Bird & Bird & Transforming public procurement

Green Paper Response

March 2021

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Introduction

Bird & Bird is pleased to submit this response to the Cabinet Office's Green Paper *'Transforming public procurement'* which was released on 15 December 2020.

Now is an exciting time for public procurement law in the UK, and many of the proposals contained in the Green Paper represent very positive developments for the way in which public money is spent. On the whole, the proposals will, in our view, lead to costs savings for authorities and bidders alike, reduce bureaucracy and increase innovation. For example, the simplification of the nature and number of available procurement procedures is a very positive step, as are the proposals for embedding transparency throughout a procurement and the improvements envisaged for the way in which procurement challenges are managed, making them quicker and less costly.

There are other areas, however, where we feel that Government could have gone further, and some where we have concerns over the practical viability of the proposals set out in the Green Paper. The rules relating to 'open' framework agreements and the proposal for removing standstill letters are two examples.

We hope that the responses contained in this paper help the Cabinet Office in further developing the proposals and ensuring that the new regime is fit for purpose. We have prepared our response principally on the basis of our own views as practitioners, calling upon the considerable experience we have as a firm in this field, but also on the basis of input we have received from authority-side and bidder-side clients.

As a final observation, we would like to commend individuals within the Cabinet Office for their approachability during this consultation period. We consider that that level of openness should be a model for all future Government consultations. We also hope that this level of interaction and cooperation will continue as the Cabinet Office develops the proposals, as it is vital in our view that the profession is fully involved in shaping the new regime.

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Chapter 1: Procurement that better meets the UK's needs

Q1. Do you agree with the proposed legal principles of public procurement?

Partially, yes.

General observations

The importance of the existing principles of procurement law cannot be over-stated. Whilst many procurement issues and complaints arise in respect of specific procedural requirements elsewhere in the relevant regulations, whenever we are asked to advise on an issue of procurement compliance and in every single procurement challenge we have been involved in, arguments for and against are predominantly made on the basis of the applicable principles (set out in the PCR at Regulation 18). Indeed, in many cases, compliance with the principles is the sole consideration to be argued/determined because there is no specific procedural requirement. As such, it is vital that the principles to be applied are appropriate, clear and understandable.

Having said that, we do believe that the current principles are well understood by contracting authorities and bidders alike and that a significant departure from them is therefore unnecessary. Our specific comments in this regard are set out below.

Transparency and Non-discrimination

We strongly agree that these should be retained, and assume, on the basis of the information contained in the Green Paper, that these will operate in the same way as they currently do. For the avoidance of doubt, we see no reason why an alternative approach would be necessary.

Fair treatment of suppliers

It is unclear to us how, if at all, this proposed principle is intended to differ from the current requirement to treat economic operators equally (Reg.18(1) PCR). The Green Paper describes this principle as requiring decision-making by contracting authorities to be "*impartial and without conflict of interest*" (GP, para 27) and that suppliers "*must receive fair and reasonable treatment…*" (GP, para 35). We strongly agree with these statements.

However, it seems to us that the proposed principle of *'fair treatment of suppliers'*, and what it will mean in practice, is not particularly clear on the face of the Green Paper. On the one hand, the proposed principle may be intended as an *extension* to the current principle of equal treatment, i.e. by encapsulating everything that the current principle of equal treatment encapsulates and additionally including (for the avoidance of doubt) impartiality, absence of conflicts of interest and 'fairness'; or, it could be intended as a *replacement* to equal treatment, i.e. by focussing on fairness, impartiality, conflicts, etc. but not on a requirement to treat economic operators equally. Whilst we are of the view that any treatment which is unequal should naturally be considered unfair (and therefore a breach of this new principle), there is a risk that contracting authorities and courts take a different, and much more liberal, approach to the concept of fairness. We would be concerned with any intention or perception that the principle of equality is being diluted or removed altogether. In our view, this principle, and what it means in practice, is well understood by contracting authorities, and its replacement with something different and nuanced may give rise to increased risk of practical and legal challenge for contracting authorities and increased scope for bidders to be treated in arbitrarily different ways. We acknowledge that 're-branding' the principle of equal treatment to potentially align it more with the language of 'fairness' contained in the GPA will be desirable on the Government's part, but we would be concerned if, in doing so, the principle of equality is

inadvertently (or indeed intentionally) diluted or removed. If this was not the Government's intention, it would seem prudent to us to clarify in the Regulations/policy that this new principle encapsulates the existing obligation to treat economic operators equally.

Integrity

It is clearly crucial that any public procurement process is conducted with the utmost integrity; and we agree that this is "*key to strengthening trust and combating corruption*" (GP, para 34). However, the description of this principle in the Green Paper appears, in our view, to be somewhat confused and duplicative of the other principles. For example, the reference to bearing in mind the needs of the customer/user is not immediately relevant to the concept of integrity, and, as is the case with the previous principle of fair treatment, there is a reference to managing conflicts of interest. Whilst we agree that the principle is vital to the effective operation of a robust public procurement regime, we would suggest that this is not new and that presently, even without this being a stated principle, it is clear that integrity is a cornerstone of the regime. If integrity is therefore to be specifically included as a principle, we would advise that it is more coherently explained than is currently the case in the Green Paper. As mentioned above, and also explained in further detail below, many procurement issues/complaints boil down to the principles – if it is not clear what sort of behaviour this principle is intended to encourage/discourage, there is increased scope for uncertainty and challenge.

Public good and value for money

These 'new' and certainly laudable principles are very obviously relevant in the context of public procurement where contracting authorities are, at the end of the day, spending taxpayers' money. Without going into all of the merits and demerits of the inclusion of these principles in the procurement regulations (as we believe other likely respondents, including those in the public sector, are better placed to opine on), we would again highlight the potential for the inclusion of these principles to lead to an increase in procurement challenges. We are regularly approached by disgruntled suppliers who believe that, notwithstanding the otherwise compliant nature of a procurement exercise, the process is flawed because it doesn't demonstrate good value for money or is contrary to the public interest. Often, in these circumstances, there is no valid procurement law justification to undermine the award decision and the supplier is persuaded that it has no grounds for *legal* complaint. If these principles are introduced, however, we suspect that they will be cited in the vast majority of procurement challenges brought under the new regime, and indeed that they will form in and of themselves the basis of a number of claims which may otherwise not be brought under the present system. On reading of the Green Paper, it seems that the Government intends for these principles to be construed fairly narrowly, with reference for example to national priorities and investment decisions; however, in our view, it is highly likely that these principles will be relied upon in future litigation in a far wider sense.

Q2. 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?

Yes.

As an initial observation, however, it is unclear to us whether the new unit is proposed as a replacement of or in addition to the PPRS.

