public matters newsletter

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Lifting of automatic suspension

On 29 May 2014, the Northern Ireland High Court granted an application by Western Health and Social Care Trust and the Department of Health to lift an automatic suspension allowing the Trust to proceed with a framework agreement for building works at a hospital. This is the latest in a string of cases in which a court has had to consider whether to lift the automatic suspension imposed on a public contract when proceedings are commenced before the contract has been entered into.

The Trust, along with the Department of Health and the Public Safety Department (Department) commenced the procurement in September 2012. The challenger submitted a bid but was informed by the Department in October 2013 that it had not been successful and that the contract was to be awarded to another bidder. It was told that it had achieved an overall score of 92.69 compared to the winning bidder's score of 92.70 and ranked second out of seven bidders. Having written to the Department to complain about the result, the challenger began court proceedings on 27 November 2013 alleging that the procurement had breached the Public Contracts Regulations 2006. This resulted in an automatic suspension being placed on entering into the contract under regulation 47G of the Regulations. The Trust and the Department subsequently applied to the court to end this suspension.

Previous case law has already established that when considering lifting the automatic suspension, the court should apply the 'American Cyanamid' test i.e:

1. Is there a serious issue to be tried;
2. If so, would damages be an adequate alternative remedy for either party; and
3. If not, where does the balance of convenience lie?

The case law demonstrates that the courts have been generally reluctant to allow a suspension to continue when a contracting authority applies to get it removed. In particular, the courts have been very willing to conclude that the balance of convenience, in particular the public interest, favours proceeding with the contract. Whilst the public interest argument has been very apparent in some cases e.g. where landmine collection was involved, the courts have used it in other contexts where the public interest is not so striking e.g. contracts for cleaning services.

In this case, the court adopted the following analysis.

Serious issue to be tried

The challenger conceded that points relating to the actual structure of the procurement process were time barred and so could not constitute triable issues. However, the court found that the challenger had established a serious issue to be tried in the majority of the challenger's other claims. These related to:

- allegations that the winning bidder's tender was incomplete evidenced by the fact that the Trust requested further information after the tender was submitted
- alleged underscoring in relation to the type of flooring put forward by the challenger. It claimed that the evaluation panel had erred in identifying risks as well as using impermissible evaluation criteria
- various other issues relating to scoring and marking in the evaluation process including, for example, alleged errors in the assessment and scoring of the challenger's personnel.

The court did not accept the challenger's assertion that this was a case that could be determined over five days and that it would be ready for trial in June 2014. A lot of the issues were not yet clearly defined and the case involved complex issues which may need expert evidence, a number of witnesses and a consideration of a large volume of documents.

Adequacy of damages

The court concluded that damages would be an adequate remedy for the challenger and that it would not be too difficult to quantify those damages. The challenger was not the incumbent supplier and therefore would not incur costs relating to loss of staff, market share, reputation etc that would be too difficult to quantify by an award of damages.

Also, it was held that in the event that it was established that a manifest error in the evaluation process had been made, it would not be too difficult to calculate an award of damages using a 'loss of chance' calculation (the standard measure used to calculate damages in procurement cases). With regard to some of the claims, if the challenger succeeded it would lead to the court concluding that the challenger should have been appointed as the preferred bidder and therefore the difficulties in calculating loss of chance would not be present. With regard to the other claims, the court considered that a suitable expert could be engaged to calculate the appropriate reduction in damages using the loss of chance calculation and that there would be a fair amount of information available to assist in this exercise.

For completeness, the court went on to conclude that damages would not be an adequate remedy for the Trust even though the challenger had offered to give an undertaking in damages. It noted that the losses of £470,000 would be incurred if the Trust had to run an out of date hospital, the Trust would have a reputational claim that would be difficult to quantify and the Trust would risk losing its funding for the

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project. There was also a risk that the tender process would collapse if the appointed winning bidder decided to pull out whilst the undertaking in damages was in place.

Balance of convenience

In light of the above, the court held that the balance firmly came down in favour of the public interest in the construction, in an appropriate timescale, of a new hospital. The court therefore lifted the suspension on the Trust entering into the framework agreement.

This case again highlights the importance of the public interest issues when deciding whether an automatic suspension should be lifted. It also demonstrates the reluctance of the court to accept that a damages claim based on loss of chance would be too difficult to calculate. In the construction context where suitable background evidence is often obtainable and expert assessors can be used, a court may not be convinced by arguments that a calculation of damages would be too difficult an exercise.

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The Commission's state aid modernisation programme continues apace with the new General Block Exemption Regulation

The European Commission has recently adopted the final text of the new General Block Exemption Regulation (GBER), which will come into force on 1st July – a mere six months later than the old one was scheduled to expire.

Bear with us. GBER really does matter in structuring projects or funding where there might be state aid. As with old GBER, the new GBER sets out a number of aid scenarios which won't amount to illegal state aid, if the relevant conditions are complied with. These conditions usually relate to aid intensities (i.e. the proportion of the total costs of a project which aid can provide for) and the eligible costs for which aid can be used. But be aware that some high value projects may still require notification to the Commission for approval and so would not be 'automatically' exempt.

So, why is GBER so significant? The Commission's research reckons that about 30% of all aid granted in member states was justified by using the old GBER and it expects that this will increase to as much as 75% under the new GBER. The idea is that this is a good thing as states/public sector bodies will have more flexibility in providing 'good aid' without having to notify the Commission beforehand – so it's intended to focus the mind on providing aid that is of real benefit to job creation and competitiveness, while at the same time reducing bureaucracy.

