Government Response to the Transforming Public Procurement Green Paper consultation published

Chapter 1: Procurement that better meets the UK's needs

The Green Paper set out the principles of public good, value for money, transparency, integrity, fair treatment of suppliers and non-discrimination. The Response now orders these into "principles" and "statutory objectives". The principles remain as transparency, non-discrimination and fair treatment of suppliers (clarified as covering both the equal treatment of suppliers and procedural fairness during the procurement procedures).

The rest of the principles will be established as statutory objectives. For example, "public good". This is now framed as the objective of maximising the "public benefit" – designed to help encourage consideration of social value and help ease any concerns over the potential conflict between national and local priorities (e.g., as set out in the National Procurement Policy Statement); The rest of the statutory objectives are: value for money; integrity; and the promotion of the importance of open and fair competition.

It seems that "statutory objectives" will provide the detail as to what the principles actually mean for contracting authorities in practice and how they should be applied by contracting authorities when conducting their procurements. Guidance on principles and statutory objectives and their purpose is expected.

The omission of the principle of "proportionality" from the list of principles included in the Green Paper was subject to much comment, but the Response notes that, although this is a key concept for (central) Government, it will only be introduced when required in specific contexts and via specific regulations (e.g. the legal regime will require the timescales of a procurement process to be proportionate to the cost, nature and complexity of the contract).

The Response also provides further detail on the "Procurement Review Unit" (PRU). This will be the oversight body concentrating on non-compliance with the new procurement regime and any systemic/institutional breaches and challenges by contracting authorities. It will be sited in the Cabinet Office and will be made up of a small team of civil servants, advised by a non-statutory panel of subject matter experts.

It is likely to deliver the same service as the current Public Procurement Review Service (PPRS), investigating poor practice and policy reported by suppliers, but its stated main focus will be to address systemic or institutional breaches of the procurement regulations (either made across a number of contracting authorities or consistently by a single contracting authority). Rather oddly, the Response suggests that it will only act on tip-offs from other government departments or data available under the new transparency proposals, rather than bidders (who may be better placed to spot continuing trends in poor procurement practice). Nevertheless, the role of the PRU will be key in delivering feedback to Cabinet Office so that it can consider whether the procurement legislation is delivering what it should deliver. It seems to us that more thought may be given to the interface between the PRU and existing regulators – it

acknowledges that private utilities are overseen by existing regulatory bodies, but does not acknowledge that (e.g.) housing associations are already subject to regulation by the Regulator of Social Housing.

Chapter 2: A simpler regulatory framework

Whilst the Green Paper talked about "slashing" the 350+ regulations governing public procurement, the Response takes a more measured tone and confirms that it intends to "combine" the current four sets of regulations into a simpler legislative framework.

There will be sector-specific differences for utilities and defence procurement (mainly around exemptions, procurement tools and modifications for utilities and exemptions on various grounds for defence procurement). There is also a recognition in the Response that the reforms to joint commissioning and integrated provision across health, public health and social care currently being taken forward through the Health and Social Care Bill will need to be grappled with by local authorities and the NHS – but we are promised that the Cabinet Office and the Department for Health and Social Care are working together to ensure a coherent procurement regime.

We will, apparently, recognise the new procurement legislation – its application, scope and definition will be familiar, with the new provisions set out in the Green Paper, being described in simpler and clearer language that the EU terminology currently used.

Chapter 3: Using the right procurement procedures

The three processes proposed in the Green Paper of:

- Open procedure (for simple or "off the shelf" products);
- Limited Tendering Procedure (to be used in certain circumstances, such as extreme urgency);
- "Competitive Flexible Procedure" (the Response notes that this will "give buyers freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors").

The Green Paper proposed to remove the Light Touch Regime to award certain contracts, but this has been retained, along with its higher threshold. Nevertheless, the Government is still considering how to exempt competition for user-choice and more detail will need to be provided in due course as to the exact parameters of when the Light Touch Regime can be used.