In our view, an overhaul (or complete replacement) of the PPRS is long overdue. The service is ineffective and the outcome is generally not worth the effort and time it takes a supplier to lodge a complaint. The Green Paper refers to the service as having investigated over 1800 cases and *"unlock[ing] over £8m in late payments"* (GP, para 43). With respect, for a service which has been in operation for 10 years, this is a pretty poor record in the context of the £290bn annual spend on UK public procurement (GP, page 5).

One of the key weaknesses in the PPRS system, in our view, is its lack of enforcement powers as is acknowledged in the Green Paper itself (GP, para 43). Many of our bidder clients see the service as 'toothless' and so, even where they have valid concerns about the conduct of a procurement and/or the approach taken by a contracting authority, they see no tangible benefit in raising these issues with the PPRS. The 1800 cases referred to in the Green Paper therefore pales in comparison to the number of potential complaints that may otherwise be made if the service was more effective.

If the proposed new unit is therefore intended to replace the PPRS, this could potentially be an improvement on the existing system, particularly in light of the proposal for the new unit to have specific intervention powers (although see our response to Question 3 for further commentary on these proposals). However, it does seem to us on a reading of the Green Paper that this may not be the intention given the apparent difference in scope of the two systems. Whilst both appear to be aimed at addressing poor public procurement practice, the PPRS is focussed on dealing with issues arising in respect of a specific procurement process, whereas the new unit appears concerned more with systemic issues within a contracting authority. Both of these aims are, in our view, important.

In our view, it would seem both efficient and effective to have a *single* unit which had a remit over both issues identified above, and which further had intervention powers of some kind.

If the Government intends to create this new unit *and* retain the PPRS, we would strongly advise that reform of the PPRS is necessary. One suggestion in this regard may be to give the PPRS the same (or similar) intervention powers as the new unit, as it would seem anomalous to us to have two distinct services, both focussing on addressing poor procurement practices, but which had very different enforcement powers.

Q3. 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?

We agree with the proposals in the Green Paper that membership of the panel should be drawn from the legal profession, as well as senior representatives of contracting authorities, suppliers and potentially other qualified procurement professionals. What is key in our view is that, whoever the members are, they are suitably qualified to perform the role. In our view, there can be vast differences in the quality of procurement professionals and we would therefore advise that the criteria for appointment should be strict and the number of members appointed should be kept to a minimum to avoid wide differences in approach. We would suggest that experienced members of the legal profession are likely to be best placed to perform this function.

As for the sanctions available, the proposal in the Green Paper for spending controls may certainly operate to deter poor practice; however, at the same time, it seems counter-intuitive that cutting a contracting authority's budget will in turn lead to improved quality. An alternative approach be may to introduce a 'special measures' system whereby contracting authorities could be put under specific, regular monitoring programmes and/or relevant procurement functions within the authority could be replaced on a temporary basis until the authority's reliability could be demonstrated.

Chapter 2: A simpler regulatory framework

Q4. Do you agree with consolidating the current regulations into a single, uniform framework?

In principle, yes.

We agree with the sentiment in the Green Paper that there are "*currently too many sets of regulations with overlapping and complex rules*" (GP, para 51). A more streamlined approach would, in our view, make sense and particularly benefit private sector organisations bidding into different sectors, as well as authorities that operate cross-sector. We would note, however, the references in the Green Paper to certain proposals which may result in less flexibility, particularly for utilities. Generally, the Green Paper appears to assume that the benefits of uniformity outweigh the disadvantages of removing these flexibilities. In our view, whilst that may be the case in respect of individual proposals, we would advise against removing sector-specific provisions solely for the purpose of simplicity, and instead to take a more targeted view of the sector-specific rules to determine whether there is merit in keeping them.

We also note the reference in the Green Paper to a "*single set of regulations specifically designed for the UK market and priorities*" (GP, para 51) (emphasis added). Although we are not cited on the plans of the devolved administrations, in seems particularly unlikely at least that the Scottish Government will sign up to a uniform set of regulations across the whole of the UK. It appears likely to us that Scotland will retain rules which are more closely aligned to the existing EU-based framework. There is no recognition of this in the Green Paper, and the potential impact it will have on companies doing business across the UK.

Q5. Are there any sector-specific features of the UCR, CCR or DSPCR that you believe should be retained?

We consider that the following sector-specific features should be retained:

- Activities directly exposed to competition (Regulations 34 and 35 UCR)
- Qualification systems (Regulation 77 UCR)
- Security of information (Regulation 38 DSPCR)
- Security of supply (Regulation 39 DSPCR)

Chapter 3: Using the right procurement procedures

Q6. Do you agree with the proposed changes to the procurement procedures?

Yes, we take the view that in order to undertake transparent and fair procurements, there does not appear to be any compelling reason why procedures should be defined to the extent they are in the current regime. Our view is that if the authority/utility is compliant with the basic principles of transparency, equal treatment etc. (or such amended principles as proposed in the Green Paper), then it should be free to design a procurement process which best suits its commercial requirements.

We also agree that there is significant overlap between Competitive Dialogue (CD), the Competitive Procedure with Negotiation (CPN) and, to a certain extent, Innovation Partnerships. Therefore (subject to a few challenges this may bring as discussed below), we believe our public and private sector clients would welcome a streamlining of these procedures.

We do, however, see a number of challenges remaining, unless Government adopts further measures to overcome some of the issues described within Chapter 3, as follows:

- In respect of the reference to the current procedures "tying buyer's hands" in paragraph 59, we believe that there is a misconception that it is the procedures themselves which prevent innovation or designing a process in a particular way as to achieve certain commercial ambitions. From a legal perspective, the regulations which prescribe how to conduct the current procedures (e.g. among others, regulations 27 to 32 of the Public Contracts Regulations 2015) essentially cover issues such as:
    - distinguishing between the selection and award stage of the procedure and the types of criteria which can be used;
    - minimum timeframes which must be observed to enable bidders to prepare their expressions of interest (or 'Selection Questionnaires') or tenders;
    - the obligation to publish a contract notice/contract award notice;
    - whether the procedure enables the authority to conduct the process across several stages;
    - whether the procedure permits 'face to face' interaction with bidders;
    - the requirement to justify the use of complex procedures such as CD and CPN;
    - any rules concerning the further 'negotiation' of final tenders if using the CD or CPN procedure.

