



Green Paper: Transforming public procurement.

London Universities Purchasing Consortium, formal  
response document.

05<sup>th</sup> March 2021

## **Introduction**

Following the publication of the Green Paper in December 2020 LUPC has engaged regularly with its 88 members across higher and further education institutions, not-for-profit organisations in the education, arts, science, charity, and wider public sectors.

We have held a number of virtual group and 1:1 meetings with procurement leads, category managers and our executive committee. We also encouraged responses via an online survey.

The feedback we have received through all the above has been included in this, our formal consultation response.

For questions or comments on this document, please contact Emma Keenan, Deputy Director LUPC, [e.keenan@lupc.ac.uk](mailto:e.keenan@lupc.ac.uk)

## **General Feedback**

Overall, it was agreed that the proposals are an excellent step forward and meet the need to cut existing red tape and simplify procurement. Members are supportive of a more flexible regime, particularly in respect of below-threshold procurement. The proposals do present a more common sense approach to procurement however there needs to be clear guidance to ensure the proposals are followed compliantly, with defined consequences for those who do not.

It is felt that the proposals will require, and allow, procurement professionals in the public sector to use commercial skills which should benefit all stakeholders, though this may present challenges, or requirements for additional training in some organisations who have previously used the rules as justification for the way of doing things. Our members are very keen that a good balance is struck between the benefits of the changes suggested and the perceived additional administrative burden on procurement teams reducing time and opportunities for strategic commercial and innovative thinking, particularly with regard to the additional reporting requirements.

The inclusion of Social Value as an important aspect of a procurement is welcomed as a positive change and long overdue however many feel that the proposals do not go far enough with regards to other regulations, particularly the requirements of the modern slavery act.

All members recognised that there will be a need for Government to provide clear guidance on the application of any new regulations, that training should be centrally provided (rather than needing to be procured by individual organisations), and that language used should be consistent with current terminology or explained effectively.

Further clarity on how the regulations and possible sanctions would (or would not) apply to the sectors represented in our membership, which includes predominantly higher education institutions, are required.

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

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

The response to this in our survey was unanimously yes however, clarification is required around the strictly defined circumstances of when single source procurement can take place and who can make that decision. Under non-discrimination, more information is needed on how awards can be made to SMEs and local businesses.

### 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?

Responses to this question were mixed. There is some enthusiasm however, it is evident that further information is required with regards to the scope and authority of the organisation, some reassurance that it would not interfere with process nor promote opportunities for challenge and that good would need to come out of it with regards to the regular publication of learning, case studies and examples of good (and bad) practice.

It would need to be resourced and managed effectively, with appropriate (two way) communication channels and agreed timescales for the resolution of issues. The original OGC gateway reviews provide a model which would be useful to refer to on how this could be managed.

### 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?

Whilst the idea of this proposed panel seems good to most respondents in theory, there is some reticence as to how it might work in practice. It was unanimously agreed that some members of the panel must have hands on and very recent practical procurement experience from a wide range of organisations subject to the regulations. Other members should be sought from Legal, Commercial, HR roles as well as business/industry bodies.

The committee should be robust and committed (and supported by law) to apply sanctions such as debarments and fines if required. Consistency will be key to getting reputational support for this in the longer term.

## Chapter 2: A simpler regulatory framework

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

Our members agree with this approach and recognise the wider benefits this will bring.

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

There was some support to retain a less regulated version of the DSPCR in the interest of national security.

The importance of a clear definition of a Contracting Authority was highlighted as vital by almost all members. This currently differs across sectors, for example, some Higher Education Establishments are not required to follow the regulations.

## Chapter 3: Using the right procurement procedures.

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

Yes, the importance of simplifying the process whilst providing extra flexibility, including around timescales, to meet specific requirements is welcomed, as is the opportunity to feedback officially on the proposals.

Further clarity on the use of the limited tendering procedure is required.

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

We received a mixed response to this question. The majority did feel it is appropriate and necessary however it requires clear unequivocal guidance on when this can be utilised, and sanctions applied effectively where it is abused to deter persons using it inappropriately. If a swift Cabinet Office approval process could be introduced that would provide consistent governance.

The retention of the current section 84 report would be helpful for transparency where persons have used crisis as a ground for limited tendering.

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

The opportunity to use innovation in the procurement process is welcomed by all however we were reminded of the innovation partnership which seemed good in theory but in practice, did not meet the needs of procurement teams. Effective consultation and consideration of “real life” scenarios is important to get a good outcome.

