LANDMARK CHAMBERS: LOCAL GOVERNMENT UPDATE

Public Procurement Update

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1. This paper provides an update on developments in the law of public procurement. It begins with a brief overview of public procurement law in the UK. This is followed by analysis of key developments in the following areas:

    a. Development projects;

    b. Automatic suspensions;

    c. Bid evaluation; and

    d. The effects of Brexit

An Overview of public procurement law in the UK

The legislative regime

2. Procurement law regulates the procedure by which public bodies award and conclude contracts with outside bodies. Public procurement represents a highly significant economic activity, and has been estimated as comprising some 14% of the UK's GDP and 31% of UK government expenditure.[1] Most of the specific law dealing with procurement is to be found in rules in contract award procedures derived from EU law. The present framework is provided principally by four EU directives:

[1] OECD figures from 2013, available http://www.oecd-ilibrary.org/governance/government-at-a-glance-2015/general-government- procurement-as-percentage-of-gdp-and-as-share-of-total-government-expenditures-2013_gov_glance-2015-graph88- en;jsessionid=80thmemhh4b8c.x-oecd-live-02 (accessed 7 June 2017)

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(i) The Public Contracts Directive 2014/24/EU ("the PCD"), governing procedures for the award of public works contracts, public supply contracts and public service contracts;[2]

(ii) The Utility Contracts Directive 2014/25/EU, governing procedures of entities operating in the water, energy, transport and postal services sectors;[3]

(iii) The Concessions Directive 2014/23/EU, which governs procedures for the award of works and services concession contracts;[4]

(iv) The Defence & Security Directive 2009/81/EC, governing procedures of entities operating in the fields of defence and security.[5]

3. The most important of these directives, the PCD, is implemented in England and Wales by the Public Contracts Regulations 2015 ("the PCR").

What contracts are covered by the PCD?

4. The PCD imposes imposes various procedural requirements whenever a "*contracting authority*", either by itself or through a third party, seeks offers in relation to a proposed public *"works"*, *"supply"* or *"service"* contract, the value of which exceeds certain thresholds. Some key definitions are as follows.

5. A *"contracting authority"* is defined in Article 2(1)(1) of the PCD as:

[2] As implemented in the UK via: the Public Contracts Regulations 2015 and, in Scotland, the Public Contracts (Scotland) Regulations 2015 and Public Contracts (Scotland) Amendment Regulations 2016

[3] As implemented in the UK via the Utilities Contracts Regulations 2016 and, in Scotland, the Utilities Contracts (Scotland) Regulations 2016.

[4] As implemented in the UK via the Concession Contracts Regulations 2016 and, in Scotland, the Concession Contracts (Scotland) Regulations 2016 and Concession Contracts (Scotland) Amendment Regulations 2016.

[5] As implemented via the Defence and Security Public Contracts Regulations 2011

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"the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law"

6. The concept of *"public contracts"* is defined in Article 2(5) of the PCD:

"'Public contracts' are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive."

7. Article 2(6) defines the concept of *"public works contracts"* as:

"(6) 'public works contracts' means public contracts having as their object one of the following:

(a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;

(b) the execution, or both the design and execution, of a work;

(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;"

8. *"Public supply contracts"* are defined by Article 2(8) as:

"public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations";

9. Finally, *"Public service contracts"* are defined by Article 2(9) as "*public contracts having as their object the provision of services other than those referred to in point 6 [public works contracts]"*

10. The PCR are stated in similar terms, see Reg. 2(1) in particular.

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11. It is worth noting, at this point, that the PCD expressly excludes certain types of contract form its effect. Of particular note are contracts for the acquisition of land or buildings. Article 10 states that:

> *"The Directive shall not apply to:*
>
> *(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon;*

12. This exclusion is replicated in reg. 10(1) of the PCR, which provides that the Regulations do not apply to a proposed public service contract:

> *(a) for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property, or which concern interests in or rights over any of them*

13. It is well established, however, that in some circumstances the transfer of property rights may be subordinate to the carrying out, or specification, of works in what is in substance a *"public works contract"*. The requirements of the PCD and the PCR apply in such circumstances because a main purpose of the agreement is a contract for public works (see further below).