  Aside from the above baseline requirements, from a legal perspective, there remains a significant degree of flexibility in terms of designing a process which seeks to identify bidders who are able to offer more innovative solutions. For example, by testing innovation as part of the selection and award stages, to designing contractual mechanisms to incentivise suppliers to innovate and sufficiently 'future-proofing' the contract such that the authority is able to incorporate such innovations within the existing contract. In our view, the perceived barriers to innovation are not connected to the procurement rules – it is usually a lack of time, confidence, skillsets and senior 'buy-in' which prevent the implementation of more innovative solutions. We believe that simply modifying the legislation which underpins procurement law will not be sufficient to realise the ambitions concerning innovation within the Green Paper. If the UK Government wishes to do this, it will require investment in a transformative programme of training, liaison with senior public sector personnel and guidance.
- From an authority/utility's perspective, there is likely to be a sense of nervousness in respect of using a procedure which is less 'defined' in terms of the structure involved. Authority personnel may be comfortable with the parameters of the existing procedures which they are familiar with. To that end, we believe that a significant part of the public sector will continue to utilise the previous procedures, albeit badged as using the "Competitive Flexible Procedure" for some time. Notwithstanding this, we believe that this issue will diminish over time, particularly in sectors where procurers face a discerning bidder market and, as such, to attract

the 'right' competition, authorities may need to be more adaptable and demonstrate more 'innovation' in respect of the procurement procedure itself. However, we also envisage that in attempting to be more ambitious/bold and adopt an alternative approach, some authorities may inadvertently fall foul of the procurement rules. An obvious example of this may be widening the amount of interaction with the preferred bidder at the end of a procurement process, which could result in heavily negotiated changes to the terms of the contract or the preferred bidder's final bid. We therefore believe specialist advisors will play a key part in maximising the potential afforded by the introduction of the new Competitive Flexible Procedure, while at the same time ensuring adherence to the underlying legal regime.

- It is not clear what is intended in paragraph 65 of the Green Paper (i.e. "*for procurements where the contracting authority may not want to limit the field through an initial selection stage without first evaluating the product, technology or software being offered; this would be particularly useful where a prototype or other practical demonstration is required*"). This paragraph implies that criteria which would be defined as 'award' criteria under the current regime could be used to create a shortlist of suppliers during the selection stage. Some further guidance on what is envisaged here and how this relates to the conduct of the selection stage would be helpful.
- We also note the reference in paragraph 70 of the Green Paper to producing guidance. After speaking with a key contracting authority client, one of their key concerns is ensuring the quality of such guidance. Further, at present, a number of guidance documents are binding on central Government bodies, however not the wider class of contracting authorities. Therefore, our contracting authority client was particularly concerned about the mandatory application of such guidance in any future regime, particularly in light of the fact that other parts of the public sector are independent for good policy reasons.

7. Do you agree with the proposal to include crisis as a new ground on which limited tendering can be used?

The distinction between 'crisis' and 'extreme urgency' is not entirely clear to us and we do not necessarily agree that there is any ambiguity as stated in paragraph 78 of the Green Paper. Further information on what the Government perceives this ambiguity to be would be welcome.

The recent response to the COVID-19 crisis appears to be a catalyst for this ground; however, we would argue that many procurements which are connected to this particular crisis are adequately covered under the existing rules contained in Regulation 32 of the PCR. Our concern is that the heavy focus on this issue is driven more by political considerations, than legal ones, as the Government seeks to 'seize' on any perceived flaws in the current EU-derived rules to justify the benefits of leaving the EU and the advantages of establishing our own procurement law regime. Whilst we have nothing in particular against the introduction of a 'crisis' ground, we consider this to be unnecessary and, therefore, contrary to the Government's objective of making the rules more streamlined.

If the 'crisis' ground is to be included, it certainly makes sense for a crisis to be determined at a central and senior level (as proposed in the Green Paper) and not at an individual authority level, as this would in our view be susceptible to abuse.

Q8. Are there areas where our proposed reforms could go further to foster more effective innovation in procurement?

As explained in our response to Question 6 above, we strongly take the view that legislative reforms alone would not be enough to foster more effective innovation in procurement. There are, however, a number of practical measures which could be taken to achieve this such as providing greater guidance and training as further discussed in our response to Question 6.

We would also note that the term 'innovation' is often used in various contexts and can have varying interpretations. Therefore, we believe further work could be done in order to articulate what the ambition is here (e.g. is there an ambition to receive more innovative proposals, conduct procurements in a more innovative way, or something else?). Any reforms proposed will need to be focussed and should be supported by tangible and clearly defined proposals.

Q9. 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?

Speaking on behalf of many of our private sector clients who regularly supply the public sector, we are aware that there are a number of factors which inhibit the potential for innovative solutions. As discussed in our response to Question 6 above, it is not the procurement regime itself which prevents the procurement of innovative solutions. It is often a lack of time, skillsets, preparation, senior buy-in from the purchasing authority etc. which give rise to this.

Q10. How can government more effectively utilise and share data (where appropriate) to foster more effective innovation in procurement?

We do not have a particular view on this issue, albeit we can see the benefits of sharing 'know-how' including precedents, "lessons learned" etc. with other public sector bodies.

Q11. 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?

It is of course encouraging that the Government wishes to consider how to enable public procurement to be used as a tool to drive innovation in the UK. However, it is not entirely clear what is being proposed by the term "pre-procurement processes", for example, whether this is a reference to "Pre-Commercial Procurement" or "PCP" (a concept which has been discussed at length by the European Commission – see https://ec.europa.eu/digital-single-market/en/pre-commercial-procurement) or other activities, such as pre-market engagement or other forms of interaction with suppliers which may take place prior to the commencement of a formal procurement process.

In terms of interaction with suppliers prior to undertaking a formal procurement process, we are strong advocates of the use of pre-market engagement and working with the supplier market to structure procurements which are effective and attractive to the market, and therefore more likely to be successful and result in the award of a contract which really drives best value for the taxpayer. However, far too many of these exercises merely constitute "tick-boxing" activities and the results of those interactions are rarely considered and/or are incorporated into the subsequent procurement process. This may be due to issues such as timing (i.e. there is not enough time to implement some of the suggestions proposed by the bidder market) or the quality of the feedback provided (e.g. lack of *constructive* criticism from suppliers in terms of proposing an alternative approach from that suggested by the authority). Our view is that, carried out correctly, pre-market engagement can be used as a tool for facilitating innovation. Early discussions with the supplier market to understand alternative ways of doing things are much more likely to foster more innovative solutions.

In terms of PCP, one of the significant challenges with this type of activity is the inability for any authorities participating in the PCP to purchase the 'end result' of any research and development conducted by the parties. Indeed, we have a number of clients who regularly participate in PCP initiatives with public sector organisations who express frustration that once the R&D phase is completed, the authority is then required to advertise the contract and undertake a procurement process. This not only gives rise to concerns surrounding ownership of intellectual property rights, but also the fact that the contract itself could be awarded to an alternative entity which was not involved in the initial R&D phase. Likewise, contracting authority clients often refer to the "valley of death" in using this process, i.e. the inability to enter into a contract, without undertaking a subsequent procurement procedure.

