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Does section 54 apply to local authorities?

There has recently been much discussion about s.54 of the Modern Slavery Act 2015 (MSA) and its impact on businesses, but little guidance to date on whether it applies to local authorities and other public bodies. S.54 is intended to combat 'modern slavery' - human trafficking, slavery, servitude and forced or compulsory labour- in certain organisations and their supply chains.

Commercial organisations, as defined (see below), which supply goods or services in the UK and have, with any subsidiary, an annual turnover of £36 million or more (less trade discounts, VAT and any other taxes on the income from goods and services) must publish a slavery and human trafficking statement in respect of each financial year. This must set out the steps taken during the financial year to ensure that modern slavery is not taking place in any part of its own business or in any of its supply chains.

The statement may include information about:

- its policies relating to slavery and human trafficking
- its structure, business model and supply chains
- the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk
- its effectiveness in ensuring that slavery and human trafficking is not taking place in its businesses or supply chains, measured against appropriate key performance indicators
- its due diligence processes in relation to slavery and human trafficking in its business and supply chain (this should be proportionate to the identified risk, the severity of the risk and should be informed by any wider risk assessments that have been conducted)
- the training about slavery and human trafficking available to its staff.

Does s.54 of the MSA apply to local authorities?

For the purposes of the MSA, *"commercial organisation"* means a body corporate or partnership which carries on a business or part of a business in any part of the UK. *"Business"* includes a trade or profession, but does not expressly include or exclude local authorities -which are bodies corporate but not naturally described as *"carrying on a business"*.

Government guidance 'Transparency in Supply Chains' (Guidance) provides that *"the Government expects that whether such a body or partnership can be said to be carrying on a business will be answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means) or is a partnership, it does not matter if it pursues primarily charitable or educational aims or*

purely public functions. The organisation will be caught if it engages in commercial activities and has a turnover of £36m, irrespective of the purpose for which profits are made."

Local authorities regularly supply goods and services, and many have trading companies which do the same. The Guidance therefore suggests that where a local authority engages in commercial activities, even if it only does so for the purposes of reinvesting profits in the local area, it could be caught by the requirements of s.54 of the MSA if it meets the turnover threshold. This is not expressly stated in the MSA or the Guidance, and therefore a note of caution should be exercised. But, read together, the two documents appear to indicate that local authorities should be producing and publishing statements in accordance with the MSA if they otherwise fulfil the above criteria.

MSA and procurement processes

It is also, for local authorities and other public bodies which are contracting authorities for the purposes of the Public Contracts Regulations 2015 (Regulations), worth noting that the Regulations have been amended. They now provide that organisations in breach of sections 1,2 or 4 of the MSA (which make it an offence to hold people in slavery, forced labour or servitude; or to carry out human trafficking, and related offences) must be excluded from procurement processes conducted under the Regulations (Regulation 57(1)).

Read the Guidance here.
Read our legal update for commercial organisations.
Read our legal update 'Are you ready for the Modern Slavery Act 2015?'

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The European Court of Justice (ECJ) has recently considered state aid in the context of sales of land by public authorities. The principles reaffirmed by the ECJ may be useful to public bodies considering land sales.

State aid

As many of our readers will be aware, state aid regulation is part of the EU competition regime and is intended to prevent public bodies from using public funding in a way which mayadvantage undertakings in one EU member state as compared to those in others. State Aid itself is defined in Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) as *"any aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States"*.

In order to be considered state aid, a particular measure must meet all of the below criteria:

- it is granted by the state or through state resources
- it favours certain undertakings or the production of certain goods
- it distorts or threatens to distort competition
- it affects or is able to affect trade between member states.

Any measure which meets the above criteria will be state aid. There are usually a number of steps that can be taken to avoid the granting of illegal aid provided that the authority realises that state aid is an issue, but often it is missed. The sale of land is a key area for such issues to arise. This is because the sale of land at an undervalue by a public body has the potential to meet the criteria set out above.

Case law

In July 2015, the ECJ delivered its judgment in the case of BVVG Bodenverwertungs –und -verwaltungs GmbH v Landkreis Jerichower Land[1]. The facts of the case are complicated and are not required in order to examine the relevant principles, so we have not repeated them here. The case arose from a dispute in relation to a sale of agricultural land following a public tendering process. A challenge was made against the sale under a German law allowing challenge to the sale of land, at the value identified following an open procurement process (the 'open market value'), if the open market value was grossly disproportionate to the 'agricultural market value'.

The following question was referred to the ECJ – does the prohibition on state aid, referred to above, conflict with this national rule which potentially requires sale of land at less than market value?

[1] Case C-39/14

The ECJ considered that, in principle, a sale in compliance with the relevant German law could be state aid provided that, in the particular case, all of the conditions for this were satisfied[2]. The court therefore considered that, where a national law establishes rules for the calculation of market value, those rules must result in a value which is as close as possible to the true market value and that the existence of such rules will not, in themselves, prevent a finding of state aid. In this particular case the ECJ also held specifically that the justification for the law (which was implemented in order to protect farmers from paying high prices for new land which might endanger the profitability of their farms) was not of itself sufficient to exclude the measure from being state aid.

