ADDLESHAW GODDARD

TRANSCRIPTION

PROCUREMENT GREEN PAPER - WHAT YOU NEED TO KNOW

Michael Rainey

Hello and good afternoon everyone and a very Happy New Year to you all. Welcome to our Webinar on Public Procurement Reforms this morning. I'm Michael Rainey from Addleshaw Goddard. I'm joined today by my colleagues, Jonathan Davey and Louise Dobson. We're also delighted to be joined today by Professor Sue Arrowsmith QC. Professor Arrowsmith is one of the world's leading procurement law academics and in the UK her work is regularly cited in the top reported procurement cases. She has also been a member of the government's Procurement Transformation Advisory Panel who have been advising the government on precisely the reforms we're talking about today. So we're all really looking forward to hearing her thoughts on that.

The focus of today's session is on the government's new Green Paper Transforming Public Procurement which was published by the cabinet office back in December. It's a consultation paper at this stage and it proposes a number of relatively radical overhauls of procurement law throughout the country. It replies to both public bodies and to utilities although the document itself and its title has a very distinct public sector [label]. It is also worth stressing at this stage that the reform proposals apply primarily to England. We are yet to see, but we are awaiting responses, from Wales, Scotland and Northern Ireland to see how the law is going to be developed in those countries too.

We're going to here today from Sue first and then Louise and then Jonathan in turn. Please do submit questions as we go along because we're going to have a slot after each speaker where we can put questions on their section. We've got about 280 attendees on the Webinar today so we're hoping that between you, you can come up with some fiendishly difficult questions for each of the speakers after their session. So without any further ado I'm going to hand over to Sue with the first of our discussion topics today. So Sue, over to you.

Professor Sue Arrowsmith QC

Okay thank you very much. Can you hear me okay?

(Michael Rainey) Yeah

Ok, so I have.. and by the way if you have any really fiendishly difficult questions we're going to pass them on to Michael I think but we would welcome your questions nevertheless. So I've got a lot to get through today, I've been given a lot of topics to get through in around 45 minutes so I'll get straight stuck into it. This is an overview of what I'm going to talk about, a little bit about the background and timetable to reforms, some general themes of the proposals and how they're going to work and then I'm going to take a number of specific topics on, particularly the award procedures side of things, in my talk.

So, the background and the timetable I think most people will be aware that you know we left the EU a while ago but we didn't stop being bound by EU law immediately. There was a transition period but that ended at 11 pm on New Year's Eve and so we're no longer subject to EU procurement law. However, we are still subject to the WTO's Procurement Agreement so that's quite important because that is kind of like a skeletal version of EU law and it requires most contracts that are covered by the directives still to be open to trade with the EU and also with other trading partners and it also requires remedies and it requires transparent procedures. So what that means is that you know it's not a "free for all", some people seem to be under the impression that "oh you know, now we can have a free for all and award contracts to British firm" but that just isn't the case because the WTO rules are still applicable. So that

obviously limits the scope for any reforms that the government was going to undertake. Sorry my slides don't appear to be changing now.. what's happened here? Yeah, okay .. so in terms of the background again what we've had since New Year's Eve is we've carried on being bound by the current procurement Regulations, although we've left the EU the Regulations that we have based on EU law have carried on applying until they are repealed and replaced. The case law that interprets these rules both from the UK courts and the EU will also, in principle, carry on applying although our highest courts have a little bit of flexibility not to follow the EU cases. This is you know, I think in practical terms we can say that in general the case law will still apply and the point of that is obviously it avoids any disruption until we put the longer term reforms in place and it also makes sure that we're complying with our obligations under the DPA and the same applies for TUPE and other EU-based rules in our system, they will also carry on applying until they're repealed. So at the moment the situation is pretty much as it was before.

However there have been a few changes. These are the Regulations that have introduced those changes and I think the most important one that people are generally aware of is that as from New Year's Eve there has been an obligation to publish all things procurement in the Find a Tender system of our own government rather than in the EU's Official Journal. The Regulations call this by the way the UK E-notification service so if you come across that term that's basically what Find a Tender is referred to in the rules. There's more information on that, obviously I haven't got time to go into that now, but the government has produced an action note with more information on that. The other changes are pretty minor really they're just things like obviously you send your reports to the Cabinet Office or other relevant bodies now instead of the Commission. Another point to make is that though we're continuing award procedures those that started before the end of the transition period and also very importantly awards under frameworks and dynamic purchasing systems will continue to apply the old rules, so if you started under the old rules you will finish the whole thing under the old rules and that means you need to put your award notices in the Official Journal, not just in the UK system.

Okay so that's the background, that's where we are now and then just before Christmas we had this Green Paper, Transforming Public Procurement that we're talking about today so that was produced after meetings between the Cabinet Office and a series of focus groups and you know input from the Procumbent Transformation Advisory Panel and the closing date for the consultation is March 10th so there's a little bit of time to be thinking about this and getting responses in and I do hope that people will respond in significant numbers.

When will we have the new legislation? I wish I knew. I don't know. I don't think there's any set timetable for that. I would be pretty confident there won't be anything new applying in 2021. Early 2022 who knows? But obviously you know there has to be time both to adopt the legislation and for people to understand what it means and to get used to it so I don't think it's going to be coming in overnight.

Right, the next step we have to just look at very briefly is since the Green Paper we have obviously had this agreement between the EU and the UK which is known as the EU/UK Trade & Co-operation Agreement and this actually adds some bits and pieces, some of them quite important to the GPA which is another constraint on possible reforms and in particular I would highlight that that Agreement covers some further utilities that are not covered by the GPA. The GPA does not cover the gas and heat sector and it doesn't cover any private utilities, they have now been added into basically our trade obligations so what that means is that private utilities in the GPA sectors and also utilities in the gas and heat sector will not be coming out of the procurement rules. There are other bits and pieces in there and things like there's an obligation to use electronic means that isn't found in the GPA but obviously we were going to do that anyway and that applies now, so none of that is particularly significant. That by the way, the stuff in that Agreement, is in place now by virtue of the European Union Future Relationships Act, but as I say it's not of huge practical significance at the moment in terms of procedures because the current rates still carry on applying.

Okay, another very important point to make is that despites it title the Green Paper is actually not about transforming public procurement, it's about transforming public procurement law and I think this is quite significant to appreciate because this is not supposed to be the answer to how we improve our public

procurement completely, it's just setting the legal framework within which we will hopefully try and improve our procurement. You know law I think has quite a limited role in this, you need a decent legal framework but you won't get good procurement just by having a decent legal framework, there's a lot more to it than that, so this is supposed to set a framework that doesn't obstruct good procurement but it doesn't say how you're going to do good procurement and all the policies that make that up, so I think that's quite important to appreciate and I think the title is misleading because it's very clearly about an only intended to be about what the legal framework is going to be.

So, another general point about the new legislation is the proposal is that it won't just be about opening markets and it's not often understood I think, the point of the EU rules was not about how member states should get value for money, how they should promote integrity, it was purely about putting in place safeguards to open markets to trade and all the other stuff about how you get good value and so on was supposed to be left to member states. The problem with that open market focus of the legislation is that it did tend to get interpreted certainly the Court of Justice very much as the open market interest always took priority. I think it was sometimes that you know it was a load of red tape, you're doing all this stuff to try and make sure there was no discrimination but that actually is preventing governments from getting good value, its creating very bureaucratic procedures and high procedural costs. So what we want to do in the new legislation is to make it very clear that the legislation is about all the objectives of public procurement, not just opening markets to our trade partners but about getting good value, about integrity, about the "public good" is the phrase they use that is using an aspect about using procurement to promote good social and environmental policies, and its proposed that the legislation will list those objectives.