While we understand that the introduction of the innovation partnership procedure was designed to counter these issues, the procedure has not been widely used. From speaking with public sector clients and industry contacts, it would appear that this that this is primarily due to the way in which Regulation 31 PCR was drafted (which we acknowledge was essentially based on Article 31 of the Public Sector Directive (Directive 2014/24/EU), which itself was not entirely clear). As this was a new procedure, which arguably introduced a very different type of process in comparison to the more 'established' procurement procedures, in hindsight further training and/or formal guidance in terms of its use may have garnered further confidence from authorities. This can be remedied however in order to facilitate a more flexible/innovative procurement procedure going forward, i.e. providing more guidance and clarity in respect of how the Competitive Flexible Procedure could be

used to design a procurement process, predicated on the Innovation Partnership procedure. In essence, this would mean taking the optimal parts of the Innovation Partnership procedure as set out in the PCR, and developing this to describe a clear process which could be used by authorities to foster greater innovation.

Q12. 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?

In terms of 'removing' the procedure, in reality it appears to us that this is not necessarily what will be happening here (as it seems that the Competitive Flexible Procedure will not introduce any further rigidity in respect of the way in which such procedures are designed/conducted).Instead, it simply seems that the Green Paper is proposing to lower the thresholds which previously applied to such procurements.

We believe that the higher thresholds could continue to be applied in respect of procurements which are currently considered 'light touch'. This would both recognise the distinction in terms of those services which are generally considered to only be of interest to domestic suppliers as well as retaining the flexibility which the Light Touch Regime currently offers. Indeed, by reducing the threshold, we believe that this will significantly increase the workload of procurement officers/authority staff at a time where it appears fundamental changes will be introduced.

Chapter 4: Awarding the right contract to the right supplier

Q13. Do you agree that the award of a contract should be based on the "most advantageous tender" rather than "most economically advantageous tender"?

We do not have any particular views on this proposal as this does not appear to bring about any tangible changes to the procurement regime. However, we understand that this may be helpful in reinforcing the fact that authorities are able to take a broader view of what can be included in the evaluation of tenders in assessing value for money including social value as part of the quality assessment.

Q14. 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?

Yes, in principle we agree that this principle should be retained as it is an important part of ensuring proportionality. However, we recognise that previous case law from the European Court of Justice does give rise to some confusion in respect of using procurements to achieve greater social value. Therefore, further clarity on the factors which can be considered as part of designing award criteria should provide further confidence in building in mechanisms to assess bidders in these particular areas.

There will, however, need to be a balance struck between being able to utilise a wider range of criteria and whether the use of such criteria is proportionate to the contract in terms of value/subject-matter. For example, we have seen instances where such criteria (and contract conditions) require significant further investment from bidders to provide 'bespoke' offerings in respect of the authority's social value objectives, which can result in higher pricing (e.g. if additional staff need to be recruited to manage this element of the contract). This could be potentially managed by producing guidance to highlight the risks in using such criteria, or designing the criteria in such a way that this inadvertently prohibits the participation of SMEs (who are less likely to have dedicated staff who concentrate solely on the implementation of social value initiatives). Our view is that the same level of social value can be achieved by considering measures/initiatives which bidders are already implementing as part of their day to day business and/or in conjunction with other customers, which can avoid significant duplication and, therefore, additional cost.

Care would also need to be taken that such exceptions are not too politicised as this could result in a scenario where the UK is in breach of its obligations under the GPA. We would also assume that any exceptions to this basic requirement would be optional for the contracting authority, rather than mandatory. If this assumption is incorrect, we believe that our contracting authority clients would be concerned about incorporating award criteria which does not directly link to the subject-matter of the contract and neither relates to its own *internal* policy objectives.

Q15. 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?

In principle, we agree with this proposal, primarily as the Green Paper is proposing that a clear framework will be drafted which will provide some parameters around its use. The Green Paper does not, however, provide sufficient detail on this topic to provide a more definitive view on this proposal at this time.

Q16. 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?

Yes. We do not have a particularly strong view on this topic, however, as this is not an issue which we have encountered frequently in supporting contracting authorities undertaking complex procurements.

Q17. Are there any other behaviours that should be added as exclusion grounds, for example tax evasion as a discretionary exclusion?

We do not have any particular view on this topic with the exception that ultimately, authorities should have the ability to exclude any bidder where there is evidence of a conviction based on fraud or dishonesty, subject to any self-cleaning measures proposed.

Q18. Do you agree that suppliers should be excluded where the person/entity convicted is a beneficial owner, by amending regulation 57(2)?

Yes. We do not have a particularly strong view on this topic, however, as this is not an issue which we have encountered frequently in supporting contracting authorities undertaking complex procurements.

Q19. 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)?

Yes. While we do not have a particularly strong view on this proposal, it would seem to make Regulation 57 PCR easier to digest/understand.

Q20 Do you agree that further consideration should be given to including DPAs as a ground for discretionary exclusion?

Yes, we agree that this should be given further consideration. In essence, our views in this regard mirror those set out by the Procurement Lawyers' Association (PLA) (on the basis that members of our team contributed to this element of the PLA's response).

Our greatest concern is that this could act as a deterrent to entering into a DPA, particularly for entities whose main source of business is public sector contracts. Indeed, one of the most important benefits of the DPA regime from a prosecutor's point of view is that the regime encourages companies to self-report in the first place, and also co-operate during any investigation. This will often include the requirement for the company to disclose any information or material pertaining to the investigation. DPAs are therefore viewed as a tool for tackling instances of fraud, bribery and other economic crime on the basis that those who co-operate are not penalised. It would therefore seem counter-intuitive for one regime to encourage the use of DPAs as a means of eradicating fraud, bribery and other economic crime, while the public procurement regime would essentially give rise to a disincentive to enter into a DPA.

Q21. Do you agree with the proposal for a centrally managed debarment list?

We are not entirely clear what is being proposed here. For example, will this essentially constitute a list of entities and their respective convictions from which authorities are able to obtain information and *then* decide whether that entity should be excluded? Or conversely, does this constitute a 'blacklist' of entities which should be excluded from each procurement?

Aside from the above, we would largely agree with the submission provided by the PLA on this particular topic (on the basis that members of our team contributed to the debate concerning this issue).

Q22. Do you agree with the proposal to make past performance easier to consider?

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;
- 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;
- 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; and
- 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.

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 fellow 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.

In circumstances where a supplier is not performing in accordance with its obligations, it is commonplace that such suppliers are essentially '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.

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. A common complaint includes 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. This can result in disagreements which can impact on an authority's perception of whether the supplier's performance is 'good' or 'poor'. 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).

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.

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.

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 unlikely 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.

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.

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.

Q23. Do you agree with the proposal to carry out a simplified selection stage through the supplier registration system?

Yes, partially. We believe that a central repository of bidder information which would reduce some of the administrative burden on suppliers will be welcomed. However, it is not clear how such a system would restrict the flexibility of contracting authorities to 'bespoke' the selection stage, i.e. will contracting authorities be able to design additional, appropriate criteria from which to create a shortlist of suppliers who would be suitable to deliver the contract in question?