The practical effect of the new GBER, therefore, is to extend its scope to cover new categories of aid, to increase financial thresholds for some projects (meaning less aid has to be notified) and to simplify procedures for public bodies looking to award aid.

Some of the new exemptions

We've set out here a summary of some of the key new exemptions. We'll be commenting further over the next few editions of Public Matters, but if you want to read the original text, here's a link to it.

Innovation clusters (Article 27)

This is, in essence, the Commission's development of its 2005 German Incubator decision, with the additional ability to provide aid to innovation clusters which are not just restricted to small and medium enterprises (SMEs).

Investment aid may be granted for the construction or upgrade of innovation clusters, with eligible costs being the investment costs in 'intangible and tangible assets'. Aid intensity of investment aid is a maximum

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of 50% of the eligible costs plus 15% for innovation clusters located in Article 107(3)(a) assisted areas and 5% for innovation clusters located in Article 107(3)(c) areas. The maximum aid available is €7.5 million per cluster.

Interestingly, the aid for innovation clusters may only be granted to the legal entity 'operating' the innovation cluster, though presumably the operating entity could then contract out the management of the cluster to another body.

There is a requirement that access to the cluster's premises, facilities, and activities is open to several users and be granted on a transparent and non-discriminatory basis. Fees charged for using the cluster's facilities and for participating in the cluster's activities must correspond to the market price or reflect their costs.

Process and organisational innovation (Article 29)

This new exemption is primarily intended to benefit SMEs with innovation costs, which include personnel, equipment and land, research and intellectual property, and additional overheads related to projects. Aid to SMEs can be granted in respect of 50% of these eligible costs. While aid to large undertakings can be granted to it is only permissible where they are working collaboratively with SMEs and a lower aid intensity (15% of the eligible costs) applies.

Damage caused by natural disasters (Article 50)

This exempts aid schemes to make good the damage caused by earthquakes, avalanches, landslides, floods, tornadoes, hurricanes, volcanic eruptions, and wild fires of natural origin as these are deemed to be compatible with the internal market. Aid can cover all the costs arising from damage incurred as a direct consequence of the natural disaster but any schemes must be established within three years of the disaster and aid must be granted within four years of the disaster. The costs of 'damage' cannot exceed any decrease in value in property attributable to the damage (so if repair costs are greater than any decrease in value it wouldn't be possible to meet them under GBER) but damage can include lost income calculated in accordance with GBER. This could prove useful if the UK continues to experience floods of a similar magnitude to those afflicting the South West earlier this year or if Rutland continues to experience earthquakes.

Transport for remote regions (Article 51)

Although under earlier proposals 50% of the cost of return tickets to or from remote regions was to be granted to consumers who 'have their normal residence' in the remote region this is now set at 100% of the cost. The aid must not be limited to certain carriers, types of transport or the specific routes. In reality, this is perhaps most likely to be of use in more isolated parts of Scotland than other parts of Britain.

Broadband infrastructure (Article 52)

The new broadband infrastructure exemption enables investment aid in respect of the deployment of passive broadband infrastructures, civil engineering works relating to broadband, and deployment of basic and 'next generation access' broadband networks. As is the case with all aid relating to broadband the position is fairly complex and is dependent on a number of factors, including the existing broadband infrastructure in the relevant area. This exemption builds on the Commission decisions and individual and scheme notifications over the last few years - one of which, of course, is the UK's approved scheme established by Broadband Delivery UK (BDUK).

Culture and heritage conservation (Article 53)

This new category of aid covers a wide scope of cultural purposes and activities (including museums, archaeological sites, historic buildings, art, books, music, drama, morris dancing – but not including aid to the press or magazines). Support can take the form of investment or operating aid. This exemption is expected by the Commission to cover the vast majority of aid granted by member states in support of this objective.

This allows aid of up to €100 million per project or €50 million if operating aid. The exemption is intended as gap funding for infrastructure – reasonable profits are allowed at operating level. So, clawback mechanisms will have to be put in place. The alternative is to apply maximum levels of 80% aid intensity for aid up to €1 million. There are also slightly different mechanisms for publishing music and literature.

The UK's existing Historic Environment Regeneration Scheme (which focused on repairs to and restoration of historic buildings etc) will be replaced by the new exemption.

Sport and multifunctional recreational infrastructures (Article 55)

Regular readers will be aware of what a hot topic sport and state aid is. In the recent judicial review application relating to Coventry City Council's involvement in the Ricoh Arena (R(Sky Blue) v Coventry City Council), Hickingbottom J opined that there is a wide margin of discretion for a public sector body to decide whether they are acting as a private investor– and declined to decide between expert views as to what were market terms and what were not.

The new GBER makes it clear that aid can be provided towards investment costs for sport and multifunctional recreational facilities (such as stadia and arenas, but not leisure parks or hotel facilities) and operating costs for sports infrastructure. Although generally the aid is limited to investment viability gaps or operating losses, if the aid is less than €1,000,000 then a simpler test is applied in that the aid only needs to constitute 80% or less of the eligible costs. Aid can be provided to upgrade existing facilities and so will be useful where authorities are looking to support or improve loss-making facilities in order to support public health objectives.

