to fall within the scope of the discretionary exclusion grounds. Arguably, this is already covered by the discretionary exclusion ground in regulation 57(8)(c) on the basis of "grave professional misconduct, which renders its integrity questionable", but further guidance would be needed as to what level of tax avoidance would fall within the meaning of this exclusion (for example, does this only pertain to repeated tax avoidance, or to schemes that have been found to be tax avoidance following referral to the General anti-abuse rule (GAAR) panel?).

17.11 **Other behaviours to consider**: Broadly speaking, the exclusion grounds set out in the Public Contracts Regulations 2015 are comprehensive. That being said, it is noticeable that the various mandatory exclusion grounds set out in regulation 57(1)(e) have been repealed by regulation 6(38)(a) of the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020.

17.12 Regulation 57(1)(e) formerly referred to offences relating to fraud which affected the European Communities' financial interests, and covers a variety of offences including fraud, theft, fraudulent trading, and fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979 or Section 72 of the Value Added Tax Act 1994.

17.13 We query whether conviction for the offences that were previously listed in regulation 57(1)(e) should be retained as grounds for mandatory exclusion, albeit no longer in the context of fraud affecting the European Communities' financial interests, but in the context of fraudulent activity more generally.

17.14 Finally, there has been much scrutiny of recent procurement practice in the response to the COVID-19 pandemic, and there has been a particular focus on the issue of "profiteering". Where a contracting authority can demonstrate that an economic operator has made excessive or unfair profits in public contracts awarded in response to an emergency (or crisis), it is suggested that this should be ground for discretionary exclusion. As with our comments on tax avoidance, it seems to us that this might arguably fall within the ambit of regulation 57(8)(c) on the basis of "grave professional misconduct", but further guidance would be welcomed on this issue.

18 QUESTION 18: DO YOU AGREE THAT SUPPLIERS SHOULD BE EXCLUDED WHERE THE PERSON/ENTITY CONVICTED IS A BENEFICIAL OWNER, BY AMENDING REGULATION 57(2)?

18.1 As noted in the response to question 16, seeking to enhance the transparency of the beneficial ownership of entities with whom the public sector contracts is aligned with broader policy objectives in this regard. Regulation 57(2) already broadens the application of the exclusion criteria to any person who is convicted and who has powers of representation, decision or control of a supplier. Amending the scope to refer to beneficial owners would be consistent with this approach.

18.2 However, there are already practical difficulties in delineating the scope of regulation 57(2) (and the application of the standard selection questionnaire) given the complexity of ownership and control structures in many corporate groups and the references to ‘powers of

representation, decision or control' being potentially broad concepts. Further and as noted in question 16, the definitions and approach to beneficial ownership can differ. Therefore, if beneficial ownership is to be included within regulation 57(2) (or its equivalent) we recommend that there will not only need to be clarity as to what constitutes beneficial ownership to ensure any exclusion is applied fairly, proportionately and transparently, but to the extent that any of the existing references in regulation 57(2) remain, further clarification of the application of these would also be helpful.

19 QUESTION 19: DO YOU AGREE THAT NON-PAYMENT OF TAXES IN REGULATION 57(3) SHOULD BE COMBINED INTO THE MANDATORY EXCLUSIONS AT REGULATION 57(1) AND THE DISCRETIONARY EXCLUSIONS AT REGULATION 57(8)?

19.1 This question addresses non-payment of taxes exclusions, which are contained in a separate section of the Public Contracts Regulations 2015 (the "PCR") to those for mandatory and discretionary exclusions. The non-payment of taxes exclusions under regulation 57 states:

> *"Mandatory and discretionary exclusions for non-payment of taxes etc*
>
> *(3) An economic operator shall be excluded from participation in a procurement procedure where—*
>
> *(a) the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions; and*
>
> *(b) the breach has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of any of the jurisdictions of the United Kingdom.*
>
> *(4) Contracting authorities may exclude an economic operator from participation in a procurement procedure where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.*
>
> *(5) Paragraphs (3) and (4) cease to apply when the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines."*

19.2 Our understanding of the Government's proposal is that regulation 57(3), which contains the mandatory exclusion limb for an economic operator's non-payment of taxes, will be moved into regulation 57(1)'s list of "Mandatory Exclusions". Whilst it is not expressly set out in the question, we assume that the intention is to move regulation 57(4), which contains the discretionary limb for the non-payment of taxes, into the list of "Discretionary exclusions" within regulation 57(8).

19.3 Overall, the proposal seems to be a mere legislative mop-up of the currently isolated non-payment of tax exclusion and having minimal substantive change to both the nature and the consequences for the exclusion. However, the process of combining regulations 57(3) and 57(4) into the lists of mandatory and discretionary exclusions within regulation 57(1) and 57(8) has two further implications:

19.3.1 on the impact of the time limits at regulations 57(11) and (12) PCR, which have been amended by the Public Procurement (Amendments, Repeals and Revocations) Regulations 2016 (the “PPR”); and

19.3.2 on the operation of the exemption to the exclusions within regulation 57(5).

19.4 It is not clear whether these are intended and they raise questions as to the proportionality of the approach being adopted.

19.5 Section 14(2) PPR excludes regulations 57(3) and 57(4) from the time limit provisions contained in regulations 57(11) and 57(12). Regulations 57(11) and 57(12) limit the duration of mandatory and discretionary exclusions from applying. Under section 14(2) PPR, the non-payment of taxes became an absolute exclusion regardless of the time frame over when the non-payment occurred. Therefore, if the Government’s proposal is to combine the non-payment of taxes into the mandatory and discretionary exclusion lists, it is assumed that the time limits will revert to applying for the non-payment of taxes, unless the Government also intends to move from the principles established by the PPR 2016. Consequently, in the case of the mandatory exclusion for the non-payment of taxes, the period during which the economic operator will be excluded “is 5 years from the date of the conviction” and 3 years in the case of a discretionary exclusion. This has a considerable impact on the treatment of economic operators who have a history of the non-payment of taxes and gives rise questions over whether this treatment is proportional to the offences relating to non-payment of taxes.

19.6 Regarding the operation of regulation 57(5), this currently provides for an exemption to the mandatory and discretionary limbs contained in regulation 57(3) and 57(4). Provided the non-payment of taxes has been remedied either by payment or by entry into an arrangement to pay the outstanding taxes or social security contributions, an economic operator will not be excluded from being awarded a contract.

19.7 It is not clear whether this exemption is to be

19.7.1 removed in its entirety, with reliance placed instead on the time limits established for mandatory and discretionary exclusions; or

19.7.2 maintained whether on its own or in combination with the time limits associated with the mandatory and/or discretionary exclusions.

19.8 The proposal is not clear. It is not immediately apparent why the exemption should be removed if the fault has been rectified in a manner consistent with self-cleaning.

19.9 In the absence of consideration of the potential implications, our initial view is that it may be easier for the sake of the reader if regulations 57(3), (4) and (5) continue to be separated from the lists of exclusions within regulations 57(1) and 57(8).

19.10 Perhaps the more pertinent issue is the substantive test for the non-payment of taxes and, specifically, what behaviours result in an economic operator being in “breach of its obligations relating to the payment of taxes and social security contributions”. It is apparent that the legislation does not appear to require any assessment of the type of taxpayer behaviour that has led to the non-payment of tax, whether this is illegal tax evasion or aggressive tax planning, where the boundaries are more blurred. Additionally, there has been concern that the bar for disqualification has been set too high and that tax disputes to warrant exclusion under the mandatory exclusion often settle outside judicial procures meaning that economic operators have escaped from the regulation 57(3) exclusion.

20 QUESTION 20: DO YOU AGREE THAT FURTHER CONSIDERATION SHOULD BE GIVEN TO INCLUDING DPAS AS A GROUND FOR DISCRETIONARY EXCLUSION?

20.1 We agree that the inclusion of DPAs as an additional ground for discretionary exclusion merits further consideration, but care should be taken in terms of the steps taken to

implement such an exclusion, given the potential for adverse consequences as set out below.

20.2 We agree that DPAs should not be considered a mandatory ground for exclusion as such an approach is likely (as identified in the Green Paper) to have a dissuasive effect on relevant entities negotiating DPAs with the prosecuting authority (CPS, SFO etc). Currently, one of the clear advantages of entering into a DPA is that a company is able to avoid the risk of mandatory exclusion in the event of a conviction. By including DPAs as a ground for mandatory exclusion, any individual company's incentives to negotiate a DPA are likely to be (potentially severely) undermined, given that the ban from participating in future public tenders for a defined period will be extended to other applicable members of the corporate group.

20.3 It follows, however, the risk of a deterrent effect cannot be eliminated even if DPAs were included as a discretionary ground. We think this would be particularly the case if: (i) the policy decision is to include all DPAs as a potential ground, irrespective of whether they are related to supplier's capability to perform the contract in question; and (ii) if parent companies are also included within the scope of the DPA concluded with the prosecuting authority, effectively subjecting the entire corporate group to the possibility of being excluded.

20.4 We agree that, in principle, the deterrent effect mentioned above might be managed through appropriate deployment of self-cleaning measures which, as identified in the Green Paper, could be used to shorten (and presumably negate altogether) any period of exclusion. The evidence required to demonstrate self-cleaning under procurement rules (e.g., internal investigation, strengthening of compliance function, dismissal of staff) would, in practice, be similar to the measures required to be taken by a company under the DPA.

20.5 However, in practice, it is not clear whether a public authority would be well-placed to judge the efficacy of such measures, given the potentially complex scope of a DPA and in the absence of the formal appointment of an independent monitor (which is relatively rare). An individual public authority could, at least in theory, exercise its discretion to exclude in a way that conflicts with the prosecuting authority's approach – by rejecting DPA conditions as insufficient evidence of self-cleaning from a procurement perspective even though such measures were deemed sufficient to avoid a conviction by the prosecuting authority. It is also unclear to what extent self-cleaning measures beyond those already incorporated into the DPA (e.g. increased internal controls, dismissal of staff, change of senior management culture, etc.) would be required further by a public authority.

20.6 In such a scenario, the company concerned could effectively be sanctioned twice for the same conduct even though it has met its legal obligations under the DPA. Moreover, this could result in the unintended consequence of preventing the best bid for a particular contract from being submitted, which would be sub-optimal from the public authority's perspective as well.

20.7 The issue of when the DPA is taken into account by the public authority is not discussed in the Green Paper, beyond assessment at the selection phase. There is a gap in the remedies available to the public authority, which also applies to broader poor performance remedies available to the public authority during the lifetime of the contract. For example, if a firm which has entered into a DPA is awarded a contract but then breaches a DPA condition resulting in the DPA being withdrawn, it might be argued that there has been a failure to promote integrity in procurement processes – particularly where the conduct remedied by the DPA relates to the performance of the contract. We consider this aspect of remedies available to public authorities during the lifetime of the contract in such circumstances merits further consideration by the Cabinet Office.

20.8 As a potential solution to the above, we think that this issue could to some extent be managed through guidance to public authorities – for example, by requiring that they take the principles set out in the DPA Code of Practice (issued jointly by the CPS and SFO) into consideration when considering the adequacy of self-cleaning measures. It might also assist

to have a suitably-qualified third party review the measures taken and report on their effectiveness to the public authority, although this would entail additional cost to the supplier.

20.9 However, the risk remains of potential inconsistencies – not just between the relevant prosecuting authority and public authority, but even between different public authorities, especially when coupled with the fact that discretionary grounds entail a case-by-case approach by each contract. Such an issue is not unique to DPAs but could also arise, for example, in the context of compliance programmes to remedy a competition infringement.

20.10 It might be possible to mitigate potential discrepancies in approach by setting up a central body of procurement expertise to review the efficacy of measures taken by companies subject to DPAs and adopt a more harmonised approach to exclusion on these (and potentially similar) grounds, in light of the DPA Code of Practice. This would help to align incentives from a company's perspective, and could potentially be combined with the proposals for a centrally managed debarment list, as discussed below. This would also help mitigate the risk of challenge to the decisions of public authorities exercising their discretionary powers (we note issues of legal certainty regarding decisions taken based on soft-law guidance) and help promote confident and consistent decision making by public authorities.

