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Public Procurement after the UK's EU Departure

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by Simon Randall CBE

FOREWORD

This pamphlet is the work of Simon Randall CBE, a long-standing member of the Society who is a solicitor specialising in local government work, with the emphasis upon public procurement and outsourcing.

At a time of considerable political uncertainty and with the public finances under great pressure, it is important that the new government should look creatively at how administration can be streamlined to save both costs and time. Public procurement offers an area where it is widely acknowledged that improvements should be made.

- Public procurement affects over £200 billion of contracts for work, supplies and services
- Current EU inspired procurement regulations have grown in complexity and our departure from the EU affords the opportunity to simplify procurement with an Anglo-Saxon approach and reducing red tape
- An opportunity to make better use of the Public Services (Social Value) Act 2012 to award contracts on the basis of improving the economic, social and environmental wellbeing of the relevant area, thus more closely reflecting the aspirations of SMEs and community organisations
- Reduce the number of public bodies obliged to abide by the new procurement regulations, including housing associations, who should have been exempt in any event
- Introduce simpler and speedier procurement dispute resolution

The paper, also, marks the continuing commitment of the Society of Conservative Lawyers to stimulate debate on issues of importance. The content of the paper reflects the views of the author and not, of course, any collective opinion of the Society. But by facilitating the production of this paper I am very pleased that we are maintaining an established tradition of bringing legal input to practical political challenges for the benefit of the Conservative Party.

I would like to thank Anthony Speaight QC, Chairman of our Research Committee, for his advice on the pamphlet and also Charles Banner, who undertook a review. The Society is, also, grateful to everyone at Winckworth Sherwood LLP who has assisted with the publication and to the housing associations, local authorities and contractors who have made the comments and helpful suggestions as to the way forward.

Rt. Hon. Dominic Grieve QC MP
Chairman of the Executive Committee
Society of Conservative Lawyers

Introduction

Public Procurement rules influence over £200 billion of public sector contracts per annum.

Public Procurement barely featured during the course of the June 2016 Referendum campaign, although there was an (unverified) estimate produced by the Vote Leave Campaign¹ that Government deals with the private sector under the EU procurement rules cost Whitehall an extra £1.7 billion a year. This cost arises from, firstly, the unnecessary complex regulations inherited from the EU and, secondly, the tendency for the UK to gold plate the implementation and operation of such regulations.

However, it is undeniable that the procurement industry involves additional expenditure of hundreds of millions of pounds spent by both the 100,000 “bodies governed by public law” and by potential contractors competing for public contracts. Recent estimates indicated that a competitive procurement process following a full EU procedure cost an average of £45,200 in the UK, with £8,000 of those costs borne by the public sector employer. This compared with an EU average cost of £23,900, making the UK public sector procurement processes 90% more expensive than the EU mean.²

In addition, the same research showed that the UK also had adopted one of the longest public sector purchasing processes, 53 days longer than the EU average and 20 days longer than Italy, the next longest.

The Local Government Association undertook research on the impact of the EU procurement legislation³ (including EU Directive 2004/18) which was implemented in England, Wales and Northern Ireland⁴ as the Public Contracts Regulations 2006⁵ (“**the 2006 Regulations**”) with their member local authorities in 2010. One of the shire districts highlighted stated:

“while it is of course critical to ensure fair, open and transparent procedures are followed, the time it now takes to comply fully with each piece of guidance almost negates any value or cost benefits of going through a competitive tendering process. It seems procurement professionals and organisations who were following fair and transparent procedures prior to 2009 are being burdened with more unnecessary work levels to comply, while organisations who did not comply before may feel overwhelmed with the complexity of the framework to comply.”

The same survey recorded that 50% of the procurement officers who responded emphasised that “the 2004 directive has not led to more efficient and effective procurement practice, and two thirds stated that procurement costs and administrative burdens had worsened as a result of the directive”.

Government stated public procurement policy is that “*it must be based on value for money being the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought*”.⁶

1 The Guardian 25 May 2016 reporting speech from Michael Gove MP

2 CEBR Report: Cutting the cost of Public Sector Procurement quoted by Faithful & Gould, 28 April 2014

3 The impact of EU procurement legislation on Councils by Local Government Association, December 2010

4 Public procurement has been devolved entirely to the Scottish Government since 1999 and some aspects to the National Assembly for Wales

5 The Public Contracts Regulations SI.2006 No.5

6 Public Procurement Policy by the Crown Commercial Service, 1 October 2015 updated 8 February 2017

This paper will be outlining a short history of procurement within the European Union and how the current Public Contracts Regulations 2015 (“**2015 Regulations**”)⁷ have created such a complex regime for procurement. One of the significant benefit of the UK’s departure from the EU will be the opportunity to re-cast or replace the existing regulations with a more appropriate Anglo-Saxon emphasis and a more UK-centric approach, stressing the principles of the Public Services (Social Value) Act 2012 (“**the 2012 Act**”)⁸ and enabling the UK to have the fullest possible access to trading partners in Europe and the rest of the world.

This pamphlet will deal generally with the 2015 detailed Regulations which only apply to England, Wales and Northern Ireland, and there will be no commentary upon either defence or utilities procurement⁹ and general issues relating to trade or the Government’s wider negotiations.