Public bodies may find it useful to note the guidance which the ECJ gave on how market value may be calculated. It advised that there are a number of methods which may be used to establish market value, such as selling to the highest bidder, or obtaining an expert report, although the court recognised that these are not the only methods. In respect of sales to the highest bidder, the court considered that where an open, transparent and unconditional bidding procedure takes place, it may be presumed that the market price corresponds to the highest offer, providing that the offer is binding and credible, and that it is not necessary to take into consideration economic factors other than price. In such circumstances, the public body is not obliged to take other steps to check the market price, such as obtaining experts reports[3]. However, caution should be exercised here. This decision does not mean that the carrying out of a bidding process means that the market value will automatically be established. Where other factors would impact on the value that is achieved, these will be taken into account when considering whether the particular measure amounts to state aid. For example, where a sale must be negotiated with extreme haste, this may result in a bid being received which is lower than the true market value had a more 'usual' period of time been permitted for the sale.

The key points to note from this decision are that:

1. Sales of land at below market value have the potential to be state aid, regardless of whether they are permitted by national law. Therefore, public bodies cannot rely on compliance with a consent under s.123 of the Local Government Act 1972 to ensure compliance with state aid law, which should be considered in parallel.
2. Where an open, transparent and unconditional bidding process takes place, and there are no other factors which might have a bearing on whether market price is established, public bodies can assume that the highest bid corresponds to market price without carrying out further investigations as to whether market price has been achieved by the bidding process. Where there are other factors at play (such as urgency), public bodies should consider obtaining further evidence to establish whether the highest bid is market price.

[2] Banco Privado Protugues and Massa Insolvente do Banco Privado Protugues, Case C-667/13
[3] Land Burgenland and Others v Commission, Case C-214/12

3. Bidding processes and experts' reports are accepted by the ECJ as being valid processes for establishing market value, but it is accepted that there may be other methods which are also appropriate.

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Introduction

Lord Justice Jackson in his report highlighted that many elements of litigation such as disclosure and witness statements can become disproportionately expensive.

It is with this in mind that the Rolls Building courts have piloted two schemes: The Shorter Trial Procedure (STP) and the Flexible Trial Procedure (FTP). This article seeks to give an overview of the schemes.

Background

In the autumn of 2014 four judges (Mr Justices Hamblen, Edwards Stuart, Birss and Jay) were instructed by to investigate possible procedures which could be adopted to achieve a shorter, more flexible litigation procedure. The committee met on several occasions and prepared two pilot schemes: Shorter Trial Procedure (STP) and the Flexible Trial procedure (FTP) for claims brought in the Rolls Building courts including the Commercial Court, the Chancery Division and the Technology and Construction Court. Met with much positive feedback, both of these schemes are governed by the new Practice Direction 51N and will last for a period of two years (which commenced on October 1 2015). It is expected that these procedures will be adopted by both claimants and defendants and will help to reduce costs and the number of claims in the high courts.

The schemes

The names of the scheme provide a clear description of how the schemes differ.
STP places the emphasis on getting through the entire proceedings as quickly as possible, and the FTP enables the parties to agree a flexible, simplified and expedited case management procedure.

The Short Trials Procedure (STP)

Aim

The procedure involves changes to the usual position under the CPR, starting at the pre-action stage. STP is for more straightforward cases that do not involve multiple issues or extensive documentary or witness evidence. Great emphasis is placed on the proceedings taking place as quickly as possible (therefore cases issued in the Rolls Building requiring a trial of less than four days including the reading time will be caught under this scheme). The key aim is to target trials listed 10 months from the issue of proceedings, with judgment six weeks thereafter.

By having designated judges and hearings dealt on paper and not orally, this will drive waiting times down.

Some of the key features of this claim include:

- every STP will be assigned a dedicated judge. This aims to provide continuity and efficiency over the management of the cases
- pre-action protocols do not apply, making the STP quick and cheaper. A party seeking to adopt the STP should send a Letter of Claim and the defendant should respond within 14 days. Although parties will still be expected to ensure that full and proper details are given in relation to claims
- submissions and evidence will be shorter and limited in length, a lot of the procedure will be on paper or over the telephone. Parties will not need to disclose as many documents and the length of the proceedings could be more than halved
- costs budgeting will not apply, unless the parties otherwise agree.

The Flexible Trial Procedure (FTP)

Aim

The FTP has no specific timetable for proceedings. It allows parties to be flexible resulting in reducing costs and obtaining an earlier trial date. The scheme is aimed particularly to provide a more relaxed trial procedure. Parties are required to issue a claim as normal and the FTP is agreed prior to the case management conference. Disclosure is limited and the FTP aims to reduce a heavy reliance on oral evidence and submissions so much so that submissions at trial are made in writing with oral submissions subjected to time limits.

Some of the key features of this scheme include:

- parties are encouraged to limit disclosure and oral evidence at trial to the mini-mum necessary to reduce costs
- FTP provides a more relaxed trial procedure
- parties can adapt the trial procedure to suit their particular case
- oral, factual and expert evidence will be limited to identified issues and witnesses.