20.11 However, this could in turn lead to other issues, in terms of maintaining equal treatment – e.g. between UK and non-UK suppliers – the latter should not be treated more or less favourably because they do not appear on a central list. It should be considered whether these effects could be mitigated by providing for assessment of DPAs or their equivalents from other GPA Member States in the UK regime. These issues are discussed in more detail below in the response to Q21.

21 QUESTION 21: DO YOU AGREE WITH THE PROPOSAL FOR A CENTRALLY MANAGED DEBARMENT LIST?

21.1 We recognise that a centrally managed debarment list, provided it is sufficiently well-resourced, could offer benefits in terms of clarity and transparency for other public authorities: we see clear efficiencies in having all relevant information in one accessible database.

21.2 Further, the proposal would be consistent with other measures set out in the Green Paper to combat poor performance e.g. the reference at paragraph 126 to US authorities storing supplier information on a central database. However, such US practice seems to be predicated on a clear link between supplier’s reliability and actual contract performance (which may then lead to debarment or suspension) whereas the debarment list proposed in the Green Paper would seem to serve broader policy objectives, in terms of including all suppliers "with relevant convictions", and some thought would need to be given as to who can access such information, particularly given data protection requirements.

21.3 We consider that in principle the debarment list could be extended to cover discretionary grounds in order to maximise the coverage and efficiencies associated with such a database. However, further thought would need to be given to the process by which public authorities propose to add suppliers to the list as this could lead to inconsistencies in approach across the public sector, which could again lead to the possibility of suppliers not being treated equally.

21.4 A centrally-managed debarment list could be combined with a centrally managed release process. Establishing a central body of expertise to manage the removal of companies from the debarment list, similar to that employed by the World Bank, would help ensure a more structured and predictable process for companies having to prove that they have adopted sufficient self-cleaning measures, which could potentially apply to mandatory as well as discretionary exclusions: this would also help avoid connotations associated with companies being "blacklisted". Again, having a suitably-qualified third party to monitor and report back on the effectiveness of the self-cleaning measures could assist the process.

21.5 However, the practical question remains as to how this would fit together with the selection stage of a procurement process: would the central body or the procuring body have the final say over whether a supplier is to be excluded from a particular procurement, given potentially different policy considerations? To the extent that the central body is taking the final decision, we would expect that any legal challenge should lie against that body rather than the procuring authority.

21.6 As regards the design of any centralised debarment system, we consider that it is helpful to look at the World Bank model. In addition to the centrally managed release system referred to above, there are other features that could usefully be adopted by the Cabinet Office, in terms of having independent units to conduct different aspects of enforcement to guard against confirmation bias: the World Bank system differentiates between investigation, first level adjudication and second (final) level adjudication.

21.7 We consider that the distinction between the investigative and decision-making processes could be usefully maintained if designing a centrally managed debarment system; however, we anticipate that any appeals against decisions to include a supplier or applications to be removed from the debarment list would be dealt with through the courts, rather than by an administrative government body. Alternatively, this may be an area in which the specialist procurement tribunal discussed elsewhere in the Green Paper could be given competence, given the specialist nature of such proceedings.

22 QUESTION 22: DO YOU AGREE WITH THE PROPOSAL TO MAKE PAST PERFORMANCE EASIER TO CONSIDER?

22.1 In summary yes, we agree that it should be easier for authorities to consider past performance as a means of deciding whether to exclude a supplier from a public procurement process, but only where this is appropriate and proportionate. We agree that the existing ground for poor performance is rarely used, as contracting authorities rarely terminate public contracts on the basis of poor performance.

22.2 Notwithstanding the proposed updated drafting, contracting authorities may remain reluctant to exclude bidders solely on the basis of this exclusion ground, therefore in practice, we believe it is only likely to be used in very obvious cases of poor performance.

22.3 Contracting authorities should be able to consider a wider range of information from the perspective of making a decision whether to exclude a bidder on this basis. A central system/database similar to that proposed in paragraphs 126 and 127 of the Green Paper is likely to be welcomed by authorities. However, authorities may be fearful of libel claims or similar, if reporting poor performance results in certain suppliers being excluded from participation in future procurements. Therefore, in practice, KPIs may need to be very clear and objective so that authorities have greater confidence in reporting such data in a public forum.

22.4 In respect of the management of such a central database, we would recommend that there is a clear appeals process, so that suppliers have an opportunity to appeal any scores provided and/or remove themselves from any quasi-debarment list, to avoid formal litigation in this area.

22.5 **Use of poor performance in a prior public contract as an exclusion ground**: From the perspective of acting for contracting authorities, we believe that the removal of the requirement to demonstrate that poor performance resulted in termination, damages or comparable sanctions will be welcomed, in principle. Indeed, discussion amongst PLA members revealed that they had rarely ever advised on the use of the current exclusion ground, due to the fact that it is very rare that a public contract is terminated due to poor performance.

22.6 In circumstances where a supplier is not performing in accordance with its obligations, it is commonplace that such suppliers are basically ‘managed out’ through a phased exit, the terms of which are mutually agreed between the parties. Suppliers often reluctantly agree to

mutually agree a phased exit, partially on the basis that if the authority customer did terminate the contract on the basis of poor performance, the supplier would be required to declare this when participating in future public procurement processes and risk exclusion.

22.7 Therefore, the removal of the requirement to demonstrate that poor performance resulted in termination, damages or comparable sanctions will be very significant for the supplier market. Indeed, we believe the supplier market will have a preference to receive absolute clarity in terms of when a supplier can be excluded from a procurement on the basis of poor performance under the new regime. In our experience of acting for private sector clients in the context of disputes concerning supplier performance, it is often alleged that the resulting poor performance is in some (or all) part attributable to the contracting authority customer who has failed to comply with its obligations. Common complaints include finding out that the original advertised scope of the contract was incorrect/underestimated, and therefore the supplier is often forced to take on additional responsibilities (often at no additional fee) in order to meet agreed milestones. Decision making within authorities can also be bureaucratic and deadlines are often missed due to the authority's own internal decision-making process. In short, there will always be 'another side to the story', which means it will remain important that suppliers have the ability to make proper representations to contracting authorities in order to explain further context (it would appear that the self-cleaning measures would enable this, albeit we would query whether a further exchange with the bidder concerned should be a requirement, such as that utilised in the context of abnormally low tenders, prior to an authority making a final decision to exclude the bidder concerned).

22.8 However, from the perspective of acting for contracting authorities, we believe that in order to be effective, there would need to a degree of flexibility and discretion in respect of when this ground can be used.

22.9 We note paragraph 125 of the Green Paper which states that the Government would provide guidance to support commercial teams in understanding the circumstances when a supplier may be excluded for poor performance on previous (public) contracts. We believe that such further guidance would be welcomed from both perspectives and would achieve a good balance between the two conflicting views. Our recommendation is that any guidance produced makes clear that there is no 'one size fits all' approach, as each scenario will need to be considered on the basis of the relevant facts.

22.10 **Likelihood of this ground being utilised**: Unless contracting authorities can be confident that they are able to exclude a supplier on the basis of this exclusion ground, in practice, it is likely that this will be used unless there is very clear evidence of poor performance. However, authorities may be more confident about making a decision in this regard if they are able to refer to a central database which effectively 'confirms' that they are able to exclude certain entities.

22.11 **Consideration of further information**: At present, contracting authorities rely heavily on self-declarations and references from those customers which the bidder has suggested. A bidder is unlikely to propose a referee who will provide negative feedback. However, there is clearly a balance to be struck if authorities are at liberty to consider a wide range of materials to decide whether a bidder should be excluded on the basis of prior poor performance in a public contract. For example, media articles are often inaccurate, present one side of a story or lack the requisite level of detail to determine the facts.

22.12 Therefore, we agree that a central database appears to be a good idea, particularly if this is going to be managed by a dedicated team of staff who conduct proper investigations into reports of poor performance. Authorities providing feedback may be nervous, however, about reporting low scores in the event that this results in claims under the public procurement regime, libel claims etc. Therefore, the Cabinet Office (assuming it is this department which would take responsibility for the database), may need to consider how this issue is addressed. This could be mitigated by ensuring that KPIs are as objective as possible (which means that it is easier to defend any potential claims on the basis of libel for example as the defendant authority would be able to prove that the report it has provided to

the Cabinet Office is true). In addition, if there was a clear appeals process in place which enabled suppliers to convey their views, it seems more likely that this process will be considered fair and balanced. A further consideration is how far-reaching this ground is to be interpreted in terms of group companies. For example, would a supplier merely 'escape' this exclusion ground by bidding under the name of another entity in a subsequent procurement process? Some flexibility may be required here to avoid this scenario, particularly where the poor performance concerned was attributable to a particular individual/management team etc.

23 QUESTION 23: DO YOU AGREE WITH THE PROPOSAL TO CARRY OUT A SIMPLIFIED SELECTION STAGE THROUGH THE SUPPLIER REGISTRATION SYSTEM?

23.1 We do not have sufficient detail of the system including what information it will hold and how it will be used in practice to comment.

23.2 We would make the following specific observations:

23.2.1 PCR currently permits economic operators to complete a live "business passport" in the form of the ESPD. This enables economic operators to insert basic selection information once and use (and update) it for the purposes of responding to a procuring body's contract opportunity. A procuring body is obliged to accept it if an ESPD is submitted. This right has been in place since 2015 but, in our experience, has been rarely used by economic operators in the UK.

23.2.2 The supplier registration system will only be able to contain basic selection information in practice because the system cannot have visibility of particular contract opportunities and their size, scale and subject matter when suppliers register. Economic operators will therefore likely be required in practice to respond to selection criteria (tailored to the subject matter of the particular procurement) in order to pre-qualify for a particular contract opportunity and for a procuring body to assess their capability (and appropriate level of financial strength – see comment below) regardless of whether there is an intention to reduce the number of suppliers to be invited to the tender stage. A system which avoids duplication of time and effort – in suppliers only having to submit basic information once - will be welcomed by suppliers but we assume procuring bodies will still have to assess it (particularly if there is any updated information submitted by the supplier at the point of a request to participate) and it is unlikely to avoid the time and effort involved in running a separate bespoke selection stage.

23.3 It is not clear whether this system is intended:

23.3.1 to be a UK wide qualification system, similar to those currently in operation in the utilities sector, such that a procuring body can use the supplier registration system as a route to market (as an alternative to publishing a Contract Notice) and will only engage with registered suppliers at the exclusion of economic operators that are not registered. Utilities can use these systems as the selection stage (identifying the relevant technical category to match their contract opportunity) and proceed to tender stage unless they wish to reduce the number of suppliers; or

23.3.2 as an information repository from which economic operators and procuring bodies alike can easily access basic selection information for registered suppliers but at the same time will accept requests to participate (and selection questionnaires) from economic operators that are not registered (and will need to ensure equal treatment across all suppliers).

23.4 The text at paragraph 130 of the Green Paper which indicates "Contracting authorities would be able to apply criteria (for example, a financial threshold) to this information in order to determine whether suppliers would be eligible to tender for the relevant contract opportunity" suggests that this is similar to a qualification system from which a procuring body may create a shortlist of eligible tenderers.

23.5 Following on from the above, the use of any criteria or "filters" to sift out which suppliers would be eligible to tender for a contract opportunity (and by implication, excluding others) will need to be carefully considered. Use of these filters generates complexity and risk including around transparency and fit to the rules entitling an economic operator to rely on a third party in order to satisfy selection criteria. If a Supplier is excluded through the use of an automated financial threshold, it is unlikely to have had prior transparency of the threshold (bespoke to the contract opportunity) and not had the prospect of deciding to rely on a third party (a parent or joined a consortium etc) in order to satisfy the financial threshold. Similarly, and again where the supplier registration system is used as a route to market, there are difficulties in registered economic operators joining with other economic operators (not registered to the system) in groups and/or relying on a third party (not registered to the system) in order to satisfy selection criteria.

23.6 The approach of the supplier registration system, depending on its purpose, may therefore inadvertently limit the market and access for SMEs to team up with other economic operators or rely on third parties to help them access opportunities they cannot do on their own. Utilities have significant experience of operating and using qualification systems and their expertise in this area should be taken on board.