Public Procurement Objectives

Professor Sue Arrowsmith, a leading academic and author of *The Law of Public Utilities* Procurement has identified eight key objectives for any public procurement system¹⁰ which should be incorporated in any regulations:

1. Value for money (efficiency) in the acquisition of required goods, works or services
2. Integrity – avoiding corruption and conflicts of interest
3. Accountability
4. Equal opportunities and equal treatment for providers
5. Fair treatment of providers
6. Efficient implementation of industrial, social and environmental objectives in procurement
7. Opening up public markets to international trade (where relevant)
8. Efficiency in the procurement process

After the Second World War co-ordination of international trade gave rise to the first steps for the General Agreement on Tariffs and Trade signed by 23 nations (including the UK) and operating from 1948. Public procurement by government and other public bodies has been developed slowly, with the emphasis in the early years upon procuring goods, services and works from local contractors or suppliers. Indeed, the UK’s procurement rules were largely left in the hands of the individual public bodies (particularly local authorities) until the UK joined the EEC.

7 The Public Contracts Regulations SI.2015 No. 102 which implemented Directive 2014/24/EU

8 Originally introduced as a private members bill by Chris White Conservative MP for Warwick, the Government assisted its passage through Parliament

9 Procurement regulations include Defence and Security Public Contracts Regulations SI 2011/1848 (as amended), utilities Contracts Regulations SI 2006/6 (as amended), National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations SI 2013/500, Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations SI 2013/1582 and regulations dealing with concession contracts and remedies

10 Public Procurement Regulations: An Introduction by Professor Sue Arrowsmith and others, Nottingham University 2010

A Short History of Public Procurement in the EU

The European Commission has issued its proposals through a series of directives, initially separately and covering the supply of goods, public works and contracts with similar, although not identical, provisions.

There were two significant directives, the first issued in December 1969 (number 70/32/EEC) (the “**1969 Directive**”) dealing with the supply of goods and the second directive in July 1971 (number 71/305/EEC) (the “**1971 Directive**”) dealing with public works. An indication of the growth of EU Procurement directives is the fact that the 1969 Directive consisted of three pages and seven articles, whereas the most recent 2015 Regulations ran to well over 100 pages with 122 Regulations and 6 Schedules. There are interesting features in both the earlier directives, the most significant of which is the fact that they applied only to Government entities, local authorities and those bodies specifically listed in an annex to the directive. Indeed, this latter approach continued until the early 1990s and, more importantly, is still used by the World Trade Organisation (“**WTO**”) in its Revised Agreement on Government Procurement (“**GPA**”).¹¹ The GPA does impose on WTO members a light touch procurement regime.

The UK became a full member of the European Community in 1972 under the Conservative-led government of Edward Heath. The opposition Labour Party leader (Harold Wilson) expressed the view that *“the terms [of the accession agreement] involve an intolerable and disproportionate burden on every family in the land and, equally, on Britain’s balance of payments”*. He reaffirmed that *“we saw great advantage in getting into Europe if the terms were right, but that, if the terms were wrong Britain was strong enough to stand outside and prosper.”*

The Labour Party were victorious at the 1974 General Election and, in accordance with their manifesto, undertook renegotiation of the terms of the 1972 accession and promised an in/out referendum on such terms. The Government published a detailed white paper¹² outlining the terms of the renegotiations, with significant paragraphs dealing with food and agriculture, trade and aid and sovereignty. There was no direct reference to public procurement, although there were general paragraphs dealing with trade barriers, relevant extracts from which are:

“98. One of the objectives of the Community as set out in the EEC Treaty is to remove artificial barriers to trade and industry within its boundaries so as to maximise the advantages for employment and living standards of a single market of 250 million people. The Community is one of our largest and fastest growing markets. Access to this large market should lead to increased specialisation, standardisation, investment in new capacity and longer production runs.

100. The removal of barriers to trade relates not only to tariffs but also to the legal, fiscal and other barriers which can impede the free flow of goods within the Community, the free movement of firms and of industrial investment, and the free movement of workers, including the self-employed. It is inevitably a slow and laborious process; but [one] example may be quoted of areas in which work is going on and in which United Kingdom influence has been

¹¹ The current WTO GPA was finalised in 2014

¹² Membership of the European Community: Report on Renegotiation Cmnd.6003, March 1975

brought to bear: the freedom of citizens of member states to exercise their employment or profession anywhere in the Community.”

There was, also, a sentence in the sovereignty chapter that *“our membership of the Community in the future depends on the continuing assent of Parliament”*. The 1971 Directive, which only applied to the, then, six member states had an impact upon the State, and a very small number of other organisations and these varied from country to country. By way of example, Belgium incorporated *“structures of the Church”* and Italy *“relief and charity organisations”*.

Over the years since the 1975 referendum the public procurement regulations have expanded in scope and enveloped more bodies who are required to tender out their supplies, services and works contracts.

The French Mistranslation

One of the key elements in this approach has been to dispense with the lists of affected “bodies governed by public law” appearing in earlier directives. In 1989 the first time a definition of such bodies was incorporated in Directive 89/440/EEC which substituted a new Article 1 in the 1971 Directive.

The definition appeared in the original French draft and has since been incorporated (with few changes) in subsequent directives.

Reproduced below is the original French definition and the Commission’s translation into English, with the author’s underlining:

“On entend par organisme de droit public, tout organisme:

- créé pour satisfaire spécifiquement des besoins d’intérêt général ayant un caractère autre qu’industriel ou commercial;*
- doté d’une personnalité juridique; et*
- soit l’activité est financé majoritairement par l’État, les collectivités territoriales ou par d’autres organismes de droit public, soit sa gestion est soumise à un contrôle par ces derniers, soit l’organe d’administration, de direction ou de surveillance est composé de membres dont plus de la moitié est désignée par l’État, les collectivités territoriales ou d’autres organismes de droit public.”*

The English translation reads:

“A body governed by public law means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and*
- having legal personality, and*
- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.”*

The French word “contrôle” implies “control” rather than management supervision but, as a result of the English text mistranslation, all the UK’s housing associations¹³ (or registered providers of housing) now come within this enlarged definition. Housing associations were drawn into the public procurement net in 2005 following an unchallenged opinion of the European Commission¹⁴ inspired by the French Government,¹⁵ who considered (erroneously) that the UK’s successful housing associations were subject to the same levels of “control” as the French “association du logement” or housing association equivalent.¹⁶ Even if one accepted the “management supervision” provision of the original directive, it could be successfully argued that UK housing associations are now subject to a very light touch regulatory regime falling far short of management oversight. This regime has been further deregulated by changes introduced from 6 April 2017 under the Housing and Planning Act 2016.¹⁷ Housing Associations are not brought within the Directive’s scope by any of the criteria and no associations are financed for the most part by the State and none have more than half of their boards appointed by the State or similar bodies¹⁸.

