

There has been no holiday for procurement law developments this summer. In this quarter's edition, we cover the latest updates on the Procurement Bill and associated regulations, the Provider Selection Regime and the Social Partnership and Public Procurement (Wales) Act.

The summer has also seen some important case law updates, including a rare case on concession contracts.

## Legislation

### Procurement Bill

On 11 September 2023, the Procurement Bill (Bill) returned to the House of Lords for the "consideration of amendments" stage. If the House of Lords approves the amendments, the Bill will receive royal assent. If not, the Bill will return to the House of Commons for consideration of Lords amendments.

Commencement of the new regime under the Bill is currently planned for October 2024.

### Consultation on Regulations

Over the summer, the Cabinet Office launched, in two phases, a consultation on the regulations that would be enacted under the Bill if it became law:

- **Phase 1 (closed on 28 July 2023)** – Predominantly related to areas of the Bill that require lists, calculations or further definitions to be used in practice and was based on regulations, which were published with the consultation. The draft regulations and questions in the consultation related to the following areas:
  - Scope of "Light Touch Regime" contracts and "Reservable Light Touch Services"
  - Exempt contracts: vertical and horizontal activities calculations
  - Exempt contracts: utilities intra-group turnover calculations
  - Utility turnover and supply tests
  - Intra-UK procurement
  - Definitions of "Central Government Authority" and "Works" for threshold purposes
  - Disapplication of section 17 of the Local Government Act 1988
  - Disapplication in regard to NHS procurement

- **Phase 2 (closed on 25 August 2023)** – Related to the transparency provisions and notices that will be used by contracting authorities to fulfil their legal requirements if the Bill becomes law. Again, this included draft regulations, which covered the following matters:
  - Contents of the following 13 notices/transparency measures: (i) Pipeline Notice Planned Procurement Notice; (ii) Preliminary Market Engagement Notice; (iii) Tender Notice; (iv) Utilities Dynamic Market and Dynamic Market Notice; (v) Transparency Notice; (vi) Procurement Termination Notice; (vii) Assessment Summary; (viii) Contract Award Notice; (ix) Contract Details Notice; (x) Payments Compliance Notice; (xi) Contract Performance Notice; (xii) Contract Change Notice; and (xiii) Contract Termination Notice
  - The planned Central Digital Platform, including the provision of "Supplier Information"
  - Transitional provisions

Consultations mirroring the above phases were launched by the Welsh government, but with modifications to reflect the Wales-specific differences to the proposed new regime.

### Central Digital Platform

The Cabinet Office has announced its continued work to facilitate the development of e-procurement systems to align with the new regime. The Cabinet Office has invited suppliers, contracting authorities and e-procurement system providers to submit views and feedback on prototypes of the notices that will be required under the new regime.

### Training for Contracting Authorities

The Cabinet Office announced the launch dates for its learning and development materials that will be made available to contracting authorities in anticipation of the new regime. Initial "knowledge drops" (on-demand video resources providing an overview of the changes) will launch in November 2023, with more detailed training courses (self-guided e-learning and "deep dives") to be made available after March 2024.

### Flowchart

In July 2023, the Welsh government published a helpful flowchart,<sup>1</sup> setting out which notices will be required under the Bill at which stages of relevant procurements in Wales. This will be of use to any authority or supplier to Wales that is attempting to navigate the proposed new transparency regime.

<sup>1</sup> <https://www.gov.wales/procurement-bill-notice-flowchart>

## Provider Selection Regime Consultation

In July 2023, the government published its long-awaited response (Response) to the consultation on the new proposed "Provider Selection Regime" (PSR),<sup>2</sup> which is intended to implement new rules for procuring healthcare services in England. The foundation of the PSR is to define the available commissioning processes by reference to "three decision circumstances":

- **Continuation of existing arrangements** – For circumstances where the incumbent provider is the only viable provider due to the nature of the service; where alternative providers are already available via patient choice routes; or where the incumbent is doing a good job, is likely to continue to do so and the service is not changing.
- **Identifying the most suitable provider when the decision-maker wants to use a new provider or for new or substantially changed arrangements** – For circumstances where existing arrangements need to change considerably; where the incumbent is no longer able/wants to provide the service; or where the authority wants to use a different provider and the decision-making body considers it can identify a suitable provider without running a competitive procurement process.
- **Competitive procurement** – For situations where the authority cannot identify a single provider or group of providers that is most suitable without running a competitive process, or to test the market.

