



Cabinet Office

# **Transforming public procurement**

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# Transforming public procurement

Presented to Parliament

by the Parliamentary Secretary at the Cabinet Office

by Command of Her Majesty

December 2020



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## 4 Transforming public procurement

# Ministerial foreword

The end of the Transition Period provides an historic opportunity to overhaul our outdated public procurement regime. I have seen myself that these rules have made it much harder for us to create opportunities for innovative companies to win business and improve public services or for public bodies to exclude suppliers that have performed poorly in the past. Now we have an opportunity to design something that delivers for our communities and our businesses. That is something everyone working on this can see as a dividend from the UK leaving the EU, no matter how they voted in the referendum.

The UK spends some £290 billion on public procurement every year. This huge amount of government spending must be leveraged to play its part in the UK's economic recovery, opening up public contracts to more small businesses and social enterprises to innovate in public service delivery, and meeting our net-zero carbon target by 2050. The Government has already reviewed the Green Book to ensure it supports "levelling up" and is taking other steps for example through the National Infrastructure Strategy to ensure vibrant and resilient supply chains.

This Green Paper addresses another element of this programme of reform: the reform of our procurement laws. For too long, modern and innovative approaches to public procurement have been bogged down in bureaucratic, process-driven procedures. We need to abandon these complicated and stifling rules and unleash the potential of public procurement so that commercial teams can tailor their procedure to meet the needs of the market.

The UK is ready. We have amended our legislation and systems to ensure a smooth changeover at the end of the Transition Period. The UK's new "Find a Tender" service for publishing contract notices will go live on 1 January 2021, replacing the Official Journal of the European Union.

I now want to create a regulatory framework that delivers the best commercial outcomes with the least burden on our businesses and the public sector. We have already introduced a policy which will allow below threshold contracts to be reserved for UK suppliers which will come into effect at the end of the Transition Period. I want to use these further reforms to drive a culture of continuous commercial improvement across the public sector. This is good news for UK companies bidding for public sector contracts. Taking full control of our rules will allow us to respond to evolutions in procurement methods and techniques much more quickly, ensuring our regime remains modern and up-to-date.



COVID-19 has meant that, across the public sector, commercial teams have had to procure contracts with extreme urgency to secure the vital supplies required to protect frontline NHS workers, maintain public services and support our communities. I make no apology for that but there are lessons we can learn and the reforms in this Green Paper will strengthen our longstanding and essential principles in public procurement of transparency, ensuring value for money and fair treatment of suppliers.

These reforms will also ensure we remain committed to the WTO Agreement on Government Procurement, which the UK will join as an independent member on 1 January and which guarantees access for UK suppliers to £1.3 trillion in public procurement opportunities in more than 48 countries. We will respect our commitments to not discriminate against parties in this and other bilateral international trade agreements on public procurement.

In preparing these proposals, we have engaged with a huge range of interested organisations and individuals through many hours of discussions and workshops across the country over the last 12 months. This consultation opens the opportunity for each and every stakeholder to have their say. Delivering the ambitious aims of the Green Paper will require a huge effort. I hope this marks the beginning of public procurement becoming more effective, easier for businesses, and more transparent for citizens.

Lord Agnew

Minister of State for the Cabinet Office

# Executive summary

1. The proposals in this Green Paper are intended to shape the future of public procurement in this country for many years to come. The Government's goal is to speed up and simplify our procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery. The current regimes for awarding public contracts are too restrictive with too much red tape for buyers and suppliers alike, which results in attention being focused on the wrong activities rather than value and transparency. We need a progressive, modern regime which can adapt to the fast-moving environment in which business operates. Markets and commercial practice are constantly evolving and we must ensure that the new regulatory framework drives a culture of continuous improvement to support more resilient, diverse and innovative supply chains.
2. The UK is open for business. We want British business to be in the best competitive position to win international orders. On 2 December 2020, the UK deposited its Instrument of Accession to join the World Trade Organisation's Agreement on Government Procurement,<sup>1</sup> (GPA) and will become an independent member in its own right when the transition period ends on 31 December 2020. This will guarantee access to £1.3 trillion in overseas public procurement markets providing major export opportunities for British businesses. In designing the new regulatory framework, we are committed to the GPA and its principles of fairness, impartiality, transparency, and non-discrimination. The Government will continue to maintain and build on our existing international relationships and new bilateral trade agreements.
  - We propose enshrining in law, the principles of public procurement: value for money, the public good, transparency, integrity, efficiency, fair treatment of suppliers and non-discrimination.
3. The Government proposes to comprehensively streamline and simplify the complex framework of regulations that currently govern public procurement. We propose rationalising and clarifying the parallel rules in the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011, replacing them all with a single, uniform set of rules for all contract awards. This will be supplemented with sector-specific parts or sections where different rules are required for effective operation or to protect our national interest, for example in the defence or utilities sectors.

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<sup>1</sup> Government procurement - The plurilateral Agreement on Government Procurement (GPA)

4. The procurement procedures for awarding public contracts can be restrictive and create complexity and confusion for buyers and suppliers. This stifles innovation and deters small businesses and start-ups from ever bidding for public contracts. We can get rid of duplication and bureaucracy, making the system more agile and flexible while still upholding fair and open competition. The Government proposes replacing the outdated procurement procedures with a new procedure which will allow for more negotiation and greater engagement with potential suppliers to deliver innovative solutions in partnership with the public sector.
  - We propose slashing the 350+ regulations governing public procurement and integrating the current regulations into a single, uniform framework.
  - We propose overhauling the complex and inflexible procurement procedures and replacing them with three simple, modern procedures:
    - a new flexible procedure that gives buyers freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors.
    - an open procedure that buyers can use for simpler, 'off the shelf' competitions.
    - a limited tendering procedure that buyers can use in certain circumstances, such as in crisis or extreme urgency.
  - We propose removing the Light Touch Regime as a distinct method of awarding contracts and applying the rules applicable to other contracts to services currently subject to this regime.
5. The Government wants to open up public procurement to a more diverse supply base, making it easier for new entrants such as small businesses and voluntary, charitable and social enterprises to compete and win public contracts. We want bidding for public sector contracts to be simpler, with procedures that are quicker and cheaper to participate in and information on contracts easier to find.
  - We propose establishing a single digital platform for supplier registration that ensures they only have to submit their data once to qualify for any public sector procurement.
  - We propose legislating for a new Dynamic Purchasing System (DPS+) that may be used for all types of procurement (not just commonly used goods and services).
6. Transparency will remain a fundamental tenet of public procurement to ensure proper scrutiny of contract awards and minimise the risk of corruption. We must exploit digital technology to deliver better value and will legislate to introduce a common data model for all contracting authorities in line with the global Open Contracting Data Standard. More procurement data will be published and it will be done in a standard, machine-readable format, accessible to all. By joining up the current plethora of procurement systems we can simplify the process of bidding for public contracts and drive the commercial benefits from better sharing of data. We also propose introducing a new ground of 'crisis' for the most serious of situations with strengthened safeguards for transparency and use while allowing contracting authorities to compete opportunities at pace, this will be supported by clear guidance.

- We propose embedding transparency by default throughout the commercial lifecycle from planning through procurement, contract award, performance and completion.
  - We propose requiring all contracting authorities to implement the Open Contracting Data Standard so that data across the public sector can be shared and analysed at contract and category level.
  - We propose introducing a new requirement to publish contract amendment notices so that amendments are transparent and to give commercial teams greater certainty over the risk of legal challenge.
  - We propose including 'crisis' as a new ground on which limited tendering can be used to provide greater certainty for contracting authorities in these circumstances.
  - We propose making it mandatory to publish a notice when a decision is made to use the limited tendering procedure.
7. The huge power of some £290 billion of public money spent through public procurement every year in the UK must support Government priorities: to boost growth and productivity, help our communities recover from the COVID-19 pandemic, and tackle climate change. There should be a clear 'golden thread' from these priorities to the development of strategies and business cases for programmes and projects and through to procurement specifications and the assessment of quality when awarding contracts.
8. The policies, projects and programmes to which public spending is directed are determined by the Government, using the Green Book to develop proposals that both achieve their intended objectives and deliver improved social welfare or wellbeing - referred to as social value. Public procurement is critical in translating those decisions into the right contracts with the right providers to achieve the required outputs in the way that offers the best social value for money.
9. Achieving value for money in public procurement will remain focused on securing from suppliers the best mix of quality and effectiveness to deliver the requirements of the contract for the least outlay over the period of use of the goods or services bought. But we want to send a clear message that public sector commercial teams do not have to select the lowest price bid, and that in setting the procurement strategy, drafting the contract terms and evaluating tenders they can and should take a broad view of value for money that includes social value. This includes award criteria for evaluating final bids and scoring their quality, to encourage ways of working and operational delivery that achieve social value objectives.
- We intend to legislate to require contracting authorities to have regard to the Government's strategic priorities for public procurement in a new National Procurement Policy Statement.
  - We propose allowing buyers to include criteria that go beyond the subject matter of the contract and encourage suppliers to operate in a way that contributes to

economic, social and environmental outcomes on the basis of the 'most advantageous tender'.

- We propose retaining the requirement for the evaluation of tenders to be made solely from the point of view of the contracting authority, but amending it so that a wider point of view can be taken exceptionally and only within a clear framework of rules.
10. Awarding the right contract to the right supplier is the cornerstone of public procurement and the litmus test for an effective procurement regime. In order to have the best public services we need the best suppliers and we believe the proposed new regulatory regime will better support contracting authorities in selecting those suppliers. The current procurement regulations allow contracting authorities to take into account the past performance of a supplier on only very limited grounds and commercial teams often have to rely on bidders' self-declarations rather than objective, evidence-based information. We can act now to raise the bar on the standards expected of all suppliers to the public sector and ensure that outstanding small suppliers are able to secure more market share, increasing productivity and boosting economic growth.
- We propose using the exclusion rules to tackle unacceptable behaviour in public procurement such as fraud and exploring the introduction of a centrally managed debarment list.
  - We propose giving buyers the tools to properly take account of a bidder's past performance and exclude them if they clearly do not have the capability to deliver.
11. Much of the bureaucracy that suppliers complain about in a public procurement process arises because of the fear amongst buyers of a decision being challenged in the courts. Most of this comes from ambiguity in the procurement regulations that create a particular vulnerability in the supplier selection and contract award stages. The current processes for legal review cost too much time and money; small businesses in particular find the process too resource-intensive to pursue. In this Green Paper we look at the options to reform the legal review system as well as tackling claims over minor issues that delay contract awards. We want to tackle vexatious claims which slow down delivery and speed up dispute resolution.
- We propose reforming the process for challenging procurement decisions to speed up the review system and make it more accessible.
  - We propose refocusing redress onto pre-contractual measures while capping the level of damages available to bidders, reducing the attractiveness of speculative claims.
12. The Government wants to improve commercial practice across the public sector and will intervene if capability is lacking. Contracting authorities should be held to account for ensuring their commercial teams have the necessary skills and experience to ensure taxpayers' money is spent effectively and efficiently.
13. Taken together, the Government believes these legislative reforms can transform public procurement to make it faster, fairer and more effective. But they will not in

themselves deliver unless contracting authorities act to ensure their commercial teams have the right capability and capacity to realise the benefits. To support this the Government will, subject to future funding decisions, provide a programme of training and guidance on the reforms.

## Application

14. The Government anticipates that the new rules proposed in this Green Paper would apply in respect of contracting authorities undertaking wholly or mainly reserved functions. We will continue to engage with the Welsh Government, Northern Ireland Executive and Scottish Government about the application of these proposed reforms.

## How to respond to this consultation

15. In producing this Green Paper, the Cabinet Office has engaged with over 500 stakeholders and organisations through many hundreds of hours of discussions and workshops. This has included stakeholders from central and local government, the education, and health sectors, small, medium and large businesses, the charities and social enterprises sectors, academics and procurement lawyers.
16. The Government also established a Procurement Transformation Advisory Panel, which brought together procurement experts from across the world to discuss the opportunity for reform and ideas of how that could best be done. We would like to take this opportunity to express our thanks to the panel members and all those who have taken part in the engagements to date; your views and ideas have all contributed to the proposals.
17. In this next stage, we invite you to respond to the questions in this public consultation together with any evidence that could help us develop, implement and monitor the success of the reforms.
18. Responses should be sent to [procurement.reform@cabinetoffice.gov.uk](mailto:procurement.reform@cabinetoffice.gov.uk) by 10 March 2021.