Why does it matter? Well apart from the fact that it encourages an interpretation that gives a proper balance between those objectives rather than just focusing on non-discrimination and open markets, it matters for other reasons because if you look at some of the things in the current EU rules, the reason they are like that is because the legislation is just about open markets so if you take for example the light regime, the social services and so on, it has a much higher threshold for application of the rules at the moment than other types of services and the reason for that is because there was the idea and foreign suppliers aren't interested in small contracts in that field, they're only interested in the very high value contracts, but if you're regulating from the point of view of having good procurement and following procedures that make sure you get value for money, there's no reason to have a higher threshold for those services. The sort of basic safeguards of transparency and completion are needed at lower levels than that, even if foreign suppliers aren't interested. So it has those kind of practical implications and although the Green Paper is not totally explicit on this, the indication is that the thresholds will be the same for light regime services.

One comment I would make on the list of objectives and I would fight very hard to include this is it doesn't include ensuring an efficient procedure in the list of objectives of the regulation and I think that needs to be brought in explicitly because one of the big problems with the current rules is the way the EU has interpreted them to impose quite onerous procedural obligations in order to safeguard discrimination. I think there needs to be a better balance and less bureaucracy and you know I think to refer specifically to the need for an efficient procedure, cost effective proportionate procedure, would help achieve that balance and I think that needs to be added to the list of things listed in the legislation.

So turning on the general themes then what we've got is a single and uniform set of rules which I've always argued for very strongly so to have one set of rules which will replace the current Regulations, so the proposal is a single set of rules replacing public contracts, rates, utilities, concessions and defence and putting it all into one single set of regulations. Where I think the proposals fall down is not including other procurement legislation that we have in the UK like the Local Government Act provisions section 17 that deals with social objectives and the Social Value Act. There is absolutely no reason not to include that into an integrated single set of rules. The reasons in the Green Paper are totally unconvincing and I think it's just a question of the scale of things and can we put it all together and I think it's disappointing that it's not more ambitious and not putting all of our procurement law in a single

set of rules and a single set of remedies as well because we all know that we have constant problems of different remedy systems and juridical review systems and the systems under the Regulations and which one you use and so on. So I think that is a kind of disappointing aspect but it's great that the rest of the stuff is being put in a single set of regulations.

What's also very significant is the idea that there will be uniform procedural rules, not just all in the same instrument but actually the same rules for all of those sectors and including the concessions and including also the light regime which exists within those different regulations. How much this concept of uniformity will be followed is not quite clear, it's clear with the procedural rules they're going to be pretty well uniform. Will the thresholds be the same, my guess is probably not, that's not explicitly discussed. I imagine that though I would prefer that the thresholds were lowered for defence and utilities I think that's not likely to happen particularly with the private utilities situation. If we do have separate thresholds for defence I sincerely hope the rules will not be using the current distinction between defence and security procurement and other procurement which is an absolute nightmare. I guess it's good for lawyers it gives them a lot to do if they're working in that sector but you know it should be much more simple, it should just be a separate threshold for hard defence equipment and a very simple definition of what that is your tanks and missiles and so on. I hope the exclusions will be largely the same, again it's not very clear but the Green Paper does refer to you know we've got to work out whether we're going to have some differences for defence. I think you don't need any special definition of defence procurement because I think most of the exclusions and provisions in defence ought to be just put in general terms in the Regulations so if you have things like an exception as you do in the defence forms for government to government agreements then that can just go in the form of that form in the Regulations you don't have to specify it's just for defence or what type of procurement it covers, you can just put it in in general terms. Those questions are not answered in the Green Paper I think that discussion has still to be had about how much of the special stuff in the defence rule will be maintained. So the point about the general principles behind the legislation is there's a lot of emphasis on having significantly simplified legislation but accompanied by extensive guidance to explain what the legislation means, so that's emphasised in the Ministerial Foreword, it is seen in the fact you've got a single and uniform regime which in itself is a massive simplification. It is seen in the fact that the award procedures are being condensed into two procedures, its seen in the proposal for simplified rules on selection for example which is one that clearly to me was a target for simplification, so instead of having in the public sector rules this huge long list of very specific evidence that you're allowed to take into account, that you just simply have a simple test of objective criteria possibly with a government steer on what those should be which I don't have any time to talk about in detail but it will be much more simple than the current approach.

How far simplification goes is not totally clear though. I would hope there would be significant simplification of the award criteria rules literally just to say most advantageous tender and take out all the other stuff which is just confusing padding and that doesn't help. Anything that is needed to be confirmed can be done in guidance. They don't seem to be having any view of simplifying exclusion rules which I think is a shame and I think the stuff they're proposing on framework agreements actually adds complexity which I'll come to later but I suspect in general most of the provisions of the Regulations will be simplified and a lot of stuff will be taken out. I would just say that the quality of the guidance will be absolutely crucial because I don't think the simplification will work without very good guidance, high quality, detailed. That is the plan, whether it will be realised and the resources will be put into it, remains to be seen and I think that will be very important.

Another theme is that the legislation does seem to be doing largely what I would want to see happen which is using the concepts that people are familiar with and the terminology people are familiar with, where that's appropriate, where there's no need for change. That certainly seems to be the intention because the Green Paper talks about the new regime consolidating the rules with significant amendments, it doesn't talk about a whole new regime. It suggests the structure of the Regulations is going to remain the same. It talks about giving procuring bodies the flexibilities that utilities and concessions have, while recognising that people are familiar with the terminology of the Public Contracts

Regulation, so that again suggests preserving what is there in terms of terminology and concept. A direct proposal is to keep the open procedure pretty well as it is, the same with exclusions and so on, the same with modifications, so if you look at the balance I think it ticks very much on the side of "yes we're going to keep the same approach, same terminology, same concepts". On the right hand side where you've got you know a slightly different approach is with the new procedures which are going to have new names. I don't think they're really different procedures but they are going to be renamed, I think that was inevitable with the competitive procedure because it's basically pushing lots of procedures into one single one and I'm going to talk a little bit in detail about those in a second.

Another thig emphasised in the Green Paper is the balance of interests but it needs to be rebalanced to particularly give more flexibility to procuring entities to make commercial decisions and that's seen, for example in the new competitive procedure. There is emphasis on social value and there's emphasis on reducing the burdens of the procedure even though that's not going to be, well at the moment, not suggested as an explicit objective and it's very important this should be followed through in the case law and I've already mentioned that's why I think they need to state an efficient, proportionate procurement process as an objective so that this balance does get followed through in the way the rules are interpreted.