The Response confirms that the general approach proposed in the consultations for the new PSR will remain as planned. This means that there will be a move away from competitive procurement as the default means of arrangement of healthcare services in certain circumstances. Instead, under the new regime, healthcare authorities will be able to award contracts without a competitive procurement in decision-making circumstances 1 and 2, namely, where there is a well-performing existing arrangement that is to be continued or where there is to be a new service/change of provider, but the authority considers it is able to identify a suitable provider without running a competitive procurement.

The Response confirms the following:

- The PSR will permit mixed procurement to be procured under the PSR providing that applicable healthcare services are to be the main subject matter of the contract. Further details will be provided in regulations and statutory guidance.
- The definition of "Considerable Change" (a component of "decision circumstance 2") will be determined to have occurred where the value of the change exceeds both £500,000 and 25% of the contract lifetime value, or where the proposed change would result in the delivery of different services.

- Where authorities decide to offer patients a choice of a limited number of providers of services for which patients do not have a legal right to choice, they must use decision-making circumstances 2 or 3 to select the provider(s) from which patients can choose.
- Authorities will be required to publish certain notices to ensure transparency of decision-making. This will include an "intention to award" notice and publication of the balancing of key criteria and the authority's rationale for selecting the provider. Authorities will also be required to publish annual summaries of contracting data.
- A new, independent panel will be established to look at and advise on both issues relating to patient choice regulations (that will be made under new patient choice provisions inserted by the Health and Care Act 2022) and the PSR. It is unclear, however, what powers this new panel will have and, therefore, how effective it will be in ensuring and enforcing compliance.

## Social Partnership and Public Procurement (Wales) Act

As reported in our June 2023 edition of [Public Procurement Quarterly](#), the Social Partnership and Public Procurement (Wales) Act (Act) was enacted earlier this year with the purpose of improving social responsibility and wellbeing in and through public procurement. On 29 July 2023, the Welsh government brought into force by statutory instrument<sup>3</sup> (Order) ss.1-8, 11-14, 46, 47 and 49 of the Act – relating to the establishment, membership and procedures of the new Social Partnership Council for Wales (Council).

The Council will be chaired by the first minister and will comprise representatives of both employers and workers from the public, private and third sectors. In a written statement<sup>4</sup> from Hannah Blythyn, deputy minister for social partnership, in June 2023, the Welsh government indicated that nominations for membership of the Council will be invited in the months following commencement. The first meeting of the Council is planned for January 2024.

On 1 April 2024, the Order will also bring into effect ss.15, 16, 18 and 20 of the Act, which includes the implementation of the new "Social Partnership Duty". This duty requires public bodies to seek consensus or compromise with recognised trade unions or other staff representatives when developing their wellbeing objectives or making decisions of a strategic nature about the steps they intend to take to deliver the objectives.

The Socially Responsible Procurement duty, contained in Part 3 of the Act, will not be commenced until late 2024/early 2025 at the earliest.

<sup>2</sup> [https://www.gov.uk/government/consultations/provider-selection-regime-supplementary-consultation-on-the-detail-of-proposals-for-regulations?utm\\_medium=email&utm\\_campaign=govuk-notifications-single-page&utm\\_source=193487ba-23e9-4df8-a98f-a7ae697fec29&utm\\_content=immediately#full-publication-update-history](https://www.gov.uk/government/consultations/provider-selection-regime-supplementary-consultation-on-the-detail-of-proposals-for-regulations?utm_medium=email&utm_campaign=govuk-notifications-single-page&utm_source=193487ba-23e9-4df8-a98f-a7ae697fec29&utm_content=immediately#full-publication-update-history)

<sup>3</sup> The Social Partnership and Public Procurement (Wales) Act 2023 (Commencement No. 1) Order 2023

<sup>4</sup> <https://www.gov.wales/written-statement-social-partnership-and-public-procurement-wales-act-2023-commencement>

## Case Law

### *Dukes Bailiffs Ltd v. Breckland Council* [2023] EWHC 1569 (TCC)

#### Background

In December 2022, Breckland Council (Council) (as a member of Anglia Revenues Partnership) issued an invitation to tender (ITT) for the provision of debt enforcement services. Dukes Bailiffs Ltd (an Enforcement Agent company) tendered for the contract but was unsuccessful due to its score being 2.5% lower than that of a rival bidder (Bristow & Sutor).