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

**We propose enshrining in law the principles of public procurement: the public good, value for money, transparency, integrity, fair treatment of suppliers and non-discrimination.**

**We intend to legislate to require contracting authorities to have regard to the Government's strategic priorities for public procurement in a new National Procurement Policy Statement.**

**We propose establishing a new unit to oversee public procurement with powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities.**

## Introduction

19. At £292 billion<sup>2</sup>, public procurement accounts for around a third of all public expenditure. Every penny of this vast sum must be focused on delivering full value for money for the United Kingdom. By improving public procurement, the Government can not only save the taxpayer money but drive social, environmental and economic benefits across every region of the country.
20. Procurement reform is not new but it has always had to work within the framework of EU based regulations. The latest EU Directives were transposed into UK law in 2015 and 2016, while the Public Services (Social Value) Act 2012 sought to maximise the benefits of public spending in the UK. And there have been many non-legislative reviews of commercial capability across the public sector, for example Sir Peter Gershon's 1999 review of civil procurement identified the need for more strategic procurement skills in government procurement.
21. The COVID-19 pandemic has underlined the need for an effective regulatory regime for public procurement. Hospitals, healthcare professionals and workers urgently needed medical supplies, personal protective equipment, cleaning and hygiene

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<sup>2</sup> Combined figure of gross current procurement (£220,428 million, pg 80) and gross capital procurement (£71, 583 million, pg 81) from the Public Expenditure Statistical Analysis (PESA) 2019.

products. The importance of public procurement has rarely been so prominent in the public domain and it can now play a significant role in the economic recovery.

## International trade obligations

22. The UK is now free to develop an independent policy on public procurement, building on our new membership of the WTO Agreement on Government Procurement (GPA) in our own right as a sovereign country. Membership of the GPA provides British businesses with certainty that they will be able to continue to bid for overseas public sector contracts worth £1.3 trillion each year, and means that overseas suppliers have the right to bid for UK public sector contracts under the GPA, delivering inward investment and better value for UK taxpayers.
23. Our new regulatory framework will therefore be founded on the principles and rules set out in the GPA, namely: non-discrimination, transparency and impartiality. Competitive procurement will continue to be the standard approach, with single source procurement remaining the exception, to be used only in strictly defined circumstances.
24. The UK will continue to comply with its procurement obligations under other international Free Trade Agreements (FTAs). The agreements we have agreed or plan to negotiate with trade partners such as the US, Japan and Australia, will encourage and promote the UK's interests in fair and transparent cross-border trade in public procurement while retaining the opportunity for the UK to transform its own public procurement regime.

## Corruption in public procurement

25. Corruption in public procurement is a crime. It wastes public resources and leads to inefficient procurement. Public procurement is susceptible to corruption due to the large sums of money involved and the large volume of contracts. To prevent procurement corruption, the reforms to the procurement regime will be based on transparency, competition and objective criteria in decision-making. They will support transparency and accountability in the management of public finances, including budgeting, reporting on government revenue, expenditure and performance, auditing and risk management. The principles outlined below will underpin the regulatory framework and demonstrate our commitment to tackling corruption in public procurement by ensuring open, transparent, non-discriminatory behaviours and processes are the foundation of procurement.

## Principles of public procurement

26. The principles of the new regulatory framework for public procurement should be consistent with HM Treasury's Managing Public Money and the seven principles of public life as set out by the Committee on Standards in Public Life.
27. The Government proposes that the following interdependent principles should be included in the new legislation:



- Public good - procurement should support the delivery of strategic national priorities including economic, social, ethical, environmental and public safety.
- Value for money - procurement should enable the optimal whole-life blend of economy, efficiency and effectiveness that achieves the intended outcome of the business case.
- Transparency - openness that underpins accountability for public money, anti-corruption, and the effectiveness of procurements.
- Integrity - good management, prevention of misconduct, and control in order to prevent fraud and corruption.
- Fair treatment of suppliers - decision-making by contracting authorities should be impartial and without conflict of interest.
- Non-discrimination - decision-making by contracting authorities should not be discriminatory.

### **The public good**

28. The decision to invest public funds into policies, services, projects and programmes is subject to analysis and appraisal to assess the public good that is expected to accrue as a result of the expenditure. For national spending this will have been conducted in accordance with the HM Treasury Green Book guidance and subject to National Audit Office scrutiny. Procurement should draw a clear link between the objectives, outcomes and anticipated benefits that underpin the investment decision and the selection of contracting parties to deliver those benefits.
29. Public procurement should also be leveraged to support strategic national priorities. Commercial teams should have regard to the Government's national priorities when conducting public procurement. These will be set out in the National Procurement Policy Statement (see below). This is consistent with international practice where public procurement is regularly leveraged to achieve social and environmental value beyond the primary benefit of the specific goods, services and capital works through operational delivery that contributes additional social value.

### **Value for money**

30. The Government is making clearer the ways in which value for money is assessed at the point of the investment decision, which will be set out in a revised Green Book. A critical element of the assessment is a strong strategic case that sets: a clear objective aligned to government priorities, a rationale for intervention, and/or robust evidence and analysis for how different options for delivering that intervention will advance that objective (the 'logical process of change').
31. The role of procurement is to translate the desired outcomes into the right contracts and select the supplier or suppliers that will deliver these in the way that offers best social value for money. For many procurements there may only be a single contract, but for complex major projects there will be many hundreds of separate contracts of different types, sizes and sectors that need to be packaged and procured in such a

way as to deliver the whole project successfully. Whether there is one contract or many it is critical to maintain the “golden thread” from government priorities via the business cases through to procurement specifications and the assessment of price and quality when awarding contracts.

32. Value for money does not therefore mean simply selecting the lowest price, it means securing the best mix of whole-life quality and effectiveness for the least outlay over the period of use of the goods, works or services bought. Value for money also involves an appropriate allocation of risk and an assessment of the procurement to provide confidence about its probity, suitability, and economic, social and environmental value over its life cycle.

### **Transparency**

33. The principle of transparency in public procurement is central to the integrity and accountability of the system and the fight against corruption. This is consistent with best international practice. It ensures business opportunities are accessible, and processes and decisions can be monitored and scrutinised. It ensures that decision-makers are held accountable for spending public money and helps open up public procurement to more effective competition that, in turn, can deliver better value for money.

### **Integrity**

34. The principle of integrity is key to strengthening trust and combating corruption. Procurement professionals must always bear in mind the needs of the “customer” or “user”. Planning a public procurement must promote good governance, sound management of public money, and a professional relationship between buyer and supplier, e.g. managing conflicts of interest, protecting intellectual property and copyrights, confidential information or other standards of professional behaviour.

### **Fair treatment of suppliers**

35. The principle of fair treatment of suppliers means all suppliers must receive fair and reasonable treatment before, during and after the contract award procedure so as to encourage participation by suppliers of all types and sizes. Suppliers should have timely access to review mechanisms to ensure the overall fairness of the procurement process.

### **Non-discrimination**

36. The principle of non-discrimination applies to procurement under the new regulations and means contracting authorities cannot show favouritism among domestic suppliers. This principle also applies to suppliers who have rights under an international trade agreement that covers the procurement. Non-discrimination in this context means that suppliers, goods and services from any other party to the agreement are given no less favourable treatment than domestic suppliers, goods and services.

## National Procurement Policy Statement

37. Taxpayers' money spent through public procurement will be used to deliver government priorities through projects and programmes that generate economic growth, help our communities recover from the COVID-19 pandemic and tackle climate change. To ensure that the procurement process itself scrutinises suppliers' methods adequately and reflects the requirement to deliver the full range of benefits in each contract, the Government will separately set out plans to legislate to require contracting authorities to have regard to national priorities of strategic importance in public procurement. These priorities will be published in a National Procurement Policy Statement including:
- delivering social value including economic, social and environmental outcomes;
  - commercial delivery including publishing pipelines of future procurement;
  - commercial capability including benchmarking performance.
38. Linking the elements of social value through into procurement is critical to ensuring the social, economic and environmental benefits are delivered through the contract. The National Procurement Policy Statement will set out key outcomes that the Government believes all contracting authorities should have regard to in their procurement and commercial activity where they are relevant to the subject matter of the contract and it is proportionate to do so, such as:
- Creating new businesses, new jobs and new skills in the UK;
  - Improving supplier diversity, innovation and resilience;
  - Tackling climate change and reducing waste.
39. Following the collapse of Carillion, the Government published the Outsourcing Playbook and has recently developed the Construction Playbook which sets out how contracting authorities can get the commercial delivery of public services right at the start. This applies whether the decision is to outsource and deliver a service in partnership with the private and third sector, in-source, use in-house resources or a mix of both. The Playbook includes:
- Publication of commercial pipelines. Contracting authorities should publish annual pipelines of their planned procurements and commercial activity, looking forward at least 18 months but ideally three to five years.
  - Market health and capability assessments. All complex outsourcing projects should undertake market assessments to determine the health of the relevant market and consider how the commercial strategy and contract design could be set to address potential market weaknesses.
  - Project validation review (PVR). All complex outsourcing projects should go through an independent PVR prior to any public commitment being made in order

to benefit from cross sector expertise in assuring deliverability, affordability and value for money.

- Delivery model assessments (also known as Make versus Buy). Contracting authorities should conduct a proportionate delivery model assessment before deciding whether to outsource, insource or re-procure a service through evidenced based analysis.
  - Should Cost Model. All complex projects should produce a Should Cost Model as part of the Delivery Model Assessment to estimate the total cost of delivering the service and protect the authority from low bid bias.
  - Pilots. Pilots should be used where a service is being outsourced for the first time. Piloting a service delivery model is the best way to understand the environment, constraints, requirements, risks and opportunities.
  - Key performance indicators (KPIs). All new projects should include performance measures that are relevant to the service objective and proportionate to the size and complexity of the contract and make at least three KPIs publicly available.
  - Risk allocation. Risk allocation should be subject to scrutiny prior to going to market, with meaningful market engagement.
  - Pricing and payment mechanism. The approach to pricing and payment goes hand in hand with risk allocation and should similarly be subject to greater consideration and scrutiny to ensure it incentivises the desired behaviours or outcomes.
  - Assessing the economic and financial standing of suppliers. All outsourcing projects should comply with a minimum standard when assessing the risk of a supplier going out of business during the life of a contract.
  - Resolution planning. Suppliers of critical service contracts to the public sector, should provide corporate resolution planning information so that the contracting authority is prepared for any risk to the continuity of service delivery posed by insolvency.
40. Contracting authorities should also ensure they have the right organisational capability and capacity so that their commercial teams are sufficiently experienced and trained to ensure effective commercial delivery. They should assess the procurement skills across their organisation, including benchmarking themselves against relevant standards, to ensure they have the appropriate capability to implement the new reforms and realise the huge potential benefits.
41. In taking account of these national priorities, contracting authorities will need to ensure compliance with the law as currently set out in the regulations and as subsequently amended by any legislation or statutory guidance arising out of these reforms. Additionally, they will need to comply with obligations under our international agreements including the GPA. Contracting authorities will still be free to take account of their own strategic priorities as now.

## Oversight

42. The Minister for the Cabinet Office is responsible for the public contract regulations and for the Government's policy on public procurement, including publishing statutory guidance and Procurement Policy Notes for information or action by contracting authorities in central government and across the public sector.
43. The Cabinet Office is also responsible for the Public Procurement Review Service (PPRS). The PPRS was established in 2011 (then known as the Supplier Feedback Service) to informally investigate concerns raised by suppliers, particularly small businesses, relating to public procurement practice in England (similar functions operate in Northern Ireland, Scotland and Wales) and support continuous improvement across the public sector. The PPRS has statutory powers set out in the Small Business, Enterprise and Employment Act 2015 to investigate the performance by contracting authorities of their functions including actions relating to entering into a contract and the management of that contract. The PPRS publishes its findings but it does not have powers to enforce them or make judgements. Since 2011, the small team in the PPRS has investigated over 1800 cases and unlocked over £8m in late payments owed to suppliers both by contracting authorities and in the supply chain.
44. The Government proposes establishing a new unit, supported by an independent panel of experts, to oversee public procurement with powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities. This unit would aim to improve capability and practices for the benefit of all contracting authorities and suppliers rather than provide remedies for an individual supplier on a specific procurement. This will be facilitated through greater information about purchasing and supply markets and behaviour, allowing targeted interventions to be implemented, optimising policy delivery and driving improvements in capability, behaviour and practice.
45. This unit would have responsibility for:
- Monitoring - to assess and address systemic gaps in commercial capability and understanding, especially as the new rules are adopted. An increased level of monitoring will be necessary initially as the reforms bed in and contracting authorities engage with the new flexibilities.
  - Intervention - powers to issue improvement notices with recommendations to drive up standards in individual contracting authorities. Where these recommendations were not adopted, the unit could have recourse to further action such as spending controls.
46. The Government proposes establishing this unit within the Cabinet Office. Civil servants would undertake investigations based on information and data generated through improved transparency as well as complaints about systemic issues. The reports produced would be submitted to an independent panel drawn from a pool of experts, which would make recommendations to the Minister for the Cabinet Office. This pool of panellists could be made up of, for example, current or former senior representatives from local government, health and other sectors, commercial experts, supplier representatives and members of the legal profession. To ensure

transparency, the recommendations of the panel would be published alongside the Minister's decisions.

47. If a debarment register were introduced as a result of the feasibility study proposed in chapter 4, the unit could be responsible for centrally managing mandatory and discretionary exclusions of affected suppliers.

