



COVID-19– Geldards Public Sector Update

Business Emergency Advisory Team

29th April 2020



Public Procurement

Tiffany Cloynes, Partner, Clare Hardy Senior Associate

29th April 2020

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Framework Agreements

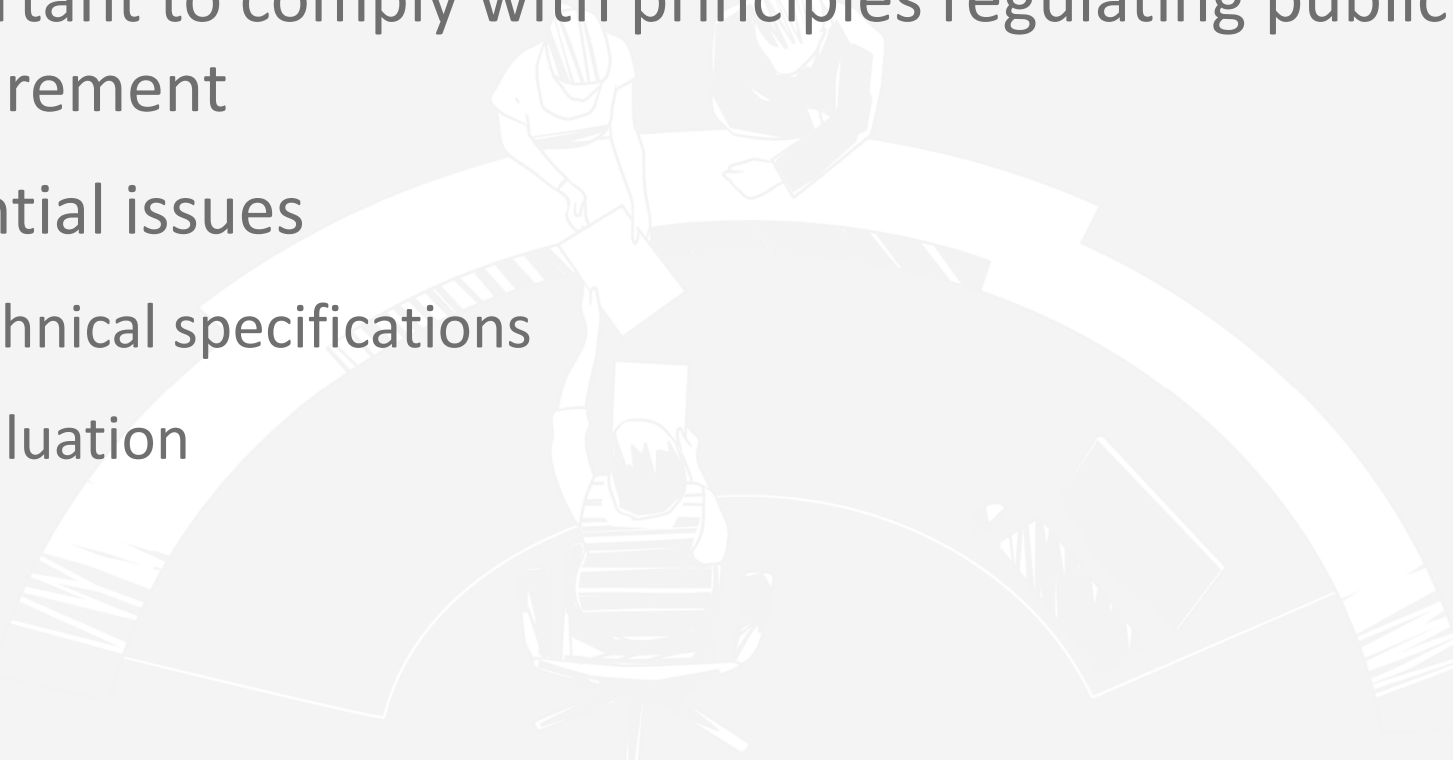
- Section 33 Public Contracts Regulations 2015
- Contracting authority may conclude framework agreements to establish terms of contracts with economic operators during a specified period
- Must not last longer than four years except in exceptional circumstances justified in accordance with subject matter
- Call-off contracts to be awarded in accordance with arrangements specified in procurement of the framework

Using frameworks

- What frameworks do you have the right to use?
- Do your own rules expect you to use particular frameworks?
- Will the call-off terms and conditions meet your requirements?
- Can your appointed contractor comply with them?
- Extensions and other modifications – Regulation 72
 - Will it still comply with Regulation 33?

