Transforming Public Procurement

Green Paper | Consultation Questions

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Introduction

The proposals in the government's Green paper on Transforming Public Procurement are intended to shape the future of public procurement in this country for many years to come.

The government's goal is to speed up and simplify our procurement processes, place value for money at their heart and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery.

This document contains Shoosmiths' responses to questions posed to those wishing to respond to the consultation.

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Consultation Questions

Q1. Do you agree with the proposed legal principles of public procurement?

As a general principle it is agreed that an overhaul of the public procurement process is needed. However, the biggest challenge, as we see it, will be to ensure that all the procurement officers in the various contracting authorities are suitably trained to put into practice the new principles. As at present, there is an inconsistency across authorities and purchasing consortia as to how the current rules are applied and, in particular, how contracts are placed and negotiated. The lack of transparency and commercial application does quite often mean that a number of the 6 principles are not met.

Q2. Do you agree there should be a new unit to oversee public procurement with new powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities?

As a concept this is welcomed however it is not clear how this would have a role to resolve a Supplier's concern about an individual procurement. This would then leave traditional means of challenge being the sole remedies available to a supplier and, where there is a desire to engage with all levels of the supply chain, it must be acknowledged that an SME will be unlikely to pursue a legal challenge due to the cost. As such the proposed remit of the new unit demonstrates benefits from a high-level point of view but not to support the Government's drive to work with suppliers from all levels of the supply chain.

Q3. Where should the members of the proposed panel be drawn from and what sanctions do you think they should have access to in order to ensure the panel is effective?

Private sector experts from all sectors should be engaged in this panel to ensure that it draws from practical market knowledge and experience. The challenge will be to keep the panel up to date with up to date sector knowledge, or to at least enable it to draw from that knowledge. At present contracting authorities don't have access to this sort of knowledge which can lead to arrangements which don't reflect current practice which will inevitably impact on the proposed procurement principles. Members of the legal profession should be included to ensure that recommendations and any sanctions are consistent with the law and/or a process for recourse/challenge to avoid any unwarranted interventions.

In terms of sanctions, it is noted that the purpose of the unit will not be to consider individual complaints but to oversee processes. This does lend itself to it being more of a policy body than one which will issue sanctions other than to exclude suppliers. Whilst there is reference to interventions that could be imposed on contracting authorities there must be an acknowledgement that these interventions could need immediate resolution and whilst spending controls may be feasible in some instances, they will not be practical in all and as such it may be that for those contracting authorities there is a requirement for them to have their procurement function outsourced to a centralised body or an alternative contracting authority until the shortcomings have been adequately addressed.

Q4. Do you agree with consolidating the current regulations into a single, uniform framework?

In an ideal world the simplification of legislation would of course be something that everyone would strive to achieve, especially as within the existing rules and regulations there is quite often a lack of understanding on both sides in terms of which regulations should be followed and which processes are being used. The clear aim of this process has to be a better understanding of what can and can't be done as part of the procurement process. Whether that can be achieved under the existing system is unclear as the chances are that despite a level of training, buyers will always revert to the practice they have known. This may not be of such a concern in principle but from a supplier's point of view, a level of negotiation for some goods and services will always be expected where the proposed commercial terms bear no resemblance to sector standards or commercial expectations. This once again has the impact of contracts not necessarily being value for money or for the public good. On that basis ,it is unclear how an overhaul of the procurement process can take place without some level of alignment or consolidation of the regulations although we consider that any consolidated regulations should have some sector specific elements to reflect the differences between sectors.

Q5. Are there any sector-specific features of the UCR, CCR or DSPCR that you believe should be retained?

The carve outs from each set of regulations should be retained to ensure that those sectors are not caught by future regulations.

Q6. Do you agree with the proposed changes to the procurement procedures?

The proposed changes will enable the Government to emulate closer with what is happening in the public sector, in particular the Competitive Flexible Procedure, which in turn will enable procurements to meet the 6 proposed procurement principles. It is agreed that there is a risk that buyers will stick to old methods which is why the training and support given to the buyers will need to be robust and extensive and support given from sector specialists.