Directive 2014/24/EU and Public Contracts Regulations 2015 No. 201

The nadir of the European Union’s public procurement regime was reached with the introduction of the above directive (the “**2014 Directive**”), as incorporated into UK legislation. The Commission engaged in significant consultation, and the UK’s Cabinet Office became involved in securing a number of significant amendments, referred to below.

However, the explanatory memorandum to the original 2011 draft directive¹⁹ merits full extracts:

“The existing public procurement legislation needs to be revised and modernised in order to make it better suited to deal with the evolving political, social and economic context. A revised and modernised public procurement legislative framework to make the award of contracts more flexible and enable public contracts to be put to better use in support of other policies.

This proposal has two complementary objectives:

- increase the efficiency of public spending to ensure the best possible procurement outcomes in terms of value for money. This implies in particular a simplification and flexibilisation of the existing public procurement rules. Streamlined, more efficient procedures will benefit all economic operators and facilitate the participation of SMEs and cross-border bidders.*
- Allow procurers to make better use of public procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency,*

13 Also referred to as registered social landlords or registered providers

14 Reasoned opinion 2000/2219 C(2002) 2340, 26 June 2002

15 Letter from Yvette Cooper as Minister of Housing and Planning to National Housing Federation, 23 June 2005

16 Social Housing in Europe by Christine Whitehead and Kathleen Scanlon contains analysis of French Social Housing, July 2007

17 See various sections in Part 4 and Schedule 4 to the Housing and Planning Act 2016 referred to in Social Housing Magazine, April 2017.

18 See Submission by Procurement Research Group of the Society of Conservative Lawyers to the European Commission on Green Paper on the Modernisation of EU Public Procurement Policy, April 2011

19 Brussels, 20.12.2011 COM (2011) 896 Final 2011/0438 (COD)

combating climate change, promoting innovations, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services

Stakeholders have voiced demand for a review of the public procurement directives to simplify the rules, increase their efficiency and effectiveness and make them better suited to deal with the evolving political, social and economic context.”

The principal significant features of the 2015 Regulations are as follows:

- The regulations continued to combine public works, services and supplies contracts
- The former subdivision between Part A and Part B Services in the 2006 Regulations²⁰ was eliminated with a new “light touch” regime for a wide range of services, reflecting the original Part B requiring limited OJEU advertising (Regulations 74-76). At Appendix A is a list of all services under discussion with all those services incorporated in the former Part B Services, and those within the new light touch regime
- Restricted range of services (including libraries, museums, certain cultural and sporting services) reserved for mutuals²¹, subject to new entity pursuing public service mission with profits reinvested in business and employee management participation or ownership – with a contract of only three years (Regulation 77). Appendix A lists those services identified for the mutuals procurement regime
- Direct awards permitted to entities wholly owned by contracting authorities (with no private sector equity participation) and the entity must undertake at least 80% of its activities for such authority (Regulation 12)
- Introduction of a new procurement procedure involving innovation partnerships (Regulation 31)
- Limited contract modification can be negotiated without running the risk of requiring fresh procurement (Regulation 72)
- Number of new provisions were inserted in Part 4 following Lord Young’s report on SMEs.²²

The Cabinet Office (under Francis Maude MP, as he then was) issued a press release²³ following the finalisation of the EU Directive, drawing attention to some of the useful changes, including contract reservation for mutuals, the ability to exclude suppliers for poor performance and expectations that SMEs will benefit from the new regime.

The press release, also, suggested that the new procurement regime reduced red tape. However, this view is not shared by procurement practitioners as the UK government incorporated gold-plating in addition to the already complex EC provisions and overlooked other issues in the 2014 Directive, such as:

²⁰ The Part A Services were subject to the full rigours of the 2006 Regulations, whereas the Part B Services were subject to limited requirements under Regulation 5

²¹ Public Service Mutuals are defined in the 2015 Regulations (Regulation 77) very loosely and are organisations who management or ownership structures based upon employee ownership or participatory principles or require active participation of employees, users or stakeholders. This could include bodies ranging from employee co-operatives to charities.

²² Report on Small Firms 2010-2015 by the Rt. Hon. Lord Young of Graftham, 10 February 2015

²³ EU to open on public procurement following UK government following: Cabinet Office Press Release, 15 January 2014

- Prohibition or restriction on price only criteria (Article 67)
- Promotion of environmental, social and labour standards (Article 17.2), although aspects of the 2012 Act have been used increasingly by contracting authorities
- The mutuals reserved contract provisions in Article 77 leave a great deal to be desired in that the wording lacks clarity, the relevant services are very restricted and the three year contract length provides limited time for the new organisation to establish itself ready to bid for a new (longer) contract

Overall, the 2015 Regulations are far more complex than their predecessors, with nine basic procurement procedures, low thresholds and the separate continuing obligation under the Treaty of Rome principles to conduct open procurement for contracts below such thresholds where there might be “cross-border interest”.