Okay another very important point which I can only talk about to a limited extent that you might want to follow through is the proposal for what I'd like to refer to as the open contracting approach. This will be a big change if it does come about over time. You know we have already started moving towards it but the idea of this approach is that you systematically gather and publish all information on procurement in a form that's useable to the government and to stakeholders including members of the public and suppliers in a very systematic way in an electronic system and this does not mean just putting your PDFs on line, you know your documents, it means actually producing your information in a way that is very valuable and feeds into this system specifically for the purpose of the electronic system and it applies to all stages of the process this idea. We're used to focusing on the award phase when we look at legal regulations but you've also got the planning and the execution stages and the idea of this open contracting approach is that you put all your information out there, right throughout the process and you design the way you produce information for that specific purpose, so it includes your contracts and amendments to contracts and so on and your planning documents, not just your, you know the stuff that you produce in the award phase and it's all out there, not just for suppliers but for the public. Obviously the benefit of this, it allows the analysis and monitoring of what's going on in public procurement and by organise I meant organisations there, organisations themselves and by other stake holders. So to give just a list of examples, obviously I'm not going to go through them but if you have all your information out there you can spot things like collusions between suppliers because you can see that similar types of contracts awarded by different bodies throughout the country, low and behold the same few suppliers are busy and low and behold they're all getting a certain proportion of the contracts in a kind of pattern and it's amazing how easy it is to spot that kind of thing when you've got this systematic information. You know comparing price data, obviously you have to have good data and know what it means but there's a lot of stuff you can do with that kind of system and if anybody wants more information I would recommend you go to the website of the organisation Open Contracting which is a non-profit body, spun out from the World Bank which is you know it's there to help governments around the world deal with this and they produce the data standard for this and you can find a lot more information on there about how it works and what people do with it and what it's all about so if I could just refer you to that for information on this concept.

So the Green Paper is more or less committing to this kind of concept it says "we're committing to transparency by default in the practice publication of information right throughout the cycle" that's the plan. There will be exemptions. Obviously commercially confidential information which will be based on the current Freedom of Information Act exemptions and there'll be a lot of guidance plan there to tell government bodies exactly how to apply this to specific types of information. The plan is the data will be published using the Open Contracting data standard that's produced under the auspices of Open Contracting, that organisation I referred to, its already used for central government information where it

needs to be published to a large extent and the point of that data standard is you produce information in the format that is set by that standard and that's what makes it accessible and useable and allows you to relate information right across the system. Again you'll find a lot more information on the standard on that Open Contracting webpage.

This is obviously a big undertaking and the government said in the Green Paper the proposal is to release a timetable in due course. It will take a lot of resources and commitment as well so it will be interesting to see what the timetable till be and how this will be rolled out.

Okay, so that's the scene, let's just get onto the specific procedures. So as I've mentioned, the plan or the proposal in the Green Paper is to simplify the procedures into two procedures. The open procedure which is pretty much as we have it now and a new procedure called the Competitive Flexible Procedure. So instead of having all those types of procedures that I've put on the right hand side of the slide, there's going to be just the two procedures for competitive, you know openly solicited procurement and then there will also be a separate procedure which is corresponding to the kind of direct award approach which I will talk about later as well. So the Competitive procedure, Open Procedure fairly straightforward, the Competitive Flexible Procedure, the idea is this is going to be available for all types of entities of all types of procurement. Effectively, utilities and concessions and defence have that option already right? A flexible procedure available for all your procurement whenever you want it which allows you to have discussions with suppliers. The idea of that will now be extended to all contracting authorities in the public sector rules as well. This procedure, what it basically does is it allows I think almost anything that's possible under any of the existing procedures. When I say "almost" I think there are maybe some slight differences of timescale from say light regime but that's all. So you can use the Competitive Flexible Procedure to operate just like any of the other procedures, you decide how you conduct it, you decide how you structure it so you can conduct it just like a restricted procedure or just like a competitive dialogue and we know that within competitive dialogue there's loads of permutations you can follow so you can actually do within that procedure more or less anything you can do under the existing procedures. Okay? And you can have dialogue in any of your procurements at any stages provided you tell people in advance that this is what you are going to do and the GPA requires that, so if you want to have dialogue with suppliers you simply need to say that when you launch the procedure. Essentially all it involves is a public advertisement solicitation just like the competitive procedures do now, you can invite a limited number of suppliers or you can allow everybody to participate, then you choose the winner based on the most advantageous tender and you can have a single tendering stage or you can you know just operate it like a restrictive procedure single tendering stage, give it to the most advantageous tender or you can have more than one tendering stage where you get outline proposals and then you discuss them and then you get final proposals. I question whether you could actually even just have discussions and not actually have a tender phase that you can just engage in dialogue with several suppliers and then as long as you justify you know why you've chosen one rather than the other after discussing their terms with them. This issue there is whether the courts will come along and say "well no you need a kind of best and final offer stage in order to be transparent" so that's something even if its structured in the legislation you can just have discussions and negotiations. Whether the courts will interpret it like this is open to question I think. And then at any point you can basically exclude you know apply your qualification exclusion test so you can do this at the beginning or you can do this at the end or you can do it in the middle.

So really it's a simple procedure, gives you total flexibility in the same way as any of the other procedures at the moment. It also is supposed to do something which you cannot do under existing procedures which is you can have an open form of the Competitive Flexible Procedure. So you can have an open tendering procedure under the normal fashion where you just publish a notice, get your tenders, choose the winner or you can now have its proposed an open form of the Flexible Procedure which will allow you to basically put out on open invitation and then talk to everybody about their ideas and proposals before you do any kind of qualification or vetting and then simply take forward those that have the most promising looking proposals into a more detailed stage before you assess their qualifications which is something actually you can't really do under the current rules because if you use the Concessions

Procedure or Negotiated Procedure you actually have to kind of choose your participating suppliers before you start looking at their offers. So that's an additional flexibility. So I hope the intention behind that makes sense. In terms of the award criteria in competitive procedures there's very little change there, there's proposals for a change in the language from MEAT to MAT (Most Advantageous Tender instead of Economically Most Advantageous Tender) but no real substantive change. The only proposal for a change of substance is that basically the rule that you must link the award criteria to the subject matter of the contract its proposals still apply but they'll be limited exceptions. So what that means is the possibility of having award criteria that don't relate to specifically what you're buying but relate to the supplier. It's not something that contracting authorities will be able to do themselves, the idea is this will be authorised by kind of central government policy. If the government thinks it's appropriate. To be quite honest, I don't find that terribly useful in most situations. Normally if you want conditions to take into account things about the supplier like "do they pay on time?", "have they been corrupt?" you would do that normally by simply excluding them. It's odd to use that as an award criteria in my view but the proposal is to make that a possibility but subject to the control that its only where it's going to be the subject of a central thought out government policy not as a free for all because there is a danger then you start throwing away a lot of money by being very narrow in who you admit to the procurement.

So that's the main features of the competitive procedure. Let's just look at limited tendering. This is the non-competitive, well actually non-competitive is the wrong way to describe it. At the moment we have this procedure, the negotiated procedure without prior publication which is available on various grounds like cases of extreme urgency there, where there's only one possible supplier for technical reasons and so on. So the proposal is to keep a procedure like that but it's going to be called limited tendering rather than negotiated procedure without prior publications. It essentially the same thing but with some specific new ideas. So it's basically the same as that old procedure, it's called "Limited Tendering" that's the name that's used in the GPA for that procedure. So the plan is the grounds will remain largely unchanged, there is a proposal to add one new ground which is to allow use of that procedure in a crisis, this is actually a ground that already exists in the defence rules and a crisis is an event which clearly exceeds the dimensions of harmful events in everyday life etc and obviously you know Covid will be a classic example of when you would need that procedure to buy things quickly to respond to the Pandemic. It was always illogical that that only applied in the defence rules. The significance of it is that it removes the normal conditions that surround the urgency ground, you don't have debates about "Was this foreseeable? Could the contracting authority have safeguarded against all the conditions that normally surround use of the urgent negotiated procedure?" so it gives you some certainly in a very urgent situation that you know you're not going to be at legal risk. The plan is the Cabinet Office would have to declare the crisis, you couldn't say yourself this is a crisis it would have to be only when declared by the Cabinet Office that there is an event of crisis that procuring entities need to respond to.