The Open Procedure should have very clear parameters for use to ensure that it doesn't become the default setting for buyers, as in a number of cases that will not lend itself to compliance with the proposed procurement principles. In particular, the Open Procedure is frequently chosen for inappropriate procurements that require a more detailed procedure. This could be improved by allowing contracting authorities the discretion to shorten timescales in the new flexible procedure.

In terms of the Limited Tendering Procedure, the mandatory requirement to publish notices and a standstill period are both welcomed. It is suggested however that some close monitoring of this process would be required to ensure that it is not being abused and that the grounds for using the procedure are being appropriately followed. There is a risk that this could be the most readily challenged of the procedures unless of each of the grounds is clearly defined.

Q7. Do you agree with the proposal to include crisis as a new ground on which limited tendering can be used?

On the basis that a 'crisis' can only be declared in limited circumstances by the Minister then this would be helpful. Suitable checks and balances should also be in place however, such as a clear very limited definition of "crisis" and it would be hoped that in addition to the notices which need to be published, the new monitoring unit would also have powers of review over this process to ensure that it is not abused.

Q8. Are there areas where our proposed reforms could go further to foster more effective innovation in procurement?

It must be recognised that innovation is not solely linked to science projects or those with a headline 'research and development' principle. Innovation will inevitably and can be provided in the large number of projects across all sectors. The key risk here is ensuring the contracting authorities recognise this and have sufficient training to be able to identify and work with the private sector to encourage and promote innovation. This will not be achieved where the contracting authority is rigid in its approach and utilises template contracts which do not facilitate this. Equally, if a contracting authority were encouraged to adopt a more flexible and innovative approach without sufficient training for operational teams engaged in the tendering process there is plainly a risk of an inconsistent approach to procurement with increased risks of challenge to purchasing authorities.

In addition, calls to own any newly developed intellectual property will inhibit a supplier's desire to be innovative. Naturally where a project calls for innovation then the contracting authority should take ownership of the intellectual property that it has paid for, but where intellectual property is developed by the supplier as a means of offering best value then to take ownership in that situation will only stifle innovative ideas.

Q9. Are there specific issues you have faced when interacting with contracting authorities that have not been raised here and which inhibit the potential for innovative solutions or ideas?

A lack of market knowledge is quite often an issue as there will be a drive to mould each project into a template contract which prohibits innovation and quite often will restrict the supplier's ability to provide best value and or innovative solutions.

In addition, there is quite often a resistance against exploring new ideas within the template contracts as that is seen to delay projects and incur additional cost or it may be that legal/procurement services are

just too busy to support. Whilst all of this is understood, when considering the life cost of a project this position at the point of contract inception could have the effect of increasing the whole life cost as the supplier is prevented from innovating.

Q10. How can government more effectively utilise and share data (where appropriate) to foster more effective innovation in procurement?

There is a nervousness in some sectors concerning the use of intellectual property. Where a contracting authority has a non-exclusive licence with a right to sub-licence, this clearly opens the door to abuse, and this has been seen in practice. In order to facilitate better information sharing there would need to be clarity as to the reasons behind doing so and engaging with the suppliers to give them visibility and to potentially open the door to them to working with third parties. The supply chain is keen to collaborate and innovate together but quite often the terms which are offered to them to participate in Government funding initiatives is incredibly prohibitive, especially to SMEs. There needs to be more support for SMEs to innovate without having to partner with a Tier 1 supplier or an asset owner and a university. In many situations this has seen the SME cut out of future commercial opportunities and as the barriers to entry are often quite high, many will not choose to follow this route.

Q11. What further measures relating to pre-procurement processes should the Government consider to enable public procurement to be used as a tool to drive innovation in the UK?

Better training and information available to SMEs to encourage them to collaborate. As mentioned above, the barriers to entry for support are high and many SMEs, in particular considering the current climate, do not have the ability to consider these as viable options. There is a tendency for a number of SMEs to consider that intellectual property is a patent, there is not that breath of understanding as to what else is covered by intellectual property and what protection they can utilise without the need to pursue costly registrations.

