SCL SOCIETY OF CONSERVATIVE LAWYERS

TRANSFORMING PUBLIC PROCUREMENT

A Commentary on behalf of the Society of Conservative Lawyers to the Cabinet Office Green Paper

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About the authors

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INTRODUCTION

When Boris Johnson was campaigning for the Conservative Party leadership in July 2019, he stated that he would roll back the state by changing public procurement rules to favour UK companies bidding for Government work and this was echoed in the subsequent Party Manifesto. One of the key potential advantages of leaving the EU was the prospect of dispensing with the straitjacket of the EU regulations and adopting the more flexible World Trade Organisation Agreement on Government Procurement (GPA).

The UK Government did take advantage of the WTO policy on below threshold procurements. However, aspects of this Green Paper and the extension of market access coverage beyond the GPA to incorporate (inter alia) hospitality, real estate and education indicate a failure to take full advantage of the opportunities afforded by leaving the EU's restrictive procurement regime and available under the GPA. We also consider that the Manifesto commitment to "continue to support charities which have helped to transform our public services" using Government procurement has not been honoured in the Green Paper; if implemented, the proposals in the Green Paper will represent a poor outcome for this sector as well as for other voluntary bodies and mutuals.

The Government has also accepted the discredited definition of "public bodies" where the WTO has adopted the wording in the EU Acquired Rights Directive. We address this in more detailed below and did so previously in the Society's July 2017 pamphlet titled *Procurement after the UK's departure from the EU*.[1]

This paper comments upon many of the key issues in the Green Paper suggesting both omissions and further improvements based upon a total of 50 years professional practice in the specific area.

[1] Available at www.conservativelawyers.com/publications.

SUMMARY

The Government proposals are in danger of increasing red tape on procurement, increasing centralisation and failing to honour the manifesto commitments. The Government needs to incorporate the principles in the Public Services (Social Value) Act 2012 in all aspects of public procurement. There needs to be tighter rules in the procurement process to take into account any corrupt, criminal or fraudulent tax behaviour and such behaviour should be treated as mandatory exclusion for both the offending entity and all associated entities.

The Government has not used the GPA's flexibility to reduce the number of public bodies subject to the procurement rules. They should make a start by excluding parish councils and housing associations, the latter only being included due to incorrect translation from the original French Directive.

The Government should not increase its influence on public procurement for third party bodies through either the planned oversight unit or the requirement for ministerial consent for any "crisis" procurement.

The proposal to combine the existing four procurement regulations into one single document will produce a far too complex set of rules.

The Government needs to work on its plans for openness and transparency, and to facilitate a quicker, fairer and less expensive system to challenge procurement decisions.

Supporting charities, voluntary bodies and staff mutual has long been Conservative Party policy.

The Green Paper proposes to delete the key existing opportunity for this sector. The existing Regulation 77 in the Public Contract Regulations 2015 should be retained and the reserved services expanded in the new rules.

Whilst therefore the Green Paper offers some welcome improvements, the likely outcome of the proposals will be a system of public procurement that continues to be characterised by a high level of complexity and too much opportunity for Government interference, rather than a roll back, with the legitimate decision-making left to the many public bodies who will have to operate the new system.

Procurement aimed at meeting the UK's needs

We consider that the principles established in the Public Services (Social Value) Act 2012 ("the Social Value Act") represent one of the most positive additions to the public procurement regime in recent years, ensuring that issues of social, economic and environmental wellbeing are at the heart of procurement decision-making. This is, of course, particularly relevant in light of the Government's emphasis on meeting climate change targets.

We consider that the Government should legislate to provide that the principles in the Social Value Act apply to all stages of the procurement process – i.e. not simply at the pre-procurement stage – and should extend the scope of the Act to goods and works contracts.[2] In our view these factors should be central to procurement reform, and should be given greater prominence than in the Green Paper. We note in this regard that the EU-UK Trade and Cooperation Agreement specifically provides at Title VI, Article 10 that the UK can take into account environmental, social and legal considerations throughout the procurement process. We believe that effective use of public procurement will be vital to helping the UK economy recover from lockdown, and that taking full advantage of the flexibility offered by Brexit is a once-in-a-generation opportunity to ensure that Government spending provides the greatest possible benefit to local communities and economies.

