

Long Read: Transforming Public Procurement: Government Response to Consultation

We review in detail the key highlights from the responses.

09 December 2021

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 the [Cabinet Office released its response to the consultation](#) exercise.

The Green Paper talked about the introduction of general principles of public procurement namely the public good, value for money, transparency, integrity, fair treatment of suppliers and non-discrimination. The Government’s response is to refine the wording and split these into objectives and principles so that obligations are clear. It will be interesting to see how the drafting of the [Procurement Bill](#) (the Bill) differentiates between principles and objectives and what are the implications for contracting authorities in relation to compliance with either.

Whilst many respondents were against losing the concept of proportionality, the Government is not proposing to introduce proportionality as either a principle or an objective. However, they will look to capture proportionality in specific parts of the legislative drafting. It will be important to understand how this works in practice because historically, proportionality has been a useful concept in procurement generally; particularly as a brake on excess requirements of contracting authorities.

The proposals in relation to a new oversight unit were met with limited and qualified support. Concerns were raised with regard to how such a unit would behave in practice and the possibility of it considerably slowing down procurement processes. Revised proposals will be put forward for a Procurement Review Unit (“PRU”) sitting inside the Cabinet Office to be established. The PRU will continue to be able to deliver the same service as the current [public procurement](#) review service (what was the mystery shopper service) however it will have slightly wider powers to investigate and make recommendations with a view to ensuring that systematic or institutional breaches of the procurement regulations are addressed. The specific powers proposed to be given to the Minister for the Cabinet Office acting through the PRU will be:

- provide the Minister with the general power to investigate procurement functions carried out by contracting authorities;
- place a general duty on contracting authorities to co-operate with an investigation;
- place a duty on contracting authorities to respond within 30 days; and
- provide that the Minister may publish the results of investigations.

The unit will not be there to target specific procurement decisions but will be focussed on future compliance and improvement. Any contracting authority which is the subject of such report will be required to respond and report on progress and improvement following such an investigation. The new unit will also be on the lookout for systemic non-compliance across contracting authorities to potentially recommend statutory guidance as necessary.

There was broad support for a consolidation of the existing web of procurement regulation although those sectors who are currently regulated in a more light-touch manner expressed concern about consolidation increasing their burden. However the Government has confirmed in its response that they will consolidate the four principle pieces of public procurement regulation into the new Bill. They have

however confirmed that the style of the regulations will be familiar and will seek to include specific flexibilities found in the current Utilities Contracts Regulations 2016 ("UCR") and Defence and Security Public Contracts Regulations 2011 ("DSPCR") as necessary. The response also recognises the challenge for local authorities and their involvement in integrated care systems where there is a different regime for health partners and local authority partners. The paper confirms that they are working with colleagues in the Department of Health and Social Care to ensure a coherent procurement regime for these partners.

The response recognises the flexibilities currently afforded by the UCR. In the response the Cabinet Office has made a series of concessions to utilities to ensure that those flexibilities will not be lost. This will provide a welcome relief for those in the sector who feared an unacceptable increase in regulation. These concessions will however only be afforded to those qualifying utilities for qualifying purchases.

The Concession Contract Regulations will be, as stated above, merged into the single regime although again, certain different principles will apply when procuring concession contracts including the higher financial threshold. Other than that and the method of calculation of value, concessions will be subject to the new regime.

On the proposal in relation to the change to the procurement procedures and the reduction to three new procedures, there was only qualified support. A number of respondents were concerned that rather than simplifying matters it will create a level of uncertainty and potential complexity, which could be filled by caselaw, thus creating a more difficult procurement regime for both purchasers and suppliers. Notwithstanding this lukewarm response, the Cabinet Office is proposing to continue with the simplification of procedures, but will supplement the legislation with guidance and support to those involved. This will include template options for contracting authorities to design their procedures.

It will be interesting to see how closely these template options mirror existing procurement procedures and indeed how often they will be adopted without amendment. The need for consistency across the public sector is something that suppliers, particularly large suppliers, often ask Government for. To this end these proposals remain subject to those anxieties of contracting authorities who may need to design processes that are compliant with a revised regime. Additionally, this is one of the examples where primary legislation will not be the only source of truth. Statutory guidance will also be an important part of the picture and will be subject to less scrutiny than primary legislation.

Proposals in relation to urgent awards and in particular the introduction of the concept of national crisis will be subject to further review although the current provisions in Regulation 32(2)(c) in the PCR are to be retained, as they do cover most urgent situations.

The overarching response on the removal of the light-touch regime ("LTR") for certain types of services was negative. The respondents noted the increase in procurement workloads for, in particular but not exclusively, the voluntary sector who often are involved in the delivery of services subject to the LTR. To this end the Government has changed its mind over removing the LTR and will further consider the scope of which services will be included in the LTR. In addition, the Government will consider proposals to remove unnecessary bureaucracy in relation to those services which are subject to individual choice under the Care Act 2014 and the Children's and Families Act 2014. This will be a very welcome proposal for local authorities who sometimes find themselves in the invidious position of trying to procure a framework or even a Dynamic Purchasing System ("DPS") for access by individuals. In particular they will be looking to exempt competition for those services which are subject to user choice or where user choice is significant.

The Government intends to change the evaluation of tenders from "most economically advantageous" to "most advantageous tenders", allowing contracting authorities to consider the wider benefits and costs of a proposal rather than strict blackline cost. To ensure that this does not increase the burden on small and mid-sized enterprises in particular, this will be one of the parts of the legislation which is subject to proportionality.