Transparency and equal treatment

- Important to comply with principles regulating public procurement
- Potential issues
 - Technical specifications
 - Evaluation



Technical Specifications

- Regulation 42 Public Contracts Regulations 2015
- Must provide equal access of economic operators to procurement procedure
- Must not create unjustified obstacles to competition
- Methods of formulating technical specification
 - Performance or functional requirements
 - Reference to technical specifications and standards or equivalent

Technical Specifications – Case Law

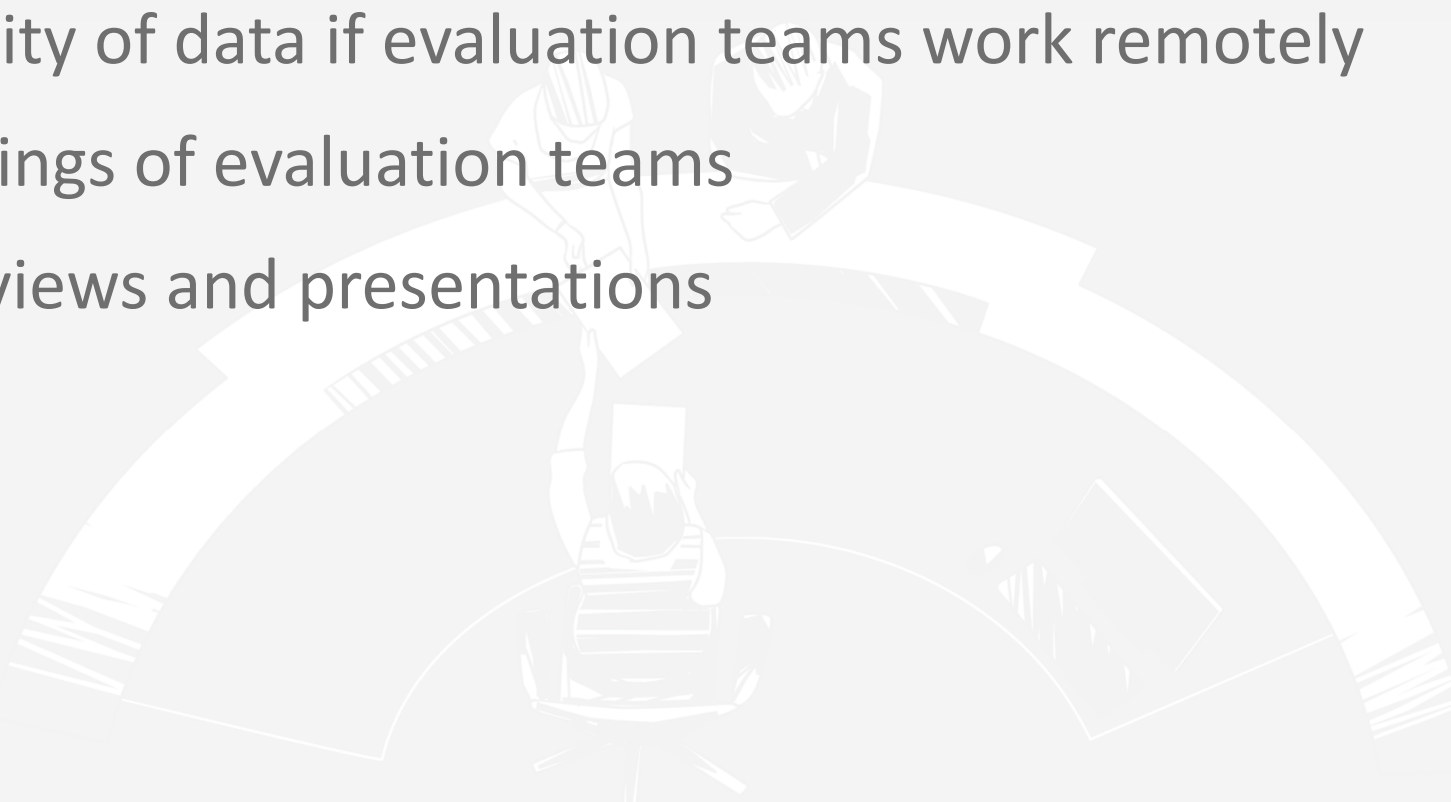
- *Roche Lietuva* – C-413/17
- Contracting authorities have wide margin of discretion
- No hierarchy of methods for formulating technical specifications but:
 - Contracting authorities must comply with principles of non-discrimination and transparency
 - The more detailed a specification, the greater the risk of favouring a particular supplier