23.7 Following on from the above, it will need to be clear how the supplier registration system works in conjunction with the proposals for DPS+ and frameworks (particular open frameworks). This is particularly the case if the purpose of the supplier registration system is to provide the selection stage from which eligible suppliers can be determined.

23.8 Finally, there needs to be clarity on who will operate the supplier registration system, the precise information it will contain and how it will operate in practice (including ensuring equal treatment across suppliers and observing transparency principles). It is important to understand whether the operator will verify the selection information provided (such that a procuring body is not required to do so) and how the operators will ensure that the supplier information (and assessment, if this is intended) is up to date and accurate at the time a procuring body seeks to rely on it.

24 QUESTION 24: DO YOU AGREE THAT THE LIMITS ON INFORMATION THAT CAN BE REQUESTED TO VERIFY SUPPLIER SELF-ASSESSMENTS IN REGULATION 60, SHOULD BE REMOVED?

24.1 Though we do not have particularly strong concerns with the current position, we do agree that the rules could be simplified, and it is not strictly necessary for the "means of proof" limitations in regulation 60 to be placed on a statutory footing.

24.2 We caution against giving contracting authorities an unfettered discretion to request information as this could result in poor practice or even misuse. For example, contracting authorities requesting bidders to submit irrelevant or excessive amounts of documentation during the procurement process whether unintentionally or with the intention of favouring certain bidders. Rather, if the limits set out in regulation 60 are removed, they should be replaced with a general statutory duty on contracting authorities to ensure that any request for information is relevant and proportionate to the exclusion ground or selection criterion in question.

24.3 Furthermore, if regulation 60 is removed from the statute book in part (i.e. just the limitations whether general or specific) or full, we recommend repurposing it as guidance (e.g. in the form of a PPN). Whilst we note that some contracting authorities may have reported that the regulation 60 limitations "constrain" their ability to properly investigate previous experience and financial standing, we suspect that most contracting authorities, as well as practitioners and bidders, appreciate and benefit from having a list of information. For example, the list of information provides clarity and certainty as to the types of information that might be requested. It also promotes standardisation and simplification of the selection stage process, particularly in respect of financial standing assessments. Therefore, the wholesale removal of the list of information in regulation 60 from the new regime could create more issues (e.g. uncertainty and the proliferation of approaches across the public sector) than it solves.

24.4 Overall, we think this strikes the right balance between ensuring contracting authorities have access to the necessary information and achieving the broader objectives of the Green Paper such as maintaining a fair system and cutting red tape and removing unnecessary barriers for organisations like SMEs and charities.

CHAPTER 5 – USING THE BEST COMMERCIAL PURCHASING TOOLS

25 QUESTION 25: DO YOU AGREE WITH THE PROPOSED NEW DPS+?

25.1 In principle, we agree with the proposed new DPS+ and in particular the change to make them available for all types of procurements. This is reflective of what we see in practice and the wide range of goods, works and services within the scope of DPS advertised by way of contract notice in the last year. Given this, we would view the DPS+ as catching up with current practice, rather than transforming procurement tools or procedures currently available.

25.2 In terms of how the proposed new DPS+ is advertised, we would propose a new DPS-specific notice, removing for example standard form sections of notices that are not relevant to DPS (e.g. information on the limit on the number of candidates to be invited to tender) and introducing new sections to recognise specific features of DPS (e.g. information on any means to terminate the DPS or part of the DPS, use of the language of categories rather than lots).

25.3 Given the potential longevity of the proposed new DPS+ we would also suggest a more user-friendly means to update a notice advertising a DPS+. In our experience there can be negative connotations associated with the use of Corrigendum notices to update already published notices. Updates to DPS+ notices should be encouraged to ensure they remain accurate and up-to-date, whilst of course being mindful of the rules on substantial modifications. This will be especially relevant for a DPS that has no maximum duration.

25.4 The selection stage is a vital stage for a DPS as it sets the rules for entry on to the DPS. We note that there can be a hard balance to strike at that stage between the openness of these systems and their usability, recognising that the more suppliers there are on a DPS the more tenders an authority may have to consider. This is an area where further legal and commercial guidance would be useful for authorities, noting the existing CCS DPS guidance of 2016.

25.5 A particular issue we note in practice is that any threshold for entry to a DPS is set at a low level to allow the maximum number and type of suppliers possible on to the DPS. However, the standards against which they have been assessed may not be appropriate for all call-offs awarded under the DPS, e.g. for larger scale contracts. Moreover, many DPS choose not to distinguish between different sizes of contracts but rather as between different categories of services or different geographical locations.

25.6 The DPS rules do not envisage a further sift of suppliers prior to invitation to tender. However, we note that under the UCR the qualification system rules (which would be replaced under these proposals by the DPS+) do allow for authorities to apply a further selection stage to narrow the field of potential suppliers ahead of moving to invitation to tender. We would query whether within any new procurement regulations or within accompanying guidance it could be made clear the extent to which there may be any narrowing of the potential field of competition for a specific ITT under a DPS. Use of automated selection tools as occurs for example in the private sector, could be useful.

25.7 The process of award under the proposed new DPS+ using the new competitive flexible procedure would seem positive, allowing each authority to determine how that procedure would work for its own DPS. We understand that the new competitive flexible procedure rules would only apply insofar as they concern the tender/invitation to tender stage of the process, i.e. there is no need for a new notice for each procurement under the DPS+. Greater flexibility including the possibility for negotiations, for example, would fit with

the DPS being available for all types of procurement, including ones with potential more complex requirements.

25.8 We would propose that the DPS-specific wording relating to 'mutual agreement' of the time limit for receipt of tenders (Reg. 34(12) PCR) is not maintained. We find that in practice this wording creates ambiguity and as a result is little used. In any case we suspect that the move to the use of the new competitive flexible procedure under the proposed new DPS+ will dispense with the need for such drafting.

25.9 Currently there is no requirement to hold a standstill period in respect of an above threshold call-off contract under a DPS, although in practice many contracting authorities choose to observe one (a benefit being that this may mitigate the availability of the ineffectiveness remedy). We understand Government's proposal to be that there is transparency of award decisions and how they were reached ahead of the move to contract award and the start of standstill. We also understand Government's proposal to be that this requirement is extended to all call-offs under a DPS (presumably above threshold). Extending the standstill to call-offs under a DPS is a welcome step in our view, particularly in view of the extension of the availability of the proposed new DPS+.

25.10 We note the proposal that a contract award notice must be published when any contract is awarded following a procurement under a DPS+. Whilst we understand that this proposal is consistent with the Government's drive for greater transparency, we would question whether there should still be flexibility for contracting authorities and utilities to be able to group together contract award notices and publish on quarterly basis, particularly if there has been prior transparency as described in the paragraph immediately above.

26 QUESTION 26: DO YOU AGREE WITH THE PROPOSALS FOR THE OPEN AND CLOSED FRAMEWORKS?

26.1 We broadly welcome the proposals on open and closed frameworks; greater flexibility is welcome as this should help to increase competition.

26.2 We would question whether:

26.2.1 it should be possible to have an open framework agreement operate for a period longer than five or eight years, provided it is regularly opened up to competition as stated in the call for competition at the outset; and

26.2.2 the new framework agreement rules should retain the possibility of a duration longer than the maximum eight years. The potential for a duration longer than the maximum is permitted in the PCR and also in the UCR, albeit subject to specific criteria which must be met and explained in any notice advertising the framework. We would suggest that there may be specific circumstances, particularly in the utilities sectors and in the case of single supplier frameworks, where a longer duration may still be appropriate. It may be appropriate to retain this flexibility but to provide more specific guidance on the circumstances in which that flexibility may be available.

26.3 We note that statement that in the case of open frameworks their re-opening may be advertised and new applicants assessed using the same requirements and evaluation criteria (paragraph 152). We would question whether there should be some flexibility to refresh requirements at that time too in order to maintain the usefulness of the framework, noting that suppliers already on the framework will be given the opportunity to update their tenders/pricing as appropriate. We would test whether it could be possible to expand the potential grounds for permitted modifications (Regulation 72 PCR) to cover such a refresh subject to clearly defined parameters (e.g. no material change in the character of the framework). Guidance in any case in this area would be particularly helpful for contracting authorities.

26.4 We presume but would welcome clarification that the central register referred to in paragraph 155 of the Green Paper would be available to all contracting authorities, not just central government contracting authorities.

CHAPTER 6 – TRANSPARENCY REQUIREMENTS

27 QUESTION 27: DO YOU AGREE THAT TRANSPARENCY SHOULD BE EMBEDDED THROUGHOUT THE COMMERCIAL LIFECYCLE FROM PLANNING THROUGH PROCUREMENT, CONTRACT AWARD, PERFORMANCE AND COMPLETION?

27.1 Yes. The rationale for the principle of transparency in paragraph 33 is well articulated. The decision as to which documents produced during the procurement ought to be published should be viewed through this lens. The transparency requirements are inextricably linked to the need to have an effective and well-functioning review system. As set out in paragraph 188 of the Green Paper, such a system acts as a suitable deterrent against breaches of the rules and provides the right for redress to bidders who have lost the opportunity to win a procurement because of those breaches. We have some observations on the specific proposals around the disclosure of procurement information as proposed at paragraphs 165 to 169 in Chapter 6:

27.2 Statutory guidance should be issued on standardised contemporaneous record keeping during the commercial lifecycle of the procurement process, including:

27.2.1 Reasons for disqualification, deselection or elimination

27.2.2 Reasons for any score with reference to the characteristics of the tender (not a replication of the scoring methodology)

27.2.3 The level of detail required (e.g. by all evaluators, against all evaluation criteria, to include moderation)

27.2.4 Which documents produced during the procurement lifecycle need to be disclosed (a) within the regulation 84 report and (b) to individual bidders (see further comments below) and how to draft them to avoid breaches of confidentiality

27.3 As soon as possible after a decision is made in the commercial lifecycle that affects a bidder's participation in the procurement, full reasons should be given e.g. to any bidder who is disqualified, deselected or not taken through to the next stage of a competition. This will help address a part of the problem articulated in paragraph 217, namely the need for suppliers to have "full and timely access to the information they need to determine whether a procurement process is being or was run properly".

27.4 The proposal for the publication of "basic disclosure information" prior to commencing standstill needs to be further considered. In order to provide bidders with the information to meet the objective of an "effective and well-functioning review system", which we agree is "central to the successful operation of any public procurement regime" (paragraph 188), each bidder needs to have the unredacted reasons for its score as set out in the contemporaneous evaluation documents. As is clear from the current review system, until a bidder is provided with the contemporaneous evaluation documents by the contracting authority it is unlikely that they will have the information needed to determine whether a procurement process is being or was run properly. Under the current review system, the fact that contemporaneous evaluation documents are frequently not disclosed until after proceedings have been issued and the Court has made an order for disclosure is a major contributor to cost and delay in procurement challenges. .

27.5 The publication of the information currently required by regulation 84 'to the world' as proposed in paragraph 166 is a positive step under the principle of transparency. However, in order to meet the objective in paragraph 188 and 191 of the Green Paper, bidders need to be provided with contemporaneous, unredacted documents from the procurement process that relate to how their bid was treated. Documents relating to the evaluation of competitors

tenders should be redacted for properly confidential information. We suggest that the senior stakeholder in the procurement should sign off on the information within the regulation 84 report and documents provided to bidders to help meet the principles of transparency (paragraph 33) and integrity (paragraph 34).

27.6 Disclosure of the "basic tender" allows for transparency, but may not wholly achieve objectives for the following reasons:

27.6.1 The tendency of each bidder will be to assert extensive confidentiality over the contents of their tender, even where there is clear guidance.

27.6.2 It may be time-consuming for contracting authorities to have to prepare redacted versions of whole tenders, which can run into many hundreds of pages. Even with guidance, there is often a difficult decision as to what falls within the FOIA / EIR exemptions and what does not.