Strengths and weaknesses

STP is a more streamlined procedure and only applicable to certain cases (therefore this should be determined from the offset which could prove difficult).

Although a positive feature is that each case has a designated judge, the STP is only possible if the courts have the capacity to hear the claim within the set period.

The STP aims to provide a heavily streamlined court procedure applicable for certain types of cases. Parties wishing to make use of the Scheme will need to determine at an early stage whether their dispute is simple

enough to be suitable for the scheme, which may prove difficult in some circumstances and may also affect the pre-action stage. The STP is also reliant on the court having sufficient capacity to hear claims within the expedited time period.

The FTP on the other hand is voluntary, has a lower level of stream lining (applying to all cases) and focuses largely on the reductions in disclosure and trial lengths.

The FTP provides a slightly lower level of streamlining applicable to all cases. The parties agree before the first CMC if to use the scheme.

The court does not have the power to enforce the FTP, however with the STP if one party is agreeable the courts can enforce this procedure. The FTP focuses mainly on reducing disclosure and the shortening of trial lengths by the reduction in oral evidence and submissions. Unlike the STP, if the parties agree to use of the scheme, the procedure can only be effected from disclosure stage onwards.

Conclusion

The two schemes are similar but not identical, and provide little clarification as to how the differences will be reflected in practice. It would appear that if the case is a straightforward one, the schemes could work, but perhaps not in a complex case.

It is clear that there are many cases that may not be suitable for either procedure. We may find that claimants may opt for the shorter trials scheme (even if not appropriate, in order to force the other side to settle).

Other litigants may avoid the STP in order to force the defendant to provide a large amount of disclosure (in the hope that supporting documents may arise to support their claim).

For appropriate cases, however, the schemes offer the chance of securing a positive outcome in a substantially shorter period of time and, critically, of avoiding costly disclosure and lengthy trial.

The committee is clearly aware of possible abuse of the new procedures and the courts have the power to apply costs sanctions to any party which acts unfairly.

We will continue to monitor the pilot and provide an update in due course.

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Who needs to use the Standardised PQQ (Pre-Qualification Questionnaire)?

Regulation 107 of the Public Contracts Regulations 2015 (the PCRs) requires contracting authorities in England, Wales and Northern Ireland to have regard to any guidance given by Cabinet Office in relation to the qualitative selection in accordance with regulations 57 to 65. These regulations relate to the selection stage, commonly known as the pre-qualification stage, with the document known as the pre-qualification questionnaire (PQQ). Guidance under regulation 107 (the Guidance) recommends that the Standardised PQQ is used for all above threshold procurements (note that Crown Commercial Service *"recommend"* that it is used, but also state that if different questions are used that this is a *"reportable deviation"*). Please note that there are certain exemption for information that is specific to Wales and Northern Ireland as set out in Regulation 107.

Regulation 105 states that chapter 7 of the PCRs (which includes regulation 107) does not apply to the procurement of health care services under the National Health Service (Procurement, Patient Choice and Competition) (no 2) Regulations 2013. Currently, no part of the PCRs apply to the procurement of the relevant health care services because of regulation 120 (this continues to apply until 18 April 2016) but it isn't clear whether the exemption under regulation 105 will continue after that date.

Below threshold procurements should not have a selection stage, and therefore will not use the Standardised PQQ. Regulation 111 does allow for *"suitability assessment questions"* only if they are relevant to the procurement and proportionate. More about this later.

Section 4 of the Standardised PQQ is only applicable to central government departments, their executive agencies and non-departmental government bodies where contracts have a value of over £5 million. This section relates to non-payment of tax or social security contributions where there has been no legally binding decision.

The open procedure

The open procedure doesn't have a separate PQQ stage. However, under the Guidance, contracting authorities are still required to use the relevant questions from the Standardised PQQ to assess that bidders meet the minimum levels of suitability. It is almost impossible simply to cut and paste the whole of the Standardised PQQ into a document so, whether for an open or other procurement process, work will have to be done to inset the relevant questions into your procurement documents.

General principles

Without reproducing the Guidance verbatim it is worth remembering the general principles on which the use of the Standardised PQQ is based. Not all of this is solely related to Cabinet Office requirements. Key is the 'self-certification' by bidder. This can be used for things such as insurance levels, policies and accounts. Eventually there will be an EU-wide 'e-certis' scheme allowing providers to upload information that can be accessed by contracting authorities to confirm details. In the meantime, contracting authorities should consider whether it is necessary to ask for information at the PQQ stage or whether it can be verified when the preferred bidder has been selected. Additionally, bidders can self-certify that they are not subject to any of the mandatory or discretionary exclusion grounds under regulation 57.

All mandatory and discretionary exclusion grounds should be used for every PQQ. However, other questions should only be used when it is proportionate and appropriate to the particular requirements of the contracting authority. This is particularly pertinent when looking at the questions in section 7 'Additional PQQ Modules', discussed in more detail below.