Evaluation

- Contracting authorities must be transparent about evaluation criteria and scoring system
- Persons involved in evaluation need to understand evaluation and the subject matter
- Evaluation must be approached in a systematic manner, with a clear rationale and conclusion for each score
- Accurate records of evaluation must be maintained
- *Lancashire Care NHS Foundation Trust v Lancashire County Council*

Evaluation - Practicalities

- Security of data if evaluation teams work remotely
- Meetings of evaluation teams
- Interviews and presentations



Abandoning a procurement

- Apply rights reserved in procurement documents
- Contracting authority must have a non-discriminatory reason to abandon a procurement
- Must inform tenderers as soon as possible of decision not to award a contract or to recommence a procedure – Regulation 55 Public Contracts Regulations 2015
- Must record in a report reasons for deciding not to award a contract – Regulation 84



COVID - 19 Contracting Complexities Part 2

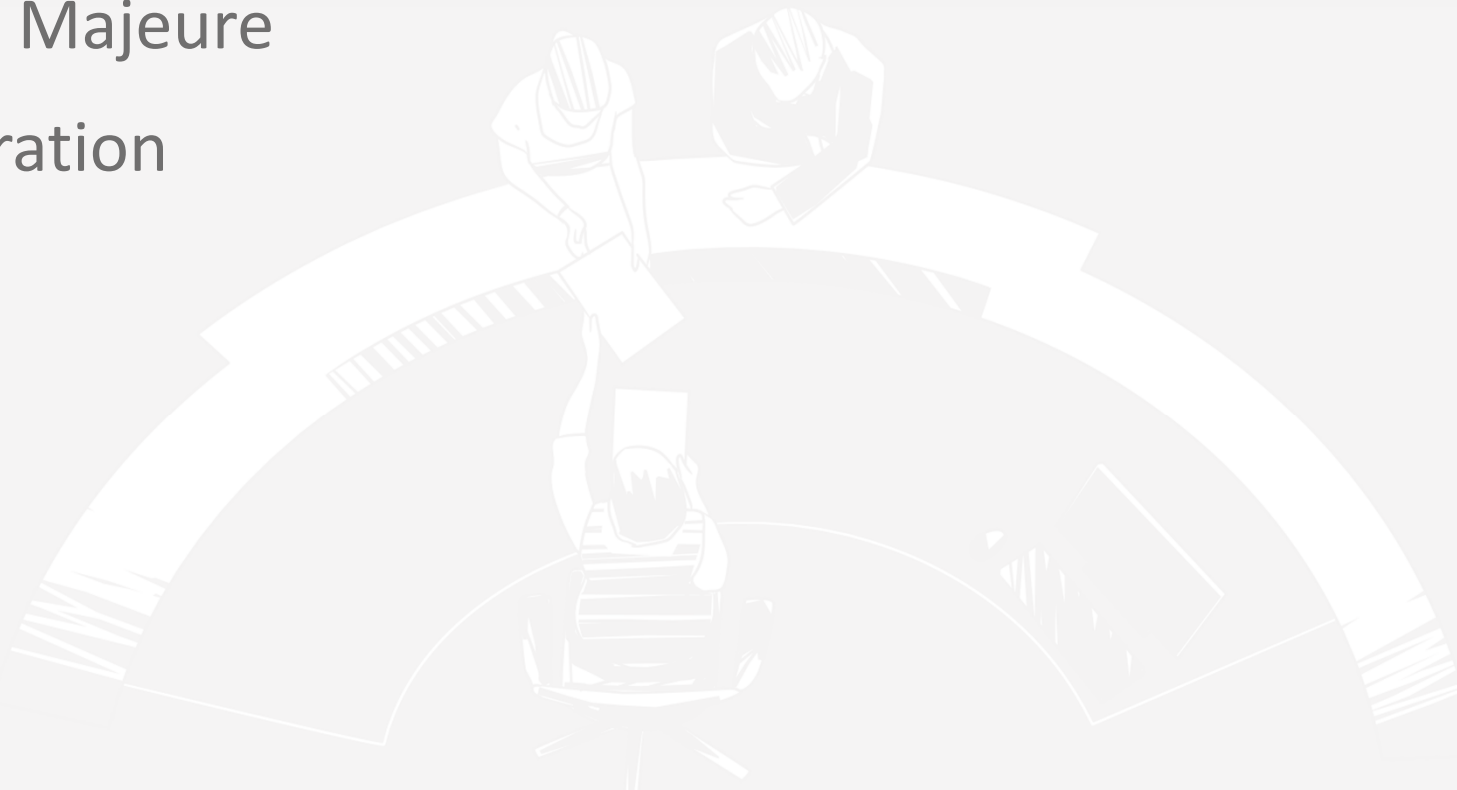
Michelle S Craven-Faulkner, Partner, Commercial Services