In this regard the legislation will also include a power for the Minister to make secondary legislation to reflect policy priorities and permit award criteria unrelated to the subject matter of the contract. Proposals to remove the link to the subject matter of the contract and its compatibility with section 17 of the Local Government Act 1988 is acknowledged. They will be looking to introduce a power to disapply section 17 to ensure that local government have the same freedoms as other contracting authorities.

The Green Paper asked a number of questions around exclusion of bidders and how this should apply in practice for those evaluating exclusion grounds. The Government's response makes it clear that the proposals were largely supported by the consultees but that their consultation demonstrates a need to overhaul the framework for exclusions. The new exclusion framework will retain the current concepts of mandatory and discretionary exclusion grounds, but will be simpler, clearer, easier for both contracting authorities and suppliers to understand, and better-suited to the commercial and legal landscape. It will also introduce further streamlining in relation to how both

grounds will apply in practice. The response confirms that there will be a transitional regime for the introduction of the new exclusion grounds.

The proposals in relation to a central debarment list will be progressed. The regime will have the following features:

- suppliers will be considered for debarment where they are excluded by a contracting authority during a procurement;
- certain categories of authorities likely to be central government, will be able to refer suppliers to the Cabinet Office;
- the new PRU will be responsible for considering cases, investigating evidence of misconduct and self-cleaning and then making recommendations to the Minister;
- suppliers will be entitled to apply for early removal before the end of the five-year period of exclusion if they can show self-cleaning; and
- suppliers will be entitled to appeal a decision to put them on the debarment list to the Court.

Proposals in relation to the assessment and utilisation of past performance in procurement decisions has been scaled back somewhat from the Green Paper, but does improve the position of contracting authorities. It probably strikes the necessary balance between ensuring that such arrangements do not disproportionately affect contractors, particularly where performance is not always within their control and the needs of contracting authorities to take on board the implications of poor performance.

The Government intends to introduce proposals in relation to a simplified selection stage and supplier registration system. Such a system would retain the majority of information required for a procurement. However, the Government have confirmed that a contracting authority will have discretion to request further information if required for the specific procurement.

Proposals in relation to the improved DPS will be implemented although this new and improved DPS will be called the Dynamic Market. This Dynamic Market will be available for use with all types of works services and goods procurement within the scope of the legislation and will involve at least two stages, qualification or acceptance onto the Dynamic Market and the call-off stage.

The new Dynamic Market system will have a significant overlap with framework agreements. However the Dynamic Market will be open to new entrants at any point in its lifetime as with the current DPS. This may well make dynamic markets more attractive than framework agreements, although further information is needed to understand the benefits and the challenges of such an approach. How these will work in practice will need to be kept under review. The proposals in relation to open and closed framework agreements are to be introduced notwithstanding some concerns raised by the utility sector, who welcome closed frameworks and their ability to foster long-term partnering relationships. To this end utilities will be allowed to award longer-term closed frameworks.

Interestingly to discourage the establishment of broad and poorly defined frameworks, it will be a requirement to identify in the tender notice or in the procurement documents the nature, scope and overall maximum estimated value of the contracts that may be awarded under the framework. This is obviously something which will be of great relevance to central purchasing bodies who will need to consider this point and the legislative drafting when establishing their national large-scale frameworks.

The response confirms the intention to build-in transparency by default although does acknowledge the burden this may place on contracting authorities, the effect on commercially sensitive information and the impact this will have on competition. To this end some of the proposals have been scaled-back and some of the publication requirements are subject to thresholds (currently set at contract value £2million) The consultation response also sets out the notices that will be the basis of the competitive regime, the transparency obligations during the procurement process and for the life of contract; these are to be welcomed. Alongside these transparency points the Government intends to implement a central digital platform for commercial data. This platform will be centrally funded and would be free for all users.

The proposals for and faster challenges to procurement decisions were subject to further review by the Cabinet Office and they acknowledge the difficulties in implementing such changes. The changes will be subject to further review and variations to the Civil Procedure Rules and/or the TCC Guidance. This will be dealt with in conjunction with the Ministry of Justice and the Civil Procedure Rules Committee.

Whilst there was some support for an independent contracting authority review system and the investigation of a specific procurement tribunal these proposals will not be taken forward. Similarly, the Government does not intend to take forward the proposal in relation to a stated primacy of pre-contractual remedies, given the potential for the delay in public service contracts being awarded.

The Government intends to introduce a new single test replacing the American Cyanamid principles in relation to the lifting of the automatic suspension in procurement challenges.

The proposals in relation to a cap on damages will not be taken forward due to the potential for significant unintended consequences, which would be more problematic than the problem it would address. Proposals in relation to standstill letters and the information provided to bidders who were unsuccessful in any process have been clarified in the response. The level of transparency and information will be welcomed by bidders although it will inevitably increase the burden on contracting authorities, both in terms of information to be supplied and the level of scrutiny on the decisions taken. This will require careful work by contracting authorities to ensure these obligations are met and do not cause greater levels of challenge.

Proposals in relation to supply chains having direct access to contracting authorities to escalate payment delays, will be adopted. The proposals provide that in circumstances where direct action is sought, the subcontractors will have to demonstrate the reasonable efforts they have made to resolve any dispute.

The proposals in relation to amending contracts were largely supported by respondents particularly around the visibility of changes and the notices that were needed. However, concerns were raised in relation to the safe harbours in long-term, high-value public contracts and further consideration is going to be needed to the safe harbours available to contracting authorities in those circumstances. However, as noted above, the proposals in relation to capping profits on incumbents who have challenged the procurement will not be taken forward.

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