We warmly welcome the announcement by the Minister for Defence Procurement in the House of Commons on 23 March 2021 that social value will always be applied in Ministry of Defence tenders from 1 June 2021 and that the UK's shipbuilders should benefit from the planned new naval ship orders. We hope that the Ministry of Defence's adoption of the social value principle throughout the tender process will now be incorporated within the new procurement rules for all tender opportunities from public bodies.

We support amendments to the rules to prevent corrupt and criminal behaviour in the procurement process and in the operation of public contracts, which sadly do occur in the UK (and overseas) with alarming regularity. Unfortunately, however, aspects of our procurement regime make it easier for this behaviour to flourish both during the procurement process and afterwards. We consider that more could be done under any new system to prevent such abuses than is currently set out in the Green Paper.

The proposed six principles of public procurement should be adjusted to recognise the importance of communities and local priorities. In particular, the "public good" principle should be expanded to specify that achieving a positive impact social and economic impact for the local area (where appropriate) should be a priority. We note in this regard that use of Government spending to improve local economic and social outcomes is particularly important in light of the Government's commitment to improve deprived areas and regenerate local economies across the UK.

The issue of financial standing is key, particularly when the principal contractor, with or without partners, proposes creating a new entity for the specific contract and suggests that a guarantee from the parent organisation should be acceptable. This approach is too often used to protect the parent from any failure by its subsidiary, and does

[2] We note and welcome the Government's previous commitment to extend the scope of these principles to goods and works contracts in the House of Lords' Debate on the Social Value Act, 27 February 2020 (https://hansard.parliament.uk/lords/2020-02-27/debates/86454D98-4A5A-4473-B31A-C8CF1B6FA7C0/PublicServices(SocialValue)Act2012).

not provide much comfort for the public body. The Green Paper correctly highlights the Carillion collapse, but we note that similar issues regularly occur even absent the insolvency of a major provider (such as in the case of Virgin Trains East Coast in 2017–18). The Government should explore means of preventing major contractors exploiting the separate corporate personality of subsidiaries to avoid losses in cases where such subsidiaries provide unrealistic bids as a means of winning business, and at the least ensure a centralised and easily-accessible method for recording such failures and allowing these to be taken into account in future procurements.

Reducing bodies subject to procurement rules

There are over 100,000 entities classified as public bodies for procurement purposes. Inevitably many of the organisations will not have large teams who are regularly involved with conducting public procurement exercises. This applies, for example, to the 2,000 or so parish councils in England. The GPA provides an opportunity to dramatically reduce the number of bodies subject to the new regulations by restricting them to:

1. central government contracting authorities (as defined in the UK GPA but excluding all national museums and art galleries); and
2. local authorities (excluding parish councils). The cost of public procurement with the existing and future regulations is a huge burden upon such entities.

The key section in the definition of a "body governed by public law" relates to at least one of the following characteristics:

(a) Financed, for the most part, by the state, regional or local authorities, or by other bodies governed by public law;

(b) Subject to management supervision by those authorities or bodies; or

(c) Having an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law.

In the original French wording of the Acquired Rights Directive section (b) above used the word "*contrôle*" which translates as "*control*", whereas the translation which has been incorporated in both the EU and the WTO is "*management supervision*". The effect of this wording is that many organisations could be caught within the public procurement net, while some others appear to have been overlooked. The issue for many organisations (such as housing associations) is the extent to which their regulator may "control" or be involved with "management supervision" of the entities with which they are involved.

On the one hand, it is argued that the Regulator of Social Housing adopts a light touch regime for housing associations (many of whom are becoming less dependent upon social housing grant to construct new homes with a percentage between 10% and less than 50% and an average of 22%), and new restrictions exist on appointments by local authorities. Thus, housing associations should now no longer be subject to these public procurement regulations particularly as some years ago it was estimated that the cost of implementing the procurement regime equated with 9,000 homes per annum.