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Introduction

- Force Majeure
- Frustration



Force Majeure

- Is there a force majeure provision?
 - If 'no'don't panic!
 - If 'yes'what does it cover?
 - Pandemic/epidemic?
 - Events outside of a party's reasonable control?
 - 'biological contamination'?
 - 'Including' or 'including but not limited to'
 - Act of God?

Force Majeure

An Act of God is said to mean;

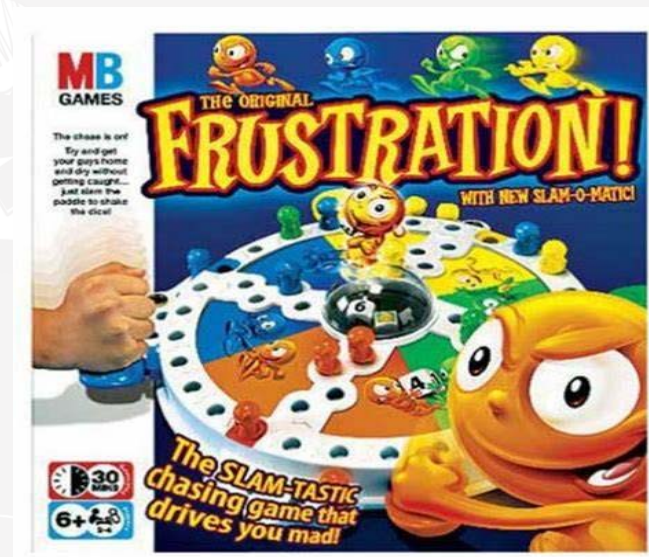
“such a direct and violent and sudden and irresistible act of Nature as the defendant could not, by any amount of ability, foresee would happen, or, if he could foresee that it would happen, he could not by any amount of care and skill resist, so as to prevent its effect”

([Nugent v Smith \(1876\) 1 CPD 423](#); Cockburn CJ at paragraph 426)

Force Majeure

- Who carries the burden of proof?
- Beyond the control of the affected party?
- Any reasonable steps to avoid or mitigate the event?
- Reasonably foreseeable?
- Process/consequence?

Frustration



Frustration

[Davis Contractors Ltd v Fareham UDC \[1956\] AC 696:](#)

“frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.”