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

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?

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?

## Chapter 2: A simpler regulatory framework

**We propose slashing the 350+ regulations governing public procurement and integrating the current regulations into a single, uniform framework.**

### Introduction

48. The UK Parliament has passed the following legislation, the regulations transpose various EU Directives on public procurement into UK law to provide the main regulatory framework for public procurement:

- Public Contracts Regulations 2015 (PCR);
- Utilities Contracts Regulations 2016 (UCR);
- Concession Contracts Regulations 2016 (CCR); and
- Defence and Security Public Contracts Regulations 2011 (DSPCR).

49. The table below shows other legislation that apply to contract award procedures. The Government does not propose to include these provisions in the new regulations as, in line with current practice, they are freestanding laws that may be updated from time to time in their own right. Including them in the single and uniform regulations would unhelpfully duplicate and complicate the legal framework.

Legislation	Purpose	Application
<b>The Public Services (Social Value) Act 2012</b>	Requires most contracting authorities to which the PCR apply to consider, at the pre-procurement stage, how the procurement could improve the economic, social and environmental well-being of the relevant area, and to consider, in conducting the procurement, how the contracting authority might act with a view to securing that improvement.	England and Wales
<b>National Health Service (Procurement, Patient Choice</b>	These Regulations impose requirements on the National Health Service Commissioning Board ("the Board") and clinical	England

<b>and Competition) (No. 2) Regulations 2013</b>	commissioning groups (“CCGs”) in order to ensure good practice in relation to the procurement of health care services for the purposes of the NHS, to ensure the protection of patients’ rights to make choices regarding their NHS treatment and to prevent anti-competitive behaviour.	
<b>Part II of the Local Government Act 1988</b>	Part II of the Local Government Act 1988 prohibits local authorities and certain other public authorities from taking into account non-commercial considerations in exercising certain functions relating to procurements for public supply and works contracts and such contracts. Authorities must also give reasons for decisions made in the exercise of those functions	England, Wales and Scotland
<b>The Local Government (Transparency Requirements) (England) Regulations 2015</b>	Requires additional contracting information to be published beyond the legislative requirements of the Public Contracts Regulations 2015. Responsibility for this legislation and the Local Government Transparency Code lies with the Department for Communities and Local Government.	England
<b>Small Business Enterprise and Employment (SBEE) Act 2015</b>	Section 39 of the Act that gives the Minister for the Cabinet Office (MCO) the ability to implement secondary legislation imposing duties on public contracting authorities in relation to procurement matters. Under Section 40, in-scope public contracting authorities must co-operate with any investigation of their procurement practices carried out on behalf of MCO.	England, Wales and Northern Ireland



<b>The Late Payment of Commercial Debts Regulations 2013</b>	Amended late payment legislation came into force on 16 March 2013, implementing European Directive 2011/7/EU on combating late payment in commercial transactions. It aims to make pursuing payment a simpler process across the EU, reducing the culture of paying late and making payment on time the norm.	England, Wales and Northern Ireland
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50. In January 2019, the NHS published a Long Term Plan<sup>3</sup> which included suggested changes to the law to support the implementation of the plan; this included proposals to change procurement legislation for healthcare services. This was followed up by an engagement exercise on the proposals and in September 2019 the NHS published its recommendations to Government and Parliament for an NHS Bill<sup>4</sup>. The procurement of healthcare services is not being considered as part of this Green Paper because the Department of Health and Social Care is continuing to consider next steps in relation to the NHSE proposals on procurement in the Long Term Plan.

## A single regulatory framework

51. There are currently too many sets of regulations with overlapping and complex rules. They are challenging to navigate for commercial teams and suppliers alike. The procurement regulations are particularly burdensome for small businesses. The Government proposes consolidating the PCR, UCR, CCR and DSPCR into a single set of regulations specifically designed for the UK market and priorities. This would reduce complexity and give greater clarity to contracting authorities on which processes and behaviours are or are not permitted during contract awards.

52. This consolidation offers the potential for making the regulations easier to understand by:

- removing confusion over the differences between the detailed rules in the different regulations;
- reducing legal uncertainty that different wording of parallel rules in different regulations may mean that the rules are different.

53. Consolidating the current regulations will be a major and complex exercise and will not by itself achieve our ambition to speed up and simplify the rules. We must combine

<sup>3</sup> <https://www.longtermplan.nhs.uk/wp-content/uploads/2019/08/nhs-long-term-plan-version-1.2.pdf>

<sup>4</sup> <https://www.england.nhs.uk/wp-content/uploads/2019/09/BM1917-NHS-recommendations-Government-Parliament-for-an-NHS-Bill.pdf>

consolidation with other reforms to deliver a simpler set of procurement rules. This is why the proposals in this Green Paper must be viewed as a package and alongside an equally important increased effort to uplift commercial capability across the public sector to unlock the benefits of this simplification.

54. The main argument against a set of consolidated regulations is whether the time and effort required in integrating the PCR, UCR, CCR and DSPCR into a single set of regulations would deliver significant benefits compared to delivering the reforms through the existing structure of four separate regulations. Four separate sets means each can be tailored to the needs of each sector. Commercial teams are generally more familiar with the PCR. The UCR and CCR are generally more flexible than the PCR, which may mean that in some cases there is a risk of flexibility being reduced by our proposals where they are more akin to the PCR. There will be familiarisation costs, as contracting authorities and suppliers become accustomed to the new consolidated rules.

## Structure of the new regulations

55. The Government proposes that the basic structure of the new regulations would follow the existing regulatory framework. We propose having a common set of main rules for public procurement with sections that contain any unique rules for utilities, concessions and defence and security procurement so we have a coherent set of regulations. The Ministry of Defence will consult as required on the specific defence and security-related elements proposed for the new regulations. In consolidating the regulations into a single and uniform set of rules, we propose to adopt most of the greater flexibilities allowed by the UCR and CCR while recognising commercial teams' greater familiarity with the PCR.

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

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

# Chapter 3: Using the right procurement procedures

**We propose overhauling the complex and inflexible procurement procedures and replacing them with three simple, modern procedures:**

A new flexible procedure that gives buyers freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors.

An open procedure that buyers can use for simpler, 'off the shelf' competitions.

A limited tendering procedure that buyers can use in certain circumstances, such as crisis or extreme urgency.

**We propose including 'crisis' as a new ground on which limited tendering can be used to provide greater certainty for contracting authorities in these circumstances.**

**We propose making it mandatory to publish a notice when a decision is made to use the limited tendering procedure.**

**We propose removing the Light Touch Regime as a distinct method of awarding contracts and applying the rules applicable to other contracts to services currently subject to this regime.**

## Introduction

56. For too long, modern and innovative approaches to public procurement have been bogged down in bureaucratic, process-driven procedures. We need to abandon the complicated and stifling rules of the procurement procedures and unleash the potential of public procurement so that commercial teams can tailor their procedure to meet the needs of the market. At the moment it is often the choice of procedure that drives the procurement, not the needs of the procurement that drives the procedure.

## Current procurement procedures

57. Across the PCR, UCR and DSPCR there are currently seven procurement procedures available to award contracts over the thresholds:

- open procedure;
- negotiated procedure without prior publication;
- restricted procedure;
- competitive dialogue procedure;
- competitive procedure with negotiation<sup>5</sup>;
- innovation partnerships procedure, and
- design contests.

58. A more detailed explanation of each of the procedures is at [Annex A](#). The CCR allow buyers the freedom to devise their own procurement procedure, subject to complying with certain procedural requirements based on the principles of transparency, equal treatment, non-discrimination and proportionality.

59. There is significant overlap between the procedures, in particular the competitive dialogue procedure and the competitive procedure with negotiation. The restrictive nature of the procedures makes them unsuitable for many procurements and the detailed rules tie buyers' hands in using them. Design contests were introduced in the PCR 2006<sup>6</sup> with the innovation partnership procedure following in the 2015 update. The hope was to encourage innovation but the complex rules have proved impenetrable to many buyers and they are rarely used. In 2017, only three contract notices for innovation partnerships and five for design contests were published by UK contracting authorities.

60. The current open and restricted procedures, which do not allow for negotiation with bidders during the process, are the most commonly used. The more flexible procedures, which do allow for negotiations at different stages (subject to certain restrictions), such as the competitive dialogue procedure and the competitive procedure with negotiation, are less frequently used. Collectively the four procedures which allow for negotiations of competitive dialogue; competitive procedure with negotiation; innovation partnerships procedure, and design contests, accounted for less than 10% of all advertised contracts awarded in the UK between 2016 and 2018 across PCR, UCR and CCR.

61. Any reforms to the procedures in the new regulations will need to comply with the UK's obligations under the GPA but this allows considerable flexibility. The key obligations are that buyers conduct in-scope procurements in a way that is consistent with the general requirements of non-discrimination, transparency and openness, avoiding conflicts of interest and preventing corruption. The GPA restricts the use of 'limited tendering' (i.e. tendering without prior advertisement) to circumstances that are reflected in the UK in the circumstances where the negotiated procedure without prior

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<sup>5</sup> In the UCR and DSPCR, this procedure is known as the negotiated procedure. In both cases this is substantially the same as the competitive procedure with negotiation in the PCR.

<sup>6</sup> <https://www.legislation.gov.uk/ukxi/2006/5/made/data.pdf>

publication can be used (e.g. extremely urgent and unforeseeable situations). It does not restrict the use of 'open tendering' (i.e. where all interested bidders can submit a tender) or 'selective tendering' (i.e. where only qualified bidders are invited to submit a tender).

62. The Government proposes replacing the existing seven procedures with three simple, modern procedures:

- a new competitive, flexible procedure that gives buyers maximum freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors;
- retain the open procedure which buyers can use for simpler, 'off the shelf' competitions as now (expanding its availability to suitable defence and security procurements for which this procedure is currently not available);
- retain the negotiated procedure without prior publication but renaming it as the limited tendering procedure.

## The competitive flexible procedure

63. The Government proposes introducing a new competitive, flexible procedure with minimal detailed rules, only those needed to comply with the proposed principles of public procurement and the GPA. This procedure would be similar to the existing "Light Touch Regime" which can currently only be used to procure specific social, health and other services. This will give commercial teams maximum flexibility to design a procurement process that meets their needs and the needs of the market. This new procedure would replace five of the existing procedures: restricted, competitive dialogue, competitive procedure with negotiation, innovation partnerships and design contests. It will also be used for the award of all concession contracts.

64. The rules for the new competitive, flexible procedure would be that:

- the process is consistent with the proposed principles of public procurement;
- the opportunity is advertised and notices are published in line with the proposed transparency requirements;
- the contract notice contains the basic information regarding the contracting authority and the opportunity (e.g. specification, timelines and any conditions for participation);
- the process remains consistent with the information provided in the contract notice (i.e. the buyer does what they said they would do at the outset);
- the process complies with the proposed requirements on selection and evaluation;
- time limits on participation and submission of final tenders are reasonable and proportionate and within the GPA minimum time periods of:

- 30 days to receive expressions of interest after publication of the contract notice;
  - 25 days for submission of tenders after issuing the invitation to tender; and
  - scope to reduce either or both of these timescales to 10 days in each case in the case of urgency.
65. Providing greater flexibility for commercial teams to design their procedure to fit their procurement will encourage innovation and allow them to engage with the market more effectively and proactively. It will allow buyers to build in stages of negotiation and deploy modern commercial tools such as reverse auctions. The proposed procedure would be suitable for a wide range of procurements including:
- simple requirements where an initial selection stage is needed to limit the number of bidders, for example to meet specific technical requirements in order to bid;
  - for complex requirements where negotiations with bidders would be beneficial in helping them understand the requirements and/or in delivering better value for money and innovation;
  - for procurements where the contracting authority may not want to limit the field through an initial selection stage without first evaluating the product, technology or software being offered; this would be particularly useful where a prototype or other practical demonstration is required;
  - for procuring innovative products or services using a phased approach to develop the solution(s).
66. This will not only benefit contracting authorities but improve the experience for suppliers, removing bureaucracy and making it easier for start-ups and new entrants to public sector markets to access these opportunities on an equal footing. This proposal sits alongside other proposals in the Green Paper, particularly on selection and award and transparency, which will truly enable the full flexibility of these changes to be exploited.
67. The increased opportunity for using negotiation should be valuable, particularly in complex procurements where negotiation can ensure suppliers gain a better understanding of the buyer's requirements, with more outcome-based specifications to allow the market to come forward with innovative solutions. Elimination of suppliers through negotiation would still need to be in accordance with the stated evaluation criteria and there would need to be a deadline for the submission of final tenders once negotiations are concluded.
68. For the full benefits of this new procedure to be achieved, there will need to be a shift in the behaviour of commercial teams. There will have to be an increase in buyer capability to exploit the freedoms and gain the true benefits available. The proposals provide significantly more flexibility; with this will come greater discretion for contracting authorities on how they conduct procurements as the rules will not be as prescriptive.
69. The Government believes the advantages of the new competitive, flexible procedure outweigh the disadvantages but there are, nonetheless, risks in the approach:

- it will be unfamiliar to buyers and suppliers and likely result in familiarisation costs and time to bed in; or buyers may choose not take advantage of the increased flexibility and revert to traditional methods, resulting in limited benefits from the new procedure.
- the increased flexibility may result in greater divergence across buyers, limiting the extent to which standard approaches are developed and increasing the overall time and cost of procurements due to poor practice;
- greater use of negotiations could prolong procurement timescales and the possibility of negotiation later in a procedure may cause suppliers not to put their best proposals forward in initial tenders;
- an increased number of legal challenges as the new procedure is tested; this could result in principles being established through Court judgments, which are always specific to circumstances and as a result can be more difficult to interpret than detailed rules set out in legislation.