Dukes Bailiffs disputed the scoring process for the tender and the reasons the Council gave for the scores, and accused the Council of bias (on the basis of alleged connections between Bristow & Sutor and the Council) and issued claims against the Council in the TCC and in the Administrative Court in respect of these matters. Dukes Bailiffs then further alleged (in the judicial review proceedings) that there was a breach of legitimate expectation that the Council's tender for the contract would be awarded under the requirements of the Public Contracts Regulations 2015 (PCR 2015).

The Council argued that PCR 2015 did not apply to the award of the contract as it was a concession contract and subject to the Concession Contracts Regulations 2016 (CCR). The Council also argued that the claim was not actionable (under the CCR) as the contract was below the minimum threshold. The Council further argued that the claim was not amenable to judicial review.

The Council applied to strike out the TCC claim (or enter reverse summary judgment).

#### Held

The court struck out the claim under the PCR 2015, granted the Council's application for summary judgment and refused Duke Bailiffs Ltd permission for the judicial review claim.

#### Key Takeaways

The case highlights the importance of the distinction between the PCR and the CCR. The fact that procurement documents express that the PCR applies is not conclusive.

A five-stage test was applied to determine if a contract is a services concession contract:

- What is the relevant contract?
- Is the relevant contract for a pecuniary interest?
- Is the contract "concluded in writing by means of which one or more contracting authorities or utilities entrust the provision and management of services (other than execution of works) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment"?
- Will the award of the contract "involve the transfer to the concessionaire of an operating risk in exploiting the services encompassing demand or supply risk or both"? (No guarantee of breaking even in normal operating conditions.)
- Does the part of the risk transferred to the concessionaire "involve real exposure to the vagaries of the market such that any potential estimated loss incurred by it shall not be merely nominal or negligible"?





## *Braceurself Ltd v. NHS England* [2023] EWCA CIV 837

### Background

This case concerns ongoing proceedings relating to the disputed award of an orthotics service contract.

In 2022, the court found that NHS England's breach of PCR 2015 ("manifest error" in evaluation) did not meet the threshold of being "sufficiently serious" that would trigger Braceurself Ltd's ability to claim for *Francovich* damages.

Braceurself appealed this decision and the NHS served a respondent's notice. The Court of Appeal considered the issue of whether the respondent's notice was a cross-appeal.

The question was an important one, as a cross-appeal requires permission.

NHS England had indicated that it intended to appeal against the judge's "manifest error" findings on liability in June 2022 and draft grounds of appeal had been prepared.

In September 2022, in a hearing to determine quantum, the judge concluded that the breach was not "sufficiently serious" to trigger a claim for *Francovich* damages.

Braceurself applied for, and was granted, permission to appeal on the issue of the availability of *Francovich* damages.

When such appeal commenced, NHS England's respondent's notice raised the same grounds as the draft grounds of appeal against the "manifest error" findings in the June order.

A hearing was ordered to determine whether the respondent's notice was, in fact, a cross-appeal, for which the NHS required permission.

### Held

The court held that:

- NHS England did not need permission to raise these matters in its respondent's notice. NHS England did not seek to appeal or vary the judge's September order, but to uphold it. There was nothing to prevent NHS England, as the successful party facing an appeal, from raising, by way of a respondent's notice, points on which it had previously been unsuccessful in raising.
- NHS England was, therefore, not required to seek permission to appeal because no question of an appeal arose on either side until the issue of *Francovich* damages was concluded.
- The fact that Braceurself's appeal and NHS England's respondent's notice raised separate issues was not enough to make the respondent's notice a cross-appeal.

### Key Takeaway

- It is possible for respondents to an appeal to raise issues in its respondent's notice, which are inconsistent with the court's original findings or are separate to matters that are the subject of appeal.



## *International Game Technology PLC v. Gambling Commission* [2023] EWHC 1961 (TCC)

### Background

The Gambling Commission conducted a competition for the National Lottery Licence in 2020. The competition was subject to the Concession Contracts Regulations 2016 (CCR).

Among two applicants were Camelot UK Lotteries Ltd (Camelot) and Allwyn Entertainment Limited (Allwyn).