Now you might be saying "well haven't we had a lot of controversy about use of this procedure during Covid times?" and "Why would we be loosening up rather than tightening up?" and I think the point is that you need both, you need the flexibility to respond without worrying about "is this foreseeable or not?" and "how's this going to be interpreted?" but you also do need better safeguards and I think where we went wrong a little bit with Covid was the way this procedure was applied so there are some proposals to deal with that. So if we look at what this limited tendering procedure is and this is also true of the current negotiated procedure without prior publication. Most people think of it as single source procurement, you go to one person and you do a deal very quickly but actually it isn't like that. You can, within that procedure, have a competition but just without a public notice. So you can often in an urgent case have time to go to 2 or 3 people fairly quickly and talk to them and see who do we think can do the best job here and in a lot of countries this is the default position. You know the default position isn't go and negotiate with one person you know, it's have a quick word with several people and see what's the best option. So this is what we need to bear in mind and what the Green Paper is proposing is to put out guidance because I think at the moment a lot of contracting authorities assume that its single source. So there is proposals for guidance to say "you should consider competition between several suppliers" and proposal for a provision to say "if you don't speak to more than one person you need to record the

reasons why that wasn't possible, why it was so urgent that you had to just go to one person. There's a proposal, I think there's also a sense that even when contracting authorities do realise they could have a quick informal competition they're loathe to do that because they worry that the losing supplier will then sue then and try and hold up the urgent procurement. So to reduce that risk and to encourage people to use a competitive approach in urgent situations there's a proposal to exclude automatic suspension when this procedure is used in an urgent case.

Right, now an additional very important safeguard that's proposed which doesn't exist at the present is that when you used this limited tendering procedure the proposal is you must put a notice out in advance saying that this is what you're doing, saying "we think this procurement is urgent and" or "that's there's only one possible supplier and "we intend to use limited tendering on that ground". It occurred to me that you might call this a MEAT notice if we're not using MEAT for the award criteria this would then be a MEAT notice, a Mandatory Ex-Ante Notice rather than a VEAT notice so maybe MEAT will come back in that context. What is essentially like the current voluntary Ex-Ante Notice except it's going to be compulsory. So you say you're going to use the procedure and you say why you're going to use it. And then there will be a 10 day standstill except in urgent cases. Okay so that would give somebody chance to challenge your use if you say "I'm going to use limited tendering there's only one possible supplier" that will give somebody else time to come forward and say "no I don't think this is justified because I can supply this product" and therefore you need to have a competition.

The plan is although it's not totally clear or even worked out fully in the Green Paper how some of these things will work but the plan is that this notice will protect you against ineffectiveness but because there has been no sort of direct remedy, there will be some kind of reasonable damages remedy if it's been wrongly used, so it will protect you up to a point but not completely if you comply with this notice requirement and standstill requirement. I think Jonathan is going to perhaps say more on that later.

Okay so that's your basic competitive procedures so let's just come on to another important topic which is what the Green Paper calls commercial tools, this is the name that it gibes to framework agreements, dynamic purchasing systems, qualification systems. These are basically tools that you when you're you know to do repeat kind of procurement so regular things, that the main use anyway also can be used on things like urgent cases so they're kind of arrangements that you set up to potentially meet future or ongoing needs. So they're dealt with in a single chapter and to me this is the most unsatisfactory part of the Green Paper. Its unsatisfactory because for a start I just simply don't think it's clear what this is trying to do. Where it is clear I don't think it's very satisfactory.

So if we start with framework agreements I think they are just making the law on framework agreements more complicated but not really adding flexibility although it's hard to see because the Green Paper isn't clear. With DPS and qualification systems the Green Paper is absolutely unclear about what the proposals are and I do not think that's an adequate base for consultation and it concerns me that people won't pick up the issues because they're simply not spelt out in the Green Paper. So just to get into a bit more detail on that.

Framework Agreements

The Green Paper's proposal is for two types of framework agreement. It talks a lot about making things more flexible but also letting more suppliers come in more regularly and not being shut out of the market by framework agreements. It proposes a closed framework agreement which will be up to four years only and that will be a limit and that will be your traditional framework agreement you know where you have your suppliers and for 4 years they're the only suppliers on the framework agreement. If you look it seems to say "3" at some places in one of the headings and "4" in the text, but anyway for a short period of time, you know you'll be allowed to have this framework agreement and it won't be allowed to be for more than 4 years. But then they say we've got a new type of framework agreement, the Open Framework Agreement which you can have for up to 8 years but this Open Framework Agreement will be once that's opened to new suppliers at various points. However, if you open it to new suppliers and you're limiting the numbers on the framework your existing suppliers will have to re-tender when its opened up to allow space for the new suppliers to come on if they're better. Now to me that's just a

series of short framework agreements if you set up a framework agreement for 5 years and ever year you have a competition to let new suppliers in where you consider them against the old suppliers who can either keep their existing terms or change them, that's a framework agreement for a year and then another framework agreement for a year and then another one which you can do already, there's nothing to stop you having a framework agreement for a year and then having the same terms and products and everything but having tenders for new suppliers to compete against the old ones to get on it. It not adding anything, it's not a new concept that allows suppliers in when they weren't allowed before and to me a much better solution is to keep a single concept of framework agreements that have guidance that makes it very clear you can re-compete them regularly and encourage people to do that. I don't see that proposal adds anything. One thing it does though is it actually, although they talk about the importance of being allowed to have stable framework agreements, for a period of time actually it reduces flexibility there because you're not allowed to have one for more than 4 years without opening it up again and this will include utilities because they're covered by this, they're allowed framework agreements with 8 years without justification. The public sector is allowed to have frameworks for more than 4 years if there is justification so what these proposals are doing is actually stopping you having a framework for more than 4 years at all, even if it's totally justified because suppliers need to put a massive investment into tooling up to perform the services or whatever. So to me that proposal reduces flexibility and it doesn't provide anything useful and it also makes the rules unnecessarily complex, you know we don't need the concept of two different types of framework agreements.

I do also raise the question though, is there an intention to introduce flexibility by having framework agreements with an unlimited number of suppliers so that you allow everybody on the framework agreement with their prices? My view is that's not allowed under the current rules, framework agreements are supposed to be something that narrow competition down you know to a small number although they're not always operated like that. Maybe that's an intention of a bit more flexibility, I'm not sure how useful that is and how good value you would get but the Green Paper doesn't spell it out. There's a sort of hint in there or implication at one point but it's not at all clear whether that is also being proposed.

Dynamic Purchasing Systems

And then Dynamic Purchasing Systems there's some good aspects of the proposals. The idea is to call these the DPS-plus and extend them to all types of procurements not just standardised purchases as at present and the idea is you'll be able to ward call off by the Competitive Flexible Procedure. Now I mean to me extending the DPS concept to all purchases is great, you know it's a good concept, it's very open there's no reason why you have this artificial limit although its more useful for standardised purchases it could be useful for others as well.