70. To mitigate the risks around unfamiliarity and underutilisation of the increased flexibility, we intend to provide training and detailed guidance for contracting authorities; this will include examples of processes that could be used under the competitive flexible procedure. As use of the new procedure increases, we would publish case studies as examples of good practice.

## The open procedure

71. The Government proposes that the open procedure should be retained as a standard procedure available to contracting authorities and extend its availability to suitable defence and security procurements. While it would be possible to undertake a process akin to the open procedure through the new competitive flexible procedure, there is merit in retaining the open procedure in its own right. It is the most popular procedure and will continue to be appropriate for simple requirements where an initial selection stage is not needed. It will also be useful to have a default standard procedure for inexperienced buyers.

## The limited tendering procedure

72. The Government proposes that the negotiated procedure without prior publication of a contract notice should be retained as a standard procedure available to contracting authorities but that it should be renamed as the limited tendering procedure. This is a well-established approach only available in a limited number of circumstances and with appropriate safeguards. Guidance will make clear that there should be no general assumption that this process is single source.

73. The process will be similar to the current negotiated procedure without prior publication of a contract notice. As is currently the case, the contracting authority must not award to a supplier who is subject to a mandatory exclusion ground and can

conduct negotiations with the supplier. They must publish a contract award notice within 30 days of contract award.

74. The contracting authority will need to document their analysis to demonstrate that their decisions are fully justified. The grounds for using the procedure will remain broadly unchanged from the current regulation 32 of the PCR which are summarised as follows:
- absence of tenders or suitable tenders in an advertised procurement;
  - artistic reasons, technical reasons or exclusive rights;
  - extreme urgency;
  - for the purchase of research and development goods;
  - additional purchase of goods where a change in supplier would result in technical difficulties;
  - purchase of goods on commodity markets;
  - purchase of goods on advantageous terms due to winding up or bankruptcy;
  - design contests (will be removed as the procedure will cease to exist);
  - repetition of works and services in limited circumstances.
75. We propose to add in a new circumstance in which limited tendering can be used, i.e. in the case of crisis (see below).
76. In the current regulations where the contracting authority intends to award a contract without prior publication of a contract notice, there is the option to publish a voluntary transparency notice and apply a 10 day standstill period before entering into the contract. In these circumstances, the remedy of ineffectiveness does not apply. The voluntary transparency notice must give the justification for the decision to award a contract without prior publication of a contract notice. As indicated by the name, this is not a mandated notice.
77. We propose to make it mandatory to publish a notice whenever the decision is made to award a contract under the limited tendering procedure. In addition, with the exception of those contracts placed due to crisis or extreme urgency, we propose that a 10 day standstill period will apply to all awards under the limited tendering procedure. This is to encourage transparency within the procurement process and will require contracting authorities to demonstrate clearly their justification for using the limited tendering procedure. This is in addition to the existing requirement to publish a contract award notice, which will be retained.

### **Limited tendering in the case of crisis or extreme urgency**

78. There is currently ambiguity in the regulations regarding contracting in the case of crisis where immediate, short term responses are required, as distinct from situations where there is extreme urgency due to unforeseeable events. It is not always entirely clear what is possible with regard to the award of contracts without advertisement. We want to ensure that contracting authorities can act quickly and effectively in appropriate circumstances, but also ensure transparency in the process and encourage competition as far as possible.
79. To provide greater clarity, we propose retaining the current circumstances for allowing limited tendering in cases of extreme urgency brought about by unforeseeable events



and include a new circumstance specifically relating to crisis. In broad terms, we propose that a crisis would cover:

- an event which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life or health of people;
- where measures are required to protect public morals, order or safety; or
- where measures are required to protect human, animal or plant life or health.

80. The inclusion of the crisis circumstance would provide greater certainty to contracting authorities should there be a national or local emergency. We propose to give the Minister for the Cabinet Office new powers to declare a crisis for the purposes of this circumstance under the reformed rules. Contracting authorities would need to submit to the Minister of Cabinet Office if they believe a crisis should be declared for the decision to be made. This circumstance would only apply to contracts awarded to deal with the immediate requirement posed by the crisis.

81. Where a contracting authority can justify limited tendering on the basis of crisis or extreme urgency, this does not mean that they should necessarily directly award a contract to a chosen supplier. Even if the time limits within the accelerated procedures cannot be met, when there are a number of potential suppliers and scope to undertake a degree of competition, a contracting authority should consider this and if they do not take this course, keep a record of their reasoning. To increase competition in these circumstances we propose that contracts let under these provisions would be excluded from the risk of automatic suspension preventing contract award and delay. This proposal is outlined in more detail in [chapter 7](#).

82. In the case of crisis or extreme urgency, the contracting authority would be required to publish the proposed notice outlined above. We are considering options for how central government departments might better notify Parliament of this information alongside publication. Further information on remedies in these circumstances is in [chapter 7](#), and for contract amendments in [chapter 8](#).

## Innovation in procurement

83. Science and innovation are important drivers of growth and productivity. Innovative technologies and approaches offer an opportunity to transform industry, the delivery of public services and the lives of people across the country. Supporting the innovation ecosystem is a key government priority, which is why the UK has been increasing public investment in this area at historic levels, to deliver our ambitions of scientific and technological leadership.

84. The UK has a world class science base and realising the benefits from this relies on a competitive, dynamic market economy. Public procurement offers significant potential as a strategic lever to drive innovation in the UK, through fostering markets for innovative new products and services, encouraging a wide range of firms to develop new and innovative solutions to solve public policy issues, and to provide the certainty needed to encourage investment in innovation.

85. Current procurement practice can create high entry costs which are a fundamental barrier to supporting innovation, while also vulnerable to shifts in public sector demand. This makes proactive engagement from businesses high-risk, even when they can drive significant efficiencies. These risks are amplified by information asymmetries that hinder market-led development of (or investment in) emerging technologies. Compounding this, innovative solutions can often be considered or sought too late in project cycles.
86. The reforms outlined in this Green Paper represent a significant step forward in providing the structures, procedures, tools and information to contracting authorities to enable them to focus on innovation as a part of their procurement approach.
87. The flexible, competitive procedure, in particular, is intended to empower contracting authorities to design and select procurement processes that facilitate innovative responses. This is intended to encourage proactive engagement with suggestions from the market. Alternative, and in some cases, novel procedures are an important aspect in achieving this because they can give contracting authorities a better understanding of the intelligent innovation opportunities available, allow bidders to adopt a different approach to that specified, and allow commercial teams to adopt 'performance' or 'outcome-based' specifications rather than 'conformance-based' specifications, thereby encouraging supplier innovation.
88. In this context, the reforms proposed in his Green Paper represent a significant opportunity for the Government to foster institutional and cultural change in contracting authorities responsible for public procurement. The Government will work across the public sector to establish a more innovation-friendly culture as well as practices among contracting authorities. This will emphasise the importance of early engagement and encourage contracting authorities to articulate challenges rather than prescribing a specific solution for delivery. This approach has the potential to result in more imaginative and inventive proposals.
89. A more sophisticated understanding of different types of value - including social value - across the public sector marketplace is an important aspect in the assessment and effective delivery of public contracts. The new Construction Playbook sets out best practice for contracting authorities, including policies to support innovation in construction such as setting clear and appropriate outcome-based specifications that are designed with the input of industry and early supply chain involvement. This is a practice the Government plans to further integrate across public procurement and builds on the message that there should be a clear 'golden thread' from government priorities to the development of strategies and business cases for programmes and projects and through to procurement specifications. If done correctly this approach will encourage market collaboration that identifies and refines proposals as well as provides evaluation criteria that can allow contracting authorities to conduct more sophisticated evaluations of quality, wider public policy delivery and whole-life value.
90. The Government wants to address and better understand the ways in which procedural, cultural and data challenges in public procurement can be overcome to better support more effective utilisation of innovation in procurement. These reforms will be supported by a programme of training, guidance and case studies to support public procurers, with the ultimate aim of improving Government's commercial capability. We would welcome stakeholders' feedback to help inform this programme

and ensure that these wide-ranging changes are properly taken up and utilised across contracting authorities.

### Going further

91. This is one element of a wider programme of reform to public procurement, and there are other processes and elements which can help procurement foster innovation. While not the focus of this Green Paper, we are interested in views on what further measures the Government can take or how the Government can encourage processes which incentivise procurement as a tool for innovation. Initial stakeholder feedback has suggested options that the Government could consider, such as the use of 'innovation labs', to bring innovative suppliers and relevant bodies together to develop ideas, including through 'multiple supplier collaborative solutions', and powers that enable review and post-contract amendments to contracts when considering variations due to innovation. There may also be more creative ways to use and share data. There are also relevant factors beyond this, such as pre-procurement processes related to R&D and award, the Small Business Research Initiative (SBRI) and the Pre-Competitive Procedure to engage and support industry more comprehensively.
92. While this Green Paper is not making formal proposals on these approaches, we would welcome stakeholders' views on what further measures the Government should be considering.

### Social, health, education and other services

93. Social, health, education and other services currently listed in Schedule 3 of the PCR have a lighter set of procurement rules, commonly known as the Light Touch Regime (LTR). The rules of procedure governing the LTR are set out in regulations 74 to 76 of the PCR
94. Service contracts that fall within the scope of the LTR must be advertised in a Contract Notice. Contracting authorities are able to determine their own procurement procedure, but it must be at least sufficient to comply with the principles of transparency and equal treatment. The procedure must be conducted, and any resulting contract awarded, in accordance with the information contained in the notice about conditions for participation, time limits for contacting the contracting authority and the award procedure to be applied.
95. These requirements are similar to the rules proposed for the new competitive flexible procedure. The main difference is that the LTR has a higher threshold of £663,540. The LTR does not have specified time limits, for example for tender returns, but they are required to be reasonable and proportionate. Additionally, publication of notices can be aggregated and completed quarterly.
96. The flexibilities proposed in the new flexible competitive procedure would allow the majority of the actions currently allowed under the LTR and therefore there seems to be little merit in retaining the LTR as a separate method for awarding contracts. Consequently, the Government proposes removing the Light Touch Regime and to apply the same rules to these services that will apply to other contracts for services. This provides more consistency across the procurement rules and contracting

authorities will no longer have to consider whether the LTR applies or not. However, this does mean that the procurement of these services will now be subject to lower thresholds.

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

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

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

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?

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

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?

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?

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

**We propose retaining the current 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.**

**We propose retaining the requirement for the evaluation of tenders to be made solely from the point of view of the contracting authority, but amending it so that a wider point of view can be taken exceptionally and only within a clear framework of rules.**

**We propose using the exclusion rules to tackle unacceptable behaviour in public procurement such as fraud and exploring the introduction of a centrally managed debarment list.**

**We propose reforming the procurement regime to allow past performance to be more easily taken into account in the evaluation.**

### Introduction

97. Awarding the right contract to the right supplier is the cornerstone of public procurement and the litmus test for an effective procurement regime. In order to have the best public services we need the best suppliers and our regulatory regime must support contracting authorities in selecting those suppliers.
98. Achieving value for money in public procurement must remain about securing the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought. This includes the whole life costs and quality aspects and the economic, social and environmental aspects of a contract. The Government wants to send a clear message that commercial teams do not have to select the cheapest bid and that they can design evaluation criteria to include wider economic, social or environmental benefits.

### Most advantageous tender

99. EU procurement rules restrict the extent to which contracting authorities can achieve value for money when compared to what is allowable under the Green Book. The

Green Book is central government guidance on appraisal and evaluation and applies to all government departments, arm's length public bodies with responsibility derived from central government for public funds, and regulatory authorities. The current PCR require the evaluation of bids to be based on the most economically advantageous tender (MEAT), assessed from the point of view of the contracting authority and there are analogous provisions in the other regulations. MEAT is identified on the basis of price or cost, using a cost-effectiveness approach and, whilst this may be lowest price, more usually it is a combination of price and "quality". Any evaluation criteria relating to quality must be linked to the subject matter of the contract. The cost effectiveness approach to the assessment of MEAT may be based, for example, on life-cycle costing. The quality criteria may include matters such as technical merit, aesthetic and functional characteristics, environmental characteristics, after-sales service, technical assistance, delivery date and delivery period or period of completion. Evaluation criteria must be accompanied by specifications, setting out the characteristics of the works, services or supplies that allow tenders to be objectively assessed.