The effect of the PCD

14. In brief, the PCD has the effect of:

    a. prohibiting discrimination in awarding covered contracts and requiring the use of specified transparent award procedures to support this prohibition and promote competition, specifically by way of:

        i. an obligation to advertise in a single forum by sending a notice to the EU's Official Journal of the EU (OJEU);

        ii. an obligation to award contracts by a competitive award procedure;

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iii. minimum time limits for different stages of the award procedure;

iv. limits on the criteria that may be used in making decision; and

v. obligations to set out selection and award criteria for each procedure in advance;

b. setting out general principles to be applied throughout the process: transparency, equal treatment, non-discrimination on the grounds of nationality, and proportionality;

c. providing for a rigorous system of remedies before national review bodies for affected EU undertakings.

15. A claim under the PCD can only be brought by undertakings seeking contracts in the public market (termed *"economic operators"*) and only apply to contracts over a specified monetary threshold.

16. The PCD is supplemented by specific rules on remedies for economic operators. The principal directive in this connection is the Remedies Directive 89/665, which contains, inter alia:

(i) a mandatory requirement to notify award decisions to losing participants and to delay the contract for a certain time after notification to allow time for challenges;

(ii) a specific minimum time limit for legal actions;

(iii) automatic suspension of the award decision following a challenge;

(iv) a requirement for concluded contracts to be declared ineffective in the case of failure to advertise.

17. Lord Hodge said this about EU procurement law in ***Edenred (UK Group) Ltd v HM Treasury*** [2015] UKSC 45 at [28]:

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"The principal purpose of EU procurement law (...) is to develop effective competition in the field of public contracts: Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici (Case C-247/02) [2004] ECR I-9215 , para 35. Thus if a public body decides to obtain services by a public contract, and the contract exceeds the prescribed threshold (...), the public body must advertise the opportunity and follow fair and transparent procedures ensuring equality of treatment, to enable potential service providers to compete for the work."

18. In addition to the overarching aim of developing effective competition, the aims of the regulation of procurement decisions might be described as including:

    (i) facilitating the ability of purchasers to obtain value for (taxpayers') money;

    (ii) improving the quality of decision-making;

    (iii) increasing accountability to the public;

    (iv) increasing transparency;

    (v) (in the context of a free market system) eradicating the use of procurement to protect and develop national industry.

Recent updates in the field of procurement law

Development projects

19. The main recent developments in this area of law arise from the judgment in ***R (on the application of Faraday Development Limited) v West Berkshire Council*** [2016] EWHC 2166 (Admin).

20. In ***Faraday***, West Berkshire Council entered into a development agreement with St Modwen Developments Limited *"to facilitate the comprehensive regeneration"* of an area of land making up a large part of an industrial estate in Newbury. West Berkshire Council were the freehold owners of the land subject to the development agreement.

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21. The development agreement structured the project into three broad stages:

    (a) A planning and design stage. The developer was obliged to prepare project plans, comprising a business plan and a master plan for the approval of a steering group composed of two representatives from the local authority and two representatives from the developer. Following approval of the plans by the steering group, the developer was then obliged to prepare a budget for the Infrastructure Costs (again, to be approved) and an application for outline planning permission in accordance with the Project Plans.

    (b) If satisfactory planning permission was achieved, the developer was then required to prepare for approval by the steering group: (i) an estate management strategy; and (ii) a development strategy for each plot. On approval, the developer was then *obliged* to obtain detailed planning approval for the work covered by each development strategy. At that point, the developer was *entitled* to serve an acquisition notice for each plot. The local authority would then be obliged transfer either a ground lease (commercial plots) or the freehold (residential plots) and at that point the developer would be obliged to undertake the development of that plot (without any public procurement exercise).

    (c) If the developer elected not to serve an acquisition for any plot, the local authority retained the benefit of the design services provided by the developer in relation to that plot prior to that decision.

22. The critical issue was whether the development agreement was a public contract to which procurement legislation applied. West Berkshire Council did not consider at the time of entering into the development agreement that it was a public contract and as such did not comply with the procedural requirements within Part 2 of the PCR. Conversely, Faraday contended that it was a public contract.

23. Holgate J held that the development agreement was not a public contract. This judgment was based on the conclusion that the development agreement did not impose

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an enforceable obligation on St Modwen to carry out the redevelopment of the site. Further, on the proper construction of the development agreement, the provision of design services was not a main purpose; rather the *"twin objectives"* of the development agreement were to facilitate the Council's regeneration of the site and to increase its financial income, neither of which brought the development agreement within the definition of a public works contract.