Innovations hubs have been attempted in the past and in some areas they have been successful but the chances are that those business who succeed in that environment would have done regardless. There therefore needs to be far more support offered to SMEs to give them the confidence that they have the tools they need to consider collaborative working and to consider responding to a tender for a public procurement which previously has been overly time consuming and requires levels of detail and information that SMEs do not have.

It is also suggested that contracting authorities are obliged to consider SMEs when writing their tenders and where it is deemed that, for whatever reason, a tender suited to SMEs is not appropriate, reasons should be recorded for that. Thereafter there should be a contractual obligation imposed on supplier to utilise the supply chain and on terms that are commercially reasonable and proportionate to the nature of supply that they are engaged on. All too often suppliers will back off all risk to the supply chain and refuse to negotiate on the basis that these are the terms which have been imposed on them. SME engagement is what will drive innovation and that will not be forthcoming where suppliers seek to place all contractual risk onto them or make the process overly time consuming and therefore prohibitively costly.

Q12. In light of the new competitive flexible procedure, do you agree that the Light Touch Regime for social, health, education and other services should be removed?

Provided that the new competitive procedure allows the same flexibility then yes, although this should be reviewed in the context of the thresholds.

Q13. Do you agree that the award of a contract should be based on the "most advantageous tender" rather than "most economically advantageous tender"?

Agreed however this will again be linked to ensuring that suitable training is provided to the relevant personnel within the contracting authorities as on a number of occasions it is felt that MEAT has meant lowest price above everything else. This has always been a particular concern of the supply chain when considering suppliers who are based outside of the UK.

Q14. Do you agree with retaining the basic requirement that award criteria must be linked to the subject matter of the contract but amending it to allow specific exceptions set by the Government?

As a principle this is welcomed, but as acknowledged, there is a real risk that this could further restrict SMEs from engaging with public procurement. Whilst the proposed mitigation would help, ultimately it will depend on how the contractual authorities exercise their discretion. Clarity is required as to whether this decision making process would have to be published to show that the contracting authority took this into consideration and the unit proposed to be established within the Cabinet Office should have within its remit an obligation to audit this decision making process to ensure that SMEs are not unfairly excluded from procurements by virtue of contracting authorities not giving this due consideration. There is no detail in the consultations what these specific exceptions will be and unless these are very clearly defined there is a risk that these exceptions could be relied on to circumvent the principle of transparency and there should be clear reasons why the contracting authority is deviating from linking award criteria to the subject matter of the contract in each case.

Q15. Do you agree with the proposal for removing the requirement for evaluation to be made solely from the point of view of the contracting authority, but only within a clear framework?

Further clarification of this point would be required. It does of course make sense that the evaluation should look beyond the contract in question but how that could be considered on a wider basis is unclear at this stage. For example, where looking at goods and services which cover an area beyond that where the contracting authority is based, that could introduce a large number of stakeholders. Would the proposal be that a wider consultation process be introduced? This would inevitably have the impact of lengthening the tender process and incurring more cost. As with the specific exceptions from linking the award criteria to the subject matter of the contract, to avoid hidden subjectivity and potential bias it should always be clear what other points of view would be taken into account.

Q16. Do you agree that, subject to self-cleaning fraud against the UK's financial interests and non-disclosure of beneficial ownership should fall within the mandatory exclusion grounds?

This is agreed but we would query why the position relating to fraud does not extend to convictions for fraud in any jurisdiction?

Q17. Are there any other behaviours that should be added as exclusion grounds, for example tax evasion as a discretionary exclusion?

Please refer to the above. In addition there will inevitably be matters such a money laundering, modern slavery, working conditions policies which should be considered as forming a basis for a ground for exclusion regardless of the jurisdiction where this has taken place and whether it is the supplier or a member of its group.

Consideration should also be given as to whereby the criminal conviction of persons with significant control and/or powers of decision making should also be taken into account.