We understand that template documents and Guidance on how to use the new Competitive Flexible Procedure will be developed to support contracting authorities make the most of this new procedure.

This chapter also highlights the uneasy role procurement is being asked to play in encouraging innovation. Despite four questions being asked around the subject, the Government's Response shows how difficult it is to devise a specific legal regime that will foster innovation. It acknowledges that most of the ideas and commentary received were more about behaviours than regulatory practice and its own conclusions are as relevant to a well thought-through and run procedure for any product or service – they are not confined to innovative ones (e.g., more emphasis on planning and pre-market engagement, support for the use of the new competitive flexible procedure, careful scoping of award criteria and the explicit evaluation of added value benefits). The Response shows how difficult it is to procure innovative solutions, where contracting authorities are often going to the market before it is properly established, and this remains an unresolved part of the Government's proposals to create a procurement regime fit for the 21st century.

Chapter 4: Awarding the contract to the right supplier

The Response confirms that, rather than referring to Most Economically Advantageous Tender (MEAT), contracts will now be awarded on the basis of Most Advantageous Tender (MAT). This seeks to reinforce the message set out in a number of Procurement Policy Notes already published: contracting authorities are able to take a broader view when determining evaluation criteria and do not have to confine themselves to price or other economic criteria.

The Response also confirms that the link between the award criteria and the subject matter of the contract will be broken for specific exemptions – for example, net zero policy, social value, modern slavery etc. Details of which policy priorities may have the effect of award criteria not being related to the subject matter of the contract would be set out in secondary legislation. Whether a contracting authority must have regard to the relevant policy or retain flexibility in this respect remains under consideration.

The Government has also listened to consultees who raised concerns over the non-alignment of its push towards policy-led considerations and section 17 of the Local Government Act 1988. Section 17 prohibits local authorities applying award criteria which are not linked to the subject-matter of the contract on the basis that they would be "non-commercial considerations". The Response notes that the new regime will disapply section 17 "in certain circumstances" to ensure that local authorities are not conflicted in this respect.

The new regime will also remove the requirement for evaluation to be made solely from the point of view of the contracting authority, on the basis that this will also help to reinforce social value and give a greater focus on outcomes and solutions for communities or contract users. Guidance on this point is promised.

The Response also sets out its proposals to tackling unacceptable behaviour in public procurement and, in a move that goes further than the Green Paper proposals, has indicated that it will refresh the legal framework for exclusions. This involves creating a UK-specific list of mandatory and discretionary grounds for exclusions which are expressed as being "simpler, clearer and better suited to the UK's commercial and legal landscape". The list provided in the Response is certainly clearer and simpler than the current ones. Further simplification has been achieved by applying a five-year time limit for both mandatory and discretionary exclusion grounds and clarifying the trigger point for mandatory grounds. It has also addressed a number of the thorny issues that often arise in practice: e.g. clarifying that exclusion grounds will cover actions of individuals and entities to which bidders have a close connection.

Government has also confirmed that a centrally managed debarment list will be included in the new regime. Suppliers will be included in the list if they meet a ground for exclusion (mandatory and/or discretionary) and there is insufficient evidence of self-cleaning. Suppliers will remain on the list for five years, but can apply for early removal if they can show they have self-cleaned. Contracting authorities will be obliged to exclude suppliers on the list to which a mandatory exclusion ground applies but will retain a discretion in respect of suppliers to which a discretionary ground applies. Suppliers not on the list will still be able to be excluded on a case-by-case basis.

Intriguingly, the Response suggests that central government contracting authorities will be able to refer suppliers they want Cabinet Office to consider to be added to the debarment list, without having themselves excluded them from a procurement themselves. Whether this makes the final cut will be interesting and we would expect some pushback from suppliers on this proposal.

Secondary legislation and statutory guidance will be due in respect of the centrally managed debarment list and it is likely that the use of the list will first apply to central government contracting authorities and then rolled out to others in due course.