24. The following points of principle can be extracted from ***Faraday***:

(a) The main object of a contract for the purposes of reg. 2 of the PCR, must be determined by an objective examination of the entire transaction to which the contract relates; and that assessment must be made in the light of, or having regard to, the essential obligations which predominate and characterise the transaction. Accordingly, the identification of the main object is not restricted to matters contained in the contract's *"essential obligations"*, or to essential matters which the party contracting with the public authority is obligated to perform (judgment, para. 173).

(b) An anti-avoidance role or interpretation should not be given to the term *"indirect obligation"* such as to broaden the established scope. Further, neither the PCD nor the PCR contain any general anti-avoidance principle. Accordingly, save where the agreement contains an artificial device, it is lawful for a public authority to enter into a contract which avoids the requirements of the procurement legislation (judgment, paras. 184-188).

(c) Evidence that the economic operator was highly unlikely not to exercise an option which rendered them legally obligated to perform works is not a substitute for a legally enforceable obligation to carry out the main object of the development agreement or otherwise a legally sufficient basis to engage the Directive (judgment, para. 207).

(d) A contract whose object is "*the design"* of works only does not fall within the scope of the public works contract definition in reg. 2 of the PCR; rather, the

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object must be both the design and execution, cumulatively, for the definition to apply. Accordingly, it is the execution of works which is determinative and of greater significance (judgment, para. 209).

25. Taking these points together and reading the judgment as a whole, it is clear that the form of the contract was the determining factor in assessing whether the contract amounted to a public works contract. Holgate J.'s approach is similar to that of Hickinbottom J. (as he then was – ironically, rejecting the submissions of David Holgate QC on behalf of the claimant) in ***R(on the application Midlands Co-operative Society Limited) v Birmingham City Council*** [2012] EWHC 620 (Admin). In particular, the conclusion in ***Midlands Co-operative*** that a public authority could choose to enter into a contract which avoids the requirements of procurement legislation is consistent with the conclusion in ***Faraday*** that the PCR do not contain any general anti-avoidance principle. Therefore, a consistent picture emerges from both cases that, save where a contract contains an artificial device which serves no commercial purpose, a contract should be construed objectively to determine whether it amounts to a public works contract, without reference to any intention by the parties to avoid the procurement regime.

26. It should be noted that Faraday have applied to the Court of Appeal for permission to appeal. The grounds advanced in support of the proposed appeal address the question of anti-avoidance: namely whether West Berkshire acted lawfully when entering into the development agreement because it committed them to entering a public works contract without a procurement process; and, more generally, whether there is an anti-avoidance principle in the PCD. This application has not yet been determined by the Court of Appeal, but it is expected shortly. If permission is granted, there will be an ongoing risk of the Court of Appeal taking a different view to that of Holgate J. in **Faraday** and Hickinbottom . in **Midlands Co-operative**.

27. Another recent and relevant judgment is ***Wylde v Waverley Borough Council*** [2017] EWHC 466 (Admin). This case concerned whether, and if so in what circumstances, someone who is not an *"economic operator"* with the right to bring a challenge to a public contract under the PCR has standing to bring a judicial review claim of an

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authority's decision to enter into such a contract. Dove J held that merely being a ratepayer or councillor for the district in question was not sufficient to confer standing. This was on the basis the public procurement regime is tightly focused on those directly engaged with and actively seeking the benefit of obtaining public contracts falling within the scope of the PCR. Insofar as judicial review was available at all for those who were not *"economic operators"* (a point which the Dove J left open), only those directly impacted by the decision such as investors in or joint venture partners of an economic operator had standing to bring a judicial review claim. The Claimants have not sought permission to appeal. The effect of ***Wylde***, assuming it is followed in future cases, is therefore to narrow the potential scope of challengers to a contracting authority's decision to enter into a public contract. The 'general public' are unlikely to be able to bring a challenge.

Automatic suspensions

28. As outlined above, reg. 95 of the PCR provides that, where an *"economic operator"* has issued a claim in respect of the decision of a contracting authority to award a contract and the contracting authority becomes aware of this, the contract is automatically suspended. This will remain the case until the court lifts the suspension by way of interim order pursuant to Reg. 96(1)(a).