It is hard to imagine that several aspects of the Standardised PQQ (significant or persistent deficiencies in performance, or a substantive requirement under another contract, for example) will regularly be used to remove a bidder from a process. How can you prove that this is proportionate to the process that you are now running? How can you show that it will negatively impact the procurement process or the delivery of the contract? While there is some guidance as to what can be taken into account when looking at these discretionary grounds, it will take some time for contracting authorities to work out how they are going to play their cards. For local authorities it is easy to see how officers will be encourage by elected members to take a harsher approach than is maybe legally correct as a way of showing high ethical standards in procurements.

The Guidance does include helpful commentary on the various sections of the Standardised PQQ so we will not go over the same ground in this article.

Scoring

Neither the layout of the Standardised PQQ nor the guidance are particularly helpful when it comes to deciding how to score various sections of the Standardised PQQ. The Guidance does state that section 1 should not be scored, and states that contracting authorities must make clear to bidders the evaluation methodology and whether there are any minimum thresholds or pass/fail questions that will result in a PQQ response being deemed non-compliant even if other sections score very well.

We have now looked at a number of PQQs for clients since the PCRs have been in force and there are several things that can be looked at when deciding how to evaluate PQQ responses:

1. Are there any 'lines in the sand' that require bidders to meet minimum requirements? For example, minimum insurance levels or turnover (bearing in mind the general requirement under the PCRs to only ask for annual turnover that is twice the value of the contract). If so, these should be 'pass/fail' questions.

2. What do you need to see in terms of past experience and the expertise of the bidders? In section 6 bidders can be asked to give three examples of previous experience and contracts. How will you use this to separate the wheat from the chaff? Clearly there will need to be a scoring system. As with all scoring systems you will need to tell bidders what the possible marks are and what you will be looking for in order to award those marks.

3. How important are other accreditations and certifications? The questions in Part B of section 7 relate to insurance, health and safety, environmental management and equality legislation. In some cases it might be important to set these as minimum requirements but, where it is possible that you could accept varying degrees of accreditation or compliance, then it would be possible to have a marking system giving different scores to bidders depending on whether they are wholly or partially compliant.

4. Finally, are there any other questions relating to professional and technical ability that are not set out in the Standardised PQQ that you require? One example would be if a contract for home care services required certain accreditations by regulators. If this is the case then Part A of section 7 allows you to insert questions that are appropriate and proportionate. However, these may be deemed 'reportable deviations' that we discuss below.

We would advise setting out a table at the beginning of your PQQ document showing how each question is to be evaluated. This will allow bidders to very clearly see the overall picture.

Reportable deviations

This is Cabinet Office's way of keeping an eye on how the Standardised PQQ is being used. From 1 September 2015 any deviation from the wording in sections 1 to 6 and Part B of section 7 must be reported to Cabinet Office via the mystery shopper scheme email address. It is not clear whether this means that additional questions put into Part A of section 7 also need to be reported. In some ways, it would make sense that they do because Cabinet Office doesn't want contracting authorities to use unnecessary, disproportionate questions. On the other hand, if you genuinely need to ask additional questions then that is different from deciding that you don't like the way a question is worded and you want to change it.

The wording in the Guidance does state *"deviations in the wording from the bank of core and additional module questions"*. Obviously, your project specific questions will not be using wording that is already in the back of additional module questions. Our advice would be that such questions do not require reporting to Cabinet Office but that a good, clear audit trail of why they were used should be kept in case it was every challenged through the mystery shopper scheme or as part of a wider review of a procurement process.

What else?

The Guidance and the Standardised PQQ includes commentary on how to evaluate consortia bids and the use of subcontractors. In this addition of Public Matters you will find a separate article looking at the inclusion of subcontracts in PQQ responses. In relation to consortia, the Guidance requires all members of a consortium to complete all aspects of the PQQ. Depending on how the consortium is made up, this may not be possible or appropriate. For example, not every member maybe proposing to provide services in relation to every aspect of the requirements. In any event, it is worth considering in more detail how sensibly to evaluate the information provided across consortium bids.

The Standardised PQQ and Guidance also includes commentary in relation to self-cleaning. How that is used in practice requires an article all of its own!

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As the debate around living wage continues to be a topical issue, and with the Scottish Government recently issuing statutory guidance concerning promotion of 'fair work practices' through public procurement, we look at the recent decision of the Court of Justice of the European Union (CJEU) of RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz where the CJEU considered whether a contracting authority can exclude a tenderer from a public contract procurement exercise where they refuse to undertake to pay workers carrying out the services under the contract a minimum hourly wage.

Background

The contract in question related to postal services in the Germany municipality of Landau. The tenderer had been excluded from participating in the public procurement procedure because it had not provided a declaration, contrary to the requirements of the contract notice and despite a reminder letter, that it would pay staff a minimum wage if it was awarded the contract.

At the time of the tender there was no minimum wage in place relating to the postal services sector and there was no national minimum wage in Germany that applied generally. There was, however, a regional law established in that municipality that required tenderers of public contracts to undertake, at the time of submitting their tender, to pay the staff working under the contract a specified minimum wage. The regional law further provided that if the tenderer failed to submit such a declaration that the tenderer could be excluded from the procurement exercise.