The complexity of the 2015 Regulations has been frequently criticised by both public bodies and contractors, many of whom have high hopes for a simpler regime after the UK’s departure from the EU.

The Federation of Small Businesses undertook a survey of their members and local authorities and reported: *“[their] members found that the time and cost involved with the public sector tendering process remains a major barrier to participation too many small businesses are left bruised by the impenetrable wall of bureaucracy and widespread conviction that big is beautiful. Coupled with strict eligibility criteria, this leaves small businesses unable to complete with larger ones and locked out of public procurement contracts.”*²⁴

The Civil Engineering Contractors Association²⁵ stated that: *“[Civil engineering contractors’] ability to deliver projects in the most efficient way is increasingly being stymied by burdensome procurement processes on projects large and small. Our research suggests this burden is caused, in part, by the rules that are enforced as a result of EU procurement regulations.”*

The Building Design magazine²⁶ interviewed architects for comments about the effect of the UK’s departure from the EU. The text of the article concluded *“the Official Journal of the European Union is a famously labyrinthine procurement mechanism that, in the minds of scores of infuriated architects, is a byword for frustration, expense, bureaucracy and unfairness”*.

Julia Unwin, who is heading an inquiry into civil society’s future, condemned the “nonsensical government procurement processes.”²⁷

As has been illustrated by some high profile procurement failures, such as the West Coast Mainline rail service in 2012, the nuclear decommissioning deal in March this year (following Court proceedings) and the tendering of search and rescue helicopter contracts in 2012, the costs to both public bodies and contractors under the various public procurement regulations are enormous.

²⁴ Local Procurement: Making the most of small businesses, Federation of Small Businesses, 2012

²⁵ Quoted in Construction Enquirer: Civil engineers call for dumping of EU procurement Rules, 2016.

²⁶ Building Design: Would Brexit free us from OJEU hell?, 17 March 2016

²⁷ Quoted in Financial Times, 24 April 2017

A vivid example of the unnecessary problems and costs created for housing associations by their inclusion within the scope of the public procurement regulatory regime is afforded by the recent High Court case *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] Con L R 157.

Shoreline is a registered social landlord which manages 8,000 social housing units in and around Lincolnshire. It wished to reduce its maintenance costs by outsourcing a 5-year contract for routine repairs. Since it was regarded as coming within the scope of the Regulations it carried out a full public procurement tendering exercise, covering hundreds of different types of jobs. The successful tenderer then suggested ways in which the contract could be managed more efficiently by charging the same standard fee for short jobs. Shoreline were attracted by this, but considered that changing the payment structure would compel it to undertake a full retendering exercise. So it suggested operating the new system informally whilst leaving the text of the formal contract in line with the tender. That course was followed until the arrival of new management personnel, who could not understand the informal arrangement. The eventual upshot was litigation which landed Shoreline not only with a judgment for £300,000 but also costs totalling twice that sum.

This expensive outcome would never have befallen this social housing landlord if it had been outside the regulations, which seem to serve little public interest in this context.

There have been similar failures under the 2006 Regulations and issues raised by contractors and suppliers in respect of the operation of the current regulations include:

- Need for clarity as to the respective criteria for selection (following initial expressions of interest and/or PQQ) and contract award plus full disclosure of criteria
- Ensuring appropriate use of framework agreements (Regulation 33 of 2015 Regulations)
- An evenhanded approach to the aggregation rules (Regulations 66 and 46)
- Avoiding situations where a public body advertises a tender with few specifications to gain ideas for re-tendering
- Avoiding tender renegotiation after award
- Use of complex and, often, subjective scoring arrangements on award
- Modification of contract during its term (Regulation 72) and unauthorised extension of contract on termination

Consultations undertaken by the author with a wide range of housing associations and local authorities indicate an enthusiasm for the adoption of new procurement regulations, and their aspirations are outlined below.

The Way Forward

There are three principal choices for public procurement after our EU departure:

- Revert to the pre-1972 procurement arrangements
- Options for procurement under the European Economic Area (“EEA”), as applies to Norway, or seeking a similar status to Switzerland, which is a member of the European Free Trade Agreement (“EFTA”)
- Seeking membership of the WTO

Reversion to the pre-1972 arrangements would not be practicable as there was no uniform approach, either nationally or internationally, and some form of UK based public procurement rules would be desirable, in any event.

An EEA-based approach is a variant of the existing European single market, as all EU countries are within the EEA, such that free movement of persons is an entry requirement and Switzerland is subject to a similar obligation to gain access to the single market.

In both cases, public procurement would be an integral part of the arrangements under the existing EU Regulations.

There is current discussion²⁸ on the possibility of the UK opting to remain in the EU customs union, possibly as part of a transitional arrangement. Whilst this has some disadvantages, it would enable the UK to adopt its own public procurement rules under the WTO's auspices and obviates the need for a hard border between Northern Ireland and the Republic of Ireland.

Thus, the WTO approach is the most appropriate.

The Government's White Paper²⁹ made it clear that there was no intention for the UK to remain within the EU single market, which would inevitably have required a continuation of the existing onerous procurement rules and, thus, the White Paper contained the following paragraphs dealing with membership of the WTO and its importance:

9.16 The UK is a founding member of the WTO and has been a member of the General Agreement on Tariffs and Trade since 1948. Our WTO membership will form the bedrock on which we build our future trade relationships. It secures access rights to other members' markets, provides a framework through which those rights can be enforced and provides a common rules-based approach to commerce across all WTO members that businesses can understand and rely on.

9.17 As part of leaving the EU, the UK will need to establish our own schedules covering trade in goods and services at the WTO, providing clarity for UK business about their access to overseas markets around the world and also providing a clear basis for negotiating new trade agreements, not just with the EU, but with old friends and new allies from outside Europe too.