What's not clear from the Green Paper to me is whether with the DPS-plus you have to invite all the registered suppliers? It just doesn't seem to make that clear and that's a massive difference. If you apply the DPS as it is now you would have to invite all the registered suppliers but if you're saying you can use the Competitive Flexible Procedure does that kind of imply you could just invite some of the suppliers? Alright? Which would be a big change because it would be a much, much less open type of system although you could operate it in an open way by inviting everybody. That's a really crucial question especially when we look for utilities here now of how it fits with qualification systems. The concept of a qualification system may not be familiar to a lot of people listening, I know there are some utilities, it's a concept that currently only applies to utilities. Public sectors can use a DPS which to me is actually a type of qualification system, it's just a qualification system where you have to invite all the registered suppliers when you actually launch the procurement. So what it is its essentially a list of interested suppliers or qualified suppliers, you can check their qualifications before they register. Utilities can use lists like this to make the call for competition like a DPS again so you make the call for competition and you don't need any further call when you place an actual contract, but the difference from the DPS concept is that utilities can actually choose a limited number of suppliers to invite and in fact they're only allowed to invite suppliers from the list but they can do that by choosing a limited number

of the most qualified and most suitable suppliers. Now the DPS-plus it said its going to replace qualification systems right? Now if the intention is that all the registered suppliers have to be invited when you have a DPS-plus then effectively that is completely different from the way qualification systems generally operate because they usually operate by just inviting a limited number of the registered suppliers so to me that is a big red flag for any utilities listening. If that is the meaning of the proposal its basically taking away the flexibility to use qualification systems as they're now used and what that means is that European competitors have more flexibility than the UK does, totally contrary to the supposed intention of these reforms. So any utilities you know you need to look at that and think about responding if you want to keep qualification systems and making it very clear why they're useful in the present form. If it doesn't mean that and if the DPS-plus is effectively a qualification system where you can just invite a limited number of suppliers what the proposal is doing is effectively extending qualification systems to the whole public sector which would be introducing much more flexibility but this isn't spelt out and I think it's a big defect in the Green Paper that it doesn't deal with that in a clear manner.

Exclusions

Okay very finally and just very quickly Exclusions. There's not a lot to say here because there is not a proposal for a lot of change. Mandatory exclusions will remain largely as now but with the proposal to extend it to fraud against the UK. There are lots of practical problems applying mandatory exclusions which I have listed there which I won't go through. The government is potentially proposing to deal with some of those by looking at the possibility of a centrally managed debarment list so the government will look at who should be excluded for mandatory exclusions how they will apply, whether self-cleaning applies and then it will be contracting authorities will just look at that list and disqualify accordingly so they wouldn't have to make the decisions themselves about things like whether self-cleaning was satisfied. There are a lot of practical problems in getting that going. I haven't got time to talk about them and I'm conscious that I'm running out of my time here but I'm going to refer you to a paper I have written on it shortly so if you want to follow that through. The proposal with discretionary exclusions is to largely keep them as now, I think they could be greatly simplified and it's a shame that the Green Paper is proposing to do that. The one thing I would highlight is past performance. One of the current discretionary exclusions is for significant or persistent deficiencies leading to early termination damages or comparable sanctions. How often when you have a contractual dispute with a supplier when they haven't performed well do you actually terminate it or seek damages? Not very often I think is the answer so that's not a very helpful exclusion and the proposal is to actually remove the requirement for early termination etc so that any significant or persistent past performance will give rise to the possibility of exclusion and again, sorry its important, that the government is thinking about introducing a centralised database of performance information to help procuring entities deal with poor past performance and to basically incentivise better performance by keeping good information on it which I think is a potentially very important proposal.

So I think that's the end of my time, let me just give you.. here's some papers that I've written on all this stuff if you want to follow any of this in more detail. I'm doing a more detailed Webinar next week if anybody is interested and if anybody who is really interested in getting to grips with all the nitty gritty aspects of that at the University of Nottingham we do have a post-graduate course which will be covering all this stuff as it unfolds, designed for professionals so I'll just give a little plug to that as my final comment. Thank you very much I'll hand you back to Michael I think now.

Michael Rainey

Brilliant, thank you very much Sue that's all fascinating and we've had a number of questions in, quite a lot, so apologies to those in advance if we don't get to your question. Just to say in advance a few of you have asked if the slides are going to be circulated after this session and yes they are, all the slides will be circulated as well as a recording of what we're discussing so you'll get a copy of all of that detail that's in the slides afterwards. Sue the first question we've had in is on the framework agreement duration caps proposals and the fact that the current legislation both utilities and PCR has so you're

allowed to go beyond the state of maximum duration in duly justified cases, do we think under the new proposals that's something that will still be allowed that extra flexibility or do we think that that will disappear because of the new open and closed distinction?

Professor Sue Arrowsmith

Yeah well I mean that's my reading of it. As you read it it's that if your framework goes beyond 4 years you have to open it up again so to me that's quite clearly seems to say we're not intending to allow them beyond 4 years which I think is problematic, I don't think that flexibility should be lost, so yeah that's my clear reading of the proposals is that you will not be allowed to have frameworks beyond 4 years unless you use the open type which effectively is not a framework beyond 4 years because you're having to open it up to new suppliers. At least unless you see, unless you have this concept of an unlimited number of suppliers on in which case you just let all the new suppliers on and then I guess you carry on with the old ones as well for more than 4 years, but how useful that is I don't know because people won't invest if they don't want a framework that everybody else is on and can be opened up to anybody else at any time, there is no incentive to do that kind of investment. Does that make sense?

Michael Rainey

Yeah absolutely and I think the concern behind the question is that you know often in, particularly utilities, construction and that sort of thing, you need quite a specialised group of contractors on your framework as your putting quite a lot of investment over the term and they're not going to want to re-compete after 3 years or if they have to they're not going to want to invest.

Professor Sue Arrowsmith

Yeah and I think what is really important about this is that people that this is going to affect you must respond to the consultation and you must be as specific as possible and say "this is why we need the flexibility, this is the kind of project I have that this is going to cause problems for me" because the whole tenor is to try and have sufficient flexibility for commercial approach and I think the more people that respond and the more specific you are about the kind of issues this will cause with practical examples, that that will have the necessary impact to get the proposals nuanced in that way, so I can't stress enough, please respond and please be specific in your responses.

Michael Rainey

Yeah I mean they're pretty complicated already the proposals so the more exceptions and extra complications they've got on top the harder this is all going to be to follow but yeah I think I would urge people to put their thoughts forward because I think one of the other questions that we've had from one of the utilities is whether you know to what extent there has been much engagement with private utilities as part of the process that has gone on to date because obviously there is a big, it feels very public sector heavy, what's been put together so far and a lot of the changes don't really help utilities.

Professor Sue Arrowsmith

My view is, I mean it's just not for me to comment on this because I have signed a non-disclosure agreement and I can't talk about the process in detail but I mean I can say that I have because I have some experience with the sector, I mean obviously either its public knowledge I've written about these issues in public and stressed these issues and as you can imagine obviously I would stress what I've been saying in public in private as well, I don't think that's any secret, but I do think it's very important that utilities in particular do respond to this to make sure that all the angles have been covered from the utilities perspective.

Michael Rainey

Yeah absolutely. Another area that people have raised a few questions around is the new sort of flexible procedure and the extent to which, I think we've seen this a bit in the Concessions Regs for example, that people had the flexibility to build their own procedure but ended up kind of defaulting to the ones that looked like the PCR/ECR procedures anyway because people are kind of scared of the risk of

flexibility and the particular questions we've had are around the sort of equal treatment transparency risk and the extra risk of challenge if you kind of design a very flexible negotiated procedure. I mean do you think that's going to increase in the short term the risk of people challenging procedures?