Issues for the court to determine

The CJEU was required to make a ruling on whether the regional law was compliant with EU law particularly Article 26 of Directive 2004/18.

The CJEU ruled that the regional provision fell within the scope of Article 26 of Directive 2004/18. The CJEU found that the obligation to pay a minimum wage constituted a 'special condition' as it related to the performance of the contract and concerned social considerations. As the 'special condition' was set out in the contract notice and the specifications, the CJEU also concluded that it was consistent with the rules of transparency and non-discrimination.

The CJEU then went on to consider whether the 'special condition' was compliant with Directive 96/71 (the Posted Workers Directive), particularly the effects on undertakings outside Germany who were interested in participating in the procurement, who envisaged posting their workers in Germany, but due to the obligation to pay minimum wage made the decision not to participate.

The CJEU concluded that Article 26 of Directive 2004/18, read in conjunction with Directive 96/71 (the Posted Workers Directive), permitted the contracting authority to impose a mandatory minimum protection by means of a legislative provision applying generally to the award of public contracts for the benefit of workers posted to the territory.

The CJEU distinguished the current case from that of Rüffert, C-346/06, EU:C:2008:189 which concerned a collective agreement applying solely to the construction sector which was not declared universally applicable and which in fact set a rate of pay that exceeded the minimum rate of pay applicable to that sector under the national German law which the CJEU found could not be justified by the objective of the protection of workers.

The CJEU therefore ruled that EU law does not preclude national legislation requiring tenderers (and their subcontractors) to undertake in writing to pay a minimum wage to staff assigned to that particular public contract. It further found that it allows for the exclusion of a tenderer (or subcontractor), from the procurement procedure if it refuses to provide such an undertaking.

This ruling does not take the UK any further forward in terms of enabling contracting authorities to require, should they wish to do so and as part of the public procurement process, that tenderers pay the living wage (being above the legally mandated minimum wage) to those persons performing services under that particular contract.

In 2014 the Scottish Government sought clarification from the European Commission which confirmed that a contractual condition to pay a living wage (in the UK, the National Minimum Wage) is likely to go beyond the protection provided by EU law.

The Scottish Parliament has recently issued statutory guidance entitled 'Selection of Tenderers and Award of Contracts: Addressing Fair Work Practices including the living wage in procurement' to address fair work practices, including living wage.

The guidance acknowledges that the living wage is only one indicator of fair work practices and although it would be a *"strong negative indicator"* of an employer's commitment to fair work practices if it did not commit to the living wage it would not mean that the bidder's approach would automatically fail to meet fair work standards. Other fair work principles used in the guidance include the unnecessary use of zero hour contracts. This approach could be adopted outside of Scotland, although whether there is a current political inclination to do so in the rest of the UK is a different question.

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Supply chain

The Public Contract Regulations 2015 (PCR 2015) clarify a number of issues related to the use of subcontractors. Under the previous regulations, it was not clear as to the level of detail that could be required in relation to subcontractors and where they

The contracting authority is able to ask the tenderer for details of any proposed subcontractor and the share of the contract it is proposing to subcontract. Where the supplier proposes to use subcontractors to deliver some or all of the contract requirements, a separate appendix should be used to provide details including the proposed members of the supply chain, the percentage of work being delivered by each sub-contractor and the key contract deliverables each subcontractor will be responsible for. It is recognised that subcontracting arrangements may change. Where this affects the overall bid any changes to the plan should be notified to the authority. Based on the new information the authority may deselect that bidder prior to awarding the contract.

Subcontractors have been protected in a number of ways. For example, regulation 113 requires contracting authorities to include provisions in the contract to ensure that there is prompt payment throughout the supply chain – within 30 days if the invoice is undisputed.

The contracting authority is able to ask about the supply chain where it is proportionate to do so and focused on the subject matter of the contract.

Mandatory/discretionary exclusion and self-cleaning

The grounds for mandatory and discretionary exclusion set out in the regulations should always be applied to the supplier and all members of a consortium bid. While this is not compulsory for subcontractors, contracting authorities are able to apply them to subcontractors where they deem appropriate. Under regulation 71(8) PCR 2015, the authority is able to verify whether or not there are grounds for excluding a subcontractor. They may do this in the same manner as the main supplier. If the subcontractor is found not to meet these requirements, the authority can insist that the subcontractor is replaced.

These exclusions do not cover all concerns that a local authority may have, for example blacklisting. While trade unions have tried to fit blacklisting in under discretionary exclusions, such as being *"guilty of grave professional misconduct which renders its integrity questionable"* under regulation 57(8)(c)[4]. However, these exclusions must be proportionate, justified by evidence and cannot be used to punish suppliers for past wrongdoings, only to prevent it from reoccurring. This is part of the self-cleaning process.