27.6.3 To meet the objectives set out in paragraphs 188 and 191 individual bidders require detailed reasons for the decision making (preferably via contemporaneous evaluation documents produced on a consistent basis in compliance with statutory guidance) rather than extensive volumes of tenders to review, particularly in light of tight limitation periods.

27.6.4 Disclosure of tenders may be prejudicial either to the possibility that that procurement will need to be rewound, or to competition in a future similar procurement process.

27.6.5 Disclosure of the basic tender in redacted form will not avoid the need in most cases for a claimant in procurement proceedings to seek disclosure of the unredacted tender of the successful bidder into a confidentiality ring of external advisers. Although confidentiality rings can be cumbersome, there is no obviously better way for claimants to be able to test the contracting authority's evaluation of the successful tender (to the extent that that is in issue).

27.6.6 It should be clearer in any event in what circumstances tenders will be disclosed so that this process is expedited where required.

28 QUESTION 28: DO YOU AGREE THAT CONTRACTING AUTHORITIES SHOULD BE REQUIRED TO IMPLEMENT THE OPEN CONTRACTING DATA STANDARD?

28.1 Yes, we welcome the requirement for all e-procurement and related systems to comply with the OCDS. In terms of the legal/practical issues which may require further development, these include:

28.1.1 Compliance with OCDS - will compliance with OCDS truly be achieved if only e-portal providers are required to comply with the standard? Generally speaking, e-portal suppliers are specialists at writing/hosting software which capture data. They do not currently analyse the quality of the information being inputted, or whether the information is being kept up to date. Indeed, it would seem that an 'OCDS compliant' e-portal would be dependent on personnel within contracting authorities and utilities inputting data into the system and understanding when such information needs to be inputted/updated and the correct format of the input to be provided. In practice, there would be relatively little that e-portal suppliers could do to ensure that the principles of OCDS were being adhered to (unless of course they diversified into a quasi 'auditor' role, checking the quality of data and ensuring that all 'events' which should be captured (e.g. contract amendments etc.) are sufficiently captured). To that end, the Cabinet Office may wish to give further thought to extending the obligation to comply with OCDS to contracting authorities and utilities.

28.1.2 Monitoring – connected to the first bullet point above, we would query how compliance with OCDS will be monitored. There are many internationally recognised standards and accreditations which set baseline standards/principles for demonstrating quality

and which aim to achieve standardisation, a leading example of this would be the International Organization for Standardization (ISO). While ISO develops standards, it does not get involved in certification, and does not issue certificates. This is performed by an external network of certification bodies. An organisation's compliance with an ISO standard is audited on a regular basis by a certification body. If the organisation remains compliant with the requisite ICO criteria, the organisation retains the ISO accreditation. Based on our understanding of OCDS, it does not currently have a network of certified bodies who could support implementation and monitor compliance with the standard. To that end, we envisage that organisations would be largely reliant on the Cabinet Office to provide such support and wondered whether the Cabinet Office could be in a position to provide this support. In addition, it is not clear how compliance with OCDS will be monitored on a regular basis to ensure adherence to the standard. Therefore again, we wondered if it was envisaged that the Cabinet Office would monitor adherence to the standard? If so, the Cabinet Office may therefore require further resource (internal and/or external) to perform these tasks, otherwise it is not clear how OCDS will be effective.

28.1.3 Interoperability – we note in paragraph 172 of the Green Paper that the Government proposes setting a timetable for all e-procurement and related systems across the public sector to become OCDS compliant and "interoperable with other public procurement systems". In our view, it appears that such interoperability would only be required in terms of the central platform, in a similar way to the interoperability that is available across e-procurement solutions through the PEPPOL interoperability tool. It is unclear how much value would be obtained if, or if the there is a real need for, third-party e-procurement suppliers to ensure that their platforms are interoperable with other third-party e-procurement suppliers.

28.1.4 Simplification - third party e-portal users often complain about their complexity and format (both from public and private sector). They are generally "clunky" to operate and not "user friendly". This can lead to issues in respect of suppliers missing tender deadlines, losing documentation and overall, they do not present a logical/clear interface. It can also be very expensive to obtain a licence for such systems. We have experience of acting for public sector organisations who do not conduct a significant amount of public procurement to justify the purchase of such a licence, which leads to such authorities using email or other platforms which are not generally designed to conduct a public procurement process such as Microsoft SharePoint or other "in-house" data-rooms provided by external advisors such as law firms or consultancies. Unfortunately, market forces have not resulted in the creation of better and more up-to-date systems.

28.1.5 System Improvements - Compliance with OCDS will not, in itself, lead to the general improvement of e-portal systems from a user-experience perspective. Many countries require public sector organisations to use a central system to undertake public procurement exercises. These are usually State-funded systems, and provided to contracting authorities on a complimentary or low cost basis. While we do not have a particular strength of feeling on this issue from a legal perspective, it is an issue which affects both our public and private sector clients. To that end, we believe that an overhaul of the public procurement regime, coupled with the development of a central system, presents an opportunity for the Government to develop a single platform, potentially outsourcing this to an external provider. E-portal suppliers could then compete to provide the platform, hopefully resulting in the improvement of e-portal solutions for the public and utility sectors.

29 QUESTION 29: DO YOU AGREE THAT A CENTRAL DIGITAL PLATFORM SHOULD BE ESTABLISHED FOR COMMERCIAL DATA, INCLUDING SUPPLIER REGISTRATION INFORMATION?

29.1 The Green Paper proposes the creation of a single digital platform to provide a single point of access for:

29.1.1 Public access to all published data online and via APIs;

29.1.2 Notices from Find a Tender service and Contracts Finder;

29.1.3 Links to e-procurement systems for tendering;

29.1.4 Access to commercial data analysis tools;

29.1.5 Price and commercial performance comparison by supplier and between supplier.

29.2 In time, it is suggested that the functionality would be expanded to include registers of suppliers, and contract performance data including spend data, a central debarment list procurement pipelines and a central register of complaints and legal challenges.

29.3 The potential advantages of making information available in a single place are clear. If the digital platform was to operate effectively, there would be time and cost savings for contracting authorities and bidders alike. Contracting authorities would have information to hand in one place rather than needing to consult multiple sources. The need for bidders to complete the same selection questionnaire information (or at least, aspects of SQ information) could also be reduced. Bidding is a time-consuming process and any time that is released to allow bidders to dedicate more time to focus on the qualitative aspects of tendering should be welcomed.

29.4 Further detail is required in relation to some areas:

29.4.1 **Commercial Data Analysis Tools**: Detail would be welcomed on what the “commercial data analysis tools” would be, how they would be used by Authorities and what protective measures would be put in place to ensure that the underlying data is of sufficient quality to make those tools effective and fair. Any data analysis tool will only be as effective as its underlying data. Will it be compulsory for contracting authorities to upload contract data? Will they have the additional resource to perform these tasks (which in turn, will depend on the level of detail and time commitment involved)? What are the consequences of not providing this data, or of providing incorrect data that may subsequently prejudice a bidder in a competitive procurement process?

29.4.2 **Performance Data**: There are clear benefits for contracting authorities to have a better understanding of bidder’s past performance, so that this can be taken into account in an appropriate manner. It is essential, however, that any decisions based upon past performance data take into account the specific details of a particular contract that may have driven certain performance issues. For example, if there is a genuine dispute as to whether there were performance issues, it follows that these should not be uploaded. If a contracting authority has procured a service that is more prone to performance issues (for instance, because the service is a first-of-kind or particularly innovative service) would it be right to penalise that bidder? If an Authority procures a low-cost service that does not (and is not designed to) incentivise a premium quality service, how will the data from that contract be treated alongside performance data from a contract that is designed to procure a premium service?

29.4.3 **Price Data**: Contracting authorities will always have an interest in understanding the best price for a particular service that a bidder has offered to other public bodies. However, it will be necessary to balance this aim with the need to ensure that bidders retain the ability to offer better-than-standard prices (and contract terms) for particular tenders. The ability for bidders to offer “special terms” and “special prices” on an exceptional basis can be advantageous for contracting authorities. If this is taken away from bidders, these measures could inadvertently lead to an increase in price under some contracts and a reduction in competitive tension between bidders.

29.4.4 **Complaints**: The Green Paper suggests that the single digital platform could hold a central register of complaints. As with performance data, it will be important that any

available data on complaints is made available only where the complaint has been found to be valid.

29.5 Overall, we are supportive of any measures that seek to make procurement faster, more effective and fairer for contracting authorities and bidders. The proposed single digital platform has obvious benefits and can build on the successes of other platforms such as the Digital Marketplace and Contracts Finder. The key to the success of a single digital platform will be in its planning and implementation. Safeguards are needed to ensure that the measures are based upon credible data that represents bidders fairly and does not undermine their ability to tender competitively.

CHAPTER 7 - FAIR AND FAST CHALLENGES TO PROCUREMENT DECISIONS

30 QUESTION 30: DO YOU BELIEVE THAT THE PROPOSED COURT REFORMS WILL DELIVER THE REQUIRED OBJECTIVE OF A FASTER, CHEAPER AND THEREFORE MORE ACCESSIBLE REVIEW SYSTEM? IF YOU CAN IDENTIFY ANY FURTHER CHANGES TO COURT RULES/PROCESSES WHICH YOU BELIEVE WOULD HAVE A POSITIVE IMPACT IN THIS AREA, PLEASE SET THEM OUT HERE.

30.1 In order to address this question within a logical framework, it is necessary to first identify the principal perceived deficiencies of the present process for procurement challenges which are suspected of causing that system to be slower / more expensive / less accessible than is desirable. This will ensure that the proposals for change can be properly targeted to the sources of the perceived problems with the present process. As the Cabinet Office is aware, the availability of pre-contractual remedies (Questions 33 – 35) is a key consideration when designing the appropriate judicial processes – its effect is to minimise the extent to which damages claims are brought, but determining more of these challenges pre-contractually would require a high degree of expedition in how procurement challenges are dealt with by the judicial system. The availability of pre-contractual remedies is, in turn, dependent on efficient and full disclosure of documents so that bidders have access to key materials required to inform a decision to challenge, and the delays otherwise associated with the current disclosure process are avoided. This is referenced further in our response to Questions 27 and 38.

30.2 **General comments:** For higher value claims that continue in the TCC (i.e. leaving aside lower value/in-flight[3]/fast track procedures) we agree with the proposals for reform including to improve pleadings, disclosure and dealing with Part 8 claims. We also agree that specific rules governing the conduct of procurement challenges can be appropriately set out in a separate section of the Civil Procedure Rules and an associated Practice Direction, building on Appendix H to the TCC Guide. We provide more detailed commentary and we make some additional suggestions below to these proposals for reform.

30.3 We also agree that for a particular type of claim (the most obvious characteristics being those of a lower value and challenges "in-flight" to the procurement process) the proposal for a tailored fast-track system is capable of addressing some of the problems inherent in the existing system. We set out below some particular suggestions regarding the fast-track proposal. We also address below under **Question 32** the fundamental question of whether or not it would be better to have a separate body established solely to deal with such claims or whether or not the objectives can be just as well achieved by a fast-track system within the TCC.

Proposals for reform for higher value ("standard") challenges:

30.4 **Pleadings:** We agree that efficiencies can be achieved through better alignment of directions for service of pleadings: We propose that time for issuing the Particulars of Claim should remain as within 7 days of issue, but that time for service of the Defence should be brought forward from the existing period of 28 days to within 14 days of service of the

[3] "In-flight" challenges is used to denote any challenge to a procurement process at any stage prior to the contract award decision.

Particulars of Claim, and that the time for service of the Reply should be brought forward from the existing period of 21 days to within 7 days of service of the Defence.

30.5 **Additional suggestion regarding pleadings:** Currently it is very common for pleadings in procurement challenges to undergo multiple rounds of amendments. This is often because pleadings are initially drafted very early in the process (as is sensible) but then as further disclosure is provided (often in stages) the claimant amends its complaint within 30 days of receipt of such disclosure in order to ensure that any such amendments do not fall foul of the 30 day limitation period. Particular difficulties arise when disclosure is provided into a lawyers only confidentiality ring which may start the 30 day limitation period running in circumstances where the client has been unable to give instructions. We therefore propose:

30.5.1 that the 30 day limitation period should not start to run in circumstances where the client itself (i.e. one or more relevant officers or employees of the client) cannot know/ought to know that it has grounds for challenge (i.e. it should be made clear that knowledge by a legal team cannot be imputed to a client where the lawyers have undertaken not to disclose that material to the client).