100. The prescriptive nature of the regulations in what and when evaluation criteria can be considered can restrict buyers' ability to secure the best outcomes. MEAT can be mistaken as the need to deliver the lowest price when actually there may be scope to deliver greater value through a contract in broader qualitative (including social and environmental) terms.
101. The Government proposes requiring the evaluation of bids to be based on Most Advantageous Tender (MAT) in line with the requirement of the GPA. Adopting MAT (together with accompanying guidance) should provide greater reassurance to contracting authorities that they can take a broader view of what can be included in the evaluation of tenders in assessing value for money including social value as part of the quality assessment. This approach is already provided for in the current regulations under MEAT, so this change would be about reinforcing and adding clarity rather than changing scope.
102. The need to take wider factors into account is, however, a balance and commercial teams must ensure that they do not 'gold-plate' contracts with additional requirements which could be met more easily and for better value outside of the contract compliance process. This gold-plating is particularly not appropriate where the Government or Parliament has already decided that such provisions should not apply to the voluntary or private sector.

## Subject matter of the contract

103. The Government proposes 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 Government. These exceptions would be limited to specific circumstances set out in statutory guidance by the Minister for the Cabinet Office.
104. The link to the subject matter of the contract in award criteria is important as it ensures that contracting authorities are evaluating tenders using criteria relevant to their individual contract and allows them to weigh up the costs and benefits of the tender against its requirements. It also provides protection against corruption because it prevents external factors influencing the criteria. However, allowing certain, specific

exceptions would permit contracting authorities to assess how suppliers are operating across the whole of their business, not just in the narrow delivery of the contract. This means they could more easily apply award criteria that take account of the Government's strategic policy priorities and drive up supplier behaviour such as:

- a supplier's record on prompt payment of its subcontractors across its business; and
- a supplier's plans for achieving environmental targets across its operations.

105. In providing this flexibility, the future regulatory regime would be able to influence, to a far greater extent, how suppliers act on such national priorities across their business.

106. This proposal is not without risk. Removing the link to subject matter of the contract may introduce a barrier to small businesses as the procurement may have requirements that are perceived by some as disproportionate. For example, it may not be proportionate to give significant weight to corporate-wide environmental targets in a lower value contract for training services, whereas it might be proportionate in a large infrastructure contract.

107. To mitigate these risks, the Government would only allow the link to the subject matter of the contract to be broken in a limited number of specific circumstances and will publish guidance to ensure effective implementation. All criteria set by the contracting authority would still have to comply with the procurement principles and reflect value for money principles set out in the Green Book, which will also help to ensure this flexibility is not abused.

## Evaluating bids from the point of view of the contracting authority

108. The fact that MEAT must be considered from the perspective of the contracting authority can be perceived to make it more difficult for contracting authorities to take broader economic and other impacts into account, for example, the consequential impact on other areas of the public sector.

109. The Government proposes removing the requirement for evaluation to be made solely from the point of view of the contracting authority, but only within a clear framework. We believe this will clarify that a contracting authority can take account of the wider impacts of a tender, such as on other contracting authorities and broader society. We propose to set out in guidance how these criteria can be objectively taken into account and assessed by contracting authorities.

## Grounds for exclusion

110. Fraud, theft, corruption and collusion in bidding deprives society of maximum benefits from the services that the public sector provides and is a major risk to the effectiveness and integrity of public procurement.

111. The Government proposes legislating to ensure that suppliers are excluded for offences related to fraud against UK financial interests by including a mandatory exclusion ground for criminal convictions related to fraud. This will plug a gap in the current regulations that requires exclusion for offences related to fraud only where this is against EU institutions.
112. Additionally, the Government proposes to amend the grounds for mandatory and discretionary exclusions. First, we propose to include a new mandatory exclusion ground relating to the non-disclosure of beneficial ownership meaning that bidders who do not state their beneficial owner(s) will be automatically excluded. Second, extending the obligation to exclude where the person/entity convicted is a beneficial owner by amending regulation 57(2). Third, amending the treatment of non-payment of taxes so that the mandatory elements are contained within the provisions currently covered by PCR regulation 57(1) and the discretionary elements are within those currently in regulation 57(8) and considering how tax evasion could be included as a discretionary exclusion. Fourth, including an explicit discretionary exclusion ground covering deferred prosecution. Finally, we also propose to take a power in primary legislation to be able to include new mandatory or discretionary exclusions and to amend existing exclusion grounds.
113. Deferred Prosecution Agreements (DPAs) are agreements that suspend prosecutions for a defined period provided the organisation meets certain conditions. DPAs apply to corporate bodies and are used to resolve issues related to fraud, bribery and/or economic crime. Under a DPA, an organisation accepts responsibility and agrees to make reparation for criminal behaviour by, for example paying a financial penalty and/or compensation, making management changes, implementing a new monitoring regime and complying with future prosecutions of individuals. If these conditions are not met during an agreed period then the DPA can be terminated and prosecution can resume.
114. DPAs are not currently caught by any of the mandatory exclusions in the existing regulations because although the organisation has made admissions, this has not been pursued to prosecution and consequently, there is no criminal conviction. DPAs are also not expressly included as discretionary exclusions. However, the conduct admitted by the organisation subject to the DPA means that contracting authorities may consider whether a discretionary exclusion ground applies, for example grave professional misconduct, subject to the right for the supplier to provide evidence to demonstrate self-cleaning.
115. To clarify the situation regarding DPAs, we propose legislating so that DPAs (and their equivalents in other jurisdictions) explicitly fall within a discretionary exclusion ground. This will allow contracting authorities to exclude organisations which are subject to DPAs from procurements where appropriate, while accepting that there are instances in which exclusion on this ground would be disproportionate or would undermine the ability of the Crown Prosecution Service or Serious Fraud Office to negotiate a DPA. A mandatory exclusion ground for DPAs could dissuade suppliers from entering into a DPA due to the impact on its ability to bid for public sector work. This might mean they opt to defend the matter at trial instead, which could be costly, time consuming and ultimately, avoidable. It would also mean that until the matter is concluded the contracting authority would have no grounds to exclude the bidder in relation to the ongoing matter. Similarly to other exclusion grounds, the supplier will



have the ability to self-clean and therefore shorten the term of the exclusion, provided they provide evidence that measures they have taken demonstrate their reliability despite the existence of the DPA.

## Debarment list

116. The Government will investigate the feasibility of developing a centrally managed debarment list of suppliers, (and which may include, where relevant, their related entities) who have relevant convictions to make it easier for contracting authorities to identify organisations that must be excluded from public procurement.
117. Having a centralised debarment list could have a significant impact on the management of unsuitable suppliers by bringing consistency and a strategic view to the way exclusions are managed and ensuring that contracting authorities are not duplicating effort in assessing the same suppliers. Suppliers would be notified when they are to be placed on to the debarment list and given the opportunity to appeal. Suppliers would be able to apply to be taken off the debarment list if they have taken appropriate self-cleaning measures. These principles already exist where current regulations include self-cleaning elements.
118. The central debarment list would be used for all the mandatory exclusions and, if established, the debarment list could continue to be developed and improved to also include suppliers that have committed actions that fall within some of the discretionary exclusion grounds. For other discretionary exclusion grounds, for example conflicts of interest, distortion of competition and undue influence, it would remain for individual contracting authorities to determine whether this results in exclusion based on the circumstances of each individual procurement.
119. Creating and managing a central debarment list would be a complex task and would involve having to collate information from different sources. We will also need to consider how the same level of information for suppliers outside of the UK could be collected.

## Past poor performance

120. The PCR, UCR and CCR include past poor performance as a discretionary exclusion ground but there are limits to the circumstances in which the ground applies:
  - the supplier's performance of a substantive requirement of a prior public contract must have shown significant or persistent deficiencies; and
  - such poor performance must have led to early termination, damages or other comparable sanctions.
121. Past performance is often assessed as part of the technical and professional ability section of the selection criteria. However, the current rules restrict the information that can be requested from potential suppliers to demonstrate technical and professional ability. Consequently, contracting authorities can find it difficult to obtain meaningful information about past performance.

122. This position is made worse by the limited availability of independent information on poor performance. Commercial teams often have to rely on suppliers' assessments of their own performance, references which contain limited information and other supporting documents provided in the procurement process. Contracting authorities may also be reluctant to terminate contracts or provide negative feedback as doing so may be subject to legal challenge from aggrieved suppliers, particularly if this leads to exclusion from bidding for future public contracts.
123. The Government proposes to broaden the range of instances in which poor performance can be taken into account within a clear framework of rules. Currently, a supplier can only be excluded if their past poor performance has led to termination, damages or other comparable sanctions. We propose that a supplier could be excluded where it had shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting authority, or a prior concession contract. This would explicitly allow poor performance to be considered even if it had not led to termination, damages or comparable sanctions. The time limit of three years for discretionary exclusion grounds would remain, as would the ability for the supplier to self-clean.
124. In order to be considered, the deficiencies in performance would need to be significant. Minor breaches or deficiencies in performance of minor requirements would not generally be sufficient to lead to exclusion from relevant or future contract opportunities. Persistent breaches of minor requirements could be sufficient, although the combined effect of the breaches and regularity of their occurrence would need to be sufficiently serious to engage this exclusion ground.
125. The Government would provide guidance to support commercial teams in understanding the circumstances when a supplier may be excluded for poor performance on previous contracts. The ability to exclude suppliers for poor performance would need to be balanced against the need to be objective and transparent and ensure that suppliers are not excluded unfairly. Decisions in relation to past performance would need to be made in an evidence-based manner and could be taken with reference, for example, to poor performance notices or persistent failure of KPIs. However, contractual mechanisms are likely to vary so it might not be possible to be completely prescriptive as to the evidence.
126. There are examples of best practice in other countries, for example the United States of America requires authorities to evaluate and document supplier performance on contracts above a specified threshold. The evaluation must address the quality of the product or service supplied by the supplier, its efforts to control costs, its timeliness and compliance with schedules, its conduct of management or business relations, its performance in subcontracting with small businesses, and other applicable factors (e.g., payment of tax). This information is stored in central databases. Federal law also requires authorities to consider suppliers' past performance when making selection decisions in procurements over threshold. Suppliers can also be debarred or suspended for wilful failure to perform under a contract or contracts, or for a history of failure to perform or of unsatisfactory performance of a contract or contracts.
127. The Government proposes implementing a similar system that would require contracting authorities to evaluate the contract performance based on set KPIs

deemed important by the contracting authority and included in the contract. The information could be published so that it is available to all contracting authorities and the public or held centrally on a database. This will improve the transparency of past performance data and, combined with the above proposal, make it easier for contracting authorities to consider the past performance of their bidders. It is also proposed that, in future, the Government will be able to set a threshold for past performance using this data. If a supplier falls below this threshold then it may be possible to exclude them from public sector contract opportunities for either a set period of time or until they carry out any required self-cleaning.

## Selection and award criteria

128. The PCR, CCR and DSPCR generally distinguish between selection criteria that are focused on the supplier and its ability to deliver the contract and award criteria that are focused on the tender itself. The UCR does not limit selection criteria in the same way and instead allows authorities to establish objective rules and criteria for the exclusion and selection of suppliers.<sup>7</sup> In order to comply with the GPA, selection criteria must continue to be limited to ensuring that the supplier has the legal and financial capacities and the commercial and technical abilities to perform the contract.<sup>8</sup>
129. It can be difficult for contracting authorities to determine which criteria can be assessed at selection stage and which at award stage. Selection criteria assess the capacity and ability of a tenderer to deliver the contract as determined by its economic and financial standing and its technical and professional ability as demonstrated by the means of proof referred to in the PCR. Award criteria are used to determine which tender is the most economically advantageous. These are two distinct processes but the differences between those criteria that can be asked at different stages can be confusing, particularly for open procedure procurements because both selection and award criteria are assessed in a single stage process.
130. The Government proposes to simplify the selection stage through the use of basic supplier information that would be submitted through the supplier registration system within the central platform described in [chapter 5](#). This information would only be submitted once and should therefore save duplication for suppliers. Contracting authorities would be able to apply criteria (for example, a financial threshold) to this information in order to determine whether suppliers would be eligible to tender for the relevant contract opportunity. In order to be compliant with the GPA, the supplier registration system will limit the types of selection criteria contracting authorities can apply to those which are provided for by the GPA.
131. It is proposed that any further criteria that contracting authorities wish to apply to further reduce the number of bidders, in line with the competitive flexible procedure, may be applied after this selection stage.

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<sup>7</sup> Regulation 78 of the Utilities Contracts Regulations 2016

<sup>8</sup> Government Procurement Agreement, Article VIII

132. Some contracting authorities consider they are constrained in assessing economic and financial standing and professional and technical ability due to the prescriptive nature of regulation 60 of the PCR. This regulation limits, in some cases, the type of information that contracting authorities can request as means of proof that suppliers have met the relevant selection criteria. The Government proposes to clarify that contracting authorities can use a wider range of information to carry out its selection criteria verification by removing the limits on information that can be requested in regulation 60.