Professor Sue Arrowsmith

Yeah. Well I think there's two points. I mean one is that you're in no worse a position than under the old rules because obviously you know if you design something that looks like your traditional procedures you're going to be fine so it's not causing any problems. In terms of being a little bit more creative and using procedures you're not used to there's definitely a strong emphasis on the guidance there, this is one area on which the Green Paper stresses very much we will have guidance and we will have guidance which gives you examples of procedures you can use, you know practical examples, we will build up case studies on this and we will give training on this. So there's a lot of emphasis on you know we know that people will need to be trained and have a lot of information on how to use this kind of stuff and obviously if you have stuff in guidance which says "this is the kind of thing you can do" and it's quite detailed, that in itself tends to give people comfort that okay this is okay, and the reality is the court takes a lot of notice of that guidance. It's just not quite so prescriptive in its little detail and potential for trips ups as having a more rigid approach in the legislation so if you essentially think of it as the current legislation but with more flexibility if you want it I think that's a good way and yeah I think some authorities could be advised to stick to traditional approaches until they're really sure what they're doing and until this guidance is there and available and there are case studies to build on and so on, so this is why I say the guidance is going to be so important the intention is there and I hope that that intention is followed through in a significant way.

Michael Rainey

Yeah, things like the number of bidders that you have to shortlist for your procedures and things is one of the sort of differentiates you can look at at the moment and I guess the guidance might help on that and its likely to just be you know adequate competition like it is in the utilities rules presumably for that procedure.

Professor Sue Arrowsmith

Yeah that would be my guess. I mean obviously it would be adequate competition and I mean maybe you put in a minimum of 3 for the first stage I just don't know. You know we don't know what details of things like the negotiated procedure or concessions procedure might be brought in, I think the detail will be quite limited because it does kind of say it's going to be like the light regime procedure although I think in part to stress to light regime people you don't have to worry about this, it's not going to constrain you. So yeah that's the kind of thing I think should go in guidance and I also think the guidance needs to deal with things like you know how many years of experience is appropriate for work and services and supplies and maybe refer to the current period so people have a little bit of comfort but without being totally prescriptive and getting this very complex law that kind of you get tied in knots because you're not quite sure what it means. So I'm hoping the guidance will have a lot of that kind of practical detail, how many you know you might for particular types of procurement but without being 100% prescriptive.

Michael Rainey

I know Jonathan has some views on the guidance so we'll hear from him about that later. Last question I think for you Sue is around the [Humbard Techel] affiliated undertakings exemptions, none of this sort of stuff is mentioned in the Green Paper itself, do we expect those sort of exemptions to continue on?

Professor Sue Arrowsmith

Yeah I would. The point is it's not mentioned in the Green Paper and my kind of instinct is if it's not mentioned in the Green Paper nobody is really worried about it too much yet but we would expect those kind of.. when you say those exemptions to continue.. of course you only needed exemptions because the EU had sort of this basic starting point that arrangements between the public sector have to be tendered so the first question is do we retain that basic starting point before we get to then do we need

the exemptions. How much that is constrained by the trade rules you know that's going to dictate the situation. The GPA is somewhat unclear on that. The general assumption seems to be that actually things between the public sector may not necessary actually need to be tendered in the first place but those kind of things I think it really does remain to be thought out and I would think if people have thoughts on them it's worth writing in with your thoughts, if you think the current rules are too restrictive on things that the Green Paper hasn't dealt with there is no harm in submitting that to the consultation and saying "hey we didn't think this was mentioned and this is what we want to say about it" because I think that's all just open at the moment.

Michael Rainey

Absolutely so again stress the message to everybody listening get in your consultation responses if there is anything you want clarified or you want to raise and we've got the address for responding later in the slides which we'll talk about towards the end.

We're going to move on now to Louise, thank you very much Sue for that, that was absolutely fantastic and we're now going to hear from Louise Dobson who's a partner in the Litigation team at Addleshaws so she's going to reply from a hardened litigator's perspective to proposals in the reform so Ill hand over to you now Louise.

Louise Dobson

Thank you very much Michael and thanks Sue that was a really interesting run through the reform. I'm going to focus now particularly on procurement challenges and the suggestions of how they might change the way that unsuccessful bidders can get some redress if there has been a problem with a procurement process so there are seven key headlines here and I'll just take you through each of them with a little bit of a comment on what that might mean for those who've been through a dispute relating to procurement and those of us who are active in acting for those unsuccessful bidders but also in defending contracting authorities or utilities who are faced with the challenge.

So the first one is that there will be no standstill letter as we know it and no CRAST so that's the characteristics and relative advantages of the successful tenderer that is the first point at which an unsuccessful bidder knows they've lost in the tender, they won't get the contract and one of their competitors has won that business. So the idea here is to extract information that will be provided as a matter of course throughout the evaluation and tender process so you won't need that effective you now communication right at the very end of that comparison between you as a bidder and other bidders in the process. I think that that will make it quite difficult for bidders to work out at that point where they sit because the normal point is when the [♦17.01 *of part 2*] to interrogate that and work out if there is something that might have gone wrong in the process which means an unsuccessful bidder might have lost out, so I think the result with either be that things are very transparent and there is the same level of information that's just provided as a matter of course that you can go back to and look to check if the evaluation scoring has been done as it said it would be done in the tender or it could lead to a position where there's lot of disclosure at an early stage about what information should be provided, what the information provided shows and where that unsuccessful bidder might fit in terms of pursuing some redress when they think there's a problem with the process.

The second headline is that there is suggestion that those should be, before any court action or any escalation of a challenge by an unsuccessful bidder, there should be a peer review of complaints by a contracting authority or utility by someone unconnected to the tender so the idea is to have a pilot programme and see if that actually leads to a drop in issued claims. I know that a lot of clients when they come to us and ask if they can get some help and advice about where they sit as an unsuccessful bidder when there is some concern about the process that has been undertaken, there is an expectation there would be some form of complaint or appeal process and when the appeal is effectively just straight into court action that can be quite a surprise to some people so it will be interesting to see how that plays out and if it does lead to a drop in issued claims. I suspect that actually the result will be dependent upon the level of resource and investment at the time that can be put into doing that review of complaints

on what changes could be made to either re-run or change things or you know move things around and the level of trust that there is in those types of reviews from unsuccessful bidders.

So first the headline is about Automatic Suspension. There is a suggestion that Automatic Suspension won't apply if there are awards on a crisis or urgent basis but where there is an Automatic Suspension it won't be done on a normal American Cyanamid test that you would have which is effectively the same test that's used for an injunction and instead there will be a procurement specific test that would look at different factors including things like you know the successful bidder and how it might affect them, public interest, urgency, so a slight cross over, a slightly different legal test and it would be just an attempt to expedite matters so the idea would be that there would be less reliance on automatic suspension as a key stage in any challenge because matters would be able to proceed a lot quicker you know with the fast and fair overarching aim of the reforms so that more contracts could be held back and not signed whilst challenges are sorted out at a very early stage, and again I think the question there will be is there enough resource to expedite things in such a way that there wouldn't be a need for that reliance on Automatic Suspension and anyone who has lived and breathed through an expedited case know how difficult they are to manage and to achieve that expedition you do need the infrastructure there to be able to push cases through very quickly.