9.18 As the Secretary of State for International Trade informed Parliament on 5 December 2016, work is already underway on this. Our aim is to establish our schedules in a way that replicates as far as possible our current position as an EU Member State, thus creating a mutually beneficial, simple and inclusive outcome, so that the interests of the UK and other WTO members are protected.

The Government, thus, intends that EU Member States would continue to have access to UK public sector contracts through any future procurement regulations. However, the Government might be tempted to adopt a different attitude as the European Commission has recently adopted unreasonable conditions for the UK-based private sector competing for EU-based contracts.³⁰

28 See Financial Times on 12, 13 and 21 June 2017 and Brexit: The Options for Trade : House of Lords European Union Committee, 13 December 2016

29 The United Kingdom's exit from and new partnership with the European Union Cm 9417, February 2017

30 See Financial Times, 20 April 2017, Brussels starts to shut British companies out of contracts, and Financial Times, 1 June 2017.

Membership of the WTO

The proposal to join the WTO as a full member after we leave the EU has support from Professor Sue Arrowsmith of Nottingham University in her important publication “The implications of Brexit for the law on public and utilities procurement”³¹. She writes that “*An agreement with the EU based on the Revised Agreement on Government Procurement could mean reduced coverage for the UK procurement regime in the areas of utilities, defence and concessions*”. More importantly she writes that “*It would also provide an opportunity for the UK to use more flexible award procedures, more akin to the EU’s utilities model than the public sector model and for a less burdensome system of remedies. This greater freedom of action would present an opportunity to improve the national procurement system*”.

An important report from the European Parliament’s Committee on Internal Market and Consumer Protection considered that the WTO Revised Agreement on Government Procurement would be the most acceptable starting point for a future EU-UK public procurement model. This is the view of the Committee report as the UK had rejected both the possibility of free movement of workers and the jurisdiction of the Court of Justice of the European Union.³²

Two very recent reports from the House of Commons International Trade Select Committee and the House of Lords Select Committee on the Constitution set out in detail the process of joining the WTO, including the immediate task in drawing up the Repeal Bill (formerly the Repeal Bill).³³ The former³⁴ contains the encouraging comments from the Director General of the WTO, Roberto Azevedo, who also stated that “*The UK is a member of the WTO today, it will continue tomorrow. There will be no discontinuity in membership*” He also added that “*I will be working hard, I will work very intensively to ensure this transition is fast and is smooth. The less turbulence the better*”.³⁵ Discussions have already been undertaken by the UK government with the WTO and whilst trade issues may take time to negotiate, there seems no reason for work to commence on drafting public procurement regulations based upon the GPA dealt with in more detail below.

The House of Lords Select Committee³⁶ was considering constitutional issues surrounding the Repeal Bill designed to incorporate existing EU law into UK law on the date of our departure including the implications of delegated powers and secondary legislation. The Committee suggested that “*a general provision be placed on the face of the Bill to the effect that the delegated powers granted by the Bill should be used only:*

- *so far as necessary to adapt the body of EU law to fit the UK’s domestic legal framework; and*
- *so far as necessary to implement the result of the UK’s negotiations with the EU.”*

31 Publication by Achilles Information Limited, September 2010

32 European Parliament Report to Committee on Internal Market and Consumer Protection, 11 May 2017.

33 See White Paper (“2017 White Paper”): Legislating for the United Kingdom’s withdrawal from the European Union Cm 9446, March 2017

34 Report titled UK Trade Options Beyond 2019, 6 March 2017

35 Interview on Sky News, 26 October 2016

36 Report titled The Great Repeal Bill and Delegated Powers, 7 March 2017

There was a separate recommendation dealing specifically with secondary legislation, such as the various public procurement regulations, including a procedure whereby if the relevant new statutory instrument amends EU law in a manner that determines matters of significant policy interest or principle, it should undergo a strengthened scrutiny procedure.

The Government, in their 2017 White Paper, have indicated that the existing procurement regulations are simply adopted into UK law – perhaps with some modest changes, as suggested below – with a firm commitment that new regulations will be forthcoming when our WTO membership has been confirmed. Whilst ideally it would be better to adopt new regulations immediately after our departure this two stage approach may be inevitable, particularly if, as has been suggested³⁷, there is to be a transitional arrangement between departure and conclusion of trade discussions and the EU, as an existing WTO member, will need to consent to the UK's individual membership. The Repeal Bill will need to acknowledge the role of the UK's devolved legislature as suggested in paragraph 4.6 of the 2017 White Paper so that devolved ministers will have the power to amend their legislation appropriately. This will be particularly important for Scotland, which has adopted the Procurement Reform (Scotland) Act 2014 for below threshold contracts. It is suggested that the interim regulations issued immediately upon commencement of the Repeal Bill could be amended in a number of ways without involving significant issues of principle:

- (a) Housing associations, as private sector entities, should be exempted from the public procurement rules entirely as the UK will no longer be obliged to observe (dubious) opinions from the European Commission and this would simply require a letter from the relevant minister. In the unlikely event of concerns as to this new freedom, the housing associations' trade body (National Housing Federation) could draw up a simple procurement code for all associations or registered providers. The NHF considered some years ago that the additional cost of EU procurement equated with 9,000 homes per annum.³⁸ These additional homes would make a significant contribution to the UK's current housing needs.
- (b) Amendments to delete references to OJEU (substituting the Gazette), the European Commission and other vestiges of the EU (including eliminating jurisdiction of the European Court of Justice), incorporating similar advertising arrangements and UK technical considerations.
- (c) The temporary regulations could embrace more fully the principles of the 2012 Act which currently requires public bodies prior to procuring services on their own or services combining hire of goods or carrying out works, to consider how such procurement would *"improve the economic, social and environmental well-being of the relevant area"*. The scope of the 2012 Act was widened to embrace the 2015 Regulations but should apply throughout the procurement process and apply not only to services, but, also, goods and works and operate as a key selection and award criteria. This could be achieved by some simple amendments to the 2012 Act in the Repeal Bill and incorporated in the temporary regulations using the Henry VIII provisions. The 2015 Society of Labour Lawyers/Labour Finance Industry Group publication on procurement³⁹ articulated similar tightened proposals stressing the importance of contractors delivering

