

Short Read: Transforming Public Procurement: Government Response to Consultation

We outline the key highlights from the responses.

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In December 2020 the Cabinet Office set out proposals for shaping the future of public procurement with the publication of a green paper “Transforming Public Procurement” (the “Green Paper”). The general thrust of the Green Paper was seeking views as to how the Government could improve public procurement as a result of new-found freedoms following our exit from the European Union. On 6 December 2020 the [Cabinet Office released its response](#) to the consultation exercise. Set out below are highlights from that consultation paper.

Key highlights from the responses include:

- the enshrining of principles of public procurement is confirmed however, these will be split in principles and statutory objectives, but further details as to what this difference will mean in practice is needed;
- the proposed removal of the light-touch regime has been scrapped;
- the proposed changes in relation to the exclusion of suppliers is to be reviewed with the intention of the introduction of a new exclusions framework which will be simpler, clearer and more focussed on those suppliers who cause a genuine risk to public procurement;
- the proposals around transparency are to be reviewed to ensure that they are proportionate;
- the proposed cap on damages has been withdrawn; and
- the proposal in relation to an oversight unit has been scaled back with the intention to build on the powers of investigation already found in the Public Procurement Review Service.

We can see that a small but important part of how these new changes will be implemented will not be by way of specific legislation, but by way of guidance issued by the Cabinet Office. Given recent case law, the importance of this type of guidance can't be overestimated. Procurement professionals will need to be very aware of what these say and the Cabinet Office will need to ensure the robustness of these guidance notes.

There are significant changes to how bidder exclusion will work, the specific exclusion criteria will be reworked to try and ensure that there is more power to exclude bidders who are a genuine risk to the good order of public procurement. Exclusion for poor past performance often vexes contracting authorities, here the response extends the situations to also include failure to adhere to rectification plan type situations. Further clarity is given to the proposals around a central debarment list. In particular how bidders find themselves on the list and the mechanisms for getting off it.

Substantive modifications provide fertile ground for concern for contracting authorities. The proposals around greater clarity and upfront transparency in the Green Paper will be adopted. This will include obligations around transparency pre-change and more clarity with the current safe harbours. In answer to responses received the Cabinet Office are considering how best to address amendments in long-term complex contracts with the potential for a new safe harbour.

The ambition in the Green Paper to improve the remedies aspect of procurement remains key. However, while some of the more radical parts of the Green Paper have been dropped, it is going to continue to explore options around changes to the Civil Procedure Rules and the TCC Guide to deliver the needed improvement, reduce costs and speed up litigation. Importantly, the Cabinet Office have specifically

said that legislation will change the current test for the lifting of the automatic suspension, moving away from the current three-part American Cyanamid test. The proposals around the cap on damages will not be taken forward. It will still try and ensure that greater emphasis is given on pre-award rectification by way of a quicker remedy system, but will not be seeking to legislatively state pre-contract remedies have primacy over post contract ones. There is speculation among procurement practitioners that judicial review claims in public procurement will become more prevalent due to the significant references to public policy throughout the forthcoming Procurement Bill. The introductions of public policy through the procurement regime will inevitably add a layer of complexity that could lead to an increase in challenges based on public law issues.

Finally, the response continues to emphasise the importance of transparency and will seek to deliver this in the forthcoming Procurement Bill. Whilst standstill letters in their current form will no longer be required, more award information will be made available publicly at the point of award. Additionally, specific information will be made available to the unsuccessful bidders, including certain evaluation documentation which is potentially beyond the current obligations. This is potentially more complicated and it will be very important for contracting authorities to be alive to. They will need to ensure that processes will deliver the required level of information and clarity over their decision making.

[Read our in-depth analysis here.](#)

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