30.5.2 That once a claim has been issued in respect of a procurement challenge, the 30 day limitation period no longer applies to subsequent amendments to the pleadings arising from disclosure given in those proceedings. By that stage the contracting authority is already aware of the claim which will have been brought expeditiously, and disapplying the limitation period to subsequent amendments will ensure that a sensible protocol can be applied to minimise and streamline pleadings. The Civil Procedure Rules and associated Practice Directions dealing with procurement challenges can make provision for subsequent rounds of amendments to pleadings, closely tied into any specific provisions regarding disclosure.

30.6 **Disclosure:** We agree that disclosure can be very burdensome, but equally we consider that disclosure is essential for a fair and robust trial. We also agree that lack of timely disclosure can significantly impact the speed of litigation, with (as noted elsewhere) a significant disparity between the parties in terms of the defendant being in possession of the vast majority of the relevant disclosure. We agree that clear and mandatory provisions which deal with what initial disclosure ought to be given (and therefore what records contracting authorities ought to maintain) will be crucial in meeting the objective of ensuring that procurement challenges are fair and fast. See further our responses to **Questions 27 and 38** on transparency and debriefing. Whilst it will be beneficial to increase the expectation on early full disclosure, it is inevitable that as a claim evolves, further disclosure will be required.

30.7 **Additional suggestion regarding disclosure**: Procurement challenges are currently excluded from the disclosure pilot due to the complexities of the type of challenge, including dealing with confidential documents and very short limitation periods. We consider that procurement challenges do merit bespoke disclosure rules tailored to address the particular nature of the disputes (and these could be contained within the CPR or Practice Direction dealing with procurement challenges). Within those directions, we would recommend that the rules provide that the parties should promote an efficient disclosure process via (a) early engagement between the parties to tailor the disclosure process to the urgency, value, complexity and nature of the claim, thereby borrowing from the flexibility inherent in the disclosure pilot and (b) early and continued engagement on tools to scope and reduce searches using key words, date ranges and custodians.

30.8 Given the importance of the disclosure process to the fair and efficient resolution of the dispute, we consider that there is merit in the directions providing for the following:

30.8.1 The contracting authority's compliance with the disclosure rules being a factor that the review body must take into account when deciding whether to grant any application by the authority for the lifting of the automatic suspension.

30.8.2 Non-compliance with the disclosure rules leading to costs penalties against the authority. Currently, a claimant may have to repeatedly request and threaten to apply for disclosure. If an authority delays production but yields before an application is heard, this can protract the proceedings and incur costs on both sides but without any prospect of the claimant recovering the costs in chasing the defendant. Penalties may include fixed costs, and/or costs awarded on the indemnity basis, payable by the defendant.

30.9 **Additional suggestion regarding confidentiality rings:** We note that the Green Paper does propose that clear guidance will be given on how information can be quickly and appropriately produced into confidentiality rings: We would suggest that consideration be given to directions which:

30.9.1 require a contracting authority who is concerned about breaching confidentiality to disclose requested documents into a "lawyers only" confidentiality ring, rather than withhold/delay on the basis of those concerns.

30.9.2 that the limitation period should not start running whilst it is only a client's lawyer(s) who have access to those documents.

30.9.3 that the expectation is that a client representative will be admitted to the ring in return for provision of appropriate undertakings.

30.9.4 annex standard form confidentiality agreement and associated undertakings.

30.10 **Part 8 claims:** We agree that the procurement specific Civil Procedure Rules and associated Practice Direction can make provision for a tailored Part 8 process. This may overlap with/replicate the "fast-track" process (see below).

30.11 **Part 54 claims:** We agree that the process for transferring a claim issued in the Administrative Court to the TCC should be expedited. Where a judicial review claim issued in the Administrative Court relates to a procurement but includes grounds of challenge that are not directly concerned with procurement law, it may still be appropriate for the claim to be transferred to the TCC. Any designated procurement judge(s) within the TCC should be amongst the TCC judges who are authorised as judges of the Administrative Court so that they can sit in this dual capacity (and also to build their experience of the judicial review procedure by sitting in the Administrative Court on occasion).

30.12 **Additional general suggestion**: In recent years litigation practitioners have been encouraged and required to adopt a less combative and obstructive approach to the procedural aspects of a dispute. Points will often be taken at length over protracted rounds of correspondence, greatly increasing costs and delaying matters. It is often possible for each side's representatives to reach agreement over procedural issues more efficiently and reasonably through speaking to each other. We consider that the CPR and Practice Direction could usefully require regular (with costs sanctions for non-compliance) meetings between each side's representatives to anticipate and resolve procedural issues before they are allowed to delay and complicate the conduct of the claim.

Detailed comments on a procurement specific fast-track system:

30.13 As stated above, we consider that a review system which promotes faster resolution, with a focus on written pleadings and resolution by an expert judge is appropriate for certain types of procurement challenges. We set out below our comments on what that "fast-track" system could achieve and on its operation, but we return in our response to Question 32 whether this forum would be best provided within the existing Court system or as a separate tribunal.

30.14 **What type of claims would be appropriate for this system?** We consider that complaints about procurement processes which are "in flight" would be appropriate for this system, for reasons already articulated. We also consider that "Part 8" type challenges would be

appropriate for this system as they lend themselves to paper based review. Finally, we also consider that lower value claims may be appropriate for this system, although fixing a set amount which determines the forum for resolution may be too inflexible and arbitrary. Instead, consideration could be given to a presumptive benchmark contract value for determining allocation of claims to a track, but in circumstances where the parties can displace the benchmark by agreement or by order. It may be appropriate to consider case management provisions at an early stage in order to determine any disagreement regarding track allocation.

30.15 **Process?** We consider that consideration could be given to a fast-track process which aims to decide complaints within a very compressed timetable, but still allowing the parties time to produce abbreviated pleadings and some documents in support, and which permits some interrogation of the parties by the review body, for example:

30.15.1 Initial claim with pleading (maximum 10 pages) and documents in support (maximum 1 lever arch file) lodged and served.

30.15.2 Within 14 days: Defence (maximum 10 pages) and documents in support (maximum 1 lever arch file) lodged and served within 14 days.

30.15.3 Within further 14 days: Preliminary assessment by the review body setting out any questions for each party. The PLA notes that whilst it may be lawful under the GPA to only provide the right to an oral hearing on appeal, the holding of an oral hearing during the fast-track stage can "unlock" some disputes, although the benefit of having a "paper only" track is speed.

30.15.4 Within further 7 days: Response to review body questions to be served by each party (maximum 10 pages and 100 pages of documents in support).

30.15.5 Within further 21 days: Decision by review body.

30.16 **Costs:** Given the diminished call on court resources such a streamlined process would create, consideration could be given to a greatly reduced court fee for such challenges and/or waiving the fee altogether. We consider that a fee of £10,528 could not be justified in circumstances where the principal remedy being sought by the challenger is a pre-contract remedy rather than damages. (The usual court fee for issuing a claim seeking a remedy other than damages is £528.) Consideration could also be given to adopting a fixed cost procedure such that the winner pays the loser's costs, but fixed to a set amount. This would promote efficient presentation of a case and provide certainty for parties.

30.17 **Judges**: If this fast-track system were to be sited within the existing TCC, we note and agree with the proposal that a dedicated TCC Judge to deal with procurement cases will invariably assist with capacity, and the parties will know that the Judge has expertise in this area. Please refer to our response to Question 32 where we address whether or not it would be advantageous to site such a body outside the TCC or not.

31 QUESTION 31: DO YOU BELIEVE THAT A PROCESS OF INDEPENDENT CONTRACTING AUTHORITY REVIEW WOULD BE A USEFUL ADDITION TO THE REVIEW SYSTEM?

31.1 We are unclear as to what this proposed "process of independent contracting authority review" would involve. Our understanding is that this review would be conducted by the contracting authority itself, and therefore this proposal is distinct and separate from any proposal for review by an external body (e.g. the Cabinet Office's 'mystery shopper' scheme referred to above). But if that is right, then it is not clear how the review would genuinely be "independent". Individuals employed by a contracting authority may not be well placed to carry out a robust investigation and potentially make findings that their employer has breached procurement law.

31.2 A contracting authority faced with a potential claim, or a claim that has been issued, should of course make its own assessment of the lawfulness of the procurement process, doing so with the assistance of its legal advisers. This is something that contracting authorities should be doing anyway. Where the authority identifies that the process was flawed, it should seek to correct matters (pursuant to its public law duties of transparency and good administration) rather than continuing to fight the challenge.

31.3 One feature of the relatively recent amendments to the procurement regime is the removal of any requirement to notify a contracting authority prior to issue of a claim. It was previously a requirement to set out the complaint in a form of pre-action letter. In the event that contracting authorities are required to undertake an internal review first, then this requirement would obviously need to be re-introduced. There are however some concerns with mandating an internal review as explained further below.

31.4 Many contracting authorities are already capable of undertaking an internal review into a procurement process that has been questioned and indeed do so. Inevitably, different bodies will have different review processes and this should be retained so as to ensure maximum flexibility and efficiency. Some organisations may not be large enough or have a sufficient number of personnel with the right skill set to undertake a review carried out by individuals who are at a distance from the individuals involved in carrying out the procurement and so may need to engage an external advisor. External legal advisors often already take on the role of investigator when a contracting authority does not have internal resource.

31.5 There is a risk that a mandated internal review process would add another layer to the ability to seek a remedy and/or that a contracting authority could use an internal review as a way to run down time on the clock so as to prevent an economic operator from filing a claim. Therefore, it would be necessary to ensure that an internal review "paused" the 30 day period and that the outcome was disclosed to all bidders who were part of the procurement as soon as possible (maybe with a maximum time limit). This disclosure should then assist with a quicker filing of particulars and the defence because many of the documents and issues will already have been shared.

31.6 We understand that in other jurisdictions independent review bodies that are separate from the contracting authority (the USA's General Accountability Office, for example, undertakes this role in the US) undertake an investigation quickly, within strict parameters. This is suggested as an alternative to an independent internal review. It is not clear which body would undertake this function if introduced in this jurisdiction and whether or not this would unnecessarily duplicate the available fora for resolution of disputes, leading to uncertainty and potentially delay. We can see that there may be benefits in providing potential challengers with non-judicial options for pursuing complaints: for example, there could be options for complaints about a procurement process to be referred to an independent administrative review body, or an ombudsman of some kind, with restricted powers to provide certain forms of redress. The selection of such options should, however, be non-compulsory for the challenger. The rule of law requires that challengers who believe that the contracting authority has breached procurement law have the right to seek a judicial determination and remedy.

32 QUESTION 32: DO YOU BELIEVE THAT WE SHOULD INVESTIGATE THE POSSIBILITY OF USING AN EXISTING TRIBUNAL TO DEAL WITH LOW VALUE CLAIMS AND ISSUES RELATING TO ONGOING COMPETITIONS?

32.1 We wholly agree with the objectives of achieving a faster, lower cost and more accessible way to resolve disputes. As stated above, this obviously extends to low value claims and in-flight complaints about an ongoing process, although further consideration needs to be given to how claims are "allocated", in particular whether allocation is elective, presumptive or fixed.

32.2 As part of our response to the Green Paper, we have carefully discussed and considered what advantages and/or disadvantages retention of a fast-track system within the TCC would have, as opposed to use of a specialist procurement tribunal for a fast-track system.

32.3 The efficient progression of litigation, and minimisation of delays and costs, requires that parties to litigation be able to access swift determinations of their disagreements by experienced judges willing to take a robust approach to managing cases, and whose approaches to case management issues is sufficiently consistent to enable parties to resolve their disagreements about procedural matters without judicial intervention 'in the shadow of the court' (i.e. knowing what the review body would be likely to decide). These qualities are offered by the TCC, which benefits from judges with substantial experience of procurement law and of dealing robustly with litigation disclosure, costs budgeting, and case management. These qualities could also be offered by a tribunal with some additional benefits and advantages that may be easier to implement than within the TCC.