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Investment in local infrastructure (Article 56)

This is essentially the Commission's attempt to codify an exemption to Leipzig-Halle and the principle that construction of infrastructure amounts to an economic activity; though perhaps ironically it doesn't apply to airports or ports, for that matter. This demonstrates that transport (like agriculture and fisheries) is in a box of its own, as far as state aid is concerned.

Aid under this exemption can be provided to meet investment costs in tangible and intangible assets for the construction or upgrade or local infrastructure. This is a catch-all provision which does not apply where infrastructure is already covered by other GBER exemptions (except for regional aid – that is, assisted areas). The relevant infrastructure must contribute locally to 'improving the business and consumer environment' or 'modernising and developing the industrial base' so proposed schemes should demonstrate local benefit if seeking to rely on this exemption. The aid which can be granted under this exemption (as is often the case) is limited to any viability gap and so to the extent profit is made, this must be deducted from the eligible costs on the basis of projections or clawed back. So this acts as the equivalent of the German incubator clawback mechanism.

The infrastructure must be made available to interested users on an open, transparent and non-discriminatory basis and the price charged for the use or the sale of the infrastructure must correspond to market price.

Any concession or other entrustment to a third party to operate the infrastructure shall be assigned on an open, transparent and non-discriminatory basis, having due regard to the applicable procurement rules – so the operator must be procured. Again, this reflects the German incubator decision.

What now?

The new GBER has, as they say, been eagerly awaited, with numerous proposals having been on hold until it was possible to use the new exemptions. Part of the deal under the state aid modernisation programme has always been to provide greater flexibility to member states to provide 'good aid' and reduce the administrative demands on the Commission accordingly. That said, the quid pro quo is that there is likely to be a greater risk of investigation by the Commission where there are suspicions of illegal state aid – and it's certainly the case that there are more administrative requirements on member states to ensure that there's a proper audit trail. An example of this is the more detailed requirements around demonstrating that aid granted does actually have an incentive effect on the recipient's behaviour. There are also new requirements to publish details of aid above set levels.

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So, the key message is to take advantage of the new exemptions and the wider range applicable to the old ones – but make sure that all the hoops are jumped through when doing so.

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Judicial review – 'totally without merit'

A note on procedure and interpretation in the judicial review context

Since 1 July 2013 applications for permission to proceed to judicial review can be declared 'totally without merit' thereby denying the claimant a right to an oral renewal hearing.

To local authorities faced with judicial review claims which may be considered not only to have no reasonable prospect of success, but also to be frivolous or unmeritorious the amendment to the rules can be a useful weapon in their armoury. For claimants these provisions are an obvious concern.

Almost a year after the new provisions came into effect and in light of recent clarification from the Court of Appeal it is worth local authorities reviewing this potentially very useful and important provision.

The changes

The changes came as a result of the 'Judicial Review: Proposals for Reform' consultation paper. The stated aims of the various proposals for reform were:

- discourage potential claimants from bringing weak, frivolous or unmeritorious claims
- ensure claims are brought quickly
- prevent progression of weak cases early on.

The amendments were introduced by the Civil Procedure (Amendments No. 4) Rules 2013 (SI 2012/1412) and came into effect on 1 July 2013. Rule 54.12(7) states that *"where the court refuses permission to proceed and records the fact that the application is totally without merit in accordance with rule 23.12, the claimant may not request that decision to be reconsidered at a hearing"*. The claimant's right to have an application for permission reconsidered orally is therefore removed where a judge certifies an application for permission as 'totally without merit'.

Meaning of 'totally without merit'

The meaning of the phrase 'totally without merit' was considered in the unreported Court of Appeal case of R (on the application of Grace) v Secretary of State for the Home Department on 9 June 2014. The Court of Appeal was required to give guidance on the meaning of the phrase in the context of Rule 54.12(7).

The case related to a Jamaican national who had remained in the UK unlawfully for 10 years before applying for leave to remain. On refusal of her application the claimant applied for permission to judicial review that decision. On consideration of the papers the claim was judged to be totally without merit. Permission was granted to appeal to the Court of Appeal to provide guidance on the meaning of the phrase.

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The claimant contended that since the certification of the claim as 'totally without merit' denied a non-abusive or non-vexatious claimant the opportunity to make oral submissions, the phrase had to be given a strict meaning. The claimant further submitted that a claim should not be classified as totally without merit unless it was so hopeless or misconceived that a civil restraint order would be justified if a similar claim was repeated.

The Court of Appeal disagreed and held that Rule 54.12(7) was not expressly linked to civil restraint orders or multiple applications. The provision does have the effect of refusing permission even before an application had ever been pursued to an oral hearing in spite of the fact that oral advocacy was able to add persuasiveness to a case. The court however considered the purpose of Rule 54.12(7) which it held was not simply to prevent repetitive applications but to confront the exponential growth in judicial review applications and a significant number of hopeless applications that had caused trouble to public authorities, the Administrative Court and the Upper Tribunal.

It was held that the meaning of 'totally without merit' was simply 'bound to fail'. To afford the phrase any stricter meaning as submitted by the claimant would be to frustrate the purpose of Rule 54.12(7).

The court confirmed that this interpretation neither detracted from the constitutional importance of judicial review jurisdiction nor was it inconsistent with the overriding objective, for two key reasons:

1. No judge would certify that an application was totally without merit unless he was confident that the case was truly bound to fail.
2. There was the possibility of appeal to the Court of Appeal.

