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Procurement Update

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presentation**

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Agenda

- Transforming Public Procurement Update
- Procurement Policy Notes
- Case Law

Transforming Public Procurement

- Government Green Paper on procurement reform
- General support for simplification of regulatory framework
- Government to proceed with some reforms
- New regime unlikely to come into force until 2023
- Six months' notice of legislation “go-live”
- Government to publish guidance and provide learning and development resources

Transforming Public Procurement

- Principles and objectives of procurement to be introduced
- Regulations to be combined into a simpler framework – with flexibilities in Utilities Contracts Regulations and Defence and Security Public Contracts Regulations retained
- New procurement procedures but retention of light touch regime

Transforming Public Procurement

- Award criteria – “most economically advantageous tender” to be changed to “most advantageous tender”
- New exclusions framework to be introduced and statutory guidance to be published
- Procurement specific test for lift of automatic suspension
- Contracts awarded under crisis and extreme urgency provisions excluded from automatic suspension

Procurement Policy Notes

- PPN 09/21 – Update to legal and policy requirements to publish procurement information on Contracts Finder
 - Updated to align with PPN 10/21
- PPN 10/21 – Thresholds and Inclusion of VAT

Case Law – Equal Treatment and Transparency

- *R (on the application of Good Law Project and another) v Secretary of State for Health and Social Care and Others* [2022] EWHC 46
- Secretary of State breached principles of equal treatment and transparency by not putting in place procedures to identify selection criteria and evaluation guidance
- Secretary of State failed to provide proper reasons for his decision
- Insufficient technical or financial checks were carried out

Case Law – Urgency and Bias

- *R (on the application of Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21
- Finding of apparent bias was at odds with finding that urgency justified use of negotiated procedure without prior publication
- Context for an assessment of fair minded and informed observer's belief was the emergency conditions arising out of the pandemic

Case Law – Automatic Suspension

- *Kellogg Brown and Root v Mayor's Office for Policing and Crime* [2021] EWHC 3321 (TCC)
- Application for expedited trial refused
- Damages an adequate remedy for claimant
- Public interest in contracting authority achieving benefits and savings from proposed contract without delay
- Balance of convenience in favour of lifting automatic suspension

Case Law – General Principles and Implied Contract

- *Adferiad Recovery Ltd v Aneurin Bevan University Health Board* [2021] EWHC 3049 (TCC)
- No sustainable claim for breach of general principles of EU law where there was no cross-border interest
- No implied contract governing conduct of the procurement

Case Law – Time Limits

- *Access for Living v Lewisham London Borough Council* [2021] EWHC 3498
- Claimant must show why there is a good reason to extend time, not why there is no good reason not to
- No exhaustive list of factors that may or not be a good reason to extend time
- Principles adequately set out in *Mermec UK Ltd v Network Rail Infrastructure Ltd* [2011] EWHC 1847 (TCC) and *SRCL Ltd v National Health Service Commissioning Board* [2018] EWHC 1985

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Thank You

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