32.4 It should also be borne in mind that it is not an inevitability that court proceedings will be delay-laden, expensive or slow. The TCC is widely recognised as one of the most efficient, modern parts of the courts system, with some unique features for managing litigation efficiently, It has adopted electronic working very successfully: something which is of particular benefit when issuing procurement claims quickly, since this can be done online via the CE-file system. Its staff usually respond swiftly to enquiries from parties' solicitors and counsel's clerks. Its work is handled in both the High Court (including both the Rolls Building in London and the District Registries across England and Wales as well as in County Courts, where cases are heard by Circuit Judges and Recorders). There is therefore potential scope to utilise these advantages of the TCC to manage cases efficiently and ensure that lower value procurement cases can be dealt with proportionately.

32.5 There is however a possibility that creating a fast-track would lead to a high volume of smaller claims which even the most efficient of courts might struggle to manage within very short turnaround times, and therefore there is merit in considering the advantages that a specialist external tribunal might add. A further key question to be answered is whether a greater number of procurement challenges being determined prior to the contract being entered into (as discussed under **Questions 33 – 35**) will lead to a higher case load for the TCC for "standard" types of claims (i.e. not just lower value, "in-flight" claims) as claims are progressed through the court system more expeditiously. The proposals for reform therefore need to be seen within the context of a potentially more demanding case load for the TCC judges for the "standard" higher value claims, together at the same time with a potentially large amount of smaller fast track claims. To the extent that a tribunal system were able to offer more flexible capacity to call upon in the form of part-time judges rather than full-time TCC judges, this may be an advantage of a tribunal system.

32.6 **What might be the characteristics of a specialist tribunal relative to the Courts?** Establishing a new tribunal, or extending the jurisdiction of an existing tribunal, to deal with some procurement challenges could have advantages in providing additional judicial resource, which could assist in enabling cases to be progressed more expeditiously. At relatively low cost we can envisage a situation where members of the legal profession, and lay experts where appropriate, could provide a qualified body of full-time/part-time tribunal judges (analogous for example to the approach with an Employment Tribunal Chair). This would entail appropriate qualification and certification, but if "housed" within an existing tribunal a bespoke fast-track regime for in-flight and low value procurement claims could be designed. This could be established under the supervision of the Senior President of Tribunals, with a close working relationship with the TCC.

32.7 Whilst many efficiencies could be made by reforming procedural rules within the TCC, there are some potential advantages of tribunals that could not easily be delivered in that way. In particular, since tribunal cases are typically heard by a panel of tribunal members (usually a legally qualified chairman sitting with two tribunal members with appropriate subject matter expertise), use of a tribunal could facilitate use of expertise from outside of the judiciary, including by people who have had experience in their working lives of carrying out procurement processes and/or bidding for public contracts. This may be beneficial to ironing out technical and process points quickly, and ensuring that issues are considered with the benefit of 'real world' experience of public procurement in practice.

32.8 We note the reference in the question (rather than in the discussion in the Green Paper) to use of an "existing" tribunal to deal with this type of claim. We understand the policy driver to avoid duplication of the logistical resource already within the tribunal system. We understand that one option that may be being considered is to allocate some procurement work to the Competition Appeal Tribunal (CAT). We have some concerns as to whether this would produce the benefits that the consultation paper seeks in terms of reducing costs and delays. Conceptually and organisationally, the CAT is a specialist "high end" tribunal, whereas the discussion proposal in the Green Paper is directed more towards lower value and in-flight challenges. Whilst there is some limited cross-over between procurement law and underpinning principles of competition and/or the UK's new subsidy control regime (a subject area which may well be appropriately allocated to the CAT's UK-wide jurisdiction), this overlap tends to be less present in "in-flight" or lower value claims. In terms of the CAT's expertise, there are many differences between the objectives of competition law compared to public procurement. The CAT is able to deal with some kinds of challenges (e.g. challenges to merger decisions) within highly expedited timescales, using three-member panels that include subject matter experts (typically including at least one senior academic in economics) and which are very often chaired by a High Court Judge (often the CAT's President, Mr Justice Roth; though there is also list of other High Court Judges who are authorised to sit as chairmen in the CAT). The reason why the CAT is able to deal with some cases so swiftly, and with such highly expert panels, is the relatively few number of cases, and the considerable resources at its disposal (for example, each case is allocated to a professional lawyer "referendaire" who assists the panel 'behind the scenes' in analysing the case and in producing their judgment). It is highly questionable whether the CAT would be able to deal with its case-load efficiently and speedily if that case-load were to be expanded to include lower value procurement claims (which could potentially come to make up the majority of its diet). It is also questionable whether the CAT could continue to call upon High Court Judges to act as chairmen, not least because it may be detrimental to the efficiency of the TCC for its High Court Judges to be frequently plucked from their TCC commitments to deal with highly expedited procurement proceedings in the CAT. Further, it is not apparent how dealing with procurement cases in the CAT would lead to the costs of proceedings being reduced. The costs of proceedings in the CAT are often very considerable because of the complexity of the cases it handles. To the extent therefore, that any tribunal model were being considered, there would have to be full consideration of how the process can be simple to use, quick and low cost. The CAT does not necessary offer this solution. The CAT's 'fast track' scheme for dealing with competition cases may, however, be a useful model to consider when designing a fast-track scheme for procurement claims in the TCC and/or a tribunal.

32.9 In the event that the fast-track procedure were maintained within the existing TCC, we consider that the appointment of some form of 'Judge's associate' may assist in expedition of cases. This would incorporate flexibility of resource (one of the perceived benefits of an external tribunal) with the simplicity of maintaining the fast-track within the existing system. A Judge's associate could undertake conduct of the first stages of the review at steps (a) to (d), with production of an opinion to the Judge who then issues the final decision. Such a person could work closely with the designated High Court Judge for procurement cases and could be authorised to make certain judicial determinations (e.g. approving consent orders or dealing with applications on paper for extensions of time for procedural steps). In time it might be appropriate to expand the role to discharging a broader range of judicial functions concerning the management of procurement claims, bearing in mind that the TCC (unlike other parts of the High Court) does not have the benefit of Masters. This would promote greater capacity within the TCC, promote flexibility of experts to assist with resolution of disputes and potentially provide a pool within which the TCC could recruit future procurement specialist judges.

33 QUESTION 33: DO YOU AGREE WITH THE PROPOSAL THAT PRE-CONTRACTUAL REMEDIES SHOULD HAVE STATED PRIMACY OVER POST-CONTRACTUAL DAMAGES?

33.1 Yes – this is generally what bidders want, and rather than paying twice for the delivery of the contract, the emphasis ought to be on ensuring that the public body has awarded the

contract to the most advantageous tender (or whatever criteria is adopted) and followed the rules correctly, rather than entering into a flawed contract and having to pay damages as a result.

33.2 If the suspension is lifted on the application of the contracting authority, then it would be fair that the cap on damages not apply, or at least that there is a higher cap on damages (see further below).

34 QUESTION 34: DO YOU AGREE THAT THE TEST TO LIFT AUTOMATIC SUSPENSIONS SHOULD BE REVIEWED? PLEASE PROVIDE FURTHER VIEWS ON HOW THIS COULD BE AMENDED TO ACHIEVE THE DESIRED OBJECTIVES.

34.1 Yes - American Cyanamid is not specifically designed for public procurement cases, and to date has generally led to the suspension being lifted, often because damages are considered to be an adequate remedy under the third limb of American Cyanamid. If the presumption is towards the primacy of pre-contractual remedies, we agree that American Cyanamid is no longer appropriate as the consideration of the third limb (the adequacy of damages) is inconsistent with a presumption towards pre-contractual remedies.

34.2 We consider that the starting position ought to be that the presumption is that the automatic suspension be maintained, where there is a serious issue to be tried, save in exceptional circumstances. This issue ties in with the reforms regarding the length of time it takes to progress a matter to trial. If this is shortened (say to 5 – 6 months) then this supports the maintenance of the suspension save in exceptional circumstances.

34.3 The Green Paper lists some potential considerations, including the concepts of urgency and public interest, which could be considered by the Court on an application to lift. It is important to provide an effective remedy in our view that it should be made clear that (a) the presumption is that the suspension should remain in place, (b) the suspension should only be lifted in exceptional circumstances and (c) the adequacy of damages should not be a consideration (see 6.5.1 above). As to the public interest, it is clear from Court decisions to date that it is easy for a contracting authority to invoke the public interest in placing the contract (e.g. in a transport or health context) and hard for a tenderer to persuade a court that there is a stronger public interest in a contracting authority complying with the Regulations. We would therefore suggest that statutory conditions are set out for the lifting of the suspension which make clear that there needs to be **exceptional** urgency and **overwhelming** public interest to allow the suspension to be lifted.

34.4 We consider that a further requirement/condition precedent for lifting the suspension should be a requirement for the contracting authority to have fully complied with all of its transparency/early disclosure obligations.

34.5 We also note that, on an application to lift, the contracting authority has all of the evidence, and it is very hard for a claimant supplier to disprove any assertions of urgency or public interest. In order to ensure that the suspension is only lifted in truly exceptional cases, we therefore suggest:

34.5.1 There is should be a requirement, alternatively a recommendation, that contracting authorities build in sufficient time to their procurement timetable to allow challenges to be dealt with prior to the contract needing to be placed, and for contracting authorities to have to make clear at the start of a procurement process if they consider that this timescale cannot be met. This should deter an authority from arguing that placing the contract is urgent if it has not allowed sufficient or any time for a challenge in its procurement timetable.

34.5.2 To counterbalance the fact that the authority has the evidence, and will be motivated to apply to lift if the proposed cap on damages is adopted, if the cap on damages is maintained, we propose that the Court at the substantive trial has a wide discretion to disapply the cap – not just in the case of malfeasance but also if factors come to light which subsequently show that the suspension ought to have been maintained.

34.6 We also note that the Green Paper does not go into detail regarding any equivalent amendments to the current "cross-undertaking in damages" whereby Claimants may have to promise to compensate the public body in question if the suspension is maintained and it later transpires that the claim fails. We consider that if the expectation is that the automatic suspension is maintained save in exceptional circumstances, then it may no longer be appropriate to require claimants to provide a cross-undertaking in damages in order either (a) to trigger the suspension in the first place – none is required under existing provisions, or (b) on any contested application to lift the suspension – the cross-undertaking in damages is typically more appropriate for commercial claims between entities rather than breach of regulatory provisions as here.

35 QUESTION 35: DO YOU AGREE WITH THE PROPOSAL TO CAP THE LEVEL OF DAMAGES AVAILABLE TO AGGRIEVED BIDDERS?

Introduction

35.1 No. The proposal set out in the Green Paper (to cap damages at 1.5x bid fees other than in exceptional circumstances) would in practice be likely to result in an ineffective review system, dis-engagement of suppliers and an incentive of poor procurement practice.

35.2 Those outcomes are likely together to lead to inefficient uses of public money at a cost to the public purse significantly greater than any achieved savings in settlement costs[4]. Bidders are in most cases unlikely to see a damages-based challenge to a procurement outcome as worthwhile or meaningful if that capping proposal is implemented.

35.3 Any remedies regime should provide a balanced package of measures. The package of remedies will not be balanced if, in most cases setting aside the decision is the primary remedy but in the remaining (presumably rare) cases where damages are now the only remedy, damages are capped at a very low amount.

35.4 In terms of alternative approaches and options, the issue of damages needs to be seen in the context of an effective system of procurement law and procurement law remedies as a whole. A key starting point is the relative priority of damages and other remedies including in particular the balance between (and so the legal test for) upholding the automatic suspension vs lifting the suspension and leaving a challenger to claim damages only.

35.5 Currently damages are seen in practice[5] by the Court as the primary remedy because of the American Cyanamid test, in particular the importance within that test of having to demonstrate that damages are not adequate. For the reasons given in our response to Consultation Question 35, we believe that suspension should be upheld and the period to trial shortened, other than in cases of exceptional urgency and overwhelming public interest.

