



## Transforming public procurement

### Green Paper on reforms to public procurement law after Brexit

The Cabinet Office has published its consultation paper for reforms to public procurement law for a post-Brexit Britain, outlining what promises to be the most radical changes to public procurement in a generation.

This insight aims to provide you with an overview of the key proposals set out in the Green Paper.

**The reforms are intended to redefine public procurement law following the UK's withdrawal from the European Union, building on the Government's commitment to the World Trade Organisation Agreement on Government Procurement (GPA).**

**New legislation:** The Government proposes to repeal the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011 and produce a single set of regulations covering all contracts. However, the Green Paper has not addressed procurements for healthcare services, which will be developed separately in consultation with the Department of Health and Social Care.

**Scope of the procurement regime:** No changes are proposed as yet to the definitions of public contracts, concession contracts or utilities contracts, and the current financial thresholds will remain in

place until December 2021. There are also no proposed changes to the definition of "contracting authorities", which will presumably continue to include registered providers and ALMOs as well as central and local government bodies.

**Principles of procurement:** In a move away from the need to open up the common market, the Green Paper proposes that the new legislation will be underpinned by six core principles: public good, value for money, transparency, integrity, fair treatment of suppliers and non-discrimination.

The introduction of the newly phrased principle of "public good" chimes with recent outputs from Government, including the Social Value Model, PPN 11/20 concerning the reservation of below-threshold contracts to SMEs/VSCs and local businesses, as well as the anticipated publication of the National Procurement Policy Statement. All contracting authorities must have regard to this Statement, which is likely to include creating new businesses, jobs and skills in the UK; improving supplier diversity and innovation, tackling climate change and reducing waste. The Government promises further guidance for supporting innovation and developing social value in procurement.

**Award procedures:** The Green Paper proposes a complete overhaul of the procedures for awarding contracts, as follows:

- The current Open Procedure will be retained for simple "off the shelf" procurements and will be made available for suitable defence and security contracts.
- All other current procedures will be abolished and replaced by a new "competitive flexible procedure". Contracting authorities will be required to advertise opportunities via the new Find a Tender Service (FaTS), run procurement procedures in accordance with the proposed principles, and observe minimum time periods for receiving expressions of interest and tenders. Otherwise, contracting authorities can design their own procedures, including staged negotiations with bidders and reverse auctions, as required.
- The current negotiated procedure without prior publication of a contract notice will be retained and renamed the "limited tendering procedure". The grounds for using this procedure will remain broadly unchanged, although it will now be able to be used in cases of "crisis" as well as extreme urgency brought about by unforeseeable events. A relevant "crisis" will need to be declared by the Minister for the Cabinet Office but could cover events substantially endangering or restricting human life, measures to protect public morals, order or safety or to protect human animal or plant life or health. The exception will only apply to contracts awarded to deal with the immediate requirement posed by the crisis.

When using the limited tendering procedure, the Green Paper proposes mandating the publication of a notice by the contracting authority before it enters into the directly awarded contract as well as the observance of a ten day standstill period (although a standstill period will not be required if the procedure has been used for reasons of crisis or extreme urgency)

**Selection criteria:** The Government proposes to retain the current distinction between selection and award criteria, and proposes simplification of the selection stage by allowing bidders to submit basic information via a central online database (see below) that contracting authorities may access. Contracting authorities will also be able to use a wider range of information to carry out selection criteria verification.

**Grounds for exclusion:** The Government proposes including new mandatory exclusion grounds relating

to criminal convictions related to fraud - the non-disclosure of beneficial ownership or where a beneficial owner is guilty of an excludable offence, and new discretionary exclusion grounds covering tax evasion and where a deferred prosecution agreement has been entered into.

The Government will investigate the feasibility of a centrally managed "debarment list" of banned suppliers. This facility would revolutionise the impact and efficacy of this stage of a process, which is often difficult, costly and time-consuming for an individual client to undertake. However, the cost and feasibility of compiling such a list may result in this idea not making it out of the blocks.



**Past poor performance:** Bidders may be able to be excluded for significant poor performance on previous contracts even where this did not lead to termination, damages or other sanctions, and is considering requiring contracting authorities to publish KPI performance for individual contracts on a central database. The idea of KPI performance being published has been gleaned from examples of best practice in other jurisdictions. Again, whether such a central database is deliverable will define the impact and efficacy of this proposal.

**Award criteria:** New requirements are proposed on the basis of Most Advantageous Tender (MAT), rather than "Most Economically Advantageous Tender" (MEAT). MAT is consistent with the GPA and the deletion of "Economically" does not mean that the relevant criteria should not include price nor be capable of measurement. Instead, the Green Paper suggests that the concept of MAT will allow contracting authorities to take into account a wider range of evaluation criteria.

Further, the Green Paper proposes that a contracting authority does not need to evaluate tenders solely

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from its own point of view. Instead, wider benefit and impact on other contracting authorities may be taken into account. Further guidance is promised on the limited amount of scenarios in which this approach will be permitted. The basic requirement for award criteria to be linked to the subject matter of the contract will be retained, but with specific exceptions to be set by the Minister for the Cabinet Office in statutory guidance and in line with the National Procurement Policy Statement.

**Dynamic Purchasing Systems:** Both Dynamic Purchasing Systems (DPS) and framework agreements are used frequently in the current procurement market and viewed as useful commercial tools and vehicles. The Green Paper sets out suggestions for both procurement tools to make them even more flexible and attractive. The current DPS procedure will be replaced by a new commercial tool called DPS+ with no maximum duration, and which can be used for all types of procurements, not just simple services and supplies. The proposals note that the DPS+ will not be time limited although any right of termination will need to be advertised in the original notice. Contracts under a DPS+ will be awarded via the competitive flexible procedure. As with the current DPS rules, a supplier may submit an application to be included at any time, and all suppliers who meet the selection criteria required will be admitted to the DPS+.