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

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?

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?

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?

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

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

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)?

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

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

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

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

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

# Chapter 5: Using the best commercial purchasing tools

**We propose legislating for a new Dynamic Purchasing System (DPS+) that may be used for all types of procurement (not just commonly used goods and services).**

**We propose legislating for new options in framework agreements including an option for an ‘open framework’ with multiple joining points and a maximum term of 8 years.**

## Introduction

133. There are a variety of commercial tools described in the current regulations, some of which vary depending on the applicable regulations. These commercial vehicles are not currently provided for in the CCR.

## Current Dynamic Purchasing System

134. Dynamic Purchasing Systems (DPS) are available under the PCR and UCR. A DPS is currently only available for commonly used goods and services that are generally available on the market. First, in the initial setup stage, the DPS is established by admitting all suppliers who meet conditions for participation in the DPS. The DPS must remain open to suppliers to join throughout its duration, as long as they meet the conditions for participation. Contracting authorities are not permitted to impose any limit on the number of suppliers that can join a DPS. When the contracting authority wishes to procure a contract under the DPS, the contracting authority invites all suppliers on the DPS (or the relevant category within the DPS) to bid for each contract to be awarded using the restricted procedure. The contract is awarded to the supplier that submitted the best tender evaluated based on award criteria set out in the notice advertising the DPS. Direct awards are not permitted with DPS.

135. There is no limit to the period of validity of a DPS, but contracting authorities must state the period of validity in the notice advertising the DPS. If there is a change to the period of validity and where the DPS is terminated, contracting authorities have to notify the EU Commission or, after the end of the transition period, publish a contract award notice on Find a Tender Service.

## Current Qualification System

136. Qualification Systems (QS) are only available under the UCR but are used extensively in the utilities sector in the UK. In some procurements the purpose of the QS is to pre-qualify suppliers onto a register for specific works, supplies or services, streamlining the procurement process. In other procurements they are used as a means of identifying a group of suppliers in the market who are capable of delivering the requirement. Instead of placing notices for each contract, the QS can be advertised continuously and subsequently used to invite suppliers on the list to tender for requirements.
137. The QS can involve different qualification stages and the utility can set the rules and criteria for its operation. The number of suppliers who can be selected can be limited. Once this register is established, specific contracts are awarded using one of the available procedures in the UCR.

## Current framework agreements

138. Framework agreements are used extensively in the UK with the intention of speeding up and simplifying the process of awarding contracts for particular needs as well as aggregating demand to drive competition between suppliers and leverage better prices and quality.
139. Call-off contracts under framework agreements must be awarded in accordance with the rules set out in the PCR, UCR or DSPCR. The PCR and DSPCR rules are more detailed and set out the different procedures to follow where the contract is awarded directly or by way of a mini-competition. The maximum term of the framework agreement is four years under PCR and seven years under DSPCR unless there are exceptional circumstances (meaning the market can be closed for this period). The UCR only sets out the basis in which a contract is to be awarded under the framework agreement (e.g. contracts are awarded based on objective rules and criteria that may include reopening the competition to those on the framework). The maximum term of the UCR framework agreement is eight years unless there are exceptional circumstances (meaning the market can be closed for this period).
140. Transparency in frameworks is not straightforward and it is not always possible to match values and awards of call-off contracts to the original advert and framework agreement.
141. Currently there is a mixed understanding of the deployment of the complex tools available. Commercial teams often struggle to select the best procurement vehicle. There are several reasons for this:
- complexity of existing tools means that it is difficult for contracting authorities to select the best one for the proposed task;
  - inflexibility of the available tools means that it is hard to build innovative commercial agreements;

- some of the tools are limited in the circumstances in which they can be used (e.g. DPS can only be for commonly used purchases).

142. This means that:

- framework agreements can be used when DPS are more appropriate, e.g. contracting authorities want to pre-select suppliers but cannot specify everything up front;
- framework agreements set up by central purchasing bodies can have a very wide scope which can still result in complex process rather than a simple call off as intended (although lots can be operated within frameworks which can mitigate this);
- DPS are used but there is a lack of understanding over what "commonly used purchases" means and when they can and cannot be used;
- QS are very popular in the utilities sector but are currently limited to utilities procurements only.

## GPA rules on multi-use lists

143. The GPA does not set out detailed rules relating to commercial tools but it does set out some basic rules relating to multi-use lists. A multi-use list means a list of suppliers that a procuring entity has determined satisfies the conditions for participation in that list, and that the procuring entity intends to use more than once (DPS and qualification systems are examples of a multi-use list).

144. Contracting authorities may maintain a multi-use list of suppliers but they must be advertised annually or, where published electronically, made available continuously. The notice advertising the list must include:

- description of the goods or services, or categories
- the conditions for participation and the methods used to verify those;
- the name and address of the procuring entity;
- the period of validity of the list, description of its renewal or termination;
- an indication that the list may be used for GPA procurement;
- enough information for suppliers to decide if they want to bid.

145. Contracting authorities must allow suppliers to apply for inclusion on the list at any time and must include suppliers that meet the conditions of participation on the list within a reasonably short time. Sub-central authorities and utilities are allowed to use the notice advertising the list as a call for competition. Contracting authorities must promptly inform any supplier of the outcome of their request to participate in a procurement under the list or be included on the list. Where suppliers are rejected from participating in a procurement or inclusion on the list, or are to be removed from a list, they must be promptly informed and, on request, provided with a written explanation of the reasons.

## Dynamic Purchasing Systems (DPS+)

146. The Government proposes legislating for a new commercial tool, a DPS+, to replace DPS and QS, which will be a form of GPA multi-use list. The DPS+ will be a flexible, highly commercial tool ideally suited to providers of agile online and other dynamic marketplaces. New suppliers will be able to join at any time with no maximum duration. Procurements could be undertaken within a DPS+ using the new competitive flexible procedure. And the DPS+ could be used for all types of procurement, not just common goods and services.

147. The following rules would apply to the DPS+:

- the advertising notice must notify the market of a contracting authority's intention to set up a DPS+ and describe the details of conditions for participation;
- it must remain continuously open with a live advertising notice on Find a Tender service to allow new suppliers who wish to apply to do so at any time;
- if an applying supplier meets the conditions for participating, they must be admitted; the number of suppliers cannot be limited;
- it need not have a maximum duration, although any means to terminate the list must be detailed in the original advertising notice;
- supplier applications for inclusion at qualification stage should be evaluated as they are received;
- suppliers cannot submit a tender until the contracting authority decides to run a procurement to award a contract under the DPS+;
- there is no award in the DPS+ without a procurement to select one winner from all eligible suppliers;
- a procurement under the DPS+ must be conducted using the new competitive flexible procedure;
- a contract award notice must be published when any contract is awarded following a procurement under a DPS+.

## Framework agreements

148. Frameworks are ideal for situations such as catalogues and markets requiring high volume commodity items and call-offs, stable long term relationships, especially where direct award call-off is allowed and a high degree of stability and certainty exists in a market. More flexibility is available in frameworks under the UCR where it is also possible to have a longer term.

149. To increase the innovation currently stifled by the limited flexibility offered in PCR-style frameworks, we propose to introduce a new option that allows for a longer



maximum term and for the framework to be open for new suppliers to join at defined points. This will make it easier to achieve value for money, particularly where the contracting authority needs a longer-term relationship, for example in construction and infrastructure.

150. The Government proposes to offer contracting authorities a framework tool that has two options for all types of contracts including utilities: closed and open.

#### **Closed framework agreements of up to four years duration**

151. This would mean the particular market would be closed to suppliers other than those on the framework for a maximum of four years, offering a period of stability and reducing bureaucracy that may be appropriate in some situations.

#### **Open framework agreements of up to eight years with an initial (up to) three year closed period**

152. This would allow any supplier to submit a bid to join the framework at predetermined points. If the commercial team wishes to have a framework with a duration of longer than four years, the framework must be opened at least once after the third year for new entrants to join. The contracting authority would need to advertise the re-opening of the framework in a notice and assess new applicants by applying the same requirements and evaluation criteria as applied when the framework agreement was originally awarded.
153. Commercial teams could open the framework up as many times as they wish during its term, as long as this is stated in the call for competition. Suppliers already on the framework should be given the option of remaining on the framework based on their original bid or submitting an updated bid. This will allow them the opportunity to update pricing etc. so they are not disadvantaged as regards suppliers bidding at a later point. If they decide to submit an updated bid, they risk not being re-appointed to the framework, as their bid will be evaluated alongside new suppliers' bids. Commercial teams can limit the number of suppliers on a framework at any one time but if they do so then they will need to re-evaluate the bids of suppliers already on the framework (if those suppliers decide not to submit an updated bid) to determine which suppliers the available places are awarded to and avoid the original suppliers 'blocking' access to new suppliers.
154. In this new open framework, new entrants have the opportunity to be awarded a place on a framework agreement during its term. This would be of particular benefit to small businesses in facilitating their access to procurements because they have more opportunities to participate. Additionally, establishing arrangements whereby new suppliers can be added to the arrangement after it has been set up will encourage competition, allow new market entrants to join, and prevent suppliers from being 'locked out' of the arrangement for its duration. Open frameworks would place an administrative burden on the commercial team depending on how many times the framework is to be reopened and whether to limit the number of appointed suppliers.

## General framework rules

155. We propose that the following additional rules will apply to both closed and open frameworks:

- Improved transparency will be achieved by a requirement for all commercial tools to be recorded onto a central register, making it easier to find and compare. Additional transparency will be required in contract awards, with all award notices being visible in the new central platform and linked to the framework from which they were procured.
- Direct award within framework agreements remains permissible if it is possible to objectively determine a single supplier capable of meeting the requirement.
- Single supplier frameworks remain permissible for closed frameworks only.
- In addition, contracting authorities will be required to include terms in framework agreements allowing them to remove suppliers from a framework agreement if any of the exclusion grounds apply during the term of the framework, subject to self-cleaning (meaning that suppliers who have, for example, committed fraud or bribery, have modern slavery or money laundering convictions must be removed).

## Charging

156. A fee or levy can be charged on a supplier for participating in a commercial vehicle such as a DPS+ or framework but only when they result in a contract being awarded and the supplier submitting an invoice. Any charges recovered by the contracting authority must be proportionate, used solely in the public interest and be transparently described on the central register of commercial tools.

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

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

# Chapter 6: Ensuring open and transparent contracting

**We propose embedding transparency by default throughout the commercial lifecycle from planning through to procurement, contract award, performance and completion.**

**We propose requiring all contracting authorities to implement the Open Contracting Data Standard so that data across the public sector can be shared and analysed at contract and category level.**

**We propose establishing a single digital platform for supplier registration that ensures businesses only have to submit their data once to qualify for any public sector procurement.**

## Introduction

157. Since the Gershon review<sup>9</sup> of public procurement in 1999, contracting authorities have invested in digital systems to automate and improve their procurement processes. The UK was the first G7 country to commit to the Open Contracting Data Standard (OCDS)<sup>10</sup>, it was then approved by the GDS Open Standards Board for use by the UK Government at the end of 2016, following the rigorous open standards approval process and open standards principles.

158. Successive Governments have created a series of centralised and semi-centralised initiatives to connect public procurement. For example:

- Contracts Finder - a single, free to use portal for current and future public sector contracts in the UK<sup>11</sup>

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<sup>9</sup> Review of Civil Procurement in Central Government

<sup>10</sup> <https://www.gov.uk/government/publications/open-standards-for-government/open-contracting-data-standard-profile>

<sup>11</sup> the Contracts Finder requirements in Part 4 of the PCR extend to the whole of the UK but do not apply to Scottish, Welsh or Northern Ireland contracting authorities whose functions are wholly or mainly devolved. See reg 1(7) and reg 1(8) of the PCR.

- Supplier Registration Service - used by both buyers and suppliers to log in to procurement-related systems.
- Digital Marketplace - an online platform that all public sector organisations can use to find and buy cloud-based services (e.g. web hosting or site analytics)
- Open Contracting Data Standard (OCDS) - to enable disclosure of data and documents at all stages of the contracting process using a common data model.
- Contract and Spend Insight Engine (CaSIE) - a management tool to share information and support collaboration between central government departments.