37 Financial Times, 7 April 2017

38 Costs 9,000 homes a year: Inside Housing, 11 February 2011

39 Society of Labour Lawyers/Labour Finance and Industry Group: Socially Responsible Procurement, March 2015

social value and committing themselves to meeting social and environmental award targets. More recently the House of Lords Select Committee on Charities recommended that public bodies should “account for” rather than merely “consider” social value and proposed other similar procurement changes.⁴⁰

Local authorities, in particular, have been slow to use their powers under the 2012 Act in exercising procurement decisions and adopting policies to create social value. Bristol City Council⁴¹ has such a policy, the overarching intent being to ensure commissioning activity maximises social, economic and environmental benefit while delivering value for money:

“[the] aims are:

- 1. To further our sustainable procurement objectives to protect and enhance the environment.*
- 2. To promote the local economy by supporting micro, small and medium sized enterprises and the voluntary and community sector in Bristol to thrive.*
- 3. To tackle disadvantage and address inequalities of health, wealth and opportunity in the city.*
- 4. To involve local people and organisations in how we meet the needs of local communities through the commissioning cycle.”*

- (d) Subject to ensuring that it does not breach any binding international guidelines, the Government should substantially increase the existing thresholds for goods and services which have been considered far too low for many years and confirm automatic dispensation from the Treaty of Rome obligation to advertise below threshold contracts whether or not there was considered to be “cross border interest”.
- (e) Whilst it would be desirable in the short term to amend radically the provision of Regulations 74-76 and 77 to widen the scope of the services included within those provisions, it may be easier simply to incorporate those services in Schedule 3 of the 2015 Regulations (as amended) and include these services within the provisions of Regulation 77. In addition, the initial contract term should be extended from three to fifteen years which would be rather more realistic for a new public service mutual, which is likely to be an SME. Eventually all the services listed in Appendix A should be subject to reworked rules reflecting amended Regulations 74-77.
- (f) Correct the definition “bodies governed by public law” and wording referring to “management supervision” so as to exclude housing associations from the public procurement rules. It has been suggested that all 190,000 registered charities should also be bound by the 2015 Regulations as they are subject to the same elements of “management supervision” by the Charity Commission as are housing associations by the Homes and Communities Agency.

⁴⁰ House of Lords: Stronger Charities for a Stronger Society, 26 March 2017

⁴¹ Social Value Policy, Bristol City Council 2016

The New Public Procurement Regulations

The author has undertaken some detailed consultation with range of housing associations, contractors and local authorities as to their aspirations for entirely new procurement regulations. Comments have been received about the drawbacks of the existing regulations and many suggestions as to any new provisions which have been included within the paragraphs below. Indeed some of those comments have been embraced in the six suggestions above to be incorporated in temporary regulations pending the UK's formal admission to WTO membership. Consequently all the above suggestions should be incorporated (subject to additional amendments below) in the new regulations.

Some aspects of the World Trade Organisation's Revised Agreement on Government Procurement highlight its flexibility as it has been drafted to encourage increased membership particularly from developing countries with the emphasis upon improving transparency, integrity, avoidance of conflicts of interest, preventing corrupt practices and reducing barriers for SMEs who promote wider socio-economic objectives.

The key elements in the Revised Agreement on Government Procurement are:

1. General rules governing the issues referred to above which incorporate non-discrimination, use of electronic means, conduct of procurement as above
2. Minimum standards dealing with notices, conditions for participation, qualification of suppliers, time limits, documentation, treatment of tenders and awards
3. Establishment by WTO members of their own domestic independent review procedure as well as consultations and dispute settlement
4. Existence of a WTO committee to undertake periodic reviews of the GPA including the treatment of SMEs, treatment of sustainable procurement and safety standards
5. The important Annexes which would appear in each WTO member's procurement regulations dealing with the following information:
 - (a) Annex 1 detailing central government entities subject to procurement rules
 - (b) Annex 2 listing the sub-central government entities, which would include local authorities and quangos
 - (c) Annex 3 lists other entities subject to the same rules
 - (d) Annex 4 list the goods covered within the rules (including thresholds)
 - (e) Annex 5 lists the services (other than construction) (including thresholds)
 - (f) Annex 6 lists the construction services (including thresholds)
 - (g) Annex 7 can incorporate general notes

Professor Sue Arrowsmith writes that *“there is a possibility, although perhaps rather slight, that [the UK’s departure from the EU] would see the UK throw off the shackles of EU procurement law, leaving it free to design its own system.”*⁴² Unfortunately the UK Government has tended not only to incorporate EU Procurement Directives in full but also to add other unnecessary gold plating provisions to increase the complications for public bodies and contractors alike. Thus the prize for the UK government is now to devise some simpler procurement rules to reduce red tape and the costs associated with the existing system.