There should be a degree of caution exercised in allowing broad grounds for discretionary exclusion, however; as we have seen the threat of exclusion from future procurements used as a litigation tool by purchasing authorities. Categories for discretionary exclusion need to be clearly defined and reasonable in nature.

Q18. Do you agree that suppliers should be excluded where the person/entity convicted is a beneficial owner, by amending regulation 57(2)?

Agreed but on the basis of the points set out our response to Question 16 above.

Q19. Do you agree that non-payment of taxes in regulation 57(3) should be combined into the mandatory exclusions at regulation 57(1) and the discretionary exclusions at regulation 57(8)?

Agreed.

Q20. Do you agree that further consideration should be given to including DPAs as a ground for discretionary exclusion?

Agreed.

Q21. Do you agree with the proposal for a centrally managed debarment list?

Agreed.

Q22. Do you agree with the proposal to make past performance easier to consider?

Partially agreed. this would require guidance to be provided to commercial teams to ensure that this is monitored effectively. This does however once again point to the need for the contracts used to be fit for purpose and measure against the market to ensure that suppliers are not deemed to be poor performers by virtue of the contract setting unrealistic targets. The timescales in which the past performance occurred should be relevant as a company should not be excluded from a procurement indefinitely on the grounds of a previous director having a criminal conviction years ago.

We are also concerned that any such proposal must ensure that suppliers are not penalised as a result of genuine contract disputes with purchasing authorities. The monitoring of such performance should be clear and objective; so as to avoid it being used as an improper means of contract management and/or dispute resolution between suppliers and purchasing authorities.

Q23. Do you agree with the proposal to carry out a simplified selection stage through the supplier registration system?

This is agreed but consideration must be given to the fact that quite often this process is what excludes SMEs or new market entrants from qualifying for procurement processes, in particular due to either the thresholds that are required to be met in proportion to what is being procured or the depth of the questionnaire. How would this be addressed in light of the desire mentioned earlier in the Green Paper to encourage innovation?

Q24. Do you agree that the limits on information that can be requested to verify supplier self-assessments in regulation 60, should be removed?

Agreed, though what can be requested should exclude confidential information.

Q25. Do you agree with the proposed new DPS+?

Agreed, subject to the points relating to qualification entry levels set out above. Consideration must also be given to the number of DPS+ that a supplier may need to sign up to and the time that would take. This may be prohibitive in itself and therefore it is queried whether they could be any jointly owned/combined lists covering certain contracting authorities. The collaborative approach would greatly assist SMEs.

Q26. Do you agree with the proposals for the Open and Closed Frameworks?

Agreed in principle but experience has shown that framework arrangements can be overlooked and procurements undertaken outside of those arrangements. Suppliers who considered they had the opportunity to receive significant work under a framework are then left having expended the cost of winning their place on the framework but receiving no orders under it. This would need to be prevented other than in clearly defined situations with transparency to show a contracting authority's reasons to not use a supplier on a framework.

Q27. Do you agree that transparency should be embedded throughout the commercial lifecycle from planning through procurement, contract award, performance and completion?

Transparency is a key requirement when considering a wide scale review of this nature however there is a clear conflict between what should be published to ensure processes can be held to account and how that could impact a Suppliers market position. There are already issues where a project is undertaken in phases where a contracting authority will utilise commercial terms agreed with a Supplier in phase 1 as the basis for tendering for Phase 2. In doing so there is inevitably disclosure of pricing, intellectual property, processes and methodology covered by confidentiality, supply chain etc. There is therefore a concern that transparency could lead to open publication of negotiated commercial terms of a Supplier which would place them at a commercial disadvantage amongst competitors. There would need to be clear guidance therefore as to the nature of information capable of being disclosed.

Q28. Do you agree that contracting authorities should be required to implement the Open Contracting Data Standard?

Agreed subject to comments above.

Q29. Do you agree that a central digital platform should be established for commercial data, including supplier registration information?

A centralised system would be welcomed but there is a concern that in the interim there would be a number of system running in parallel which will inevitably cause confusion to buyers and suppliers. The interaction between systems would need to be established within a relatively short period of time to ensure that it didn't place an unnecessary burden on all parties with regards to data input and which system to monitor.