On the other hand, the Charity Commission has more power to intervene in the management supervision of failing charities, which it regularly exercises. Yet the 90,000 registered charities are not considered as public bodies within the procurement definition.

Government oversight or not?

The Government proposes to establish a new unit to oversee public procurement with power to review and intervene to improve the commercial capabilities of contracting authorities.

We do not support the creation of this unit other than to gather the important statistics referred to below. We suspect that this unit may have been suggested to exercise some supervision over Government tendering such as occurred when the Covid-19 pandemic required the purchase of huge supplies of personal protective equipment. Whether that is the case or not, we consider it is highly undesirable for any such unit to have

powers of intervention which would create huge uncertainty for public bodies legitimately exercising their public procurement powers as well as to potential contractors. Thus, we consider that if this unit is created at all, it should only be responsible for commenting upon the statistics and case studies with recommendations as to good practice or changes in the regulations.

Simpler regulatory framework?

The Government states that it will be "slashing" 350+ regulations by combining the existing four separate regulations covering services / works, utilities, concessions and defence / security. In practice, however, we have concerns over whether combining the four existing regimes into a single piece of legislation is likely in fact to achieve simplification. It would be difficult to have common rules for (say) a contract to manage a care home or a contract for the design and supply of a new naval vessel, and we note that the Government does not appear to intend this, but rather would preserve "*sections that contain any unique rules for utilities, concessions and defence and security procurement so we have a coherent set of regulations*". As such, it is currently unclear precisely how combining the current regimes will simplify the overall system. If this can be achieved, we would welcome it as a positive step, but we are concerned in the absence of further detail that the likely result will be an overly convoluted and difficult to navigate piece of legislation that introduces unwarranted complexity into (in particular) "normal" public procurements as the result of needing to achieve a one-size-fits-all approach. Furthermore, and as indicated in the Green Paper, there are aspects of the Public Contract Regulations 2015 (PCR) in particular which deserve to be retained and enhanced.

In addition to enlarging the remit of the Social Value Act, there are two other areas of concern, which particularly affect the charity, voluntary and mutual sectors relating to the Light Touch Regime (LTR) in the existing Regulations 74 – 76 in the PCR and the reserved contracts under Regulation 77. We have significant experience in these sectors, including creating such entities and working with them on their procurement tendering. They have successfully bid for a wide range of contracts which, if now to be opened to all bidders, will downgrade the quality of the services involved. In respect of this we could provide separately examples of such instances which have affected the communities where the services are provided or enjoyed.

Reservation of services for the charity, voluntary and staff mutual sector

Regulation 77 was inserted in the PCR following negotiations conducted by Francis (now Lord) Maude when Minister for the Cabinet Office, with emphasis placed upon staff mutuals within local government and the health service. That project created many successful organisations who, but for the pandemic, would continue to thrive and expand. Regulation 77 has proved vital to these organisations in the past, and will in our view be central to ensuring their recovery after the pandemic. We therefore consider that Regulation 77 should be incorporated within any new regulations, with services being reserved for charities, voluntary bodies and staff mutuals. The current services within the new Regulation 77 should be:

- health, social and related services
- administrative social and healthcare
- provision of services to the community, staff and other training
- administrative housing services
- domestic help and nursing services
- medical personnel services
- library, archives, museums and other cultural services
- sporting services (including recreation) and
- educational and vocational health services.

By incorporating health services within the reserved items for the charity, voluntary and staff mutual sector, the Government will be honouring the recent recommendation to avoid tendering out such services to the private sector where possible.

Right procurement procedures

The Green Paper is somewhat confusing in its approach. It is unclear if the Light Touch Regime (LTR) is being adopted in its entirety for all contracts, or whether the existing LTR is simply be abandoned and folded into a new regime for all services. This has the potential to confuse the whole of the public procurement regulations in circumstances where all the four existing regimes are combined in one regulation. We have, as noted above, misgivings about this approach. Accordingly, and as suggested above, the existing services within the LTR should be added to a new and expanded Regulation 77 in the new regulations as suggested.