The claimant, International Game Technology PLC and various of its group companies (IGT), was not an applicant. However, in its bid, Camelot identified two of its key subcontractors were within the IGT group.

In March 2022, Allwyn won the competition and Camelot finished as the second-placed bidder.

IGT then pursued a claim directly against the Gambling Commission alleging breaches of the CCR. The Gambling Commission argued that IGT had no standing to make the claim, as it had not submitted a bid in the competition and it was an intended subcontractor to Camelot.

IGT argued that its group companies were "economic operators" for the purpose of CCR and that a duty was owed to each of them.

### Held

The High Court considered that IGT, as a potential subcontractor, did not have the necessary standing to bring a procurement claim and the claim was dismissed.

### Key Takeaway

- Subcontractors do not have standing to bring a claim under the CCR. The position is likely to apply more widely (for example under PCR 2015).

## Other Updates

### PPN 08/23: Using Standard Contracts

In August 2023, the Government Commercial Function and Government Legal Department published<sup>5</sup> three standard contracts for immediate use by central government departments, executive agencies and non-departmental public bodies. The new model contracts are to be used for purchases of bespoke goods or services, as follows:

- **Model Services Contract** – For complex services/services procurements that will typically require some form of formal dialogue or negotiation with potential suppliers, with a lifetime contract value of £20 million or more.
- **Mid-Tier Contract** – For goods and/or services procurements that are not particularly complex and do not require formal dialogue or negotiation with potential suppliers, with a lifetime contract value of less than £20 million but above the procurement threshold.
- **Short Form Contract** – For low value goods and/or services procurements below the procurement threshold.

A list of changes to and guidance for all three contracts is linked in PPN 08/23.

### National Audit Office Report on Competition in Public Procurement

On 19 July 2023, the National Audit Office (NAO) published its report “Lessons Learned: Competition in Public Procurement”<sup>6</sup> (Report), which examined whether the government had mechanisms in place to encourage competition in public procurement and how government departments can make their use of competition more effective.

Key findings in the Report include:

- The concept of competition is well embedded in government and is the established default approach for procurement.
- Different approaches are needed for different sectors and procurements to create effective competition. Departments need to invest in developing their requirements and scoping the best route to achieve them. This includes developing markets; encouraging more suppliers to bid to increase choice; understanding their own capacity limits; and understanding the factors other than the number of bidders that influence the effectiveness of competition.
- Competition should be encouraged throughout the life cycle of the contract. Pre-market engagement is essential to developing requirements that facilitate competition. Competitive pressure should be maintained through contract performance by applying information on the market.

- Departments need to consider how their actions during procurement exercises can affect long-term participation of suppliers and competition. High bid costs, lack of confidence in evaluation and a lack of feedback can deter suppliers from bidding, potentially causing a contraction in the public procurement market.
- The use of frameworks has increased substantially over recent years in relation to the award of large contracts. Frameworks can reduce competition when not used effectively and government guidance requires contracts for goods or services that are not common, a full competitive procurement should be used.
- Government departments often do not implement their own guidance intended to promote competition – for example, non-compliant contract extensions and failure to publish procurement pipelines.
- The Cabinet Office does not use contract data to evaluate the effectiveness of competition across government, including where data indicates widespread lack of competition for large contracts.

The report concludes by making detailed recommendations to the departments’ commercial teams and the Government Commercial Function to maximise the benefit of effective competition.

## Contacts



### Jenny Broderick

Partner, Leeds, UK  
M +44 754 593 5614  
E jenny.broderick@squirepb.com



### Will Sparks

Partner, Brussels, Belgium  
M +324 905 61 719  
E william.sparks@squirepb.com



### Sam Hare

Senior Associate, London, UK  
M +44 792 160 0172  
E sam.hare@squirepb.com



### Tatiana Siakka

Senior Associate, London, UK  
M +44 782 520 4638  
E tatiana.siakka@squirepb.com



### Eloise Crawshaw

Associate, Manchester, UK  
M +44 795 714 8728  
E eloise.crawshaw@squirepb.com



### Conor Pedder

Solicitor Apprentice, Leeds, UK  
M +44 782 520 4583  
E conor.pedder@squirepb.com

5 <https://www.gov.uk/government/publications/ppn-0823-using-standard-contacts>

6 <https://www.nao.org.uk/insights/competition-in-public-procurement-lessons-learned/>