4 https://www.ucatt.org.uk/files/publications/150218%20Blacklisting%20Public%20Procurement%20Booklet.pdf

To self-clean, a supplier must attach to the appendix a summary of the breach, and any action that has taken place to remedy and thereby 'self-clean'. This should demonstrate that the supplier has taken measures to show its reliability despite an exclusion being possible. The severity and circumstances of the relevant misconduct should be taken into account. A supplier can cleanse itself by proving that it has compensated for the misconduct, co-operated with the investigating authorities by clarifying the facts, and taken appropriate technical, organisational and personnel measures to avoid further misconduct or offences. This remedial action must be to the satisfaction of the authority and, if it is, the supplier will not be excluded from the procurement process. If the authority is not satisfied, they must provide the supplier with a statement of reasons for their decision that their self-cleaning was insufficient. This is under regulations 57(13)-57(17) PCR 2015.

The impact

Stemming from Lord Young's report of May 2013, 'Growing your Business' and the European Commission's desire to support SME participation, these changes to public contract requirements should assist smaller companies in their bids for public sector contracts. However, they also allow the contracting authority to check on their supplier's subcontractors, adding an extra layer of protection on their procurement procedure. Contracting authorities still have to ensure that this does not become a deviation from the PQQ and the queries regarding the subcontractors must be proportionate and relevant to the subject matter. Authorities should try to receive this information through the appropriate questions, including the grounds for exclusion, or they could end of being reported to the Mystery Shopper service within 30 days of publication of the PQQ.

A useful guidance on PQQs since PCR 2015, published by the CCS, can be found here.

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"Neighbourhood planning is not a legal requirement but a right, which communities in England can choose to use."[5]

Although the concept of local neighbourhood planning has existed for several years[6], it is only fairly recently that local planning authorities (LPAs) have begun to see a rise in parish and town councils, as well as other qualifying bodies[7], choosing to engage by producing a neighbourhood plan. It seems that people are becoming more alert to the fact that an opportunity exists for local residents to influence the development of planning policy within their local area. Communities may also be incentivised to create a neighbourhood plan as this means that parish and town councils will receive 25% of the revenues[8] from the Community Infrastructure Levy (CIL) (if the LPA has a CIL charging schedule in place) arising from development in their area. It should be noted, however, that 15% of CIL revenue (capped at £100 per dwelling) will be given to the parish council (or the LPA will consult with the community if there is no parish council) regardless of whether they have a neighbourhood plan or not.

Despite not being responsible for its preparation, local planning authorities play a key role in any neighbourhood plan process in their area. They have statutory responsibilities, including the organisation of an independent examination of the plan and subsequent referendum and, as a consequence, bear the cost of fulfilling those responsibilities. Local planning authorities need to be aware of neighbourhood planning, and in particular their own role in the production of a neighbourhood plan, the impact that this will have on them as an authority and the effect of a neighbourhood plan on the LPA's local plan. In addition, local planning authorities would be wise to make provision to cover the costs associated with the neighbourhood planning process.

The legal basis

Neighbourhood planning was introduced under the Localism Act 2011 to give local communities a more 'hands on' role in the planning of their neighbourhoods. It introduced new rights and powers which allow local communities to shape development in their local area. These rights and powers, and the process through which they can be utilised, have become more prescriptive through the Neighbourhood Planning General Regulations 2012 (as amended) with the most recent amendment coming into force earlier this year with the introduction of the Neighbourhood Planning General (Amendment) Regulations 2015.

[5] National Planning Practice Guidance (NPPG) on Neighbourhood Planning , para 002
[6] Since the Localism Act 2011 came into force
[7] Under s38A(12) of the Planning and Compulsory Purchase Act 2004, a 'qualifying body' can be a Parish or Town Council, a Neighbourhood Forum (designated by the Local Planning Authority) or a community organisation group.
[8] National Planning Practice Guidance on Neighbourhood Planning, para 003

The plan

A neighbourhood plan sets out a local community's development objectives for the future. It can be general or detailed depending on how prescriptive local people want to be. It must address the development and use of land within its designated 'neighbourhood area'. A neighbourhood area is designated by the LPA following an application submitted with supporting documents by a qualifying body.

It can include policies on housing, employment, economic growth, education and leisure. It can also include policies on infrastructure, but such projects would need to be justifiable and support the objective of sustainable development contained within the National Planning Policy Framework (NPPF).

It should support the strategic development needs set out in the LPA's local plan with an aim to positively support local development (in accordance with paragraph 16 of the NPPF).

The stages of producing a neighbourhood plan

The statutory process that should be followed to introduce a neighbourhood plan is set out below:

1. Designation of the neighbourhood area by the LPA.
2. Preparation of draft neighbourhood plan.
3. Pre-submission publicity of the plan and consultation with various groups.
4. Submission of finalised plan to the LPA.
5. Independent examination – the LPA instructs an independent examiner who produces a report on the plan which is then published by the LPA. The LPA must then decide whether to accept or reject the plan. Rejection of the plan could be outright or could be in part with the LPA proposing modifications.
6. Referendum – a vote takes place which is hosted, and funded, by a 'relevant council'. Under Schedule 4B of the Town and Country Planning Act 1990 a relevant council is a district council, county council, metropolitan district council and London boroughs. If the electorate votes in favour of the plan, the LPA then proceeds to check the plan conforms with EU obligations and does not breach the European Convention on Human Rights. They are then in a position to approve it.
7. Once approved, the plan is introduced and attracts the same legal status as the LPA's local plan. This is discussed further below.