35.6 If implemented, that change would address many of the understandable exposure/pay twice concerns of authorities summarised at paragraphs 208 and 209 of the Green Paper. Damages would become a residual remedy rather than the primary remedy. That would also reflect the clear preference of most bidders (who usually wish to retain the ability to be appointed as their main objective as the Green Paper accurately notes[6]) and the double financial exposure of authorities.

35.7 That would then leave a minority of proceedings in which damages remained in play, for which it would be important to address:

35.7.1 Any further, existing problems or uncertainties with damages that need to be addressed in the interest of the effectiveness of the system.

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[4] In practice damages are dealt with by settlement. There has not to date been a full reported quantum judgment; the main quantum authority was decided in 1999.

[5] As para 203 of the Green Paper correctly notes.

[6] Also at para 203

35.7.2 The level and methodology for damages that is (i) fair to bidders and (ii) incentivises good procurement behaviour by being a large enough sanction, without being 'indigestible' for authorities.

35.8 Those two points are considered below. For the reasons given, we do not believe that capping is required or productive for damages claims as a residual category. However suggestions are made on clarifications which, if made instead of capping, would benefit both authorities and bidders.

Detailed response to the premises upon which the Green Paper is based

35.9 The Green Paper proposals on capping damages are based on a number of premises. We consider that these premises are either incorrect or will not be resolved by capping damages. We take each premise in turn below:

35.10 **Paragraph 208: "The process whereby damages are sought can be a long and expensive one":** Unlike claims where the automatic suspension remains in place, damages claims are not expedited because, once the contract has been placed, there is no urgency to determine the issue. Whilst the premise is correct, only a very small number of cases actually progress that far. However, introducing a cap on damages could create a greater number of longer, more drawn out trials. Knowing that the Court may lift the cap on damages in certain types of case (for example where deliberate wrong-doing is found as per paragraph 212 of the Green Paper), a claimant will have relatively little to lose by taking a matter to full trial to prove its case.

35.11 **Paragraph 209: "The potential for large payouts can encourage speculative claims from bidders":** We do not agree that there is any evidence that the potential for large payouts encourages speculative claims. Firstly, bidders are very aware of the risks of challenging their customers. They often see litigation as the last resort which they are reluctantly pushed into because of the short limitation periods in procurement claims. Secondly, bidders tend to want to obtain pre-contractual remedies. This is because even a standard damages claim is unlikely to really compensate a bidder fully for the knock-on consequences of losing a valuable contract. Historically, however, it has been authorities, not bidders who want procurement claims to be for damages rather than for pre-contract remedies

35.12 Further, the existing checks and balances in the Court system already operate as an effective restriction on the quantum of damages which a successful claimant ought to be awarded. A claimant cannot expect to obtain an award of damages for its lost profit merely because it is able to establish that there has been a breach by the contracting authority. It must also:

35.12.1 Establish that the breach caused the claimant to suffer or risk suffering loss. Common categories where this might be the case include:

(a) Where the marks awarded are obviously mathematically incorrect, or irrational, and correction of that error means that the contract should have been awarded to the claimant.

(b) Where there has been a lack of transparency or unequal treatment and, but for that breach, the claimant would have won the contract.

35.12.2 Establish whether the breach has caused it to suffer loss, or merely "risked" causing it to suffer loss, in which case the Court may only award the Claimant a percentage of its lost profit.

35.12.3 Establish that the breach is sufficiently serious (though see below re the uncertainty caused by the abolition of the rule in Francovich in the EU Withdrawal Act 2018).

35.12.4 Establish its loss in accordance with the existing rules relating to assessment of quantum and mitigation.

35.13 Whilst there have been notable high profile examples of large settlements it is not the case that a successful claimant is automatically entitled to its full loss of profit such that the contracting authority ends up "paying twice".

35.14 Paragraph 209: "**Whilst the spectre of high damages can act as a significant deterrent against poor practices, this can create risk averse behaviours which stifle innovation**": We agree that Court judgments have led to improved practices such as better transparency and record keeping, which is of course beneficial to the public purse. What the Court judgments tend to show is that flawed processes often arise as a result of an effort to "over-prescribe" to the evaluators what marks they should give and/or a lack of innovation by re-using evaluation methodologies which were designed for different procurements. Following high profile cases such as *Woods v Milton Keynes*, authorities have in fact been encouraged to adopt more flexible, less rigid and more innovative procurement practices which do not simply adopt a previous template designed for a different procurement, but which place great emphasis on the authority's requirements.

35.15 Paragraph 210: "**The proposal to cap damages to legal fees and 1.5 x bid costs would achieve the following**:

35.15.1 **"Recompense the supplier for monies spent on a flawed competition":** We disagree that this would be an adequate compensation. The impact on a claimant of losing a much valued contract goes far wider than merely the wasted bid costs; the loss of the contract can have a long-lasting effect on the claimant in terms of market positioning and ability to bid for other contracts. It can lead to significant restructuring or redundancy costs. It can have long-term knock-on consequences which go way beyond the mere loss of anticipated revenue from that contract.

35.15.2 **"Stand as a deterrent against poor procurement practice":** We disagree that facing liability of 1.5 x bid costs would be an effective deterrent. Bid costs may be very low for certain contracts, or very low even for higher value contracts if a supplier has an established presence in that market and a well-resourced internal bid team.

35.15.3 **"Would not stifle innovation":** We disagree that the threat of damages stifles innovation. Court judgments have, if anything, encouraged public bodies to recognise the advantages of designing procurements which are fit for that particular purpose, and which encourage the exercise of expert discretion by evaluators.

35.15.4 **"Would not create inefficiencies":** We disagree that uncapped damages creates inefficiencies. On the contrary, we think paradoxically that capping damages will increase inefficiency as it will:

(a) encourage a greater level of "paying out" by contracting authorities to settle cases, or

(b) lead to claimants digging their heels in and holding out to trial to establish deliberate wrong-doing; or

(c) lead to the situation where a contracting authority actually wants to settle a case at a higher level than the cap, but does not do so either because paying more than 1.5 x bid costs would be ultra vires or because it would be tantamount to an admission of deliberate wrong-doing.

35.16 Paragraph 211: "**Limiting the level of damages may be regarded as unfair by the market and depress bidding for public sector contract**": We consider that this is a justified and real concern. Many suppliers invest in the public sector market precisely because of the transparency about published requirements and the belief that a fair process will be followed. Very few bidders make a conscious decision to invest and innovate in the

public sector market because they see a damages claim as a viable “Plan B” if they do not win. If there is a cap on damages, it will increase the frequency with which authorities apply to lift the suspension which will not leave bidders with an effective remedy. It will not provide an effective deterrent to authorities, and will not therefore promote good practice. Longer term it will discourage and deter suppliers and will depress overall value for money and competition in the market.

35.17 Paragraph 211: “**We do not believe that it is appropriate to compensate suppliers for the loss of a “chance” of being awarded a contract because of unintentional errors made during the procurement process**”. Whilst some errors may be unintentional, they can nevertheless lead to the contract being awarded to the supplier who does not offer overall value for money. This is not in the public interest. As stated above, where a bidder can establish a breach, but cannot show that the breach is also causative of loss, the claim will fail in any event under existing jurisprudence.

35.18 **The proposal undermines the stated presumption in the Green Paper of pre-contractual remedies:** Capping damages may incentivise undesirable behaviour from authorities. An authority may be incentivised to apply to lift the automatic suspension when the only penalty is a low level of damages. This is likely to be much more appealing than risk having to re-run the procurement, with the associated costs and delay. In procurements where the automatic suspension is likely to be lifted, whatever the test for doing so (which can be applied to a very wide range of public contracts where the public interest is at stake), an authority may be inclined to take the risk of poor procurement practice if it knows that its only realistic risk is a low level of damages.

35.19 Capping damages will therefore frustrate one of the central stated aims of the Green Paper, which is to prioritise pre-contractual remedies. Whilst the Green Paper proposes a different test on an application to lift above, the odds will always be in favour of a contracting authority on an application to lift:

35.19.1 Evidence submitted to the Court in a written witness statement that the proposed contract is critical/urgent is virtually impossible for a claimant to disprove, and hard for a Judge to resist on an interim application. There is no opportunity for the Judge or the Claimant to “test” that evidence through cross-examination or oral witness evidence.

35.19.2 Capping damages would therefore lead to more suspensions being lifted as there would be no deterrent to an authority applying to lift. As the Green Paper notes, the clear preference of parties is for pre-contractual remedies, but the cap on damages would work against this.

35.20 If the cap on damages is imposed then it should be lifted if the automatic suspension is lifted. Alternatively, the Court should have a wide discretion to remove the cap on damages.

35.21 Overall, the mischief that the cap on damages is intended to address will be addressed via faster resolution of cases with the suspension in place in any event, which will lead to fewer damages actions.

35.22 The proposal is that the cap on damages does not apply in various cases of “no tender” or “no advert” but what is the difference? Why should a bidder who has not had the opportunity to bid (which is potentially a wide category of claimants) get a “no cap on damages” remedy whereas a more proximate bidder who is obviously closer in the chain of causation gets a cap on damages?

36 QUESTION 36: HOW SHOULD BID COSTS BE FAIRLY ASSESSED FOR THE PURPOSES OF CALCULATING DAMAGES?

36.1 For all the reasons given above in response to **Questions 35**, the PLA considers that capping the level of damages to legal fees and 1.5 x bid costs would be a flawed approach which would severely limit the effectiveness of the review, incentivise poor procurement

practice and ultimately lead to inefficient use of public money. The arguments against capping damages apply to any cap that departs from the normal compensatory principle that successful claimants should be put in the position that they would have been in had the wrong not occurred. But, if the Government nevertheless wishes to introduce a cap for residual damages claims in cases where the automatic suspension is lifted, it is important that the cap should be set at a sufficiently high level to be capable of providing:

36.1.1 meaningful recovery for a bidder which has not been awarded a contract that it would have won absent a breach of procurement law; and

36.1.2 a sufficient disincentive to authorities to avoid poor procurement practice with wider impacts on the public purse.

36.2 1.5 times bid costs does not amount to adequate compensation for the bidder's loss of the contract. It is a wholly arbitrary figure and bears no relation to the value of the lost opportunity for the bidder.

36.3 We understand the policy drivers behind seeking to impose certainty for the parties, but in practice, the PLA does not consider that bid costs can fairly be assessed for the purposes of calculating damages, both as a matter of principle for the reasons set out above, and as a matter of practice for the reasons set out below.

36.3.1 The amount of bid costs which different bidders incur varies across the market, and does not necessarily correlate to the expected profitability of a contract. For an established supplier, bid costs may be comparatively low. For a new entrant, bid costs may be higher.

36.3.2 How would bid costs be assessed? Would a bidder have to submit bid costs when submitting its bid so that the parties were clear on the amount of compensation? Would this include investment costs such as setting up a local subsidiary in order to deliver the contract; recruitment; investment in new technologies? Or merely the costs of lost management time in drafting the bid submission and/or external costs? If management time is included, how is this measured and valued from supplier to supplier?

36.3.3 If there is a defined and prescribed limit to what bid costs will be in different situations, how will these be set? Will these be set by central government guidance? Will there be different guidance to reflect the many different types of public sector contract, ranging from goods and services, to construction, to long term PFI projects, to concession contracts? Will they be simply defined with reference to the overall value of the contract?

36.4 The PLA's view is that a cap on damages of 1.5 x bid costs is therefore neither an effective or dissuasive remedy, nor a simple solution to implement.

36.5 The existing jurisprudence already offers a restriction on a claimant's ability to obtain damages. That ability is by no means unfettered for the reasons set out at 35.12 above. It is the case that there is some uncertainty about precisely how the Courts will approach quantum, but that is purely because there are so few cases on quantum which reach the Courts. The Courts are used to applying a "broad axe" to produce a result that is just in all the circumstances.