Paragraphs 130 and 131 of the Green Paper state that the system proposed would "*limit the types of selection criteria contracting authorities can apply to those which are provided for by the GPA*" and "*any further criteria that contracting authorities wish to apply […] may be applied after this selection stage*". This implies that a selection stage could essentially be divided into two distinct 'sub' stages which would create an additional layer of bureaucracy for both authorities and bidders.

The current standard selection questionnaire (SSQ) mandated by the Cabinet Office requires authorities to report any deviations from the standard selection questions set out in the document (albeit we are not clear on how often such reports are made). It also provides authorities with the opportunity to ask additional "Project Specific Questions" in a separate section which do not need to be reported to the Cabinet Office. From our experience of working with many contracting authorities, this approach has been sufficient (albeit not always entirely satisfactory), as it does enable authorities to use the Project Specific Questions to draft specific and tailored selection criteria which ensures that only the most appropriate suppliers are advanced to the next phase of the procurement process. There is usually little appetite to change the 'standard' questions within the remainder of the questionnaire (albeit these could benefit from some improvement), on the basis that they are fairly generic and concern the types of questions which authorities would usually incorporate into a selection questionnaire in any event (e.g. exclusion grounds, financial information etc.). In addition, authorities are at liberty to design the evaluation criteria they will use to evaluate responses to those 'standard' questions. To that end, we believe that a similar approach could be replicated within the supplier registration system, i.e. a 'fixed' element of the

system which is essentially the current 'mandated' questions set out in the SSQ, and a 'project specific' element which enables authorities to insert their own project-specific criteria.

We strongly believe that it is important that authorities are able to continue designing and using their own project-specific selection criteria. A good example of this is where case studies are required in order to assess the suitability of the candidates in respect of whether they have appropriate and relevant experience to be considered for the contract in question. The drafting of such questions cannot be a 'one size fits all' approach, as the content requirements for each case study will differ depending on the project.

Other than the observations set out above, we would echo the PLA's response to this question, on the basis that members of our team contributed to the discussion here.

Q24 Do you agree that the limits on information that can be requested to verify supplier self-assessments in regulation 60, should be removed?

We do not have a particularly strong view on this topic and would defer to the comments made within the PLA's response to this question, on the basis that members of our team contributed to this discussion.

Chapter 5: Using the best commercial purchasing tools

Q25 Do you agree with the proposed new DPS+?

Our initial observation with respect to the 'DPS+' relates to the retention of the name. It seems odd to us to keep a name which very clearly corresponds to the previous EU regime, and even odder to add the '+' on the end when the original DPS will no longer be available. To our mind, whilst DPSs have become increasingly popular in recent years, they are not universally recognised (in the same way as, for example, a framework agreement is) and so it seems unnecessary to us to retain the moniker, particularly where this has the potential for confusion.

With respect to the DPS+ proposals themselves, we would make the following comments:

- In our view, whilst DPSs certainly have their advantages (particularly for agile online and dynamic marketplaces as the Green Paper highlights), the potential to have a large number of suppliers in a given category or sub-category, which *all* have to be invited to tender for specific opportunities, can make them unwieldy and unworkable in practice. It doesn't seem to us on our reading of the Green Paper that the DPS+ will be any different in this regard.
- We are unclear what a "*continuously open…live advertising notice*" is and how it will work in practice (GP, para 147). By way of further explanation, Bird & Bird itself monitors FTS on a daily basis for new opportunities by applying our relevant search criteria. Is it the case that any DPS+ notices which are relevant to our search criteria will appear on our search every day, will they only appear once or will they appear periodically?
- We are unclear what is meant in practice by "*the means to terminate the list must be detailed in the original advertising notice*". In our view, procurers will want to reserve the right to terminate a DPS+ at some point, but they are unlikely to have a clear view on this at the point they publish their advertising notice.
- The fact that procurements under a DPS+ must be conducted under the new competitive flexible procedure appears to preclude the use of the open procedure. This seems very odd. In our view, a DPS+ would lend itself particularly well to commodity-type purchasing (as is currently the case) where an open procedure is likely to be the most suitable procurement process for awarding specific contracts. Notwithstanding whether the open or the competitive flexible procedure is used, both types of procedure encompass a selection stage. Therefore, we believe it is erroneous to refer to these types of procedures as means of 'calling off' a DPS+. As far we understand the proposals, selection criteria will have been used to determine whether a supplier is admitted to the DPS+ on at the point of admission. Therefore, it would appear unnecessary to use a procedure which requires the application of further selection criteria at the point of awarding a contract – which we assume is not the intention.
- We note that the DPS+ will replace qualification systems (QS) in the utilities sector. It appears to us that one significant difference between these two systems is that the DPS+ will not allow a procurer to 'short-list' a smaller group of suppliers to invite to the tender stage, and instead will require the authority to go out to all suppliers on the DPS+ (or the relevant category/sub-category). This is less flexible than is currently the case with QSs. In our view, that is not necessarily a particularly negative development, as it has always been a concern to us that many QSs do not have a transparent and compliant mechanism for this kind of short-listing exercise.

Q26 Do you agree with the proposals for the Open and Closed Frameworks?

We support the retention of 'closed' frameworks, on the basis that these will operate in much the same way as existing frameworks under the current rules.

The proposals for 'open' frameworks are, however, more problematic in our view. In this regard, we would make the following observations:

- Re-opening an 'open' framework in year three (at the latest) by re-advertising the opportunity and assessing new applicants against the original evaluation criteria is essentially akin to setting up a new framework agreement. The proposals therefore give authorities *less* flexibility (rather than more) because, if they simply chose to award a new framework, they would be able to deviate from the terms of the original competition. In doing so, they could update the evaluation criteria to reflect any innovations in the market that have occurred since the framework was originally established or indeed learn lessons from that process. Re-opening an open framework would restrict their ability to do this.
- We accept that the advert required to be published in year three (at the latest) may be more streamlined than a full framework contract notice, and that, in requiring an authority to apply the same evaluation criteria, there may be a reduced administrative burden on an authority. However, we think that this will have a negligible impact, and indeed that any residual benefits will be outweighed by the benefits of establishing a new framework at that stage, which would allow the authority to update its process to reflect innovations/lessons learnt.
- The position of existing suppliers on an open framework seems particularly unsatisfactory. In our experience, most (compliant) multi-party framework agreements have a limit to the number of providers admitted to the framework. The reality then is that these providers will essentially be forced to re-apply whenever the framework is re-opened, or risk being removed. This is, therefore once again, essentially akin to running a new framework competition, but without the benefit of being able to vary some of the underlying terms/evaluation criteria.

With regard to the *'General framework rules'* (GP, para 155), we certainly agree with the proposal for a central register of commercial tools, as currently it is very difficult for potential bidders and authorities alike to identify what framework/DPSs exist and what they cover. It is unclear to us, however, if this central register is central only to a particular authority or covers all authorities? The latter approach would be far more useful in our view.

Chapter 6: Ensuring open and transparent contracting

Q27 Do you agree that transparency should be embedded throughout the commercial lifecycle from planning through procurement, contract award, performance and completion?