The provision of a suitable pre-market engagement procedural checklist, process, or programme to assist contracting authorities in improving and updating their market knowledge would be useful, as would additional templates to ensure consistency through public procurement processes.

Pushing innovation may well impact on the culture of procurement, it is important to consider this and how interested parties can benefit from shared learning in this space.

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?

Anecdotal evidence that some authorities push bidders into a tight turnaround (which possibly may dissuade some who may be innovative or have limited resources) but then take a long time in their decision and award.

Often it is the human nature issues which are the biggest challenges: complacency, a reliance on bureaucracy to dictate the procurement process, excessive risk aversion and a lack of incentives to achieve change and value for money to name a few. Clearly demonstrating good examples of excellent innovative thought processes and practice will encourage change in this area.

As in question 5, the importance of clarification around who a contracting authority is and who can operate outside of the regulations is vital here to ensure the balance between regulation and action.

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

Our members discussed this and the balance between commercially confidential information as well as useful detail which could benefit not only innovation, but other factors too – for example highlight fraud, or unfair practices. Some members felt the scope of this question too narrow, the publication of case studies, not just data being important.

There was a suggestion that there needs to be an acceptance that organisations in the public sector are seen as partners so sharing data between authorities should be the norm. However, others felt that collaboration between contracting authorities through purchasing consortia such as the LUPC for example, gave opportunity for formal and informal sharing of information which avoids unnecessary bureaucracy.

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?

Feedback was that there needs to be a good balance between the need to procure quickly (not all stakeholders understand the regulated procurement process), and to comply effectively. Continuing to encourage the use of a PIN would help ready the market so that the overall process could be sped up.

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? The vast majority of our membership agreed with this approach.

## Chapter 4: Awarding the right contract to the right supplier.

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

All members agreed with this though some felt that the current MEAT award does not prevent including additional social and environmental value, as long as it is transparent and relevant. The simple change however does encourage persons to think more widely and it is therefore welcomed.

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?

Whilst some members agreed with this, there was also some confusion around when it would be acceptable to exclude a supplier from a process for specific subject matter outside mandatory exclusions. For example, with respect to suppliers record of prompt payment or its plans for achieving environmental targets within its operations.

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?

There were mixed responses to this question, around half thought this was a good idea; those who said no or don't know felt it important that it really would need to be a very clear framework to prevent abuse.



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?

100% of respondents agreed with this proposal.

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

It was agreed that Tax evasion should absolutely be a behaviour that should lead to disbarment, perhaps even where an agreement has been reached with HMRC.

Some respondents supported broadening the list of discretionary exclusion grounds to include a proven breach of any UK laws, however it was unclear how this might be managed effectively.

Several respondents also suggested that prior performance, including consistently unsuccessful (and without merit) award challenges, should be able to be considered.

Unanimously, it was agreed that failure to produce a modern slavery statement, if the company meets the criteria to have to publish one, should also be a valid and mandatory exclusion ground.

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

The vast majority of responses agreed with this.

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)?

All respondents to this question said yes.

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

This section was unclear for most respondents, with the majority of answers being don't know.

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

Responses to this question were mixed. There is concern that a creation of exclusion/barring list(s) could present commercial and litigation risks that are not acknowledged or addressed in the paper. All respondents agreed that whilst in theory this may be a good idea, the management of this list would need to be efficient with clear guidelines around what happens if suppliers are added or removed from the list during a tender process or throughout the life of an agreement. Further clarification is required in this area from the Cabinet office.

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

The majority of respondents felt this would be appropriate however concerns were raised over fairness and also how challenges to this could be managed if the framework for application were not robust.

It was noted that poor performance is subjective to each project and the data quality which will support the publishing of performance will likely be inconsistent, which may damage SME and micro business participation, and shift too much power on the contracting authority. Additionally, it was felt that it may also increase risk of challenge and subsequent costs to both parties and may dissuade new bidders from participating.

Additionally, consideration as to if the right to exclude should be extended to the contracting authority undertaking a framework call-off should the 'removed' supplier have been locally removed for poor past performance, which led to termination, damages, or other comparable sanctions.

Clear guidelines should be provided as to how this should be managed.

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

The majority of respondents agreed with this proposal.

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

Responses to this question were mixed, further information would be welcomed on how broadly this could be utilised.