That said, to have a single platform against which all procurements could be managed would be of immense help to all parties and would clearly help towards reducing some levels of bureaucracy.

Q30. Do you believe that the proposed Court reforms will deliver the required objective of a faster, cheaper and therefore more accessible review system?

If you can identify any further changes to Court rules/processes which you believe would have a positive impact in this area, please set them out here. We consider that the proposed Court reforms do aim to address many of the flaws in the current system, in particular arising from the length and cost of proceedings. We also consider that the very short time frames between the issuing of a standstill letter and the need to issue proceedings creates a situation which is not ideal for dispute resolution. The lack of sufficient time to properly review what are often very complex procurement submissions often leads to parties acting with haste and insufficient information. This leads to situations both where unmeritorious claims are issued simply in order to preserve a cause of action and meritorious claims are not acted upon because the tenderer is unable to properly evaluate its claim in time.

We do not agree that the fact that only 20% of challenges make it to trial is a criticism and often the best resolution for all parties can be achieved through alternate dispute resolution. We consider that parties should be encouraged to undertake early mediation and/or other forms of alternate dispute resolution shortly following the issue of proceedings; both as a stock taking exercise before either party has incurred significant legal cost and in an effort to resolve matters without the intervention of the Court.

Q31. Do you believe that a process of independent contracting authority review would be a useful addition to the review system?

We consider that some form of early neutral evaluation of any challenge would likely be of benefit to all parties; but any such review system should not be conducted by the Purchasing Authority which inevitably often feels the need to justify the actions of its procurement team and assessors. Any such evaluation should be conducted by an independent third party or judge.

Q32. Do you believe that we should investigate the possibility of using an existing tribunal to deal with low value claims and issues relating to ongoing competitions?

The introduction of a tribunal system may address the lack of access to justice for lower value procurement claims. However, we would caution that contract value alone is often not a reliable indicator of the complexity and importance of a public contract to either tenderer or the purchasing authority. Any such system should allow for appropriate case management to move a case out of the proposed tribunal system where such a system is not suitable due to the public importance of the Contract or other issues of complexity that may arise.

Q33. Do you agree with the proposal that pre-contractual remedies should have stated primacy over post-contractual damages?

We agree with the observation that most challengers prefer to have the opportunity to perform the contract than be awarded damages. The recommendation appears appropriate, but to operate as intended it must be coupled with a presumption that the automatic suspension remains in place; as at present unsuccessful bidders are often pushed into a damages claim through the regularity with which purchasing authorities succeed in their attempts to lift the automatic suspension.

Q34. Do you agree that the test to list automatic suspensions should be reviewed? Please provide further views on how this could be amended to achieve the desired objectives.

We do feel the test to lift automatic suspensions should be reviewed; however, we feel this issue goes hand in hand with the need to introduce faster and more flexible methods of dispute resolution. The introduction of a fast track method appears to us to be appropriate. We consider that there should be a rebuttable presumption in favour of preserving the automatic suspension, particularly if a cap to the level of damages is introduced.

Q35. Do you agree with the proposal to cap the level of damages available to aggrieved bidders?

We do not agree with the proposal to cap the level of damages, particularly in cases where the authority has successfully applied to lift the automatic suspension; as this will serve as a significant disincentive for suppliers to pursue otherwise meritorious claims and encourage poor procurement behaviours. We consider that this can be better addressed by discouraging the lifting of the automatic suspension, and the introduction of a faster dispute resolution process with primacy given to non-damages claims.

Q36. How should bid costs be fairly assessed for the purposes of calculating damages?

We do not agree with the proposal to introduce a "should cost" model, which will be wholly inappropriate in large and complex tenders, owing to the great variety in the nature of the work that needs to be undertaken on different bids. We consider a more appropriate model would be to introduce costs budgeting principles into the tender process whereby tenderers record their costs prior to contract award, to prevent post-contract cost inflation in the context of litigation.