The significance

The key distinction from other forms of parish, village or town plan that communities may have prepared is that a neighbourhood plan, once approved by the LPA following a referendum (see above), has the same legal status as the local plan[9]; it also forms part of the development plan. Local planning authorities, therefore, need to have an awareness of the extent to which they are required to be involved in the development of a

[9] National Planning Practice Guidance on Neighbourhood Planning , para 006

neighbourhood plan and the way in which a neighbourhood plan, in turn, can impact upon their current/draft local plan.

Accordingly, planning decisions should be made based upon policies contained within the neighbourhood plan as well as the local plan. The NPPG confirms that even an emerging neighbourhood plan may be a material consideration when determining planning applications[10].

Local planning authorities also need to be aware that they are obliged to incur costs to support the independent examination and the referendum as this must be led by the LPA. There is grant funding from central government available but this is not guaranteed and may not cover the entire costs incurred by the LPA throughout the whole process.

Furthermore if a plan is legally challenged, which occurred with the Tattenhall Neighbourhood Plan in Cheshire last year, the LPA will be responsible for meeting those costs. It is therefore paramount that they cooperate with, and assist, the qualifying body in order to avoid further expenditure at a later date. The LPA is required to take a *"proactive and positive approach"*[11] by the NPPG by working collaboratively with the organisation producing the plan. It gives specific examples of collaboration including sharing evidence and seeking to resolve issues to ensure the plan has *"the greatest chance of success under independent examination"*[12].

There is a possibility that a neighbourhood plan could conflict with the current or draft local plan, whether that be in policy terms or site allocation for development, as well as the NPPF, NPPG and the CIL Regulations 2010 (as amended). In order to avoid any conflict or duplication, the need to collaborate and support the qualifying body in order to mitigate that risk and 'iron out' any issues is key.

It is also worth adding that should there be any conflict between policies contained within the development plan, precedence is afforded to the latest policy to be adopted and any conflict should be decided in favour of the most recently adopted plan.

A key role to play

As we have seen above, the LPA has to play its part in the production of any neighbourhood plan and, in order to keep costs to a minimum, it should be proactive and cooperate wherever possible. Whilst the neighbourhood planning process imposes a significant time and cost burden on the LPA, it is important that it considers the process as an opportunity to engage with local communities and inform any emerging policies regarding development.

[10] ibid, para 007
[11] ibid, para 009
[12] ibid, para 009

The NPPG makes it clear the role of a LPA is to:

- take decisions at key stages of the neighbourhood planning process (where an authority operates an executive governance system then these decisions shall be taken by the Executive[13])
- provide advice and assistance to qualifying bodies
- be proactive in providing information to qualifying bodies
- fulfil its duties and take decisions as soon as possible and within the statutory time periods: designate a neighbourhood planning area; check that the plan complies with all relevant legislation; publicise the proposed plan for six weeks; notify the relevant consultation bodies; appoint an independent examiner; publish the examiner's report; take the decision as to whether to proceed to referendum; hold a referendum (which includes publishing an information statement and notice of referendum); consider the plan in relation to EU law and publish the plan
- set out a clear and transparent decision-making timetable
- constructively engage with the community.

If the LPA fails to carry out its neighbourhood planning functions in accordance with the above then there is a risk of the plan being subject to challenge with the LPA incurring the cost of that. In addition a failure on the part of a LPA in respect of the process could result in a complaint being made to the Local Government Ombudsman.

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[13] Unlike most planning functions, the NPPG (para 023) states that decision-making to discharge the Local Planning Authority's functions relating to neighbourhood planning should be taken by the Executive. However, the discharge of this function can be delegated and so it is unlikely that this will be a matter of significance.

the future of the community infrastructure levy

The Community Infrastructure Levy Regulations 2010 (as amended) have been with us for five years now and it's fair to say they have received a luke warm reception, with 205 local authorities having adopted or prepared draft charging schedules to date.

The recent, nationwide introduction of the Regulation 123 pooling restrictions on 6 April 2015 is achieving the strategically desired effect of forcing local authorities to adopt CIL because its effects are so difficult to address in areas without CIL for major developments.

The Regulations are restrictive and often fail to demonstrate any understanding of the needs of the developer and charging authority alike when delivering a major project site.

The pooling restriction of a maximum of five planning obligations has required some lateral thinking by both developers and charging authorities to ensure sufficient infrastructure and funding is secured while retaining flexibility in the event of unforeseen difficulties when development is commenced.

While the Regulations offer a range of exemptions, these are subject to specific requirements and care must be taken not to cause a disqualifying event to occur before securing the exemption. This can have serious implications for the time frames of a development and the associated commercial contracts. Failure to secure the exemption applied for can also result in significant financial implications for the proposed development.

For example, the charitable exemption contains ownership requirements which must be satisfied before the exemption is granted and must be maintained during the claw back period of seven years. This can cause difficulties for mixed use sites and consideration is needed from the outset as to the boundaries delineated on the red line plan, the application description and it should be made clear that the development will be phased.