29. In determining whether to lift the automatic suspension, the court will apply the well-known principles established in ***American Cynanamid v Ethicon (No 1)*** [1975] AC 396. In particular, it will consider:

    a. Whether the claimant's case raises a serious issue to be tried;

    b. If so, whether damages would be an adequate remedy for either party; and

    c. If not, where will the balance of convenience lie?

30. In 2009-10, it seemed as though the initial approach of the courts was to lift the automatic suspension on application: see for example ***Indigo Services*** [2010] EWHC 3237 (QB) and ***Exel Europe Ltd*** [2010] EWHC 3332 (TCC). By contrast, a run of cases in

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2014 suggested a more rigid approach, with the courts refusing to lift the suspension in ***NATS (Services) Ltd v Gatwick Airport Ltd*** [2015] PTSR 566 and ***R (Edenred (UK Group) Limited) v HM Treasury*** [2014] EWHC 3555 (QB). In 2015, perhaps following an attempt to retreat to the middle ground, claimants appeared to have mixed fortunes, with suspensions being lifted in ***Solent NHS Trust v Hampshire County Council*** [2015] EWHC 457 (TCC) and ***OpenView Security Solutions Ltd v Merton LBC*** [2015] EWHC 2694 (TCC) but not in ***Counted4 Community Interest Co v Sunderland CC*** [2015] EWHC 3898 (TCC).

31. 2016-17 has seen several developments. In ***Kent Community Health NHS Foundation Trust v NHS Swale Clinical Commissioning Group*** [2016] EWHC 1393 (TCC), the High Court was required to consider a situation in which one of the bidders for the contract was a not for profit organisation – in this case an NHS Foundation Trust. The Trust argued that, as a not for profit organisation, damages would not be an adequate remedy in the event that the automatic suspension was lifted. The Court held (per Stuart-Smith J) that the question of adequacy of damages should be answered by reference to the interests of the person seeking the injunctive relief and damages should not be considered an inadequate remedy simply because the claimant, whether as a not-for-profit organisation or for other reasons, had not suffered and would not suffer substantial financial loss.

32. Further, the procurement regime adopted was meant to create complete equality of opportunity between the bidders. Therefore, the question of adequacy of damages could not be approached any differently depending upon who was the disappointed bidder. Should it fail to win the contract, the Trust's losses could be assessed without difficulty and made the subject of an appropriate damages award.

33. A similar question was addressed in ***Perinatal Institute v Healthcare Quality Improvement Partnership*** [2016] EWHC 2626 (TCC), in which Jefford J broadly adhered to the position in ***Kent***. He stated that, whilst there was no rule that damages could never be adequate for a not for profit organisation, nevertheless:

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> *The fact that an organisation is non-profit may make it more likely that it cannot be adequately compensated in damages and the BMLL case itself provides an example where that was the case because the project in question was at the heart of its activities, there would be a significant knock on effect to its other activities, and it would suffer significant reputational damage.*

34. In this case, however, Jefford J determined that the claimant's activities were at least income-generating and that, accordingly, its loss could be quantified in damages by way of its (i) tender costs and (ii) the contribution to its overheads that it would have recovered through the contract if it had been successful. This clearly militated in favour of lifting the suspension.

35. Jefford J also noted that, since the relevant contract related to a data collection and review project aimed at the reduction of perinatal mortality rates, there was a clear public interest in proceeding as soon as possible. The suspension was therefore lifted.

36. Finally, in ***Energy Solutions EU Ltd v Nuclear Decommissioning Authority*** [2017] 1 WLR 1373, the Supreme Court gave guidance, inter alia, on whether an award of damages could be refused because the claimant did not issue its claim form during the standstill period (i.e. before the contracting authority entered into the contract)?. The PCR provide that if a claim is issued within 10 days from receipt by the claimant of notification that it has not been awarded the contract, the contracting authority may not enter into the contract during this period and an automatic suspension would take effect. Additionally, the PCR imposes a challenge period (effectively a limitation period) of 30 days for bringing a claim from the date on which the claimant first knew or ought to have known that grounds for starting legal proceedings had arisen.