(Lord Radcliffe at paragraph 729)

Frustration

When was the arrangement entered into?

Frustration

- Impossibility of performance
- Contract purpose is impossible
- Significant change to a mutually agreed state of affairs
- Allocation of risk



Managing contracts and insolvency in the light of the Covid 19 pandemic

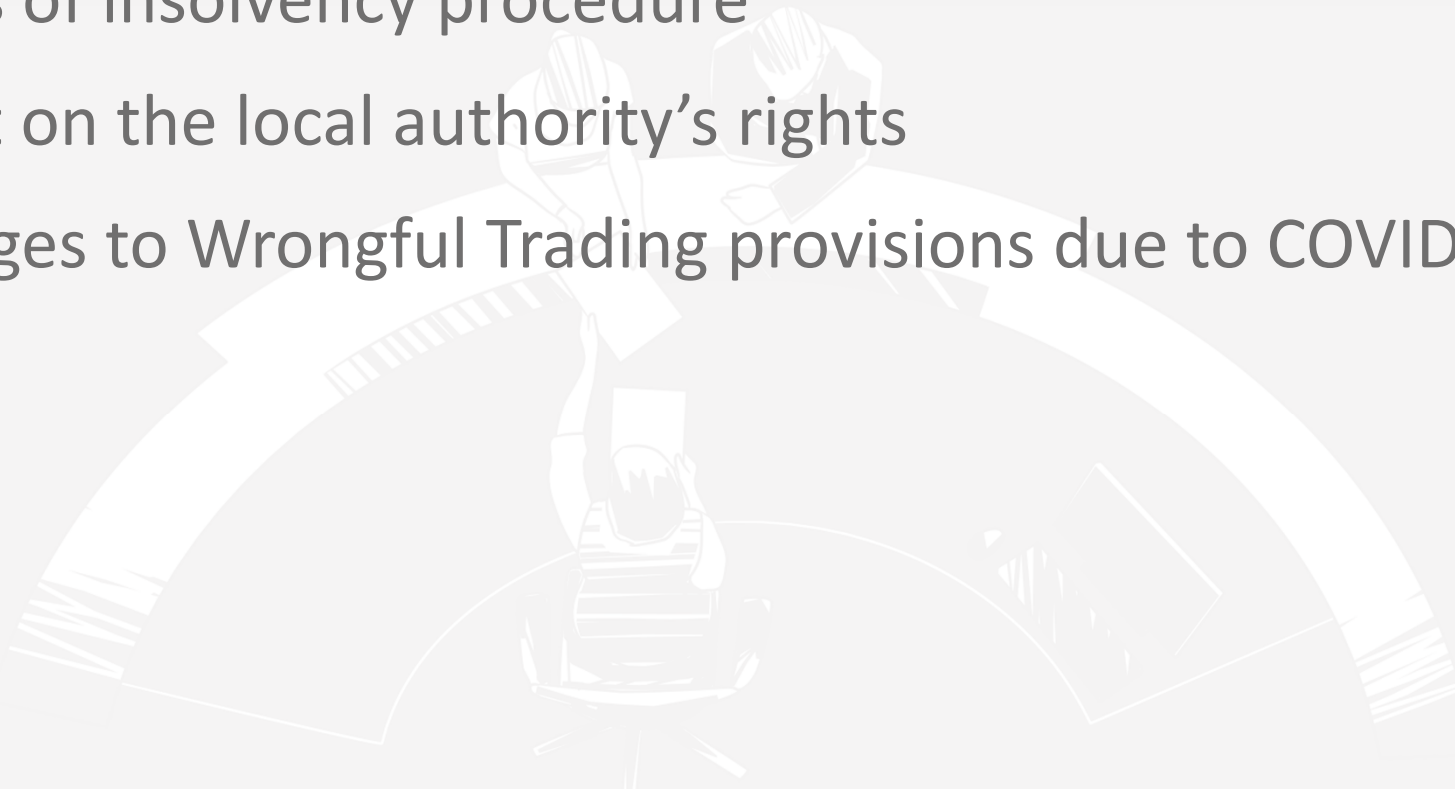
Ruth Thurland, Senior Associate, Business Recovery and Insolvency