Potential Clarification to Damages instead of a Cap

36.6 The PLA has considered whether there would be any merit in the government introducing some guidance on how damages should be calculated in public procurement cases, instead of a cap on damages. Discussion has touched on whether any such guidance is required given the checks and balances already present in the judicial system. No definitive view either way emerged from discussions, but a number of areas where assessment of damages *can* be variable (leading to uncertainty for the parties) is set out below. In the event that

Government were, contrary to the clear reasons against a cap on damages, still minded to control damages in some way, we consider that further consideration should be given to addressing the following areas of uncertainty:

36.6.1 **The application of the 'sufficiently serious' test**[7]: As para 209 of the Green Paper notes, this test applies in theory to allow the recovery of damages only in cases where the breach by the authority meets all of the conditions required for Francovich state liability as specified in Factortame, in particular the relative seriousness of the breach. However, the relevance of the test remains limited on current first instance authority[8] and, more fundamentally, the concept of Francovich liability has itself been abolished by para 4 of Schedule 1 of the European Union (Withdrawal) Act 2018 in the following terms:

> *Rule in Francovich*
>
> 4 There is no right in domestic law on or after [F1 exit day] [F1 IP completion day] to damages in accordance with the rule in *Francovich*.

36.6.2 Its continuing potential relevance in the context of procurement challenge damages therefore has the potential to add complexity and cost, whereas it is in the interests of a streamlined and effective reformed procurement remedies system for there to be clarity on both the principles of recovery and how they will be applied.

36.6.3 Reasonable Bid costs (including overhead and allowable items) – clarity regarding the circumstances in which a claimant may be able to recover bid costs (the assumption being that the usual measure of damages is to the put the claimant into the position it would have been in "but for" the breach (and therefore, bid costs will often not be recoverable in addition to loss of profit).

36.6.4 The approach the Court will adopt in loss of profit and loss of a chance cases. If, for example, a Claimant can prove on the balance of probabilities that it would have won the contract "but for" the breach, then is it entitled to its full loss of profit (and other allowable heads of damages)? Or is it entitled only to a percentage of the same? If a claimant cannot prove that it would have won the contract on a balance of probability basis, but can prove that it had a viable (but uncertain) prospect of having succeeded on loss of chance principles, what approach will the Court adopt in those circumstances? Will it reduce the entitlement to damages by a percentage reduction proportionate to the percentage chance the claimant had of winning the contract?

36.7 In conclusion, in the event that Government considered that improvements should be made to the basis on which damages were awarded in public procurement cases, the PLA would be vehemently against the introduction of a cap on damages of 1.5 x bid costs. The PLA considers that the existing judicial system already offers checks and balances to a claimant's ability to secure damages. There are some areas of uncertainty in relation to damages where the objectives of the Green Paper might be better met by clarification of the position. Such guidelines might logically be annexed to an updated Court Guidance document for procurement actions.

37 QUESTION 37: DO YOU AGREE THAT REMOVAL OF THE AUTOMATIC SUSPENSION IS APPROPRIATE IN CRISIS AND EXTREMELY URGENT CIRCUMSTANCES TO ENCOURAGE THE USE OF INFORMAL COMPETITION?

37.1 As a general observation we think clearer guidance regarding the limited tendering procedure, and whether pre/post contractual remedies are available, and if post, whether there is a cap on damages, should be provided. For example,

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[7] Deriving from the Supreme Court Judgment in *Nuclear Decommissioning Authority v EnergySolutions EU Ltd 2017 UKSC 34*

[8] *EnergySolutions EU Ltd v Nuclear Decommissioning Authority* [2016] (TCC) 3326 which held that a breach affecting outcome reached the sufficiently serious threshold.

37.1.1 It needs to be made clear what happens if it transpires that the contracting authority did not in fact have grounds to undertake a crisis procurement.

37.1.2 It needs to be made clear that a declaration by the Minister of a crisis (paragraph 80) does not justify limited tendering for all contracts to deal with the crisis but only for e.g. extremely urgent contracts.

37.1.3 A crisis should not justify a complete lack of process – and we consider that the reference to "informal competition" in paragraph 214 does not fit with the need for a proper process. There is no reason why rules for a very truncated process could not be set out. Otherwise, there is a risk that no process/principles at all will be followed.

37.1.4 There should be a limit on the length of contracts for which a crisis procurement can be used (possibly subject to exceptions).

37.1.5 It needs to be made clear whether there should be no cap on damages if a crisis procurement has been carried out. We are not clear whether this is the intention from paragraph 212.

37.1.6 Is the intention that it is still possible to apply for interim relief outside of the statutory remedies?

37.1.7 It may not be unreasonable to exclude the automatic suspension in cases where the crisis procurement has a short duration contract, but less so where the contract is longer term. We can see that if the objective is to encourage contracting authorities to use limited tendering for urgent procurements, the absence of a threat of an automatic suspension may be useful, but the flip side must be that there is no cap on damages.

38 QUESTION 38: DO YOU AGREE THAT DEBRIEF LETTERS NEED NO LONGER BE MANDATED IN THE CONTEXT OF THE PROPOSED TRANSPARENCY REQUIREMENTS IN THE NEW REGIME?

38.1 We think it is necessary to mandate provision of sufficiently detailed information (see our observations about Chapter 6 under Question 27) once a contract award decision has been made, but agree that provision of "characteristics and relative advantages" as currently mandated by Regulation 86(2)(b) need not be mandated.

38.2 We consider that the process of preparing a comparative evaluation is time-consuming for contracting authorities. In addition, it is not a contemporaneous record of why evaluators (including the moderation process where this takes place) reach the conclusions and contract award decision is made.

38.3 The evaluators ought not to be comparing tenders when they award and decide scores. Rather the evaluation process scores a bid against the evaluation criteria. It is the contemporaneous record of that process (evaluation and moderation where there is one) that needs to be provided to bidders prior to the standstill period.

38.4 A contemporaneous record of the decision making process, with senior stakeholder input, would (a) promote good practice within authorities and (b) provide transparency.

39 QUESTION 39: DO YOU AGREE THAT:

- **businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?**

39.1 In principle providing access for suppliers to the Contracting authority seems sensible, but detail is required as to what the consequences of that access will be. In particular will the contracting authority have the right or indeed be forced to reduce payments to the principal contractor and thereafter direct such reductions directly to the sub-contractor? What is the

principal contractor had been fully paid, would the contracting authority be required to seek repayment to redirect these sums?

39.2 What if payments are in dispute, we presume that the Contracting Authority would not be asked to step in as some sort of mediator? In such circumstances one would imagine that the mechanism in the legislation would need to provide for situations of genuine dispute rather than just poor payment terms. This would also need to deal with spurious disputes designed merely to delay payment. How would financial difficulties of the principal contractor be dealt with?

- **there should be a specific right for public bodies to look at the payment performance of any supplier in a public sector contract supply chain?**

39.3 Again in principle this seems sensible, however, what would the consequence of this be? Would there be a standard to be met, below which would result in exclusion? One would imagine that this would also require an ability to "self-clean" i.e. explain any poor performance. At what stage would this explanation be given, at the time of uploading such information to the database or at tendering opportunity time? Would contractors be able to object to information being put on the data base?

- **private and public sector payment reporting requirements should be aligned and published in one place?**

39.4 If this is feasible, however, public sector and private sector payment terms are often very different and therefore the ability to evaluate on a like for like basis may be difficult. However, if total transparency on both payment terms and breach of the agreed payment terms are provided, this might be useful. However, given the difference in approach, we query how it could be used without guidance?

40 QUESTION 40: DO YOU AGREE WITH THE PROPOSED CHANGES TO AMENDING CONTRACTS?

40.1 The transparency rules in relation to contract amendments are, of course, linked to the need to have an effective and well-functioning review system. We agree in principle with the proposal for a mandated system of a specific amendment notice; in comparison to the optional use of a VEAT notice which was not designed for this purpose. That will support an effective and well-functioning review system.

40.2 Our primary concern is that good contract management, including contract change, is critical to ensuring value for money is obtained. There is the risk that the new rules may operate as a disincentive to authorities and contractors considering changes to contracts simply due to the possibility of challenge or complaint from others in the market, in situations where there is no actual risk of harm to competition. A secondary risk, coming back to a well-functioning review system is that there will be so many notices published that those of genuine significance are lost in a myriad.

40.3 These concerns are addressed by our suggestions which follow.

40.3.1 The exemptions based on value and contract term are clearly stated, and welcome. What changes the "scope" of a contract will be continue to be an area of judgement and uncertainty. We would propose that if the change is within the value/term parameters, then the question of scope is removed from the equation. A practical example would be a construction contract for a new school where during pre-construction there is an opportunity identified for the delivery of some public realm improvements. It would be helpful for authorities and market participants to have the clarity that if the value change was less than 15% there would be no need to consider whether a contract for school plus public realm was different in scope than school only.

40.3.2 Another perceived gap is an exemption relating to changes to contracts which result from the proper implementation of change clauses within contracts as procured. The difference we would prefer the new regime to recognise is between a freely negotiated contract change (very fairly within the new proposed system) and a contractual outcome based on a clause which says that if X happens then Y is the outcome.

40.3.3 We are also concerned about the 10 day period between notice and actual contract amendment. The proposed exemption for extreme urgency should, in our view, take the law away from concepts of pandemic response and threat to life etc. and allow for changes to be implemented without a 10 day delay when the authority considers they are required for value for money reasons. That is not to say that market participants should be deprived of remedies, but the new regime should be permissive in terms of contract changes being implemented immediately (against a backdrop of known sanctions) rather than on its face purporting to prevent that.

41 QUESTION 41: DO YOU AGREE THAT CONTRACT AMENDMENT NOTICES (OTHER THAN CERTAIN EXEMPTIONS) MUST BE PUBLISHED?

41.1 The principle of contract amendment being published and the exemptions being similar to the exemptions in the Freedom of Information Act 2000 and the Data Protection Act 2018 is sound as is the proposal that contracting authorities will only be exempt from publishing a contract amendment notice if the amendment(s):

41.1.1 increase or decrease the value by less than 10% of the initial contract value for goods and services or 15% for works;

41.1.2 increase or decrease the initial contract term by less than 10% of the original contract term; and

41.1.3 do not change the scope of the contract.

41.2 There are benefits to this approach; greater transparency, tighter procurement controls post award and better focus on pre procurement preparation to ensure all included. It will reduce behaviours of individuals thinking they can 'just put that in post award' and ensure adequate pre procurement prep is done.

41.3 However, contracting authorities will need absolute clarity on their responsibilities and a mechanism for posting contract amendments.

41.4 Also, a ten day standstill for a contract amendment seems overly short for non-emergency contract amendments and not practical for periods of holiday/smaller companies who may not be constantly scanning notices.

41.5 Clear guidelines as to what is exempt and what is not will be required and there will potentially be a greater administrative burden on contracting authorities.

41.6 There will need to be sufficient incentive in terms of penalty for non-compliance by contracting authorities, and it is not clear how compliance will be checked.

41.7 Re the ability to amend contracts in emergencies, this needs to be subject to the same rigour as giving direct awards in emergency situations. See our comments in relation to question 7.

42 QUESTION 42: DO YOU AGREE THAT CONTRACT EXTENSIONS WHICH ARE ENTERED INTO BECAUSE AN INCUMBENT SUPPLIER HAS CHALLENGED A NEW CONTRACT AWARD, SHOULD BE SUBJECT TO A CAP ON PROFITS?

42.1 We consider that this proposal is problematic as it seeks to intervene in private law contractual matters concerned with delivery of the contract rather than a regulated procedure. There may be good reason why an incumbent is challenging a contract, and it

may be reasonable for the incumbent to continue to be paid/profit from that contract. A cap on profits may risk the ability of the parties to negotiate an extension to a contract which potentially works contrary to the public interest where important public services, goods or works are being delivered.

42.2 In addition, we can see difficulties in implementing any such proposal in terms of discerning profitability of given contracts which may be a confidential matter to each contractor.

42.3 We also note that there are existing provisions under Regulation 72 which govern any contract modifications which may be used to address the problem.

42.4 Notably, a faster timetable for resolution of challenges would also address the perceived advantage to an incumbent of brining an unmeritorious challenge as the length of extension would be reduced, and the challenge would still carry the risks of costs penalties against the contractor if unsuccessful.

The Procurement Lawyers' Association

10 March 2021