The new regulations should incorporate some aspects of the existing 2015 Regulations and build upon others and suggested below are a number of areas meriting close attention based upon the need for simplification, ensuring value for money and incorporating award criteria emphasising the importance of social, economic and environmental issues. Other commentators have suggested an approach based upon the EU’s early Utilities Directive before it was burdened with the detail added in 2004 and 2014. However the UK should use the advantages in framing its new regulations upon the existing GPA. The key issues are outlined below:

1. The Annexes 1, 2 and 3 should ruthlessly prune down the 100,000 bodies now subject to the public procurement regime. This should exclude housing associations or registered providers, permit greater flexibility for so-called Teckal companies owned by local authorities and, also, a range of quangos who obtain significant funds from non-government or other public sources.
2. Annexes 4, 5 and 6 should incorporate a wide range of options on the basis that, where appropriate, there is either preferential treatment for certain options or some of them are reserved for specified types of contractors. In particular, there should be a flexible approach to all services reflecting the former Part B provisions in the former 2006 Regulations through an Annex 5 based upon Appendix A to this paper.
3. So as to encourage SMEs to submit proposals there needs to be both a higher threshold for both goods and services subject to persuading the WTO, in so far as they dictate the amount of such thresholds, but also the adoption of provisions in Chapter 8 of the existing 2015 Regulations recommended in the Lord Young report⁴³ subject to a significant increase in the thresholds as mentioned above. The Government should use its powers under the Small Business, Enterprise and Employment Act 2015⁴⁴ to stimulate and assist SMEs tendering for public sector contracts.
4. All contracting entities (or their associated companies) who have in the past five years been subject to successful criminal or health & safety proceedings, default in payment of taxes and national insurance or serious discrimination cases should automatically be disqualified unless there are exceptional circumstances.
5. Whilst pre-qualification questionnaires have been discouraged, they are nevertheless important to establish the identity and financial strength of the tenderer. All procurement bodies should only request the essential information during the process so as to stimulate interest in any tender.

⁴² The implications of Brexit for the law on public and utilities procurement by Professor Sue Arrowsmith September 2016

⁴³ Report on Small Firms 2010-2015 by the Rt. Hon. Lord Young of Graffham, 10 February 2015

⁴⁴ Section 39 of the Small Business, Enterprise and Employment Act 2015

6. The UK should reduce the number of procurement options and, in particular, abandon the “competitive dialogue” approach entirely. It involves huge costs for tenderers which can only be recouped from contracting parties raising the overall cost of public procurement generally. Consideration should also be given to abandoning the new “innovation” approach included in the 2015 Regulations.
7. Reduction in timescales between initial advertisement (in the Gazette, a UK based portal or OJEU at the discretion of the public body) and contract award.
8. Encouraging a partnership approach to procurement with both longer terms for framework agreements, subject always to good performance on the part of the contractor, and more flexible provisions to lengthen contracts on such performance. Such arrangements would encourage greater loyalty between the parties rather than seeing the procurement process as a means to an end.
9. A more flexible approach to land transactions involving elements of public works, whether or not required as a condition of the planning consent.
10. Permitting a public body, at its discretion, to undertake procurement for the services recommended in Appendix A on the basis of either the light touch or the mutuals regime. This would develop a wider use of the Regulation 77 or mutuals approach to all the services contained in Appendix A. Such services should be reserved, at the discretion of the public body, to both independent charitable entities or public service mutuals and (subject to certain safeguards) the relevant public body could negotiate direct with their chosen contractor. These considerations should involve deletion of the requirements to “carry out a procurement exercise” under Section 83 of the Localism Act 2011 in respect of the Community Right to Challenge.
11. Most local authorities are exploring new forms of service delivery as a response to continuing financial stringency but wish to involve the local community, third or voluntary sector. The new rules need to embrace a widened version of the existing Regulation 77 of the 2015 Regulations so as to enable local authorities to implement their own preferred service delivery choice.
12. The terms of the 2012 Act should be extended under the Repeal Bill to cover goods, services and works contracts on the basis that public bodies must give weight to social, economic and environmental considerations when drawing up both their criteria for selection and their contract award. By way of example, contractors should take into account the importance of enabling local employment (including training and apprentices), engaging with the local community on construction projects and honouring their obligations to pay no less than the national minimum wage to their employees. In addition, where relevant, contracting public bodies could legitimately expect that contractors would create a local office or entity in the long term provision of services.
13. Dispute resolution during procurement has always been an expensive process and is particularly daunting for SMEs. There is one key issue which requires clarification in any new regulations, namely whether persons falling outside the definition of “economic operators” under the 2015 Regulations can challenge a public body procurement decision.

There have been two conflicting High Court Judgements⁴⁵ which gave rise to differing decisions as to whether the persons had “sufficient standing” to challenge the local authority decision. Thus, the new regulations should provide that, save insofar as is provided in the remedies section, no public contract or decision to enter into a contract may be questioned in proceedings on the grounds there has been a breach of the regulations.

More importantly, government needs to devise a simpler and speedier method of resolving disputes without creating a new obese bureaucracy. The Society of Conservative Lawyers⁴⁶ suggested a new ombudsman and/or a specialist tribunal.

Skeleton Draft

At Appendix B is a skeleton draft of the suggested new procurement regulations based upon the WTO GPA and the recommendations in this paper.

Conclusions and Recommendations

The UK’s departure from the EU affords a significant and welcome opportunity to introduce new public procurement rules with an Anglo-Saxon emphasis and UK-centric approach. These new rules would:

- Supersede the existing complex and expensive EU Regulations, which is an important opportunity from which the UK economy should benefit
- Exempt housing associations or registered providers from the rules in their entirety
- Be based upon the simpler WTO Revised Agreement on Government Procurement which emphasises value for money, integrity, accountability and efficiency in the process
- Considerably widen the types of services which public bodies (at their discretion) can reserve for either the light touch or mutuals regimes
- The Government, under its powers in the Repeal Bill, should, immediately after commencement, amend the existing 2015 Regulations to delete the EU-related references and, so far as is feasible, introduce other amendments recommended in this paper even if there are transitional arrangements
- Immediately we are admitted as an individual member of the WTO, the proposed new procurement rules should be introduced
- The terms of the Public Services (Social Value) Act 2012 should be widened to stress the importance of social, economic and environmental wellbeing in both the selection and award criteria and to cover goods, services and works contracts
- Procurement dispute resolution should be simplified and made more accessible and the new regulations need to clarify which persons can bring proceedings to challenge procurement decisions

⁴⁵ *Gottlieb v Winchester City Council* [2015] EWHC 231 (Admin.) and *Wylde v Waverley BC & Crest Nicholson* [2017] EWHC 466 (Admin.)