If a local authority is of the opinion that a matter is 'bound to fail' it should therefore consider making an application to the court relating to Rule 54.12(7).

Making an application

A defendant local authority is not required to make a separate application in this regard. Simply stating Rule 54.12(7) and requesting the court record that the application is totally without merit within the summary grounds of defence is sufficient.

Effect of a 'totally without merit' certification

If successful the Order refusing permission will record that *"by virtue of CPR 54.12(7) the claimant may not request that the decision to refuse permission be reconsidered at a hearing"*, or words to that effect. This may discourage a claimant from proceeding further with the claim for judicial review, however it is certainly not the end of the line should they wish to pursue the matter further. As stated above Rule

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52.15(1A) has been amended providing for the possibility of appeal to the Court of Appeal where an application for permission to proceed to judicial review has been recorded as 'totally without merit'.

Rule 52.15(1A) states:

> *(1A) Where permission to apply for judicial review of a decision of the Upper Tribunal has been refused by the High Court or where permission to apply for judicial review has been refused and recorded as totally without merit in accordance with rule 23.12 –*
>
> *(a) the applicant may apply to the Court of Appeal for permission to appeal;*
>
> *(b) the application will be determined on paper without an oral hearing. [Emphasis added.]*

Such an application must be made *"within 7 days of the decision of the High Court to refuse to give permission to apply for judicial review"* in accordance with Rule 52.15(3).

Unlike a claimant who has already received an oral renewal hearing who applies for permission to appeal refusal of permission, a claimant whose application has been recorded as 'totally without merit' may only have their application considered on the papers and not at an oral hearing.

If the claimant is refused permission to appeal on the papers they can proceed no further. The case of R (on the application of Parekh) v Upper Tribunal (Immigration and Asylum Chamber) [2013] EWCA Civ 679 confirmed that Rule 52.12(1A) excluded the right to renew an application given in Rule 52.3(4). Whilst this case was decided on Rule 52.15(1A) as drafted prior to the 1 July 2013 amendments, the principle applies equally to the provision as amended.

If permission to appeal is granted the claimant may then proceed to an oral hearing of their appeal of the decision of the court. The Court of Appeal is not able to automatically grant permission to proceed to judicial review on consideration of the papers. Rule 52.15(3) provides that on an application under Rule 52.15(1) the Court of Appeal may give permission to apply for judicial review rather than permission to appeal. Rule 52.15(1) applies only to appeals following an oral renewal hearing at which permission to proceed to judicial review was refused. It does not apply to consideration of an application for permission to appeal under Rule 52.15(1A).

It is unclear from the CPR whether on consideration of the appeal itself, if permission is granted, the Court of Appeal can make a decision granting permission to proceed to judicial review however it is likely that this is the case. Were this not the case, the Court of Appeal would simply make a decision as to whether the matter is 'totally without merit' thereby passing the matter back to the High Court to decide at an oral renewal hearing whether permission should be granted. Practically this seems illogical.

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Conclusions

The possibility of an application being recorded as 'totally without merit' is certainly a useful tool for defendant local authorities. It requires a claimant to potentially have to overcome two applications on the papers before being able to make oral submissions, which it is recognised are often more persuasive.

Whilst local authorities may previously have chosen not to attend oral renewal hearings where it was considered that a claim was 'bound to fail', they now have the opportunity of achieving a stronger position with a lower risk factor. Alternatively where local authorities may previously have attended oral renewal hearings, thereby incurring costs which it were unlikely to recover even if successful, they can potentially avoid such costs altogether.

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legitimate expectation of a planning contribution?

The case of R (on the application of Leicestershire Police and Crime Commissioner) v Blaby DC and Hallam Land Management Ltd [2014] EWHC 1719 (Admin) is ostensibly a case about whether or not a public office holder can have a legitimate expectation that the local planning authority (LPA) will consult them when deciding on the timing of payment of planning contributions. However, it is also an informal confirmation that contributions for blue light services are lawful (something which was hardly in doubt but had not been tested) and that the question of amount and timing of payments is one for the LPA alone, regardless of the views of others.

The development in question involved the creation of 4,250 homes and a district centre, placing increased burdens on services. The Commissioner entered into prolonged discussions with the local authority and stressed the importance of early payment of funding for police resources as the development progressed. Ultimately the final version of the 106 agreement was settled at meetings at which the commissioner was not represented.

Although the amount of the contributions required within the agreement for police services was at the level requested by the police, there were two issues with the final form of the agreement from the police perspective. Firstly, the equipment payment was payable only after a proportion of the development was constructed, whereas the police wanted the payment at the commencement of development. Secondly, the contribution for premises was drafted in a way which prescribed that it was only payable if the owner the council agreed at that time that it was necessary, or if it was determined that it was necessary through a mechanism set out in the agreement.

The Police Commissioner advanced four grounds of claim. Dealing with each in turn:

Ground one was essentially an irrationality argument, along the lines that the council acted irrationally in failing to secure ‘adequate and timely’ contributions towards policing. The ground was given short shrift by the court and the other parties. However, the judge did disagree in fairly strong terms with the defendants contention that the action by the Commissioner was a ‘quibble against a minor factor’. The statements made will no doubt be used by providers of ‘blue light’ services to forcefully argue that the contributions they seek are of significant importance and should be afforded suitable priority and precedence when negotiating planning contributions.