Q37. Do you agree that removal of automatic suspension is appropriate in crisis and extremely urgent circumstances to encourage the use of informal competition?

We understand the rationale behind the proposal to remove the automatic suspension in situations of crisis and extreme urgency; however, there must be clear procedures in place to certify such extremely urgent tenders in advance, so that bidders can appreciate the risks prior to procurement. Our concern would be that such categories be misused and could become over time more commonplace in order to strategically avoid the consequences of automatic suspension. As such the criteria for declaring crisis and/or extreme urgency should be set out clearly in advance.

We consider in circumstances where the automatic suspension is removed, so that bidders cannot meaningfully access non-damages remedies, that it would be inappropriate to impose a cap on damages.

Q38. Do you agree that debrief letters need no longer be mandated in the context of the proposed transparency requirements in the new regime?

In principle the proposal to replace debrief letters with a new transparency regime may be beneficial; both to contracting authorities and to bidders. The acceptability of such a system will clearly depend on the extent to which an unsuccessful bidder can clearly understand the reasons for which their bid has been unsuccessful and provide sufficient information to allow them to evaluate the relative merits and demerits of bringing a claim. We have some concern that the introduction of a system that is "simpler" and less individualised to unsuccessful bidders may lead to more opaque decision making which will make it more difficult for tenderers to adequately consider their position.

Q39. Do you agree that:

- businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?
- there should be a specific right for public bodies to look at the payment performance of any supplier in a public sector contract supply chain?
- private and public sector payment reporting requirements should be aligned and published in one place?

This would be welcomed, in particular with regard to providing access to the contracting authorities to those within the supply chain. Consideration should also be given to the remedies available to the supply chain in the event of late payment and the payment profiles offered. Where the contracting authority is

paying its Supplier against clearly defined milestones, it must be acknowledged that those suppliers within the supply chain will be contributing to small elements of that milestone. It can be prohibitive for them to take the financial risk of waiting until a milestone, which is outside of their control, has been met. There is also the concern that where the Supplier has failed to achieve a milestone, for whatever reason, a supplier further down the chain could be impacted through no fault of its own. This has been a real issue for some time, impacted by the effect of COVID-19 on the supply chain and must be addressed.

Also note that whilst the publication of payment practices is helpful, sanctions should be imposed on Suppliers who continue to demonstrate poor performance in this regard otherwise it has little impact.

Q40. Do you agree with the proposed changes to amending contracts?

Taking each in turn;

- The refence to 'Crisis' should align with that proposed in chapter 3 such that it must be designated as such by the Minister of Cabinet Office;
- Clarity needs to be given as to what is meant by 'substantial'. At present this is often used as a means of blocking any proposed changes regardless of their nature on the grounds that the contractual authority would deem such amendments to be substantial. It is suggested that a methodology should be introduced to ensure that the contracting authority is able to demonstrate its reasonings why an amendment would be deemed 'substantial'. Without this the concerns raised earlier in this response concerning the prohibition on innovation, failure to align to market practices etc. will remain.

Q41. Do you agree that contract amendment notices (other than certain exemptions) must be published

Clarification is required as to what is meant by the 'scope of the contract'. Does this mean a fundamental/material change? Or any change of the proposed terms? The reason that this clarification is sought, is that it is felt that the contracting authorities will inevitably err on the side of caution and feel compelled to publish all notices. This additional administrative burden will have the knock-on effect of ensuring that a change is deemed substantial (please refer to comment at Q40). Guidance will therefore be required to set out what is meant by the change in scope to ensure that it goes to the heart of the contract, for example the type of goods and services, rather than, perhaps, the frequency of a reporting process.

Q42. Do you agree that contract extensions which are entered into because an incumbent supplier has challenged a new contract award, should be subject to a cap on profits?

This is as would be expected in the public sector and therefore seems the most appropriate position to take however consideration is required as to how that would compare with the profits received by the Supplier during the contract. Could a link to a government standard rate have the potential of increasing a Supplier's profit margin in this period? If this is a possibility that would still serve to be an incentive for an incumbent supplier to raise a challenge.