The Response also seeks to make it easier to take into account poor past performance. By including "a settlement entered into due to poor performance or breach of contract by the supplier" will certainly expand the scope of the current exclusion ground. These arrangements are usually confidential, but the Response points out that it remains Government's intention to introduce a Contract Performance Register, which will contain information about a supplier's performance against contractual KPIs and the Government is also looking at whether the Register should also highlight when a supplier may be eligible for exclusion due to poor performance/has failed to remedy poor performance.

Chapter 5: Using the best commercial purchasing tools

The Response changes the name of the Green Paper's DPS+ model to "Dynamic Market" in order to reflect the additional flexibility compared with the current DPS model. It also confirms that the tool will not be limited to commonly used or simple purchases and will be available to use for all types of works, services and goods contracts.

A Dynamic Market will have to be procured via a Competitive Flexible Procedure and it is acknowledged that the first (selection) stage will be continuous through the life of the tool, with the second (award) stage being undertaken multiple times as different contracting authorities seek to award contracts. Contracting authorities are able to establish and operate Dynamic Markets for themselves and for the benefit of others too. Guidance will be provided as to the type of contracts best procured through a Dynamic Market, as well as how best to categorise suppliers.

Not much has changed regarding Government's proposals on closed and open frameworks. Closed frameworks will be limited to four years and open frameworks to eight years. A helpful flexibility has been

restored in the Response through the acknowledgement that, for all types of frameworks, a longer term than the relevant maximum term is allowed provided the justification is published in the tender notice and is justified by reference to the framework itself.

Further detail has provided that open frameworks must contain at least two suppliers and that for open procedures lasting over three years, new suppliers must be given the opportunity to join the framework at least once during its term. The longest an open framework can be closed to the market is five years. It remains to be seen as to whether the openness and competitive requirements around opening up a framework will actually result in improved value for money and reduced administrative overheads.

The Response also notes that suppliers may be charged when they are awarded a call-off under either type of framework or the Dynamic Market. Such charges must be proportionate and used solely in the public interest and set out in the framework agreement/Dynamic Market itself. We hope that these charges will also be published via the proposed Central Register of Commercial Tools, which is also designed to help clients leverage their combined purchase power; help suppliers to see which frameworks they should strategically bid for; and reduce the current duplication of frameworks.

Chapter 6: Ensuring open and transparent contracting

The Green Paper made it clear that Government wants to embed transparency by default throughout the commercial lifecycle: from planning through to procurement, contract award, performance and completion. Nevertheless, numerous consultees cautioned that a number of the transparency obligations were onerous, costly and could compromise commercially sensitive information and prejudice future competitions.

Again, this is an area where Government has listened and tried to reduce the burden. Nevertheless, contracting authorities should see these proposals as a counter-balance to the benefits that the simplification and flexibilities of the new regime should bring: so it must take advantage of those in order to avoid only experience the additional processes involved with the publication of all required information and data.

Government has therefore withdrawn its proposal to require disclosure of tenders submitted in a procurement (on the basis that it could prejudice future competitions if the initial competition has to be aborted and re-run); it has limited its proposals to publish contract documents alongside the Contract Detail Notice. Such contracts only need to be published (on a redacted basis) if they have a threshold value of £2 million or more.

The Response confirms that debrief letters will now no longer be required. Instead a contracting authority will issue an Award Notice and at the same time share with the participants "certain redacted evaluation documents (from the winning bid only) as well as sending the unsuccessful bidders their own documents privately. This will allow the unsuccessful bidders to compare the "relative advantages" of the winning bid against their own – and allow them to pursue a challenge but also consider feedback on what they need to work on to improve – which should be beneficial to SMEs.