Yes, broadly speaking the proposals transparency are to be welcomed. However, we believe that the extent of the information which is proposed to be subject to this requirement will be of concern to both authorities and suppliers alike.

Firstly, from a contracting authority perspective, the increase and sheer scope of central reporting which is currently envisaged throughout the Green Paper from commercial pipelines, to full supplier bids, to contract amendment notices, to on-going contract management information will create a significant resource burden on contracting authorities which are already stretched. This does not appear to have been acknowledged as a potential risk within the Green Paper despite this being fundamental to the successful implementation of the transparency ambitions described. The Cabinet Office would therefore need to give further consideration as to how such a 'resource gap' could be fulfilled.

Secondly, from a supplier's perspective, this could be a "double-edged sword". On the one hand, assuming an authority fully complies with its transparency requirements, those seeking to challenge procurements will be provided with much more substantive information about the award decision without having to specifically request this. On the other hand, the level of transparency proposed (in particular, copies of tender submissions) is likely to give rise to serious concerns. While recognise that these requirements will be subject to freedom of information law, in practice the correct application of freedom of information law requires substantial effort. This would undoubtedly lead to substantive/protracted discussions with bidders concerning which aspects of their tender are "commercially sensitive". There are also many other parts of a bidder's submission which may not meet the thresholds of the various freedom of information exemptions (e.g. presentational ideas, diagrams, the approach taken to language/tone etc.), but are considered to constitute part of that bidder's "competitive edge".

Even if substantive additional measures/resource were put in place to deal with the additional workload for authorities, this may not be enough to provide sufficient comfort to suppliers that their commercially sensitive information will not be disclosed and/or that they will not suffer some form of "loss of competitive edge" as a result of disclosure. In turn, this may result in fewer suppliers willing to take part in public procurement processes. In short, for the Cabinet Office, this will ultimately be a matter of managing the *perception* of suppliers, notwithstanding how many measures are put in place. To that end, we would recommend that the Cabinet Office reviews how much information should realistically be disclosed, which should strike the right balance between providing a greater level of transparency and retaining the confidentiality and confidence of suppliers.

We have published two articles relevant to the transparency measures proposed (see "Procurement Green Paper Briefings: eProcurement Proposals" by Roger Bickerstaff published in January 2021 and "Procurement Green Paper Briefings: the abolition of the standstill letter" by Claire Gamage published in February 2021) which explore these measures in more detail.

Q28 Do you agree that contracting authorities should be required to implement the Open Contracting Data Standard?

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:

- *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.
- *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 ISO 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 it is unclear to us that the Cabinet Office would 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, it is unclear to us 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.
- *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.
- *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.
- *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.

Q29 Do you agree that a central digital platform should be established for commercial data, including supplier registration information?

Yes, we agree that a central system from which accurate and timely information concerning public procurement data could be extracted would be an incredibly useful asset, albeit we have discussed elsewhere in this response how much of this information should be published in the public domain.

From a supplier's perspective, an additional example of this may be the 'register of complaints', where suppliers may be reluctant to complain about aspects of a procurement process, if this means that such information would be made publicly available. Similarly, contracting authorities are likely to be concerned that all procurement complaints could be published, whether those complaints have sufficient merit or not.

Chapter 7: Fair and fast challenges to procurement decisions

Q30 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.

Yes, the measures proposed, if implemented properly, are certainly likely to lead in large part to the efficiencies identified in the question. However, for the reasons explained elsewhere in this response, we remain unconvinced that the proposed reforms will make the review system universally accessible, particularly to SME/VCSE bidders.

With respect to the detailed proposals covered by this question, we generally support the submission made by the Procurement Lawyers' Association, which members of our team were involved in drafting, and do not intend to repeat those submissions here.

Q31 Do you believe that a process of independent contracting authority review would be a useful addition to the review system?

As far as we can tell, this proposal is dealt with only very briefly in the Green Paper (GP, para 199) and this very high level of detail makes it difficult to provide effective feedback. Having said that, though, we have set out below our initial views and look forward to further detail on the proposals being provided by the Cabinet Office in due course.

As an initial observation, the question uses the term "*independent*" but, in on our reading of the Green Paper, it is clear that this review is intended to be an "*internal*" one by the contracting authority itself. Such a review cannot be considered to be genuinely independent.

Having said that, and again noting the lack of specificity in the Green Paper, we are of the view that a process of review within the authority (as a 'second pair of eyes') may be a welcome initiative. Contracting authorities and many lawyers argue that this is precisely the process that an authority undertakes at present when faced with a disgruntled supplier questioning a procurement decision. Whilst we acknowledge that that may be the case in *many* instances (and, of course, should be the case in *all* instances), with respect it is not *always* the case. In many instances, procurements are conducted by individuals and small groups within contracting authorities who, of course, are close to the detail and well-placed to assist in undertaking a review, but can also be too personally invested in the process to take an objective stance on a complaint. In a number of instances, these individuals/ groups deal with the early stages of a procurement 'challenge' by themselves, without reference to more senior or legal colleagues. In some instances, these individuals/groups deal with the challenge up to the point that a claim is issued, without reference to more senior or legal colleagues. Clearly, this should not happen, but it does, and it is difficult as a lawyer advising a potential challenger to determine whether your client's concerns are being dealt with at the appropriate level.

Some contracting authorities currently have processes in place to review procurement decisions in light of a complaint. In our experience of working with these contracting authorities, review decisions of this type can be very effective and avoid the need for lengthy and costly legal battles.

We are therefore of the view that, in principle, a review process of this nature would be a useful addition to the system. However, there are two key issues which, in our view, would have to be considered carefully as follows:

- The Green Paper makes it clear that contracting authorities would be "*encourage[ed]*" to include this "*optional*" stage. We believe, if it is to be introduced, it should be mandatory to

give authorities and suppliers alike certainty over the process and timing of the process to be undertaken.

- The Green Paper makes no reference to how this is intended to interact with the standard 30-day limitation period for bringing a procurement challenge. The clear risk is that this is seen as an opportunity and used tactically by an authority to run down the 30-day clock. Given how tight that clock already is (particularly in the context of other types of comparable legal challenge), an extra hoop for the challenger to jump through would not be welcome. As such, we think that it is first of all necessary for clear guidelines to be given to contracting authorities as to how internal review processes should be conducted, including clear guidelines on timescales, and also that the 30-day limitation period should be 'paused' in the event that the internal review mechanism is triggered by a supplier. Parameters may be set on the length of such a pause which could be by reference to the timescales set out by Government on how long such a review process should take.

We acknowledge that contracting authorities vary considerably in size and nature, and that some authorities will be far better placed in terms of capacity or capability to undertake such a review than others. Consideration will clearly have to be given to this, and a 'one size fits all' policy is unlikely to work at least in the immediate term.