159. In addition, from the end of the Transition Period, the UK's new Find a Tender Service will be launched, replacing the Official Journal of the European Union's Tenders Electronic Daily in the UK as the official platform for publishing contract notices for new procurements<sup>12</sup>. Find a Tender service will be free to access for both UK and overseas suppliers.
160. However, the landscape remains fragmented, with missed opportunities to manage spend, bring performance tension to contract management and improve outcomes. Most contracting authorities in the UK rely on a small number of specialist 'e-senders' and 'e-procurement systems' to host their procurements and publish contract notices.
161. The data held in these systems is generally not accessible in a consistent, machine-readable format. The systems do not share common data standards or data models and cannot interoperate. Separation also exists between parts of the public sector; for example, health authorities have very limited routes to easily sharing data with local or central government.
162. Transparency by contracting authorities remains inconsistent. There is uncertainty about redaction of commercially sensitive information. Although there is increasing compliance with the requirement to publish contract opportunities and awards on Contracts Finder, there remain data gaps and limitations that make it difficult for the public sector, the private sector, civil society organisations and citizens to understand the full pattern of government procurement spend. Bidders have to register on multiple platforms to bid and input very similar information in each case. Citizens and suppliers are locked out of the data loop post-award and there is limited transparency of what takes place thereafter.
163. This lack of standardisation, transparency and interoperability is preventing the UK from harnessing the opportunities that open, common and shared data could bring. The ability to analyse spend, manage suppliers, counter fraud and corruption and see inside the supply chain to ensure compliance with government policies. The experience of other nations (e.g. Ukraine and South Korea) is that driving forward with

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<sup>12</sup> OJEU TED remains the platform for ongoing procurements, as agreed in the procurement chapter of the Withdrawal Agreement and to be implemented by the EU exit SI.

a clear digital procurement strategy focused on transparency results in greater participation and increased value for money driven by competition.

164. The Government's Transformation Strategy<sup>13</sup> published in 2017 set out how digital could transform the relationship between the citizen and state, including making better use of data and creating shared platforms, components and reusable business capabilities. However, there is currently no common strategy for digital in procurement in the public sector. To deliver this change requires contracting authorities and third party providers to move in the same direction to create a common operating environment.
165. The Government proposes legislating to embed transparency by default throughout the commercial lifecycle from planning through procurement, contract award and performance. Contracting authorities would be required to disclose procurement and contract data as soon as practically possible and significantly increase transparency in the public procurement regime. Contracting authorities would be required to declare in their tender documents when information would be disclosed and justify what, if any, information is to be treated as commercially sensitive. Suppliers would be able to bid with a better understanding of the expected transparency requirements and the timetable for when data should be released.
166. Contracting authorities would need to publish basic disclosure information, covering the information currently required by regulation 84 of the PCR with the contract award notice, including call offs under framework agreements and DPS+ before they could initiate contract award and commence standstill including:
- Bidder Identities;
  - Basis of award decision;
  - Basic disclosure of tenders submitted;<sup>14</sup>
  - Evaluation reports;
  - Basic evaluation disclosure information<sup>15</sup>.
167. In order to strike the right balance between transparency and data protection, this requirement would remain consistent with the current rules around transparency in the Freedom of Information Act 2000 (FOIA)<sup>16</sup>, Environmental Information Regulations 2004 (EIR)<sup>17</sup> and the Data Protection Act 2018 (DPA)<sup>18</sup>. Consequently, only data which would be required to be made available under FOIA, EIR and DPA, would be publishable. While this does not require an amendment to the current exemptions under FOIA, EIR and DPA, it would create a requirement that procurement and

<sup>13</sup> <https://www.gov.uk/government/publications/government-transformation-strategy-2017-to-2020>

<sup>14</sup> Under FOIA, any further disclosure would be subject to formal legal disclosure process.

<sup>15</sup> Under FOIA, any further disclosure would be subject to formal legal disclosure process.

<sup>16</sup> <http://www.legislation.gov.uk/ukpga/2000/36/section/43> accessed on 05/03/2020

<sup>17</sup> <https://www.legislation.gov.uk/uksi/2004/3391/made>

<sup>18</sup> <http://www.legislation.gov.uk/ukpga/2018/12/contents/enacted>

contract information would be published by contracting authorities, instead of being requested by interested parties.

168. The decision of a contracting authority to release information under FOIA can be complex, resulting in authorities disclosing less than they should. The default should be to disclose all information but Government will publish guidance on what would reasonably not be disclosable, including:

- profit margin and overheads;
- financial models;
- elements of the bid (and evaluation documents) which reveal intellectual property;
- elements of the bid (and evaluation documents) which reveal innovative or unique technical solutions and methodologies;
- elements of the bid (and evaluation documents) which reveal trade secrets;
- names, personal telephone numbers, addresses, email addresses or other data capable of identifying a living person.

169. There are several exemptions under FOIA that might apply to procurement; the non-exhaustive table below outlines the two that are considered most likely to be used in procurement.

<b>FOIA Exemptions</b>	<b>What does this mean for procurement under the new procurement regulations?</b>	<b>Additional information</b>
<p><b>S43 - Commercial interests.</b></p> <p><b>1. Information is exempt information if it constitutes a trade secret.</b></p> <p><b>2. Information is exempt information if its disclosure under this Act would, or would be likely to; prejudice the commercial interests of any person (including the public authority holding it).</b></p> <p><b>3. The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the</b></p>	<p>S43 (1) ‘Trade secrets’ is not defined in the FOIA. As developed through case law, it means: information used in a trade of business, which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. Typically, this is something unique to the business that gives them a competitive edge and is not already commonly known or easily deducible.</p> <p>S43 (2) Prejudice to commercial interests is not defined in the FOIA. Generally, it means</p>	<p>The impact on a bidder/supplier/authority of the disclosure of both trade secret and commercial interest information is likely to diminish over time (although this may not always be the case).</p> <p>The exemption is subject to a public interest test, whereby the respective public interests in disclosure versus non-disclosure are weighed.</p>

<p><b>interests mentioned in subsection (2).</b></p>	<p>commercially sensitive information which, if disclosed, would cause detriment to the ability of a person/ entity to do business. The impact of this could include giving commercial advantage to the competition, and/or loss of shareholder / customer / supplier confidence.</p>	
<p><b>S41 - Information provided in confidence.</b></p> <p><b>1. Information is exempt information if—</b></p> <p><b>a. it was obtained by the public authority from any other person (including another public authority), and</b></p> <p><b>b. the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.</b></p> <p><b>2. The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.</b></p>	<p>S41. This exemption states that: if, by disclosing information, a public authority would be subject to an actionable breach of confidence, the information should not be disclosed. By ‘actionable’, the Act means whether there is a reasonable prospect that a law court would rule against the authority for releasing the information.</p> <p>The deciding issue is whether there is a ‘duty of confidence’ between the information giver and receiver. The principal factors here are:</p> <ul style="list-style-type: none"> <li>• is there an agreement between the parties, implicit or explicit, that the information will be held in confidence;</li> <li>• does the information have the necessary ‘quality of confidence’; whether disclosure would be an unauthorised use of the information to the detriment of the confider.</li> </ul>	<p>The exemption is absolute and is not subject to a public interest test in the meaning of the Act.</p> <p>One of the issues public authorities have to consider when accepting information as confidential (especially where using a confidentiality agreement) is whether they can satisfy any contractual obligations in relation to keeping that information confidential, and their statutory duties under the FOI Act.</p>

	Indiscriminate classification of information as being subject to a duty of confidence is clearly contrary to the intent of the FOI Act and hence is discouraged.	
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## Open Contracting Data Standard

170. The Open Contracting Data Standard (OCDS) is a free, non-proprietary, open data standard for public contracting implemented by over 30 governments globally. The OCDS describes how to publish data and documents at all stages of the contracting process. It is the only international open standard for the publication of information related to the planning, procurement, and implementation of public contracts and has been endorsed by the G20 and the G7.
171. The Government proposes to legislate to require all contracting authorities to publish procurement and contracting data throughout the commercial lifecycle in a format compliant with the OCDS. This means data for buyers, suppliers, contracts, spend and performance would be held and published in OCDS-compatible, open, non-proprietary reusable formats. Contract award data, including call offs under framework agreements and DPS+, would include details of the buyer, supplier, bidders and a unique contract identifier. This improved data quality should make it easier to identify and counter fraud and corruption in public procurement.
172. We propose setting out a timetable for all e-procurement and related systems across the public sector to become OCDS compliant and interoperable with other public procurement systems. Contracting authorities would be able to buy market-led commercial systems and software from providers as long as they meet their obligations on standards and interoperability.
173. Implementation would require a revised set of contract notices aligned to OCDS. The following table sets out proposed UK notices.

Noticing requirement	Topic	Use of OCDS will allow for the following in this stage
<b>PLANNING</b>		
<b>Planning and Pipeline notice*</b>	Budgets	<ul style="list-style-type: none"> <li>• Strategic planning</li> <li>• Market research</li> <li>• Setting priorities</li> <li>• Access to market</li> </ul>
	Project Plans	
<b>Pre Market Engagement notice*</b>	Market studies	



<b>TENDER<sup>19</sup></b>		
<b>(all procurements including awards under commercial tools)</b>		
<b>Appropriate tender noticing*</b>	Tender notices	<ul style="list-style-type: none"> <li>• Competitive tendering</li> <li>• Cross-border procurement</li> <li>• Red flag analysis</li> <li>• Transparent feedback mechanisms</li> </ul>
	Specifications	
	Line items	
	Values	
<b>Web Form*</b>	Enquiries	<ul style="list-style-type: none"> <li>• Easy to release anonymised data and lessons learnt.</li> <li>• Fraud management</li> </ul>
<b>Tender Web Form*</b>	Tenderers Details (e.g. corporate identity, beneficial ownership)	<ul style="list-style-type: none"> <li>• Easy to release data and lessons learnt.</li> <li>• Fraud management</li> </ul>
<b>AWARD</b>		
<b>Award notice*</b>	Details of award	<ul style="list-style-type: none"> <li>• Efficient supplier management</li> <li>• Efficient complaints mechanism</li> <li>• Links to beneficial ownership data</li> <li>• Red flag analysis</li> <li>• Trade / cross border analysis</li> </ul>
<b>Award notice*</b>	Winning bidder information	
<b>Award notice*</b>	Non-winning bidders	
<b>Award notice*</b>	Bid evaluation	
<b>Award notice*</b>	Values	
<b>CONTRACT</b>		
<b>Contract detail notice*</b>	Final details	<ul style="list-style-type: none"> <li>• Cost analysis</li> <li>• Understanding what government buys</li> <li>• Trade / cross border procurement analysis</li> </ul>
	Awarded Contract Documentation (Signed contract)	

<sup>19</sup> Information extracted from <https://www.open-contracting.org/data-standard>.

<b>Contract amendment notice*</b>	Amendments	
<b>Contract Detail notice* and Contract amendment notice*</b>	Values	
<b>IMPLEMENTATION</b>		
<b>Payment notice**(**)</b>	Payments	<ul style="list-style-type: none"> <li>• Results-based contracting</li> <li>• Implementation monitoring</li> <li>• Transparent contract management</li> <li>• Red flag analysis</li> </ul>
<b>Supply chain notice*</b>	Policy data (e.g. SMEs, VCSEs, modern slavery, etc)	
<b>Contract amendment notice*</b>	Extensions	
<b>Contract amendment notice*</b>	Amendments, to show current version and changes.	
<b>Contract termination notice*</b>	Completion / termination information	

\*Denotes mandatory notice in all relevant procurements

\*\* Updated to reflect changes necessary to existing payment transparency measures.

## Central platform

174. The Government proposes developing a digital strategy and roadmap for public procurement. This will include developing a central platform with a service architecture that provides for:

- Services - a standard set of services, e.g. buyer and supplier identities that can be accessed by other systems during the procurement lifecycle.
- Inputs - able to receive inputs from buyers and suppliers, e.g. procurement notices, and suppliers, e.g. evidence locker material.
- Outputs - data tailored to user needs, e.g. a buyer running a procurement will need different views on debarment than a supplier.
- Interfaces - a series of defined interfaces with other systems to support the services, inputs and outputs.

175. The Government proposes to legislate to require all contracting authorities to publish procurement and contracting data throughout the commercial lifecycle to the central platform via links to their own systems or directly as appropriate.
176. This investment in a central platform would be designed and delivered in line with the Government Digital Service's Technology Code of Practice<sup>20</sup> and Service Standard<sup>21</sup>. Decentralised elements of the system would be market-led and standards-driven; contracting authorities could purchase commercial systems and software from any provider so long as they meet legal requirements on standards and interoperability. Over time and through compliance, the centralised and decentralised elements would be able to 'speak' and transfer data so contracting authorities, suppliers and citizens need only go to one place to access information
177. Contracts Finder would be retained to ensure potential suppliers can search for contract opportunities and to look up details of previous contracts. Scotland, Wales and Northern Ireland will continue to have their own dedicated public sector procurement websites and therefore the new procurement platform must be flexible enough to be able to integrate with these procurement websites. Existing Contracts Finder users will be enabled to access FTS automatically and need take no action.
178. The central platform should provide:
- Public access to all published data online and via APIs;
  - Notices from Find a Tender service and Contracts Finder;
  - Links to e-procurement systems for tendering;
  - Access to commercial data analysis tools;
  - Price and commercial performance comparison by supplier and between supplier.
179. Ultimately the central platform should be able to host additional functionality including but not limited to:
- Register of suppliers;
  - Register of commercial tools;
  - Contract performance including spend data and KPIs<sup>22</sup>;
  - Central debarment list<sup>23</sup>;
  - Procurement pipelines;
  - Central register of complaints;
  - Register of legal challenges.