37. The Supreme Court noted that, if the claimant had issued a claim within the 10 day period and the automatic suspension had been challenged, it would have had to give a cross-undertaking or security to the defendant. Taking this into account, the Court concluded that (para. 56):

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"In summary, an economic operator is entitled, in the face of what it views as (and later proves to have been) a breach of duty by the contracting authority, to leave it to the authority to take the risk of implementing its wrongful award decision. The economic operator cannot be said to be acting unreasonably if it fails to stop the authority from perpetrating a breach of duty which the authority could itself stop perpetrating. It cannot be said to be acting unreasonably if it refuses to give an undertaking or put up security in order to maintain a stop which it has in the first instance obtained by issuing a claim form before the authority has entered into the contract to give effect to its wrongful contract award decision"

Bid evaluation

38. The ***Energy Solutions*** case also provides helpful lessons to contracting authorities in relation to the evaluation of bids. The judgment of Fraser J in the lower court J ([2016] EWHC 3326 (TCC)) is of particular assistance in this area. The facts in this case are as follows.

39. The Nuclear Decommissioning Agency ("the NDA") is a non-departmental public body, established under the Energy Act 2004. In 2012, the NDA had invited tenders relating to the decommissioning of nuclear facilities. The claimant was one of the tenderers. Under Directive 2004/18 and the Public Contracts Regulations 2006 (the predecessors to the PCD and PCR), the authority had to award the contract to the most economically advantageous tender. The competition set out the evaluation criteria against which the tenders would be scored by the authority's experts, and certain thresholds which resulted in disqualification of tenderers that did not meet those requirements. The winner was one of the claimant's competitors, whose tender had scored highest and was thereby considered to be most economically advantageous.

40. It was found as a matter of fact that the NDA had erred in that, had the thresholds been properly applied, the winning bidder would have failed on two counts and the claimant's score would have increased, with it ultimately coming out on top and being entitled to the contract.

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41. The NDA argued that its application of the thresholds was an evaluative judgment and invoked the general principle that such judgments were immune from the scrutiny of the courts absent a *"manifest error"*. Fraser J acknowledged this general position, but found (judgment para. 274):

> *"In my judgment, the NDA's pleaded sentence that "An evaluative judgment of this sort is not capable of constituting a manifest error" is wrong, in so far as it suggests a prohibition upon finding manifest error where an evaluative judgment has been applied. There is no prohibition, but there is a margin of appreciation. Differences of opinion are not sufficient to have the score changed. Absent a manifest error, the court will not interfere"*

42. Fraser J found that the NDA had breached its obligations under the PCR and failed to award the contract to the most economically advantageous bid. Accordingly, the claimant was entitled to damages. Fraser J also issued a salutary warning to public authorities in relation to document management. He stressed the imperative requirement for authorities to retain an audit trail of their collective decision making on procurement matters, stating (para. 270):

> "*I find it extremely worrying that any public authority or its advisers on procurement could contemplate any policy that would involve the routine destruction of such important documents [i.e an audit trail of the the NDA's collective decision-making]. Public authorities have express obligations of transparency under the Regulations. It is difficult to see how the proposed or intended destruction of contemporaneous documents could ever been consistent with those obligations*"

43. He further stated that (para 132):

> *"Important aspects of the evaluation process were wholly lacking in transparency…decisions about what to about scoring that could lead to a bidder being disqualified were made "off stage" and consciously so in my judgment"*

44. And that (para. 217):

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"the whole approach of the NDA to restricting notes in this way seems to have been designed to minimise the degree of scrutiny to which the SMEs thought processes could be subject, in the event of a challenge. A simple method of ensuring that such notes were retained – for example, by issuing numbered notebooks, and collecting them – would easily have dealt with any difficulties, real or imagined, with potential disclosure"

45. He also particularly commented on the importance of keeping records of dialogue meetings, stating (para. 188):

"*A summary should not have been too difficult to prepare, and there would not necessarily have been any need to have such a summary formally agreed with each bidder…digital recording devices are widely available and inexpensive. Simply recording what was said would not have been too difficult*"

The effect of Brexit

46. Since so much of our procurement law is derived from the EU, no paper on this topic would be complete without a brief consideration of the implications of Brexit. The UK has now triggered Article 50 of the TFEU, meaning that, subject to any transitional period, the UK will leave the EU on 29 March 2019.

47. The ultimate destination of UK public procurement law post-Brexit is still uncertain. This is particularly so since the terms of the UK's exit from and continued relationship with the EU have yet to be decided. However, it is possible to say a little about the government's current proposals in relation to EU law.