⁴⁶ *Procuring Economic Growth: An Overview of Procurement Law Reforms Essential to Recovery* by Natalie Etchells, February 2017

Appendix A

Services Recommended in New Regulations and/or Reserved Contracts and Their Genesis

Service	Note reference
Publishing and printing	(A)
Accounting, auditing and book-keeping services	(A)
Health, social and related services	(LT) and (M)
Administrative social and healthcare	(LT) and (M)
Compulsory social security services	(LT)
Benefit services	(LT)
Religious services	(LT)
Provision of services to the community	(LT) and (M)
Postal services	(LT)
Range of staff and other training	(M)
Administrative housing services	(M)
Domestic help and nursing services	(M)
Medical personnel services	(M)
Library, archives, museums and other cultural services	(M)
Sporting services	(M)
Hotel and restaurant services	(B) and (LT)
Transport by rail	(B)
Transport by water	(B)
Supporting and auxiliary transport services	(B)
Legal services	(B) and (LT)
Personnel placement and supply services	(B)

Service	Note reference
Investigation and security services, other than armoured car services	(B) and (LT)
Education and vocational health services	(B), (LT) and (M)
Health and social services	(B)
Recreational and sporting services	(B)
Cultural services	(B) and (LT)

Notes:

1. The topics included in the Part A Services by the 2006 Regulations are marked “(A)” recommended for incorporation in any new light touch or mutuals regime.
2. All the topics included in the Part B Services in the 2006 Regulations are marked “(B)” and should be incorporated, as above.
3. The topics in the light touch regime of the 2015 Regulations (Regulations 74-76) are marked “(LT)”.
4. All the topics reserved for mutuals in the 2015 Regulations (Regulation 77) are marked “(M)” and should be incorporated, as above.

Appendix B

Skeleton Draft of New Public Contracts Regulations for Services, Supplies and Works

Regulation No.	Title	Brief Note of Content
1	Introduction	Citation, commencement, extent and application.
2	Definitions	A range of definitions, excluding “bodies governed by public law” and confirming the Gazette as the official public record.
3	Scope and Coverage	<p>As per the WTO GPA with confirmation as to three areas: thresholds/ valuations and exceptions. The latter will include utilities, electronic communications, defence, security and all of those in Regulation 10 of the 2015 Regulations.</p> <p>Enlarge provisions relating to land transactions.</p>
4	Contracts between public sector entities	Incorporation of a more flexible approach to contracting with other public bodies or companies in which the public body has either a controlling interest or which undertakes less than 80% of its work for such a body.
5	General Principles	Non-discrimination, transparency, avoidance of conflicts of interest and prevention of corruption, plus confidentiality and electronic means / methods of communication.
6	Developing Countries	Provision to reflect GPA (Article V), including taking into account UK foreign aid.

Regulation No.	Title	Brief Note of Content
7	Notices	Reflecting Article VII in the GPA, contents of intended procurement, including choice of procedure, timetable and selection criteria (see Regulations 58 and 60 of 2015 Regulations.
8	Choice of Procedures	Paragraphs highlighting open, restricted and negotiated procedures plus framework agreements and electronic auctions.
9	Conditions for Participation and Qualification	Issues relating to PQQ, mandatory exclusion of contractor on grounds of bankruptcy, professional misconduct, health and safety / criminal conviction / failure to pay taxes applying to both contractor or associated entity, reflecting Regulation 57 in the 2015 Regulations.
10	Technical specification and tender documentation	General requirements reflecting Article X in GPA and simplified arrangements in the 2015 Regulations.
11	Time periods	Timetable for the procurement process with an emphasis upon bettering arrangements than those in the 2015 Regulations.
12	Limited tendering	Reflecting Article XIII of GPA for specialist services, supplies or works.
13	Treatment of tenders and awarding of contracts	Clear award criteria, including marking / assessment and incorporating provisions relating to abnormally low tenders.
14	Public Services (Social Value) Act 2012	Provisions to reflect enhanced provisions of the 2012 Act.

Regulation No.	Title	Brief Note of Content
15	Reserved Contracts	Regulations incorporating participation of sheltered workshops and employment, the light touch and enhanced mutuals provisions.
16	Modifications, rectification and negotiations	General provisions requiring careful drafting setting out arrangements for these three eventualities.
17	Disputes	Incorporation of provisions (if practicable) in respect of resolution of procurement disputes.
Annexes 1, 2 and 3		Lists of central government entities, sub-central government entities and other bodies subject to procurement rules, taking into account issues raised in this pamphlet.
Annexes 4, 5 and 6		Lists goods, general services and construction services covered by the new Regulations.
Annex 7		General notes.

The Society of Conservative Lawyers is an association of lawyers who support or are sympathetic to the aims of the Conservative Party. Members hold a range of different views within those parameters and the views expressed in this paper are not necessarily held by all members of the Society or by the Conservative Party.

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For further information about the Society of Conservative Lawyers,
contact Sarah Walker (Administrative Secretary) at socconlaw@aol.com

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