Ground two was an argument to the effect that as the delegation to officers from the planning committee was to the effect that they were required to secure the contributions set out in the officers report, the failure to definitely support the premises contribution required the matter to be taken back to committee.

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The court found that the delegation was in sufficiently wide terms to mean that this was not required. The delegation was to the effect that 'the precise terms of this contribution are to be settled by further negotiation'.

The third ground was the one that apparently had most prospects of being successful, and was the legitimate expectation argument. The argument was to the effect that as the LPA had engaged in reasonably extensive discussions with the Commissioner about the contributions, the Commissioner had a legitimate expectation that the LPA would consult the Commissioner on the level and timing of the final contributions. The judge accepted that dealing of this kind between parties in these circumstances may give rise to a legitimate expectation of the kind argued for. However, he concluded in this case that the course of dealings did not constitute the required 'clear and unambiguous' representation required in cases of legitimate expectation.

Accordingly, this is something for LPAs to be aware of. They need to ensure that when engaging in discussions with possible recipients of contributions that they do not give clear and unambiguous guarantees that the recipient will be consulted and/or will have a say over the final wording used (unless of course, that is the intention).

The fourth ground was an argument to the effect that by failing to place travelling drafts of the 106 agreement on the planning file, the council had breached article 36 of the Town and Country Planning (Development Management Procedure) (England) Order 2010. The judge did not reach a firm conclusion on this point given that there was no evidence that the claimant had checked the file prior to issue of the planning permission, however, he did indicate that he found it hard to find any such requirement within article 36.

In conclusion, the case does not make any significant changes to the law, but it does emphasise a number of points for LPAs as follows:

1. Contributions for blue light services are regarded as important by the public and should not be regarded as minor matters by developers or the LPA.

2. As long as delegations to officers from planning committee are sufficiently widely drafted, even including wording which does not guarantee that the contribution will be paid does not require a return of the matter to planning committee.

3. A course of dealings with recipients of planning contributions may give rise to a legitimate expectation that they will be consulted on the final terms of such planning contributions if a 'clear and unequivocal' guarantee is provided (either through a course of dealing or directly).

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4. It is unlikely that there exists a requirement to place travelling drafts of section 106 agreements on the planning file.

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LEPs in the spotlight

Local enterprise partnerships (LEPs) have had a rough time of it recently, being pressured from both sides: Central Government has been demanding more 'shovel-ready' projects as part of LEPs' Strategic Economic Plans (SEPs), and local authorities have been vocalising their concerns about a lack of accountability.

Following Lord Heseltine's report 'In Pursuit of Growth: No Stone Unturned' the Government reiterated its commitment to more devolution of power and money from Whitehall to a local level. The Government didn't go as far as Lord Heseltine suggested by putting more than £70 billion into a pot for local spend, but it did decide to put an initial £2 billion into the Local Growth Fund (LGF) for the year 15/16. While the Government promised that every LEP would get something from the LGF, the distribution of funding will be based on the proposals set out in each LEP's SEP (a most confusing set of acronyms!).

SEPs

So, LEPs set about drafting their SEPs, to then be negotiated with Whitehall. The main aim for all LEPs is to achieve sustainable economic growth for their areas, which inevitably means long term projects. However, due (at least in part, one suspects) to a general election next year, the Government clearly wants to know that the funding will produce quick and visible results. This resulted in LEPs being asked in April of this year to prioritise 'shovel-ready' projects. This request has been criticised by some of those involved in LEPs because they see it as leading to certain types of projects being put on the back burner, one example given is that of investment in the creative industries which tends to take longer to yield results.

It is not impossible to understand such a request from Whitehall, particularly given recent reports that a large amount of the Regional Growth Fund that passed to entities such as LEPs to then further distribute at a local level has yet to be spent and is sitting with the intermediaries. Central Government may be nervous that the LGF will suffer the same fate unless some stricter guidelines on spending timescales are put in place. But it does mean that one question remains unanswerable at the moment: can LEPs improve the economic stability of their areas in ways which local authorities on their own cannot?

The answer should be a resounding yes, when you look at the benefits that good collaborative working brings. However, a recent report by the Institute for Public Policy Research (IPPR) North has concluded that a large number of draft SEPs do not show evidence of having 'economic resilience' at the heart of their proposals. The report gives various definitions of economic resilience but they have a common theme of it being more than simply hard economic growth such as increased business turnover, but being linked to social and environmental sustainability as well. This is something that, historically, local authorities have done

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very well. The report acknowledges that LEPs didn't have economic resilience in one of its classic forms as part of their agenda but it does suggest that there are some 'LEP specific' themes which should be at the heart of a good SEP. These are:

1. Responsible business;
2. Investment and local resource flows;
3. Integration and a responsive public sector;
4. Engagement and accountability; and
5. Environmental sustainability.

Together, these should allow economies to withstand another financial meltdown. The report concludes that while many SEPs make references to most of the above, only a small number address them in detail and look at how to really protect their areas against another recession.

The localism agenda

"From their creation, LEPs have attracted both praise and criticism from local government. Clear success stories and a welcome localist theme have been balanced by scepticism regarding the effectiveness of some arrangements and their accountability to local people."

So said a report by the County Councils Network (CCN) in April 2014. Both before and after this report, there have been murmurings from a number of, particularly small, local authorities that they do not feel that they have any real influence over the decisions made by their local LEP.