**Framework agreements:** The rules around the use of frameworks will be relaxed, with two options for contracting authorities to choose from:

- a framework of up to four years' duration which is closed to new suppliers, and
- an open framework of up to eight years with an initial three year closed period, after which new suppliers can be added to the framework at predetermined points over its remaining duration. If the numbers under an open framework is limited, then any subsequent additions will need to be made via a competitive process, with existing framework providers able to submit an updated bid. This avoids existing framework providers "blocking" access to new suppliers. The Green Paper notes that this may present an administrative burden on client teams, although this could be significantly reduced by the new flexibilities presented by the competitive flexible procedure.

It would be interesting to understand whether the Cabinet Office considered increasing the duration of a closed framework beyond four years, given that was the accepted practices of the Crown Commercial Service before the strictures of the Consolidated Directive hit in 2006...

**Transparency requirements:** One of the major changes proposed in the Green Paper is the requirement for contracting authorities to publish "basic disclosure information" about the procurement with the contract award notice before the contract can be awarded, including the identity of the bidders, the evaluation reports and the basis of the award decision. The Green Paper anticipates that any release of information should be in line with the Freedom of Information Act 2000, the Environmental Information Regulations 2004 and the Data Protection Act 2018. It also notes that, accordingly, such information will not normally include bidders' profit margins and overheads, financial models, intellectual property or trade secrets or any personal data. As a consequence of "embedding" transparency through the procurement process, contracting authorities will no longer be required to provide individual feedback letters to bidders. Instead bidders will be encouraged to create their own feedback from the information available.

**Open Contracting Data Standard (OCDS):** Contracting authorities will be required to publish procurement and contracting data via the OCDS, including information about procurement pipelines, market engagement notices and contract award notices and notifications of significant amendments to their contracts. Registers of complaints about procurement practices and legal challenges would also be published. The Contracts Finder service will remain available for potential suppliers to search for contract opportunities and look up details of previous contracts.

**Changes to legal challenge process:** The Green Paper identifies that the current legal challenge process is time-consuming and expensive, and proposes working with the Ministry of Justice and the Technology and Construction Court to reform the Court system to allow for an expedited trial process for legal challenges, based on written pleadings only. It also proposes to use the TCC's District Registries outside London to expand capacity. The Government has also proposed to work with HM Courts and Tribunal Service to consider a tribunal system to allow procurement challenges (possibly those

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relating to low value claims or ongoing procurement procedures) to be heard in a faster and cheaper manner.



**Changes to remedies rules:** The Government also proposes to re-orientate the position on remedies to provide greater emphasis on pre-contractual remedies. This is based on the stated preference of bidders of having the opportunity to perform the contract instead of being awarded damages. This preference would be formally stated in the new regulations and would go hand-in-hand with proposals to shorten Court time-scales, cap post-contractual damages to cover legal fees and 1.5x bid costs, (which should also have the effect of deterring vexatious claimants). This cap will be removed in certain circumstances, additional damages may be awarded in case where the claimant has not previously been able to challenge the award decision (e.g. where no contract award notice was published).

Interestingly, nothing has been included about the rather controversial remedy of the "declaration of ineffectiveness". Only awarded in a sprinkling of cases, it is surprising that scrutiny on its utility or otherwise was not raised in the Green Paper.

**Automatic suspensions:** The Government also proposes changing the rules around the lifting of

automatic suspensions preventing contract award to balance public interest, urgency, the upholding of the regulations and the impact on the winning bidder against the right for the claimant to participate in the contract and the alternative available remedies. To this end, the principles established by *American Cyanamid* will be replaced by a procurement-specific test. Further, any contracts let under the new crisis and extreme urgency provisions would be excluded from the risk of automatic suspension, except where the award has not been advertised via a mandatory notice.

**Prompt payment rules:** The Government wishes to extend the current procurement rules about prompt payment of the supply chain by allowing contracting authorities the right to investigate payment of suppliers at any tier in its supply chain, and allowing businesses a direct right of communication with the client.

**Amending existing contracts:** The Government proposes to retain the existing rules around contract amendments but tidy them up to make them easier to use. Contracting authorities will be permitted to amend contracts in cases of crisis or extreme urgency, subject to publishing an amendment notice and observing a standstill period. The use of these amendment notices will replace Voluntary Ex Ante Notices. The Green Paper also proposes to limit the amount payable under any contract extension required in the event of a contract award suspension scenario. This is to limit the "perverse" incentive identified by the Government for incumbent suppliers to raise a challenge in order to benefit from higher profits during the suspension.

**Deadline for consultation:** The Cabinet Office is seeking responses to its 42 questions set out in the Green Paper by no later than 10 March 2021.

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## Concluding remarks

The Green Paper is an interesting mix of radical reforms and proposals that don't seem to go quite far enough. The Government states that the proposed reforms will deliver the best commercial outcomes with the least burden on businesses and the public sector. The devil will, as always, be in the detail – but this objective will only be achieved if the more ambitious proposals (a central online platform for tender information, a centrally-operated debarment register and expedited remedies process) are delivered. Otherwise, there will be limited opportunities available to contracting authorities to offset the cost and time burdens of the increased transparency requirements and the upskilling and training that will inevitably be required.

**Talk to us!** Trowers & Hamblins are holding a webinar on Friday 8 January to explore the details of the Green Paper, with keynote speakers.

We will also be holding a series of further webinars and roundtables throughout January and February to explore the key impact and implications of the Green Paper and to gauge client feedback and response to the Green Paper ahead of submitting our formal response to the Cabinet Office.

For more information about the Green Paper and the proposed reforms, please do contact us.

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