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Managing contracts and insolvency

- Types of insolvency procedure
- Effect on the local authority's rights
- Changes to Wrongful Trading provisions due to COVID-19



Definition of insolvency (company)

S123 Insolvency Act 1986

- The company cannot pay its debts as and when they fall due (cash flow test), for example:
 - A statutory demand of £750 or over goes unsatisfied after 21 days;
 - A court judgment is returned unsatisfied in whole or in part.
- The company's assets are exceeded by its liabilities (balance sheet test).

Types of insolvency procedure

- Administration
- Liquidation (voluntary or compulsory)
- Company Voluntary Arrangement (“CVA”)
- New restructuring procedure?

Administration

- A **rescue** procedure – aim is to rescue all or some of the company as a going concern
- Usually involves a sale of the company's business
- Can happen very quickly – no notice to unsecured creditors
- Creates a moratorium on creditor action to preserve assets for the benefit of all creditors

Liquidation

- A **terminal** procedure
- The company's business ceases, and the liquidator realises its assets for the benefit of creditors
- Three kinds:
 - Compulsory (winding up by the Court following a petition)
 - Creditors' voluntary (company resolves to appoint liquidators on the basis that it is insolvent)
 - Members' voluntary (used where the company is solvent – not an insolvency procedure).

Company Voluntary Arrangement (“CVA”)

- A **compromise** between a company and its creditors
- Very flexible. No prescribed contents or maximum length
- Proposals must be approved by at least 75% by value of the company’s creditors (and 50% of the unconnected creditors) who respond

New restructuring procedure?

No draft legislation yet but expected to include:-

- Moratorium supervised by an Insolvency Practitioner
- Company remains under the control of its directors
- Suppliers required to continue to supply

The moratorium

Can restrict:-

- County court claims
- Other insolvency proceedings
- Enforcement of judgments
- Enforcement of security
- Actions in respect of property e.g. repossession, forfeiture

The moratorium

- Most restrictions apply in Administration
- No moratorium at all in voluntary liquidation
- Limited moratorium in compulsory liquidation – automatic stay of actions or proceedings
- No moratorium while CVA proposals being considered unless ordered by the Court

Outcomes of the insolvency process: Continuity of services

- CVA – if approved the company will continue to trade, so provision of services should be unaffected
- Administration – the Administrator may trade the business while a buyer is sought, but can only do so if in the best interests of creditors
- Liquidation – the company ceases to trade, so unlikely that service provision will continue

Sale of the insolvent company's business

- Administrator will seek to sell the business as a going concern, including its ongoing contracts
- Benefit: allows provision of services to continue uninterrupted
- Potential problem: post-sale, those services would be provided by the purchaser, not the original contracting party
- How does this sit with procurement obligations?

Alternative: terminate the contract

- A moratorium does not prevent the exercise of contractual rights (*Re Olympia & York Canary Wharf Ltd [1993] BCC 154*)
- You can terminate a contract on the grounds of insolvency if the contract provides for it
- Exception is the provision of “essential supplies” e.g. utilities (s233A Insolvency Act 1986) which may prevent termination for insolvency in an administration or CVA
- Even so, may still be able to terminate on other grounds

What else is new?

- Suspension of s214 Insolvency Act 1986: “wrongful trading”
- Designed to allow directors to continue to trade through the pandemic without risking personal liability
- Not blanket immunity – other provisions unaffected, plus there is a similar duty in s172(3) Companies Act 2006

Any questions



Contact details



Tiffany Cloynes
Partner

+44 (0)1332 378 302
tiffany.cloynes@geldards.com



Clare Hardy
Senior Associate

+44 (0) 29 2039 1766
clare.hardy@geldards.com



Michelle Craven-Faulkner
Partner

+44 (0)1332 378 391
michelle.craven-faulkner@geldards.com



Ruth Thurland
Senior Associate

+44 (0)115 983 3699
Ruth.thurland@geldards.com

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