Just moving now to the fourth headline on the next slide. So this is all amount a fast element of the suggested reforms, it will make everything a lot quicker, a lot cheaper and to give, particularly smaller bidders, a chance to get some remedies and redress if there is a problem with the process without the expense and delay of court proceedings. There were some various suggestions based on changing procedure rules and having some court reform to include different angles which might make things quicker and easier so some examples are having cases where there are written submissions only which we don't see in procurement claims that are in place in other areas like in arbitrations and other dispute resolution procedures. Encouraging the use of the District Registry so there is more cases there outside London with specific procurement judges available there to get cases through quickly and having different disclosure rules for different tenders and also "how to" guidance on running confidentiality rings which for those of us who have been through confidentiality rings, setting them up, dealing with them and administering them are very difficult to do and guidance is always welcome on that. I suppose again the question will be whether the speed at which a reform has got to move will be sustainable dependent upon obviously the court and what they can do in terms of pushing cases through and managing them quickly.

So the fifth headline and something that's been talked about a lot is use of a Tribunal for smaller cases to give those SMEs, charities, third sector bidders a quicker and cheaper resolution to claims and there talk about a pilot potentially with expansion later. So this is less prominent in the reforms than perhaps we might have expected but I do think there is a real need for that kind of quick and easy process to resolve smaller, less complicated matters and I suppose the idea might be that the peer review that I mentioned earlier is used instead of a Tribunal system but I do think that's something that, particularly smaller businesses, are looking for as an easier solution when there are problems that they identify with a procurement process.

The sixth headline is that there are suggested to be new remedies that would include things like tenders being re-run, documents being amended or decisions set aside so everything shifts to a much earlier stage so instead of looking at things like damages when you haven't got the contract, looking at a much earlier pre-contractual stage to try and resolve things so there isn't that focus on damages. And again, it all depends on how the reforms actually .. you know what comes through when the draft legislation is suggested and how those remedies are meant to help unsuccessful bidders, and also how they'll give those SMEs that those reforms are designed to help, some real help when a process hasn't gone quite right.

Then the biggest one and probably one of the ones that is something that a lot of people might want to respond to the consultation on is a suggestion of a cap on damages so that any unsuccessful bidder would have their damages capped to their legal fees and 1.5 x bid costs so there wouldn't be that

element of being able to do a damages claim to recover your margin that you would have made on the contract you should have won had the process been done properly. That wouldn't actually be bid costs either it would be a "should cost" assessment so there wouldn't be an ability to load bid costs so you had a remedy later which would reflect what you would have got in damages and you can see the reason why this has been suggested given the very high profile cases with huge sums attached for damages, but the question is how that would then interact with giving unsuccessful bidders a real true remedy and also that its very much a big significant departure from accepted law that you do have a loss of a chance type claims in other areas so it would be quite a big departure. I'll leave it there to just give you that snapshot of what's been suggested for disputes and hand you back over to Michael.

Michael Rainey

Thanks very much Louise and again apologies for those that have asked questions that we won't have time to go through all of them. Someone in the room has submitted a multiple choice question which is good although it is quite a tricky one. So the question is **if all the reforms in the Green Paper were made, do you think that's going to result in more challenges, fewer challenges or not really make any difference at all?**

Louise Dobson

I think it depends. I think it depends on whether or not everything comes in, so if they do a peer review, a Tribunal and then a court then you can see naturally different claims slotting into different areas so you would go to to a different forum for a different type of dispute, but if they don't have that infrastructure available I can see instead of things going through to proceedings, there being very much everything shuffling to an earlier stage, so being back to the old days of pre-action applications about disclosure and other things like that because there wouldn't be the same forum for dealing with disputes at the moment so I guess it depends very much on you know if there is a staggered procedure for different types of claim and also if the court has the resources to be able to push things through as quickly as the reforms would like. You know all of it is very much based on there being the infrastructure there to expedite cases and for those of us who have lived and breathed those cases that run through so quickly and are expedited, there has to be the court time and the judges available and the teams available to actually run those on that speedy basis for those speedy trials, so I think it may make a difference, it may make a huge difference but it all depends on whether the infrastructure is there.

Michael Rainey

In terms of the sort of earlier stage of the process and the peer review aspects of it do we have any detail as to you know what counts as a "peer" in that instance or again is that something that's going to be fleshed out in guidance?

Louise Dobson

I think it's to be worked out and also its described in the Green Paper as an optional stage so whether or not, for example, if you look at a local council, whether they would have the capacity to do a peer review on top of doing the tender itself, again it's all based on whether the resources and the time is there to do it properly and I suppose I would also question whether there would be that level of trust in that process, it would have to be quite descriptive I think for a bidder to be comfortable that someone has looked at it and its all fine. If it was someone independent outside of the contracting authority or utility that might be different but again that would have a different cost and time implication.

Michael Rainey

Yeah and limitation periods presumably. It will be interesting to see how those interrelate with that. Thank you very much Louise that's brilliant on the litigation side of things and so now last but by no means least we're going to hear from Jonathan Davey who's going to talk us through his reflections on some other aspects of the Green Paper. So Jonathan, over to you.

Jonathan Davey

Thanks Michael, good afternoon everybody thanks for sticking with it. Just some reflections from my side. Next slide please,

If I start a slide, my first slide with the words "Some Concerns" you might get the impression that my overall review of the Green Paper is wholly negative. It certainly isn't, and I think Sue has picked out quite a few things which are helpful, which respond to concerns that practitioners and clients have had, so if I list a lot of concerns that's not by way of suggesting that I think the whole Green Paper is a bad idea because it isn't. But I do have some concerns. The first one Sue mentioned is about bureaucracy. I picked out 16 references to guidance in the Green Paper on some of the issues I've listed there. We also are going to have a digital strategy and road map and the National Procurement Policy Statement that Sue mentioned plus case studies. That's a lot of material to assimilate. We are also going to have many new forms, again I have counted those up and there are 18 of those as well as this possibly National Record of Past Performance which presumably contracting authorities will be mandated to populate with information on their processes. Also new bodies, a possible procurement tribunal as Louise has mentioned, I personally think that's a very good idea and a new unit where we'll see procurement I'm less sure about that, that does seem to be able to have some teeth, not in relation to individual procurements but in relation to the activities of procuring entities and ultimately the suggestion in the Green Paper is that that unit could even curtail funding to bodies who aren't getting it right from a procurement point of view.

Well all of those changes and all of that bureaucracy might be fine for large contracting authorities and large utilities but I don't think any of it is going to reduce the burden on participants in procurement and I think it could be very onerous for smaller authorities and SMEs. There's a lot there for example for a smaller local authority without lots of resources in procurement or legal to come to terms with.

My next concern is about the quality of guidance and Sue alluded to this. Here's a quote from one of the pieces of guidance that's out there about land development agreements. It says:

"Where a development agreement falls outside some or many of these parameters there may be a greater likelihood that the agreement has the characteristics of a public works contract"

Well that really isn't good enough. That doesn't give guidance at all. Of course the next paragraphs says authorities should take their own legal advice so as Sue mentioned the quality of the guidance really does have to improve if it's going to help rather than hinder.

Picking up on Sue's point about the difference between reforming procurement law and reforming procurement, one must question really whether rule changes will lead to efficiency and innovation. I somewhat doubt it. We have seen those phrases used in previous situations of the directive certainly and neither of those things emerged as a result. More fundamentally, I question whether we really want innovation in public sector procurement. Innovation is risk. Innovation is complex. There are likely to be failures, there's likely to be a delay because complex procurements, even with the tools the Green Paper is suggesting, will prove difficult and time consuming. I think we want the public sector to be buying tried and tested products and services and delivering value for money by using processes and goods and services that have been tried and tested in other environments but maybe that's a debate for another day.