Most LEPs have direct representation from the larger county or unitary authorities in their area but often the district councils are represented either through the county or through a single attendee on behalf of all districts. This can mean that the level of local authority participation is considerably less than that of the private or further education sectors, for example.

The recent survey by CCN, which interviewed leaders of 20 county councils, shows that local authorities do see the benefit in LEPs, particularly in delivering projects which overlap different local authority areas. It is clear that there are good results to be achieved from undertaking more project planning in partnership with the private sector when it allows the needs of both the public and private sectors to be acknowledged and developed together.

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The criticisms mainly focus on:

- the lack of financial resources for LEPs and the fact that local authorities still bore the brunt of additional costs

- the lack of accountability of decision-making within LEPs. It will be interesting to see the outcome of the first round of LGF and whether LEPs will be required to have greater transparency and reasoning within their decisions. Interestingly, those LEPs which have received funding so far, have used one or more of their local authority partners as the accountable body for the funding and the internal protocols of local government require a much greater degree of transparent decision-making in any event

- the low levels of local government influence in comparison to the role that they play. The fact that LEPs are chaired by a representative from and have a focus on increasing output in the private sector, has at times led to local authorities' needs being put into second place. When local authorities are focussed on the general economic improvement of their areas, including growth in the private sector as a way of increasing employment and income, they will often be able to bring the broader view which is so important for economic resilience, as identified in the IPPR report.

Conclusion

It is clear that the two issues looked at here are not isolated from each other. For LEPs to be able to maximise their discussions with government and to put forward plans which will allow them to hit both the 'shovel-ready' requirements and build economic resilience, the involvement of local government, at all levels, is key. The private and public sectors both have their strengths which are often complimentary and it is only with a more equal balance of power between the two that LEPs will realise their full potential.

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Public procurement concerns the purchase of supplies, services or works by the public sector. The existing European Union (EU) public procurement regime has been implemented in the UK by the Public Contracts Regulations 2006 and it applies to 'contracting authorities' as defined in the Regulations.

On 17 April 2014, a new EU public procurement directive ('Directive') was adopted by the European Commission and came into force. All EU member states must implement the new directive into national law within two years of the date of adoption, although the UK Government is moving much quicker than this. The Cabinet Office intends to consult on draft regulations over the next few months. Once the new regulations come into force, they will replace the existing Public Contracts Regulations 2006. The Cabinet Office has announced that it intends to use the 'copy-out' method for transposing the Directive into national law, which means that it intends to largely replicate the drafting in the Directive when drafting the new regulations. It also intends to follow the structure and sequential order of the Directive.

The main purpose of the EU public procurement regime is to open up the public procurement market to competition and ensure the free movement of supplies, services and works within the EU. The EU rules reflect and reinforce the value for money focus of the UK Government's public procurement policy. The Directive is intended to simplify the public procurement regime, make it more flexible and improve efficiency in public spending. It is also intended to allow the strategic use of public procurement to address new challenges, for example, fostering innovation, increasing access for SMEs, respecting the environment, and achieving other societal goals.

We explore the main aspects of the Directive below. Once the draft regulations are published by the Cabinet Office we shall be providing a more thorough analysis.

Engaging with the market pre-procurement

Contracting authorities have traditionally been nervous about engaging with the market prior to commencing a procurement process. This is in large part due to the uncertainty around the extent to which this is permissible under the existing regime. The Directive seeks to clarify this area of the law. It provides that market consultations are permitted to assist the 'preparation of procurement' and to inform economic operators of 'procurement plans and requirements'. Contracting authorities may seek advice from, for example, independent experts, authorities or market participants 'provided such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency'. In particular, the contracting authority must take appropriate measures to ensure that

competition is not distorted where a bidder or an undertaking relating to that bidder has advised the authority or otherwise been involved in the preparation of the procurement procedure.

This provides helpful clarification that direct engagement with individual market participants is permissible before going out to procurement providing certain safeguards are put in place. It ties in with recent attempts by the Cabinet Office to encourage pre-procurement market engagement. For some good examples of market engagement exercises see the Cabinet Office's Procurement Policy Note 04/12.

New rules on contract award procedures

Under the current rules, the open and restricted procedures (the most commonly used procedures for straightforward procurements) are freely available. The competitive dialogue procedure is available for 'particularly complex contracts' so long as certain strict conditions are satisfied and the use of the open or restricted procedures would not allow the award of the contract. Lastly, under the existing rules the negotiated procedure should only be used in 'exceptional circumstances' where a separate set of strict conditions are satisfied.

Under the Directive, all of these procedures have been retained but with some changes and a new 'innovation partnership' procedure has been introduced. The minimum timescales that apply to each procedure have also been reduced by about a third.

The open and restricted procedures continue to be freely available but with reduced timescales and there is a new accelerated open procedure which can be used by contracting authorities in cases of urgency. This means that where a contracting authority can duly substantiate a state of urgency which renders impracticable the normal time limit, it can reduce the period for receipt of tenders to a minimum of 15 days.