Q32 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?

We note that this question limits responses to the use of *existing* tribunals, as opposed to the creation of a new, dedicated and tailor-made tribunal to deal with procurement cases. Whilst it is not particularly apparent from the Green Paper itself (GP, paras 201-202), which appears to open the door to a new procurement-specific tribunal, we understand that this is not the Government's intention at this stage and that the consultation is being made on the basis of potentially extending the remit of an existing tribunal only.

With that in mind, and as the Bird & Bird respondents to this consultation do not currently specialise in litigation before any established tribunals, we defer to other respondents from the legal sector (and, in particular, the Procurement Lawyers Association) on the detail of this proposal.

Our only observation on this point, which again is one made by non-specialists in how these existing tribunals operate, is that our understanding is that many of these existing tribunals work in a similar way to the current Court process e.g. they are staffed by the same judges, they can be equally costly and decisions can take considerable time. As such, unless fundamental changes are envisaged to any particular existing tribunal, we see no real advantage of transferring certain types of procurement dispute away from the TCC, which has considerable experience in dealing with these cases, to an alternative existing tribunal.

If the intention had been for the Government to establish a new procurement tribunal that would very much have been something that we would have supported, as we think there are some fundamental difficulties with the Court process that mean that certain types of claimants (e.g. SMEs/VCSEs) are discouraged from pursuing their legal rights. Principally these are issues of cost and time, but also of formality and the perception amongst many SME/VCSE bidders that escalating matters to a Court of law, essentially suing Government in a public forum, is a step too far. Whilst in reality pursuing matters before a tribunal would have the same consequences, we are of the view that SME/VCSE bidders may perceive this route to be a less extreme measure. If properly constituted in close collaboration with the profession we, therefore, believe that the introduction of a procurement-specific tribunal could be a very positive step.

The authors of this response have also written an article for the forthcoming edition of the Public Procurement Law Review on the subject of whether, in the absence of effective measures to make the review process more accessible to SME/VCSE suppliers by the introduction of a procurement-specific tribunal, there may be some merit in investigating the use of adjudication in respect of certain types of procurement dispute. Adjudication is widely recognised as having been exceptionally effective (on the whole) in construction disputes, and it has also more recently been introduced for technology-related disputes. Whilst we acknowledge that procurement is quite a distinct area of law, and that there are important issues which would need to be overcome to make adjudication work in the context of a procurement dispute, we are of the view that this may be a workable compromise solution (perhaps only in the short-term whilst evidence builds up on the need for a tribunal) which addresses concerns that the current review system is not suitable for SME/VCSE suppliers. More detail on the arguments for and against this proposal will be set out in the forthcoming publication https://www.nottingham.ac.uk/pprg/publications/law_review.aspx.

Q33 Do you agree with the proposal that pre-contractual remedies should have stated primacy over post-contractual damages?

Yes, absolutely.

As specialist procurement law practitioners, this would very clearly be our preference. More importantly, however, we know that this is also the clear preference amongst both our bidding and authority-side clients.

Q34 Do you agree that the test to list automatic suspensions should be reviewed? Please provide further views on how this could be amended to achieve the desired objectives.

Yes.

In this regard, we fully support the submission made by the Procurement Lawyers' Association on this point, which members of our team were involved in drafting, and do not intend to repeat those submissions here.

Q35 Do you agree with the proposal to cap the level of damages available to aggrieved bidders?

No.

In our view, this proposal is misconceived. The Green Paper states that UK public sector bodies are "*spending large amounts of public money…to compensate losing bidders*" (GP, para 207) and that the "*potential for large payouts can encourage speculative claims*" (GP, para 209). Based on our experience, we simply do not recognise these statements. Whilst we accept that public money is being spent to compensate challengers, this is not in the context of the award of damages (where, to the best of our knowledge, there has only ever been one judgment), but instead through extra judicial settlements. Seeking to address this issue by limiting the damages available is, in our view, the wrong solution to the problem. The proposal is further misconceived in light of the Government's well-intentioned and very welcome proposal to state a preference for pre-contractual remedies. If properly implemented, this preference will mean that the already limited *practical* focus on damages will be further mitigated, thereby making the Government's purported concerns outlined above even less relevant and the need to dilute what is currently an effective remedy, and indeed deterrent to poor practice, even more unnecessary.

Our further concerns/observations are as follows:

- We do not agree with the Green Paper that a cap of 1.5 x bid costs (plus legal fees) will act as a deterrent (GP, para 210). Indeed, our view is quite the contrary, that the cap will almost certainly lead to poorer procurement practice and may even act as an incentive to cut corners. In this regard, it would not be entirely surprising to us if, when considering whether or not to take a particularly risky course of action, an authority 'bakes in' the cost of damages claim (potentially multiple damages claims) into its financial calculations thereby allowing it to take a less cautious approach to compliance. Whilst we would fully expect behaviour like this to constitute "malfeasance", it is not entirely clear from the Green Paper what sort of behaviour this term will prohibit.
- It seems clear to us also that, in the majority of cases, the proposal will make settlement considerably easier. Whilst we are not clear on how the proposed 'should cost' model will operate, what does seem clear is that authorities and bidders alike will have a fairly precise idea of the level of bid costs will be on a particular procurement. A 1.5 x times multiple of this level may be seen by an authority as acceptable price to pay to allow it to proceed with contract award in the event that a challenge is raised (particularly when put into the context of the time and cost involved in defending matters through the Courts). We can see indeed see a scenario where multiple settlements are made in respect of a single procurement. The proposal could therefore easily result in more public money being spent on compensating losing bidders, rather than less. It is also noted that the Green Paper does not address how, if at all, settlement of procurement disputes should be managed, and the current lack of transparency on this issue will only exacerbate the problem.
- Having said that, in some cases where there may be a real advantage for the authority to settle a claim, the cap may perversely limit its ability to do so. Where an authority is at a clear risk of being found by a Court to have breached its procurement law obligations,

settlement is often a preferable option to proceeding to trial and losing. In a situation like this, where a claimant is confident in its ability to prove malfeasance, it is unlikely to accept a settlement on the basis of 1.5 x bid costs. In order to seek to settle that claim at a higher level, and ensure that it was still acting *intra vires*, an authority would perversely have to accept its own malfeasance. This cannot be a desirable outcome.

- There is no evidence in the Green Support to support the 1.5 x level, which appears to us to be entirely arbitrary. It will further result in entirely inequitable outcomes where the bid costs of one bidder (e.g. an incumbent provider) are entirely different to the bid costs of another bidder (e.g. a new market entrant – particularly an SME). It is not clear at all how the 'should cost' model will operate and how it will address these inequities.
- We agree with the Government's observation "*Limiting the level of damages payable may be regarded as unfair by bidders*" and "*might limit suppliers' willingness to bid for public contracts*" (GP, para 211). In our experience, many bidders to the public sector already consider the relative strengths of bidder/authority as being imbalanced. Authorities have considerable discretion to set the terms of a procurement/public contract in a way that wouldn't necessarily happen in the private sector. The general force of the other changes to the procurement regime envisaged under the Green Paper, whilst many of them are welcome, will only serve to bolster this discretion and essentially give authorities more market power. In light of this, an arbitrary and unfair cap on damages at the level suggested, will further discourage the right organisations from selling to Government.