It is unclear which of the proposed new approaches would be appropriate when seeking tenders where there were only a limited number of suppliers. By way of example, a story in the Times on 2 March 2021 stated that six medieval stained-glass windows in Exeter Cathedral are being restored. A full procurement process would be hugely expensive in such a case, where only a handful of specialist individuals are able to undertake the work. The same would apply to the conservation of the 11th century Bayeux Tapestry before its display in Britain.

Procurement for crises: an unnecessary hurdle

We consider the proposal that consent should be required from the Minister for the Cabinet Office for any "crisis" procurement to be an unnecessary hurdle which could, in some circumstances, represent interference in local decision-making and action. Whilst the Green paper may well have in mind concerns around erratic tendering during the current pandemic, we are concerned about future individual crises involving (say) a fire, explosion, flood or coastal erosion where there are no existing local arrangements, where obtaining consent could delay urgent emergency action. Obtaining consent in advance of procurement would, in any case, not prevent legal challenges to any decision to use crisis procurement measures; any reassurance provided to procuring bodies by seeking authorisation would therefore be illusory. While there may be merit in allowing contracting authorities to seek authorisation on a voluntary basis where time pressures allow, they should retain the flexibility to make their own assessment about the existence of a crisis.

A social value extension

We have commented above about the need to extend the remit of the Social Value Act to cover all elements of the tendering process such that the need to take into account our *climate change targets* should be at the forefront of every tender for services, supplies and works. We would also suggest, again as above, that an explicit aim of using the procurement system to benefit local communities and economies should be included within the definition of "*social value*".

Private sector and the NHS

We have referred above to the Government's promise to restrict the access of the private sector to the National Health Service. Accordingly, this needs to be borne in mind when dealing with such services, which we recommend should be incorporated in the successor to the Regulation 77. Furthermore, if the proposal to abolish the LTR is retained, we consider that the Government should explore the possibility of retaining the old, higher thresholds for services currently falling under the LTR.

Contractor exclusions and selection

Whilst we have no objection to adopting the Most Advantageous Tender (as opposed to the Most Economically Advantageous Tender) as the evaluation tool, we are concerned that there would indeed be a tendency to "gold-plate" contracts, perhaps following some aspects of the PCR.

We consider that the existing regulations dealing with mandatory and discretionary exclusions provide contractors with a number of ways in which they abuse the system to avoid awkward questions about their past activities. By way of example, one contractor following a Health & Safety conviction after a death changed its name; others create new entities for each contract relying on a parent company guarantee. Accordingly, the new regulations should adopt a more stringent

approach to the category of misdemeanours which give rise to a mandatory exclusion, and in particular should ensure that suppliers are unable to evade these provisions by such means. We support the proposal to create a centrally managed list of debarred suppliers.

We propose that mandatory exclusion should apply:

A. To the circumstances mentioned in the Green Paper plus tax evasion (as suggested), offences under health & safety and hygiene/food regulations (where appropriate) and business rate evasion

B. The exclusion should apply not only to the offending entity but also any parent, subsidiary or associated entity

C. Consideration should be given to a mandatory exclusion where a contract has been terminated for poor performance

D. The exclusion would apply for a period of 5 years from the date of the last offence of contract termination

E. Any proposed parent company guarantee must be provided by a UK registered entity

We also consider that if during the course of any contract a contractor, or its parent, subsidiary or associated entity shall commit an offence under category (a) above, it will be open to the public body to terminate such contract without any adverse consequences. Regarding the proposal to legislate so that Deferred Protection Agreements (DPA) explicitly fall within a discretionary ground of exclusion, we support this approach. The Government should, however, introduce guidance alongside this to explain when it is likely to be appropriate to exclude a supplier following a DPA.

We consider that more work will be required to identify the most appropriate way in which to handle the issue of poor performance. Nevertheless, we welcome the approach of allowing greater scope for consideration of previous poor performance in future procurement exercises. In particular, and assuming that adequate means of measuring supplier performance can be devised, we strongly agree with the proposal to create a central database detailing past performance; if this is to be effective, we agree that it needs to be available to all contracting authorities at the least.