The new legislation will require the implementation of Open Contracting Data Standards and work is already underway to develop and establish a central digital platform for commercial data, including supplier registration information. This will be a centrally funded platform which would be free to access for all users and operates on a "tell us once" principle, which is likely to save suppliers and contracting authorities a huge amount of cost and time. The central platform is also being designed to pull data from existing and other platforms, making it easy for taxpayers and bidding organisations to access all relevant information and provide them with the ability to analyse it too.

Chapter 7: Fair and fast procurement challenges

The Response confirms that many of the Government's more radical proposed reforms will not be pursued. Instead, the reforms will look at current Court processes, including introducing expedition measures aimed at speeding up challenges and making the whole process more accessible for suppliers. This chapter is very much a "work in progress", with Government stating that it is "continuing to explore feasible options for faster and more accessible routes for valid challenges of procurement decisions".

The proposals for speeding up Court processes include; enable decisions to be made on written pleadings; early and enhanced disclosure; appoint a dedicated procurement judge (although it is suggested that more than one might be required) and amend the Civil Procedure Rules and/or the Technology and Construction Court Guidance to align with relevant statutory reforms..

The Response confirms that the revision of the current *American Cyanamid* test used to lift automatic suspension will be pursued. The current test will be replaced by a simpler, single limbed test which will allow automatic suspensions to be lifted where there are "overriding consequences for the various interests concerned". This will include considering the impact of the retention of the suspension on public service delivery.

As discussed previously under Chapter 6, the Response also confirmed that the Government will pursue the removal of mandated requirement for an individual debrief letter.

A number of proposals have been dropped including: using existing tribunals to deal with lower valued claims and claims relating to existing/ongoing competitions, requiring contracting authorities to undertake an in-house/independent review of procurement decisions in the event of a dispute, stated primacy of pre-contractual remedies over post-contractual remedies. The proposal to cap damages for procurement breach to 1.5 times the claimant's tender costs has also been dropped. This was on the basis that the proposal was likely to prompt unintended consequences, including a potential increase in the number of claims and the risk that damages may no longer be seen as an adequate remedy, resulting in an automatic suspension being less likely to be lifted and contracts therefore taking longer to award.

Chapter 8: Effective contract management

The Response confirmed that the proposals to further tackle payment delays in the supply chain would be taken forward. Many contracting authorities were concerned that the proposals may unnecessarily make them arbiters in payment disputes between private companies. Given this, the Government has promised Guidance in order to provide clarity on how payment complaints should be escalated and when either the PPRS or the PRU will step-in and investigate concerns. Guidance will also cover reporting requirements from the supply-chain members.

The Response also addresses changes to existing contracts. The application of the current Regulation 72 safe harbours to proposed changes is often complex and the Green Paper proposed to re-order Regulation 72 provisions to make them simpler to navigate. In its response to the Green Paper, Trowers & Hamlins also commented that the current provisions did not assist the effective amendment of long-term complex contracts. These proposals are being taken forward, with Government seeking to make the relevant safe harbours easier to navigate and exploring options to provide a new safe harbour in legislation to assist with amendments to long-term contracts.

The Response confirms that mandatory publication of Contract Change Notices will be included in the legislation and there was also agreement from the consultees on the importance of a standstill period for contract amendments too.

Finally, the proposal for contract extensions which are entered into because an incumbent supplier has challenged a new contract award, should be subject to a cap on profits has been dropped, largely because this issue seemed to be confined to a particular sector and not a widespread issue across the public sector as a whole.

Conclusion

We must remember that the Transforming Public Procurement consultation concerns the reform of procurement law. Nevertheless, the success and impact of these reforms depend on policy and practice. Therefore, it is wise for the Government to allow for pause between the legislation being "concluded" and the "go-live" date. It will then be incumbent on contracting authorities to ensure that they are trained and ready to embrace the flexibilities presented by the new legislation, take advantage of the simplifications, whilst designing and digitising their administration processes to comply with the enhanced transparency regime. All of this will take a significant amount of investment: both in terms of time and money – but can we afford not to?

For more information about the Green Paper and the Government Response please get in touch.

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