## Chapter 5: Using the best commercial purchasing tools.

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

There were mixed responses to this question however in Higher Education there are few DPS and therefore this may be an area of less understanding for the majority of our respondents.

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

Responses to this question were mixed. From a purchasing consortium perspective, little value is perceived in the ability to undertake an Open Framework as the administrative burden would be similar (for buyers and suppliers) to re advertising, in its entirety, the framework every 4 years. This opinion however differs for individual institutions with local frameworks where fewer suppliers are involved, and this flexibility may be welcomed.

More clarity is needed on the levy, in particular what would be considered 'in the public interest'.

It was requested that a levy should only be allowable if the contracting authority is a not for profit organisation and they do not pay any money to others in provision of the service.

Clarification is sought on the conditions appropriate for buyers to direct award within Framework agreements. Any regulation would need to support bidders understanding of their position on ranked frameworks to ensure fairness in the original tender/competition.

A clear understanding of who is classified as a contracting authority (as above) is required and more strict regulation on how they are allowed to operate in the provision of frameworks for access by others. For instance, a school should not be capable of being a front for a private company delivering IT hardware to the wider public sector as sometimes happens now. We propose that it should be mandatory for anyone setting up a framework or DPS to either have express prior approval from anyone they name as a participant or have that implied through an existing stakeholder relationship.

## Chapter 6: Ensuring open and transparent contracting.

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

The majority of respondents felt this is a good idea however there should not be a larger administrative burden on stakeholders in the provision and management of the information relating to this.

Procurement pipelines were agreed to be a good idea; however, it is unclear how broadly and consistently this could be applied across all members due to the nature of differing organisational structures and activity. For example, planned and repeating framework agreements could easily be reported, however ad hoc research activity and equipment requirements may not. Clarity is required on this aspect.

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

Responses to this question were mixed. Once again, members felt that whilst in theory this is a good idea, the administrative burden this could add should be balanced against the benefit of transparent reporting. Many felt it requires further consideration and clarification on how this would be managed, monitored, and enforced.

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

Linked to the responses to question 28, this was mostly felt appropriate in principle, however it would be important to ensure all stakeholders are involved in the design, so it is not too onerous. Members suggested that ideally it could be fed by e-tendering platforms, either Find A Tender could be developed for this, or taking feeds from commercial tools.

## Chapter 7: Fair and fast challenges to procurement decisions

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.

Responses to this were mixed yes, no and don't know. No further suggestions were received on areas for further positive impact.

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

In principle some members agreed with this, generally because there is a requirement for a route, especially for small companies, to use to challenge which holds authorities to account but without making public procurement impossibly slow to award. However, it was agreed that there is a significant risk that a professional body created to oversee procurement disputes may be bureaucratic, toothless, and hard to adequately resource for the whole public sector.

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?  
All respondents agreed this would be appropriate.

Q33. Do you agree with the proposal that pre-contractual remedies should have stated primacy over post-contractual damages?  
The majority of respondents agreed with this proposal.

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

This was unclear for most respondents, with the majority answering don't know. Further clarification is required.

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

The vast majority of members agreed with this proposal. It would prevent disgruntled suppliers from seeking excessive and inappropriate levels of damages. Additionally, the threat of a challenge from a powerful supplier, can prevent contracts ever being awarded.

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

Members suggested a variety of options, including suppliers being required to submit their bid costs with their tender submission, the average cost of all bids then being considered. All those who responded to this section agreed that evidence should be provided. The average bid writer day rates as a benchmark plus a calculation of the supplier's technical expert's salary prorated to reflect the time invested in the bid could also be a useful way of calculating costs. It may also help level the bidding market, those currently with large bid teams may be less likely to deploy as much resource in the future if they knew that the costs could not be fully recovered following a challenge.

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

This was agreed as appropriate.

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

The vast majority of respondents did not agree with this. All members agreed that this is useful for buyers to demonstrate clearly the outcome of a process and for suppliers to understand and learn from the experience; it is especially useful for SME's to understand how they could improve in future bids.

## Chapter 8: Effective Contract Management

Q39. Do you agree that:

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

Respondents agreed this is appropriate and correct.

- 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?

Respondents agreed this is appropriate and correct.

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

Responses were mixed to this. The extension of the reporting requirements to the private sector is welcomed by some, however it is unclear how this might work in practice or how it could be mandated.

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

This was agreed as appropriate.

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

This was agreed by respondents as important for transparency.

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?

Overall, this was seen by respondents as an excellent suggestion.