We have commented more fully on this proposal in an article accessible via the following link: https://www.twobirds.com/en/news/articles/2021/uk/green-paper-briefings-procurement-challenge-proposals

Q36 How should bid costs be fairly assessed for the purposes of calculating damages?

As outlined in our response to Question 35, we do not agree with this proposal and are unpersuaded by the Government's justification for it. Without further explanation from the Government on the intention behind the proposal and the details of it, we are unable to provide any meaningful feedback here.

Q37 Do you agree that removal of automatic suspension is appropriate in crisis and extremely urgent circumstances to encourage the use of informal competition?

In principle, yes.

The push towards greater levels of competition in crisis/extreme urgency circumstances is certainly welcome, and we acknowledge that the spectre of possible automatic suspension is something that can currently work against competition. We are concerned, however, that crisis/extreme urgency justifications may be misused. The Green Paper acknowledges this, by emphasising the need for greater post-contractual redress in these scenarios, which we agree with.

Q38 Do you agree that debrief letters need no longer be mandated in the context of the proposed transparency requirements in the new regime?

Our views on this matter very much depend on the success of the proposed transparency requirements in achieving what they set out to achieve. If those proposals are implemented in the way intended, and the issues highlighted in our response to question 27 are addressed, we can see that standstill letters may potentially become redundant, thereby reducing the administrative burden on contracting authorities. However, we struggle to see how the transparency requirements will be implemented in practice in such a way that the information currently disclosed in a standstill letter is provided as standard. If this information is not disclosed via the proposed transparency requirements, the removal of standstill letters will be a very negative step. Indeed, in our view, this will only lead to more protracted discussions at the end of a procurement between the authority and an unsuccessful bidder, potentially taking up considerably more time than it would have taken to produce robust and insightful standstill letters.

We have commented more fully on this proposal in an article accessible via the following link: https://www.twobirds.com/en/news/articles/2021/uk/bird-and-bird-procurement-green-paper-briefings-the-abolition-of-the-standstill-letter.

Chapter 8: Effective contract management

Q39 **Do you agree that:**

- businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?
- 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?
- private and public sector payment reporting requirements should be aligned and published in one place?

We believe that the proposals will be welcomed by suppliers in the public sector supply chain, albeit this may cause some concern to "Tier 1" suppliers, who may have genuine disputes concerning the performance of its sub-contractors which entitle the Tier 1 supplier to withhold payment. Authorities would need to have sufficient resources in place to investigate the reasons for such late payment, and should be able to do so quickly so as not to further prevent the payment of outstanding invoices. It is also unclear how far back in time such reporting/data will cover – clearly if the payment practices of a Tier 1 supplier are improved over time, it would appear unjust to continue to exclude such suppliers from future procurement processes, albeit sufficient "self-cleaning" explanations may mitigate against such exclusion.

Q40 **Do you agree with the proposed changes to amending contracts?**

Yes.

In particular, we support the Government's recognition that "*a full overhaul of regulation 72*" is unnecessary (GP, para 230). In our view, Regulation 72 (and its equivalents in the UCR and CCR) is a useful tool for authorities and bidders, particularly in the context of complex, long-term arrangements. It clearly makes sense to extend these provisions to defence and security public contracts, and the introduction of rules relating to crisis/extreme urgency would also appear to be helpful.

Q41 **Do you agree that contract amendment notices (other than certain exemptions) must be published?**

In principle, yes.

In line with other proposals in the Green Paper, this drive towards greater transparency is welcome. We also wholeheartedly agree that the mandatory publication of contract amendment notices will give contracting authorities greater certainty over legal risk, allowing them to better manage this.

What is slightly unclear to us is how the exemptions to publication outlined in the Green Paper (GP, para 235) will be aligned to 'limbs' of, for example, the replacement to Regulation 72 PCR. As highlighted above, the Government does not intend to overhaul Regulation 72, and yet it is proposed that there will be an exemption to publication of an amendment notice for certain extensions to the contract term, which is not currently specifically covered by any of the limbs of Regulation 72.

With the exception of the exemptions highlighted in para 235 of the Green Paper, we understand that a contract amendment notice will be required. This would therefore include any "*clear, precise and unequivocal*" review clauses currently covered by Regulation 72(1)(a). In our view, this seems unnecessary given that such review clauses will have already been subject to a considerable level of transparency in the original procurement process.

Finally, we do have some concern with the suggestion that a mandatory contract amendment notice would not be required to be published in good faith in the way that VEAT notices are currently

required to be. As is acknowledged in the Green Paper, an "*invalid VEAT notice offers little protection from a legal challenge*" (GP, para 239) but it appears that the intention is that even unlawful amendments would be free from the risk of challenge if the procedural requirements were met, irrespective of the legality of the amendment. Whilst an authority may be seen to be acting transparently in this scenario (i.e. it is transparently publishing details of its own unlawfulness), it cannot be said to be acting with integrity which is intended to be another key principle of the new regime.

Q42 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?

Our first observation is that this question appears to be somewhat misaligned with the relevant section of the Green Paper (GP, paras 240 and 241). The question focusses solely on incumbent providers *who raise a challenge*, while our understanding of the Green Paper is that the proposed cap would apply to *any* extension of an incumbent contract, irrespective of whether or not the incumbent supplier had brought the challenge. Further clarity on this would be welcome.

On the issue addressed by the question itself, our experience of acting for incumbent suppliers who bring procurement challenges is that such action is always brought on the basis of genuine concerns/ grievances with the procurement process, rather than a cynical step to secure an extension at unreasonably higher rates. Indeed, in our experience, where an extension is requested, that extension is agreed on the basis of the existing terms of the contract. We have never seen a situation where an incumbent challenger has sought to extort the authority.

As such, we are not of the view that the proposed cap is necessary, as we do not recognise the concern identified in the Green Paper.

As a further observation, if a legitimate concern remains, it appears to us that it may be sensible for the Government to include an additional ground for the use of the limited tendering procedure where a procurement challenge is raised. In the scenario, where an incumbent provider raises a challenge and seeks to increase the price for the extension period beyond what is reasonable, such a ground would give an authority comfort that it could approach another supplier, on a limited basis, without that contract also being subject to challenge. Whilst there are likely to be practical reasons for the incumbent provider to remain in position during a procurement challenge, this ground would give the authority more flexibility (and commercial leverage in respect of any discussions with its incumbent) if it was able to look beyond the incumbent provider. It would also act as a check on the incumbent provider's pricing during this period.

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