48. On 19 June 2017 the government, via the Queen's Speech, announced plans to introduce a Great Repeal Bill ("the Repeal Bill"), which will repeal the European Communities Act 1972 and convert or transpose EU law into domestic law wherever practical. The Government has indicated that the legal changes to be effected by the Repeal Bill would take effect on the day that the UK officially leaves the EU. The Repeal

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Bill passed its second reading in the House of Commons on 11 September 2017 an will now no doubt be heavily scrutinized by various Parliamentary committees.

49. The government has repeatedly stated that one of the main aims of the Repeal Bill is to end the jurisdiction of the CJEU and the supremacy of EU law over UK law. Broadly speaking, the Repeal Bill as it currently stands provides that:

    a. preserved EU law post-Brexit should continue to be interpreted as it is currently. This will be achieved by converting directly-applicable EU into UK law, preserving all the laws we have made in the UK to implement our EU obligations, and by providing that rights in the EU treaties that can be relied on directly in court by an individual will continue to be available in UK law (section 2);

    b. EU-derived law post-Brexit is to be accorded primacy over domestic law enacted before Brexit (section 5); and

    c. Judgments of the CJEU given before the Brexit day will have the status of UK Supreme Court judgments and will therefore bind UK courts, unless the Supreme Court says otherwise.

50. However, this poses several difficult questions for procurement law, none of which have yet been resolved. In particular:

    a. The UK's absence from the EU may frustrate the ability of public authorities to comply with the various formalities imposed by the PCR and PCD. In particular, UK authorities may no longer be able to publish notices in the OJEU post-Brexit, which would mean that that the procedures for contract notices may become impossible to comply with.

    b. Arguably much of the EU law that is effective in the UK depends for its operation, practicability, and even to some extent for its coherence, upon the existence of, and interaction with, EU laws and institutions. Where those EU laws and institutions cease to be available or applicable to the UK (excepting

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those preserved in the Repeal Bill), such law becomes more challenging to operate.

c. The status of EU case law post-Brexit remains in some respects unclear. Although the Repeal Bill proposes to accord CJEU judgments the status of Supreme Court judgments, *where issued before* Brexit, it says little about the effect of judgments that are issued afterwards. Indeed the relevant section (section 6(2)) simply states:

> *"A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so."*

This does not render necessarily CJEU jurisprudence irrelevant (and UK courts may still feel free to consider CJEU judgments which relate to the interpretation of, in substance, the very measure they are themselves considering) but nor does it give it any formal status. This has the potential to cause uncertainty.

Conclusion

51. There have been a number of developments in the field of public procurement law in recent years. These can be summarised very broadly as follows:

a. Save where a contract contains an artificial device which serves no commercial purpose, a contract should be construed objectively (by examination of the entire transaction to which it relates) to determine whether it amounts to a public works contract, without reference to any intention by the parties to avoid the procurement regime (***Faraday***);

b. The *"general public"* are unlikely to be have sufficient standing to bring a challenges to public procurement contracts by way of judicial review (***Wylde***);

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c. In relation to the duty to obtain best consideration, it is not strictly necessary that a local authority review specialist valuation evidence prior to reaching a decision pursuant to s.123 LGA 1972 (***Galaxy***). The test for identifying a material consideration in such circumstances is "*whether in the circumstances of the case, no reasonable authority would have failed to take into account the specific consideration relied upon by the [challenging party], or to probe the bid or rival bids further*" (***Whitstable Society***);

d. Not for profit organisations will not, as of right, be able to resist claims to remove automatic suspensions simply on the basis that damages would not be an adequate remedy. Claims will have to be dealt with on a case by case basis (***Perinatal Institute***);

e. A claimant will not necessarily have failed to mitigate its losses where it decides not to issue a claim within the 10 day period thereby triggering automatic suspension (***Energy Solutions***);

f. When evaluating bids there is no prohibition on the court intervening, but there is a margin of appreciation. Differences of opinion are not sufficient to have the evaluative score changed. Absent a manifest error, the court will not interfere (***Energy Solutions***);

g. Public authorities must ensure that they keep and retain adequate records of their decision making in relation to bid evaluation and in particular or face to face discussions (***Energy Solutions****);*

h. Brexit has the potential to have significant implications for public procurement law. The Repeal Bill in its current form leaves several questions unanswered and, as a result, uncertainty remains.

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