

Transforming Public Procurement
Green Paper Consultation Questions and HBC Responses

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

Yes

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?

Further detail is required to better understand the remit of the unit, what powers it will have and how it will operate. Insufficient information is provided to explain why a new regulatory body is required.

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?

This would depend on the remit of the unit. It may however be possible to expand the role of an existing body, such as the National Audit Office, to undertake this role rather than the creation of a new body.

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

Yes, if the consolidation simplifies the regulations and makes them easier to understand for public bodies and suppliers alike. A simpler legal framework may encourage increased supplier participation.

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

N/A

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

Yes

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

Yes

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

Increasing the value thresholds for supplies and services would reduce the cost and resource of undertaking a formal process for both procurement and SME's/VCSE's.

Aligning the value thresholds for the Transparency Code and Contract Finder would improve consistency and visibility of data to be published.

Direct Awards – include flexibility for the use of direct award as an option within the award criteria for the new procedures and frameworks, particularly if the cost of change

due to legacy systems would have a detrimental financial impact on the authority and public purse.

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?

N/A

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

It would be beneficial to consider the reintroduction of trailblazing authorities to share knowledge and lessons learnt. A central repository for authorities to access or the creation of a central library on contract finder for authorities to upload information on common categories of spend and/or contracts.

A price benchmarking tool on common commodities would also be commercially beneficial and assist authorities to identify price variations and support improved commercial decisions.

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?

See response to Q10

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?

Yes

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

It is unclear what difference this would actually make to the evaluation / award process. The Council has not encountered any difficulties or confusion with the application and interpretation of ‘most economically advantageous tender’.

It is important that authorities are still allowed to select what is relevant and proportionate for inclusion within the evaluation; the Council would not support social value and environmental criteria becoming mandatory requirements for evaluation.

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?

No - It is highly important to retain the basic requirement that award criteria must be linked to the subject matter of the contract. The Council does not agree to the Government amending the criteria to allow specific exceptions. Consideration of other criteria may distort the award outcome and result in tax payers failing to obtain value for money, which is one of the proposed legal principles of public procurement.

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?

No - this proposal will complicate rather than simplify public procurement and potentially lead to an increase in challenges. It may also impact on the outcome of procurements resulting in contracting authorities failing to obtain best value.

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?

Yes

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

Tax evasion should also be a mandatory exclusion.

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

Yes

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)?

Yes

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

Yes

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

Yes

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

Yes in principle – However, any system would need to be workable in practice and easily understood by both contracting bodies and suppliers. Guidance on what constitutes a significant breach or deficiency in performance would need to be provided by the Government.

It could also present an increased risk of challenge from suppliers that are excluded from an opportunity. The use of KPIs may be helpful if the information published is meaningful to other contracting authorities. It does however create additional work for contracting authorities, which may be difficult for smaller organisations that already have stretched resources.

It would be more likely to work if a centrally managed system could be implemented for all authorities to access and work consistently.

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

Yes in principle – improving the process for suppliers to register and be considered for public sector contracts would be a positive development.

The system should be a passport for suppliers; once registered they can be accessed by all public sector bodies. It is important to consider how these details will be validated and to apply relevant time periods for suppliers to verify and evidence their details and any changes. This validation process must be the responsibility of the suppliers to ensure their registration is still active and not an additional burden for authorities.

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

Yes

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

Yes in principle - consideration must also be given to include the current flexibility available when using a DPS for Light Touch services. It is important that the new DPS+ replicates this.

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

Yes

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

Yes in principle – however any central system needs to be manageable at a practical level for contracting bodies. The proposals as they stand appear potentially onerous and would be an extra burden on procurement teams. Regulation 84 already provides transparency for the end to end process but it is disappointing that these reports are not already used to support transparency.

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

No - the addition of 15+ notices would be onerous and an extra burden on procurement teams and resource. Is there evidence that suppliers actually want information to this level? Also, see response to Q27 regarding Regulation 84.

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

Yes in principle, particularly if it makes it less onerous for suppliers to do business with the public sector. Implementation of such a solution may however present many challenges given the number of contracting authorities. Training for procurement teams and suppliers would be required. Maintaining and updating the system could be onerous for smaller procurement teams.

Most of the Council's procurement is below threshold. The consultation does not address below threshold procurement. From a practical perspective procurement teams would want to operate the same procurement system / portal regardless of contract value.

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.

No - Whilst there are benefits to a faster, cheaper and more accessible review system, there is a potential risk that the number of procurement challenges will increase significantly as a result of the proposed changes. This would be an extremely unwelcome development for procurement teams.

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

Yes in principle – however, consideration must also be given to the potential delays this may create in regard to the pending award decision. Clarity about what constitutes a breach is extremely important and needs to be communicated clearly to the supply market. This may help the understanding of aggrieved bidders and may prevent delays in making an award due to disappointment at the outcome of the award decision.

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?

No - this will potentially open up the opportunity for aggrieved suppliers to issue claims that will impact on delivery of services and put further strain on resources. It will also increase the cost of procurement for both bidders and authorities.

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

Yes in principle - introducing primacy measures which allow for elements of a procurement process to be re-run from a suitable step in the process, wider clarification from bidders to be sought, decisions to be set aside or documents to be amended may be a better option to discuss with bidders rather than the award of damages served upon an authority.

The additional responsibility and burden put upon procurement teams and other internal resource must however be considered.

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

Yes

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

Yes

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

Damages should be based on the time taken to prepare the bid calculated using an hourly/day rate of the relevant persons who have prepared and submitted the bid. This needs to be evidenced.

The Council has concerns that there is a risk that an incumbent supplier may put in a speculative bid to trigger an extension of an existing contract whilst the case is heard.

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

Yes

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

Yes - if the proposed transparency requirements are implemented contracting authorities should no longer be required to issue debrief letters.

Q39. Do you agree that:

- **businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?**

No - The Council fully supports prompt payment of its suppliers and their supply chains. However, more detail is however needed on how contracting authorities could enforce prompter payments in supply chains. This additional responsibility would also increase the workload for contracting authorities at a time when resources are already stretched.

- **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?**

No – to date the Council has never had any need to examine the payment performance of a supplier in the supply chain.

- **private and public sector payment reporting requirements should be aligned and published in one place?**

Yes

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

In principle, if it is made clearer for authorities as to what constitutes a substantive change and what is an acceptable amendment without the need to publish a contract amendment notice.

Greater clarity is needed on what is in scope and what is not.

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

No - this will put further burden and uncertainty on to authorities when trying to make improvements and amendments to a contract, due to the increased risk of challenge from suppliers and will potentially delay in progress.

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?

Yes but a simple system would be required to achieve this. Payments during the suspension period could be capped at the rate of the existing contract.