Similarly, the Exceptional Circumstances Relief and Phased Payment schemes offered by some charging authorities are discretionary and the discretionary nature often does not provide enough certainty for developers. Exceptional Circumstances Relief is also subject to submissions from the developer that any such relief does not trigger state aid, which cannot always be the case, particularly if there are several developments in close proximity and not all are granted Exceptional Circumstances Relief either because they fail to apply or they fail to submit a convincing argument.

It is, of course, possible for charging authorities to accept land in kind, but I would suggest that given the Government's directions to local authorities to sell land and assets, this will have limited uptake.

In London, there is the additional commitment of the Mayoral CIL which offers no exemptions, except for a phased payment policy. This is payable towards Crossrail infrastructure and in addition to any other CIL payment required by the local charging authority.

For charging authorities, consideration needs to be given to the requirement of distributing local monies from CIL receipts and the impact this may have on delivering large scale key infrastructure projects.

Although the aim of CIL is to reduce the need for Section 106 agreements, perhaps limiting their use to affordable housing provision, this has not been achieved in practice. Charging authorities have issued their Regulation 123 lists and these can be surprisingly limited in their remit, necessitating Section 106 agreements for site specific infrastructure. Keeping the number of Section 106 agreements to a maximum of 5, in accordance with the pooling restrictions, is not easy. You should keep in mind extant consents, Section 106 agreements from 2010 onwards, deeds of variation and section 73 applications may all contribute to the overall pot. We have advised on a number of approaches to seek to facilitate the desire to secure the planning gain committed from a development despite the restrictions imposed by the pooling requirement. Ultimately these approaches remain untested, and we have gone to great lengths to meet the pooling requirement.

Those developers and charging authorities who have grappled with the unbending legislation and its consequences in terms of commencement of development, available exemptions and/or reliefs and the pooling restrictions will no doubt be glad to hear that the Government has announced a review of CIL.

The Government has confirmed that Liz Peace will lead and chair an independent group conducting a review of CIL. The group's purpose will be *"to assess the extent to which CIL does or can provide an effective mechanism for funding infrastructure, and to recommend changes that would improve its operation in support of the Government's wider housing and growth objectives."*

The announcement sets out the following issues for consideration by the group:-

- the relationship between CIL and Section 106 in the delivery of infrastructure, including the role of the regulation 123 list and the restriction on pooling planning obligations
- the impact of CIL on development viability, including any disproportionate impact on particular types or scales of development
- the exemptions and reliefs from CIL
- the administrative arrangements and governance associated with charging, collecting and spending CIL
- the ability of CIL to fund and deliver infrastructure in a timely and transparent way

- the impact of the neighbourhood portion on local communities' receptiveness to development
- the geographical scale at which CIL is collected and charged.

The Community Infrastructure Levy Review Panel Questionnaire can be found here.

If you have experience of CIL, now is the time to feedback to the Government about how effective/ineffective you consider CIL has been and the problems facing all involved.

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The standard forms for the publication of public procurement notices will be soon be replaced and updated. The new set, published by the European Commission in Regulation (EU) 2015/1986 on 12 November 2015, revise and add new standard forms to the originals annexed to Regulation 842/2011.[14] Directives 2014/23/EU (Concession Contracts), 2014/24/EU (Public Procurement) and 2014/25/EU (Utilities) are the directives affected.

When?

The previous set of forms will be repealed and replaced with the new ones from 18 April 2016, but if the public procurement Directives are being transposed into national law before this date, the new forms will have to be used from that date instead.

Therefore, in the UK, public sector contracts have been using the new standard forms since 3 December 2015 because the Public Contract Regulations (PCR) 2015 came into force this year and this covers the 20 day implementation period. Concession contracts, utilities contracts and defence and security contracts will need to use the new standard forms from 18 April 2016 or, if the new Concessions Directive, or the Utilities Directive, are implemented before then, it will be the earlier of the two dates.

The changes

The new forms will be sent to the Publications Office of the European Union using eNotices and the TED eSender system because the forms have been designed for electronic use. The notices will then be published within five days of receipt. If the contracting authority wants to submit the forms by fax, e-mail or post, the old, unstructured forms must be used and this may take up to 12 days to be published. This is a step closer towards the electrification of the procurement process. For England, Wales and Northern Ireland it is slightly unclear as to the date on which there will no longer be an option as to which form can be used. E-tender portals are currently going through the process of updating their forms, with TED eSender already using the new forms. We would advise, wherever possible, that the new forms are used but this will need to be discussed with your e-tender portal provider.

The 25 new standard forms are intended to go hand in hand with the transposition of the public procurement Directive. The hope is that they are clearer that the old forms, helping contracting authorities and their advisors to comply with their procurement obligations under the PCR 2015, for example the new revised rules and extra information needed for notices. The public procurement directive introduced a competitive procedure with negotiation and the innovation partnership procedure (also under the utilities directives) and

[14] Regulation (EU) 2015/1986 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011[2015] OJ L296/1.

these are reflected in the electronic forms. The new standard forms were designed to assist contracting authorities and entities with these changes.

A guidance note on the use of these new forms can be found here.

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