Next slide please. I would just like to say a word about contract change because in our day to day practice this is one of the really important areas and the Green Paper helpfully notes the uncertainty for contracting authorities in this area but really doesn't do very much about it. It says that a full overhaul isn't considered necessary despite having noted that uncertainty. It's going to use the PCR provisions on contract changes as a basis. That means some slight loss of flexibility for utilities, echoing what Sue said earlier about frameworks, but most of what is proposed really is just a re-ordering of the definitions and although this isn't explicitly mentioned in the Green Paper, a dropping of the value threshold that's currently set out in the safe harbour provision. We still have this problem of a sizeable amendment to a large contract and I've given an example there. Do we really want to require authorities to re-procure

simply because a significant change to an existing contract is required and something I've called for before and isn't in the Green Paper is some link to the nature of the contract. If you're awarding a very large long-term IT outsourcing or a complex contract, the reality is there does need to be more flexibility, there does need to be more opportunity to change that contract than there would be simply in a contract to purchase office furniture or basic services. There's no concept in there of some link to the nature of the contract. Worse still there's now going to a mandatory requirement that unless your contract change is a smaller change you will have to submit a Contract Amendment Notice each time you make a change and you will have to standstill for 10 days after submitting that notice before the amendment is carried into effect, so that's a significant piece of additional bureaucracy. It's not unusual to see serial amendments to large and complex contracts so this could become a min-industry for contractors and contracting authorities with large numbers of contracts.

The Green Paper refers to a 30 day challenge period and suggests that there should be no question of a declaration of ineffectiveness if one of these Contract Amendment Notices is published but I'll come back to that because I think there's a logic problem with that.

Next slide please. Future Battlegrounds. Louise alluded to this and the question that she was asked also focused on this. Is there going to be more litigation or are we just going to move the location of the battle from one place to another? I listed here some of the areas where I can foresee increased scope for challenge. We've got these new principles, value for money, integrity, social value, will they become more of a battleground for challenges? Will failure to follow the guidance be talked about? Be asserted as prime facie evidence of breach of these basic principles? Sue suggested that might be possible earlier.

Past poor performance, the ante is being upped isn't it. If there is going to be a national register of past poor performance you can't expect contractors who rely on a significant part of their business for government contracts just to sit back and accept the fact that they go on that list. They'll be arguing they shouldn't be on it, there'll be arguing that they should be taken off it quicker. I can see a lot of disputes there and I can see that the more timorous authority might decide it's not going to submit details of past poor performance lest it become embroiled in litigation with a contractor who feels aggrieved that they're on the list.

Disclosures of sensitive information, this is something I've been looking at recently in a number of contexts but if all this information is going to go out there, there will be a real battle, particularly because this is going to be during the process as to what material is sensitive, what material is commercially confidential. Again I can see plenty of disputes about that, maybe in front of the Tribunal that Louise mentioned.

Sue spent a little time talking about the changes on frameworks and I agree completely with Sue that things seem to be getting more complicated there, particularly as regards the position of encumbrance, I can see some tussles as to how that's going to operate.

I said that I'd come back to contract amendment notices. We've seen in the *Faraday* case for example the Court of Appeal decide that the VTN in that case didn't adequately describe what was going on so that it wasn't effective to give the protections that normally come from a VTN so are we going to see that around Contract Amendment Notices too? It's all very well to say if you publish the notice and if it has the required information in it then there will be no question of a declaration of ineffectiveness but that will inevitably point challenges at arguing that the Contract Amendment Notice wasn't sufficient, particularly if they're bringing their challenge somewhat late.

Next slide please. What's Missing? It's tempting isn't it to focus only on what's there but it's interesting to look at somethings that aren't there at all. Proportionality is a principle we obviously get from the EU jurisprudence. The only place its mentioned in the Green Paper as far as I can see is in the Annex that describes the existing law. I hope that doesn't mean that we're going to move away from proportionality as a principle that's part of procurement.

There was talk at one stage about varying the VTN process so that instead of only being able to use it when you're pretty certain that there isn't a problem, you will remember the *Fastweb* case on that issue for example, you could effectively use VTNs as a whitewash, in other words you could own up to something that might be a breach of the rules but be certain after a period, having published the notice, that you're okay to proceed without risk of challenge. That concept certainly isn't there. It's not very clear from the Green Paper whether, given the mandatory notices, the MEATs that Sue talked about, whether we're going to have VTNs at all or not going forward, I think if that was the proposal that would be a retrograde step.

We've not had any clarification of the scope of these grounds for limited tendering. We've obviously got the new crisis ground but one we see providing a lot of problems in practice is this idea of there being only one operator who can deliver. It would be good to have some clarification on that but I'm not going to suggest that should be done in guidance given what I've said already.

As Sue mentioned private sector utilities haven't been excluded and we now know that the reason for that is the UK EU Free Trade Agreement and no reform of the Declaration of Ineffectiveness. We've seen some cases where arguably a claim of DOI has been misused and it would be nice to see that circumscribed so that that remedy is there but it's used only where its appropriate.

Next slide please.

So what should you be doing as in-house teams faced with all of this stuff? As several speakers have said, Pease do respond to the Green Paper and maybe start a discussion within your business or within your authority about what issues matter most to you. We will be submitting a response as AG so if you'd rather give your thoughts to us and have us take them into account in formulating our response we'd be ready to do that.

Train your teams once the reform is crystallised. I'm a big believer that better prepared bidders win more business. There's a first mover advantage for those bidders who understand the new rules better when they come in and use them to their advantage, either to improve their own bids or slightly cynically to challenge others when they're not following the rules.

I also believe that at least in competitive markets contracting authorities are competing for attention from the best bidders. If you're an authority that has a reputation for finishing what you start and delivering good quality procurements you'll get better attention from bidders when they're deciding which competition to respond to because they only have limited resources.

Contribute to trade body submissions. As Sue said it can make a difference, particularly if its sufficiently specific. There are also going to be periods of dual running aren't there, we're in a dual running period at the moment although as Sue said the Brexit reforms are very modest but there will be a period of dual running when the Green Paper proposals are finally implemented and there's a big role for lawyers in managing that.

Looking forward, maybe us in-house lawyers will get a watching brief so that we pick up changes to our contracts and we publish the required contract award notice and again slightly cynically we look out for competitors'' contracts being amended and we work out very early whether we might want to object.

Its bang on 1.30 I'm going to stop there. Thank you.

Michael Rainey

Thank you very much Jonathan and a huge thank you to Sue and to Louise too for speaking today and thanks to everyone for listening and for contributing questions as we've gone along it's been very useful to see. So thanks everyone for engaging. As we've all mentioned you can respond yourself to the Green Paper, the email address is on the screen there and AG will also be submitting a response so if you'd like us to pass on anything as part of that please do email one of us or your usual AG contact and again the addresses on the slide there.

We will be providing further webinars on more detailed aspects of the proposals as they develop so please do get in touch with any particular topics that you would like us cover in those.

So it only remains for me to say thanks very much for attending and to prompt you all to complete a short feedback form that you're going to get popped up on screen once this closes down, so thank you very much everyone and goodbye.