The conditions that must be met for using the competitive dialogue and negotiated procedures are now the same and have been relaxed. They can arguably be used going forward for anything that is not 'off the shelf'. The Directive acknowledges the need to provide for wider access to negotiations when running a procurement process and therefore leaves it up to contracting authorities to decide which procedure to use. The new competitive dialogue procedure expressly allows for negotiations with the preferred bidder providing no material changes to the contract are made. Interestingly, the negotiated procedure does not expressly permit post-tender negotiations so query whether the competitive dialogue procedure will become the procedure of choice for complex procurements going forward. Various safeguards have been added to the negotiated procedure to make it more structured and formalised compared to the current rules.

There is also to be a more flexible procedural regime for sub-central contracting authorities (non-central government bodies) which the UK Government intends to take full advantage of. These authorities will be

able to use a PIN as a call for competition in restricted and negotiated procedures provided certain conditions met (type and timing of PIN and start of tender process) and can limit the competition for contracts covered by the PIN only to those who expressed an interest in the PIN. Also, when using the restricted procedure, such authorities will be able to agree to the time limit for receipt of tenders with bidders (there being a default period of 10 days where no agreement is made).

No more Part A and Part B services

The existing rules set out an exhaustive list of Part A services which are subject to the full rigour of the EU rules and a non-exhaustive list of Part B services that are subject to the EU rules only to a limited extent. Most importantly, the existing directive does not impose a duty to advertise Part B services contracts. A duty to advertise such contracts can only arise under the general Treaty principles where the contract is of 'certain cross border interest'.

The new Directive provides that all services over the applicable EU financial thresholds will be subject to the full rigour of rules unless they fall within the list of services at Annex XVI of the Directive. These concern social, health, education, and certain other services (note that the list is not identical to that which currently falls under the Part B services category in the existing rules).

A special light-touch regime will apply to contracts for Annex XVI services with a value over €750,000. Whilst there will be a requirement to publish an Official Journal of the European Union (OJEU) Notice to advertise such contracts, no detailed procedures or time limits are specified in the directive. The UK Government is required to put in place national rules for the award of these contracts to ensure compliance with equal treatment and transparency principles. It intends to follow this light-touch approach leaving it up to contracting authorities to decide what procedure to run.

Public-public contracts

The Directive clarifies the circumstances in which a contract awarded by a contracting authority to another legal person will genuinely be an 'in-house' award and will not fall within the scope of the Directive. It does this by codifying the 'Teckal' line of case law with some additions. A contract between a contracting authority and another legal person will fall outside the scope of the Directive where:

- the contracting authority exercises over the legal person concerned a control similar to that which it exercises over its own departments (need to demonstrate a decisive influence over both strategic objectives and significant decisions of controlled legal person)

- more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority

- there is no direct private capital participation in the controlled legal person.

The Directive permits Teckal to apply in reverse allowing the controlled body to award public contacts to the controlling body and also horizontally between two controlled bodies.

The Directive also sets out the conditions that must be met to take advantage of the 'inter-authority cooperation' exemption which derives from the Commission v Germany line of case law. This allows contracting authorities to cooperate in carrying out jointly their public service tasks where the arrangement is governed solely by considerations in the public interest without the participation of a private sector party. A contract will be exempt where it is concluded exclusively between two or more contracting authorities where:

- the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common

- the implementation of that cooperation is governed solely by considerations relating to the public interest

- the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

Contracts reserved for mutuals

The mutualisation agenda has been given very high priority by the UK Government. The Cabinet Office has developed a number of support tools for mutuals and has launched various mutual pathfinder projects. The essential features of a mutual are:

- employees have ownership rights or a high level of input into the management and governance of the organisation

- the main aim of the organisation is to provide services for the public good rather than making profit for individuals

- at least some of the profits are reinvested into the organisation to improve service delivery.

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There is no explicit exclusion for awarding contracts to mutuals under the current regime. However, the Directive allows certain qualifying services (broadly health, social, cultural and linked administrative services) to be reserved for mutuals that meet the certain cumulative conditions.

To qualify to participate in the reserved competition, the mutual cannot have been awarded a contract for the same services by the same contracting authority within the last three years. The maximum term of the contract to be awarded cannot exceed three years either. There will still be a requirement to advertise such contracts in the Official Journal (OJEU) where the contract value exceeds the relevant EU financial threshold (note that the higher threshold of €750,000 is likely to apply for these types of contract).

Selection criteria

The Directive expands upon the list of mandatory exclusion grounds by adding convictions for child labour and other human trafficking offences and failure to pay taxes and social security contributions where this has been established by a binding legal decision.

It also introduces new discretionary exclusion grounds such as where a bidder 'has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract…which led to early termination of that prior contract, damages or other comparable sanctions'. A bidder can also be excluded where it has undertaken 'to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award'. With regard to non-payment of taxes, it is interesting to note that where a binding legal decision is not in place, a bidder may still be excluded if the contracting authority can demonstrate by other appropriate means that a bidder is in breach of its tax payment obligations. Will contracting authorities be confident enough to exercise this discretion without a binding legal decision in place?

Under the new regime contracting authorities must consider mitigating circumstances allowing bidders to avoid exclusion, including exclusion on mandatory grounds, where sufficient measures have been put in place by the bidder concerned to demonstrate its reliability. These measures must be evaluated 'taking into account the gravity and particular circumstances of the criminal offence or misconduct'. The Directive also introduces maximum periods of exclusion (five years for mandatory exclusion cases and three years for discretionary exclusion cases).