Openness and transparency

We broadly welcome the shift towards more open and transparent procurement. We can see the benefit in providing disclosure information at an early stage, as outlined in the Green Paper. We are concerned, however, that the need to abide by the Freedom of Information Act exemptions – which we agree is likely unavoidable – will mean that the information provided is of limited value to potential challengers, while providing the disclosure is still a significant burden to the contracting authority. Furthermore, open contracting and effective competition will in many cases be at odds, with bidders being potentially unwilling to provide information in circumstances where this is likely to be publicly disclosed.

As such, we consider it would be more helpful to instead establish means for information – including, where possible, confidential information – to be swiftly disclosed following (or indeed in advance of) a challenge. While the proposals to publish greater information at the time of procurement award may be helpful in allowing unsuccessful bidders to assess whether they should make a challenge, we suggest that this be combined with a requirement for substantial early disclosure (where necessary into a confidentiality ring) immediately following a challenge. Establishing a general expectation for significant early disclosure would assist with resolving disputes in a timely fashion, in line with the proposed shift to pre-contractual remedies, and assist smaller providers who are unlikely to have the resources to engage in complex legal battles of the scope of early disclosure.

We welcome the proposal to create centralised databases, but consider this should not be used as a basis for central government interference in local decision-making save where absolutely necessary. We consider that these registers will be very useful as an index for public bodies studying the contractors who have put in proposals following a tender or other notice including those

who have specialist skills. As there have been some instances of public bodies manipulating the regulations, there should perhaps be a register to record such details so that contractors' attention can be drawn to the track record of these bodies. These registers should also contain recommendations for good practice and lessons learned.

Challenging procurement decisions: the need for a specialist tribunal

The Green Paper is correct in highlighting the difficulty faced by small businesses, charities and social enterprises questioning decisions of local authorities and other public bodies. We have personal professional experience of poor behaviour on the part of some public bodies providing information under the Freedom of Information Act or supplying details of the mathematical assessment carried out under the tendering decision-making. Indeed, sometimes the delay is designed to frustrate the unsuccessful contractor from any legal challenge within the prescribed time limit. There need to be changes to the timetable. It should provide for a time limit for provision of the required and relevant information, which should be based upon a date (say) ten working days after receipt of the requested information.

We do not share the Government's confidence that reform of the current court system will meet the objectives in the Green Paper. We consider that where, as proposed, there is a shift away from damages and towards pre-contractual measures and remedies, this will need to be accompanied by a system capable of resolving disputes in a far more efficient and time-constrained manner than is currently the case. We are of the view that this is much more likely to be achieved by a specialist tribunal system, if properly resourced, than by reshaping existing court procedures. We would support the continued use of the Technology and Construction Court (TCC) for the most complex and high-value disputes, and suggest that the Government could expand the *"tailored fast track system*" to allocate challenges between the two systems. We believe that it would be preferable to create a separate dedicated tribunal system for resolving procurement disputes. We consider it unlikely that an existing tribunal system will have either the expertise or the capacity to resolve procurement disputes in the necessary timeframe. We agree, however, that it would be better for such disputes to be handled by tribunals in order to free up the TCC capacity for complex cases.

We support the proposal to shift the focus towards pre-contractual remedies. We agree that this will depend on a radically shortened timeframe for resolving disputes, and suggest that this must be the focus of reforms to the remedies system. As noted above, we consider that this is likely to be best achieved in part through a tribunal system, rather than just through reform of the current court system.

We are unable to comment on the proposal to replace the current *American Cyanamid* test for lifting automatic suspensions without further detail on what the new test would look like. We welcome the principle that contracts should remain suspended during more challenges in line with an increased focus on pre-contractual remedies, but note, as above, that this would require a system capable of resolving disputes far more swiftly than is currently the case.

We support the proposal to cap damages. We also agree with the need to retain the ability to award additional damages in particular circumstances but, in our view, these need to be set out in either legislation or guidance in order to prevent expansion of these categories over time. We support any proposal to ensure that, as above, the focus is primarily on pre-contractual remedies.

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