As for selection criteria more generally, the main categories of technical and professional ability and economic and financial standing have been retained. With regard to the latter, contracting authorities will not be able to impose a turnover requirement that exceeds twice the estimated contract value except in

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duly justified cases because of the specific risks involved. For all selection criteria, it is clarified that any requirements must be related and proportionate to the subject matter of the contract.

Award criteria

The award of all public contracts must now be to the most economically advantageous tender identified on basis of either 'price' or 'cost' using a 'cost-effectiveness' approach e.g. life-cycle costing.

There is an expanded non-exhaustive list of award criteria which includes reference to qualitative, environmental and social criteria and innovative characteristics. As for selection criteria, it is clarified that the award criteria must be linked to the subject matter of the contract. This may include factors relating to the production process, trading or a specific process for another stage of the life-cycle.

The Directive puts to rest the Lianakis debate concerning whether 'experience' can ever be used as an award criterion. It provides that award criteria may comprise 'organisation, qualification and experience of staff assigned to performing the contract where the quality of the staff employed can significantly impact the level of performance of the contract'.

Changes to existing contracts

The issue of when a change to a public contract is a 'material' one triggering a duty to re-advertise the contract is a constant bugbear for contracting authorities. The Directive codifies many of the different principles that arise out of the case law and provides much more certainty in some areas. All of the principles set out in the commonly cited Pressetext case have been included and a few specific exemptions are set out.

The new Directive provides that a new procurement is required only if a contract modification is substantial and sets out four cases in which a modification is deemed to be substantial i.e. where the change:

- would have allowed for the admission of other candidates/acceptance of another offer or would have attracted additional participants in the original procurement
- alters the economic balance of the contract in favour of contractor
- considerably extends the scope of the contract.

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The Directive provides the following safe harbours so that if the change falls within any of them, it will be permitted:

- where the modifications, irrespective of their monetary value, have been provided for in the initial tender documents in a clear, precise and unequivocal review clause/option

- where additional works, services or supplies by original contractor have become necessary and change in contractor cannot be made for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs for the contracting authority (any increase in price must be limited to 50% of original contract value – applies to each successive modification)

- where the modification is required due to unforeseen circumstances, the modification does not alter the overall nature of the contract and any increase in price is limited to 50% of original contract value

- there is a replacement of the contractor due to the exercise of a review clause/option or to universal or partial succession following corporate restructuring providing the original PQQ criteria still fulfilled and no other substantial modifications are made

- where the value of the modification is (a) below the EU financial thresholds; (b) below 10% of the original contract value for service and supply contracts and below 15% of the original contract value for works contracts; and (c) does not alter the overall nature of the contract.

This is another example of where the Directive has tried to codify the existing law. However, it only captures a snapshot of the case law as it currently stands. The courts have applied many different tests to assess whether a change is material. This is because quite often, none of the existing tests that have been developed are relevant to the particular facts of the case before the court. Contracting authorities should be mindful that further refinements of and additions to the material change tests are likely to be developed by the courts going forward. The case law will still be very relevant therefore.

SMEs

The new Directive includes various new initiatives aimed at increasing SME access to public procurement.

It is proposed to put in place a 'European Single Procurement Document' which can be used to self-declare that an entity meets certain selection criteria and none of the exclusion grounds apply. This is to prevent SMEs being required to provide certificates and other documents at the outset (although the contracting authority may still request certificates or other documents at any later stage of the process).

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Contracting authorities will be invited to divide public contracts into lots or else will need to provide a specific explanation to bidders as to why lots are not being used. It will also possible to limit the number of lots that a bidder can tender for and the number of lots that can be awarded to any one bidder.

The current directive does not really address subcontracting issues in any substantive way. The Directive contains a number of provisions in relation to subcontracting. For example, it is envisaged that direct payments to subcontractors can be requested by the subcontractor where the nature of the contract allows.

Framework agreements and dynamic purchasing systems (DPS)

The Directive clarifies rather than changes the existing rules on framework agreements. It is clarified that contracting authorities are to be clearly identified in the call for competition. It is also clarified that a multi-supplier framework agreement may provide for both direct call-offs and mini-competitions provided this is set out in the tender documents. The choice of call-off route actually used must be based on 'objective criteria'.

The DPS provisions have been revised to make them much more user friendly. Suppliers no longer have to submit an indicative tender to be admitted to the DPS. They must simply satisfy the specified selection criteria to be admitted to the DPS and the contracting authority only has to invite the list of pre-qualified suppliers to tender for specific contracts (it does not have to issue another OJEU Notice as under the current regime). This is a helpful simplification that should make a DPS a more attractive option moving forward.

E-procurement

Finally, the Directive is intended to further the Commission's objectives in relation to the use of electronic procurement across the EU.

Contracting authorities are to offer unrestricted and full direct access free of charge by electronic means to the procurement documents from the date of publication of the contract notice. It is not yet clear whether all procurement documents need to be made available at the outset of the procurement and it is hoped that some clarification is offered by the Cabinet Office in this respect.

All notices will be required to be transmitted electronically and contracting authorities must in due course allow electronic submission of tenders and requests to participate (there will be an extended transition period for such requirement – until October 2018 for most contracting authorities).

There are some exceptions to the mandatory use of electronic communications e.g. where it would require specialised tools or file formats not generally available in all member states or where there are specified legitimate reasons not to request electronic means of communication.

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We hope you find this brief guide helpful. Watch out for our further more detailed analyses of the new procurement regime in the next few months.

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