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<sup>20</sup> <https://www.gov.uk/government/publications/technology-code-of-practice/technology-code-of-practice>

<sup>21</sup> <https://www.gov.uk/service-manual/service-standard>

<sup>22</sup> Under FOIA, any further disclosure would be subject to formal legal disclosure process.

<sup>23</sup> Under FOIA, any further disclosure would be subject to formal legal disclosure process.

## Register of suppliers

180. The Government proposes establishing a single place for suppliers to submit the common data needed for procurements in an evidence locker to allow suppliers to ‘tell us once’ across the public sector. All contracting authorities would be required to use this data in their procurements.
181. The service would allow suppliers to register once, providing all the information needed to qualify for a public sector procurement. The credentials in the “tell us once” evidence locker would be similar to the current Standard Selection Questionnaire. Subject to the evidence being provided, suppliers would be able to bid for public sector competitions without having to duplicate their information with each bid they submit having only to confirm that their data in the locker was current and correct.

## Register of commercial tools

182. The Government proposes requiring contracting authorities to record commercial tools such as framework agreements and dynamic purchasing systems that are available to other contracting authorities on a central register. This register would form part of the central platform and would be available to all commercial teams to help them identify collaborative commercial agreements that can deliver the best value for money.

## Register of contract performance

183. The Government proposes requiring contracting authorities to record and publish key performance information on contracts including key performance indicators and contract amendments’ prices and volumes. This could be completed directly by the contracting authority, or passed on to the supplier to complete as part of the contract, however, the contracting authority should remain responsible for the timely and accurate completion of the data.

## Central debarment list

184. The Government is considering implementing a central debarment list. Under this proposal, all suppliers which are debarred from public procurement opportunities because either a mandatory exclusion ground or a relevant discretionary exclusion ground applies should be identified in a central register, available via the central platform. Further information on which discretionary exclusion grounds are being considered as part of the debarment list proposal are contained in [chapter 4](#).

## Procurement pipelines

185. The Government proposes requiring contracting authorities to publish annual pipelines of their planned procurements and commercial activity, looking forward at least 18 months but ideally three to five years. These pipelines will be available on the central platform.

### **Register of complaints**

186. The Government proposes requiring complaints about public procurement practices of contracting authorities and entities to be registered in the central procurement platform to record the formal process of complaint management through to resolution.

### **Register of legal challenges**

187. Legal challenges against contracting authorities related to alleged breaches of the procurement regulations should be registered in the central procurement platform. The status of challenges should be updated and published by the contracting authority in accordance with statutory guidance on transparency.

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

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

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

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

**We propose reforming Court processes, including through the introduction of a tailored expedited process, to speed up the review system and make it more accessible.**

**We propose investigating the use of a tribunal system to determine low value claims and issues on ongoing procurements and for wider use should the proposed Court reforms not deliver the required benefits.**

**We propose refocusing redress for suppliers onto pre-contractual measures which preserve their opportunity to participate in the procurement.**

**We propose capping the level of damages available to aggrieved bidders, reducing the attractiveness of speculative claims.**

**We propose removing automatic suspension on the award of contracts let competitively in crisis or extreme urgency situations.**

**We propose removing the mandated requirement to provide an individual debrief letter to each bidder at the end of a procurement process.**

### Introduction

188. An effective and well-functioning review system is central to the successful operation of any public procurement regime. The purpose of such a system is to act as a suitable deterrent against breaches of the rules by contracting authorities and to grant an opportunity for redress to aggrieved bidders who believe they have suffered harm because of such breaches. Where appropriate, it can also assist in interpreting the relevant legal rules.
189. Our procurement review system is a traditional court-based system; it is rigorous, thorough and trusted, but suppliers and contracting authorities tell us it is also lengthy, expensive and complex. Small businesses, charities and social enterprises in particular find the process too costly to pursue.

190. The current regulations include both pre-contractual measures and remedies (i.e. those that can apply before a contract is entered into) and post-contractual remedies as set out below.

- Pre-contractual measures and remedies:
  - Automatic suspension of the award of a contract;
  - Lifting the automatic suspension;
  - Suspending the procurement procedure;
  - Suspending the implementation of any decision or action;
  - Setting aside a decision or action;
  - Ordering the contracting authority to amend a document;
  - Award of damages.
- Post-contractual measures and remedies:
  - Award of damages;
  - Ineffectiveness (where the contract is cancelled and no future obligations apply and for a limited set of rule breaches only);
  - Imposition of financial penalties on the contracting authority;
  - Contract shortening.

191. The current regulations meet the UK's obligations under the GPA to provide an effective means of redress. But we can act now to address the practical problems with the current regime and develop a new remedies system that can make faster decisions on procurement challenges on all types of procurements, relying more on pre-contractual measures, so that fewer challenges proceed to court for post-contractual remedies.

## Review Process Reform

192. The Government wants to bring about fundamental changes to the way procurement challenges are heard and managed, increasing accessibility for suppliers and reducing the impact of sometimes long and expensive court cases on contracting authorities, businesses and ultimately the taxpayer.

193. Currently, the vast majority of procurement challenges in England and Wales are heard within the Technology and Construction Court (TCC), part of the Queen's Bench division of the High Court. The Court was not initially established to hear procurement challenges but has increasingly taken on this role over the last 20 years, developing considerable expertise. The judicial process through the TCC is a thorough and in-depth review of all aspects of the case. It requires complete disclosure (sometimes of some or all information into a confidentiality ring) of relevant procurement documentation and the preparation and presentation of witness statements. Its decisions are binding, although subject to a right of appeal.

194. However, we recognise that the rigour and structure that contribute to its excellence can be a hindrance in cases where a quick resolution is sought or for businesses (especially small businesses, charities and social enterprises) who may not be able to bear the cost of a lengthy process. The TCC does not separate out data on procurement challenges from its other cases but a Commission report from 2015

determined that the UK had a median length for first-instance pre-contractual, non-interim proceedings of just under 300 days (the sixth slowest). In comparison, the 16 EU Member States which set maximum durations for review proceedings have limits of between 15 and 60 days.<sup>24</sup> In our informal engagement, practitioners tended to agree that only a small proportion of claims (around 20%) make it to trial - with claims settled out of court, withdrawn or conceded well before this point. This length obviously has an impact on cost, with a median cost estimated as the second highest in the EU for a typical €10m contract<sup>25</sup>.

195. The lengthy process and its impact on the number of cases which reach full trial can have a detrimental effect on access to justice. There is no opportunity to correct a breach where a case is settled or when the contract is awarded after the suspension is lifted in favour of the contracting authority. Settling because of the risk of a lengthy trial process means that the claimant may receive less than they might have done in a damages claim and can be a missed opportunity to improve contracting authority capability. The effect on contracting authorities is equally suboptimal, with settlements paid to avoid protracted litigation where a trial may have found that no breach had occurred. Long Court processes also impact on delivery of goods, works or services for the public good as contract award must be delayed until the suspension is lifted or until the trial rules in the defendant's favour. This also affects the business of the winning bidder who had won a competition in good faith.
196. The TCC Guide sets out the framework within which litigation in the TCC is conducted and includes a Guidance Note on Procedures for Public Procurement Cases, which the parties are expected to follow. We propose, in conjunction with the TCC, the Ministry of Justice (MOJ) and the Civil Procedure Rules Committee (CPRC) to explore the remodelling and formalisation of this guidance through the creation of new Civil Procedural Rules and practice directions for reviewing and hearing procurement legal challenges which will deal with the specifics of procurement challenges. This would allow us to further develop and put onto a statutory footing the TCC framework for pursuing procurement claims. This includes taking account of the specific issues encountered in these types of claims, such as commercial confidentiality and the automatic suspension which prevents contracts being signed once a challenge is raised.
197. The Government proposes that the following main elements should be investigated for inclusion within any new procurement Civil Procedure Rules and Practice Directions:
- Tailored fast track system: this would allow for an expedited trial process with active case management that tailors the process to the individual challenge. This would take account, for example, of the urgency of the need to award the contract, the value of the claim, the stage of the procurement, when the alleged breach took place or whether the challenge is on a point of law where the facts are not in dispute.

<sup>24</sup> European Commission, Economic efficiency and legal effectiveness of review and remedies procedures for public contracts, Final Study Report, MARKT/2013/072/C (April 2015)

<sup>25</sup> Commission remedies report (see fn21 above), p124



- **Written pleadings:** this would see a presumption that certain types of claims would be reviewed on the basis of written pleadings only with a maximum recommended length, removing the need for either side to employ expensive barristers and saving time.
- **Disclosure:** the issue of disclosure has a large part to play in the length of procurement challenges. During this process, claimants seek to gather as much information as possible and defendants are concerned about the inadvertent disclosure of commercially sensitive information or in prejudicing any required re-run of the procurement. Lack of timely disclosure can significantly impact the speed of litigation. Our proposals for increased transparency in the procurement regime will address many of the issues relating to the disclosure process as information relating to each procedure will be released once the contract award decision has been made. This will give bidders immediate and more comprehensive access to much of the information that might be sought under a traditional disclosure process. Clear rules for disclosure on different types of challenges would help to establish what additional information should be disclosed as a matter of course in a particular challenge and how to quickly set up confidentiality rings within which commercially sensitive information can be released.
- **Capacity:** the TCC should seek to effect a culture change which encourages claimants and lawyers to make more use of the TCC's District Registries outside of London in order to free up capacity to be able to list all hearings more quickly. The employment of a designated procurement-only judge (in addition to those who hear procurement challenges but can also work on any other TCC case) within the TCC will also have benefits, especially in the context of a fast track system which will require increased resources to be able to continue to provide active case management in shorter timescales. A dedicated judge, as well as being a true expert on procurement, would remain solely within the TCC and not be required to travel on circuit as is the case with the other TCC judges who hear procurement claims. This would have a significant impact on court capacity for procurement challenges and ensure the smooth progression of expedited trials.
- **Timescales:** some time could be gained in the early part of proceedings by defining and aligning common timescales for submission of pleadings for both parties and setting these out clearly within the new rules. Timescales could be reduced further in applicable cases by clarifying the process and timelines for the occasions when a claim is amended, changing the process by which judicial reviews on procurement decisions are transferred to the TCC and by introducing (Part 8) half day hearings where claims are on a point of law.

198. We will work closely with MOJ and with the TCC to support the design of any new rules relevant to public procurement before they pass through the Civil Procedure Rules Committee approval process.

199. We propose encouraging contracting authorities to undertake a time-limited, formal internal review of complaints before they are lodged with the Court by staff not directly involved in the procurement that is the subject of the complaint. This optional stage

would provide a form of review which may lead to the early resolution of issues and reduce pressure on the courts. Our intention is to develop a pilot programme to assess the impact this has on the number of challenges which are resolved without Court action.

200. The objectives of these changes would be to make a future review system quicker, cheaper and therefore more accessible to suppliers, with decreased impact on delivery of public services.

## Tribunal

201. Our early stakeholder engagement has indicated that many groups would welcome the introduction of a tribunal system in order for procurement challenges to be heard in a faster and cheaper manner, based on the fact that many countries successfully use tribunal systems to hear procurement challenges, including the fastest systems in the EU. We believe that these objectives can be met through the proposals to reform Court processes, as set out above, while recognising and wanting to retain the experience and knowledge of the TCC.
202. However, we propose that we continue to investigate, with Her Majesty's Courts and Tribunals' Service (HMCTS) and other relevant stakeholders, the potential to transfer a subset of procurement challenges to a tribunal-based system - while retaining the flexibility to hear more cases in this way in the future should the anticipated benefits of Court reform not be realised. The subset may include procurement challenges which have traditionally not been brought before the Court, because of its high costs or the time taken to reach a resolution. This could include, for example, low value claims or challenges to process on an ongoing competition, such as a claim that a specification is discriminatory or that a bidder has been wrongly excluded. We propose that our initial investigations will focus on the viability of establishing a clear, fast and value for money route for resolution of these sorts of issues.

## Pre-contractual Remedies

203. The move to a quicker review system with an earlier trial presents the possibility of formally stating a preference to shift the focus of supplier remedies away from damages and towards measures which allow for elements of a procurement to be re-run, decisions to be set aside or documents amended where a breach has been identified. There is officially no primacy in the current system to suggest that the award of damages is to be preferred over these measures although this does often occur in practice. This is contrary to many bidders' preference for having the opportunity to perform the contract instead of the award of damages<sup>26</sup>.
204. We propose formally stating this preference in the new regulations. This reflects the proposed introduction of streamlined procedures to shorten Court timescales (this

<sup>26</sup> See, for example Arrowsmith, S., & Craven, R. (2016). Public procurement and access to justice: a legal and empirical study of the UK system. *Public Procurement Law Review*, 6

would not be appropriate if timescales were not radically reduced) and the capping of post-contractual damages. This does not mean that where there are solid grounds for the procurement to be continued, a Court cannot rule to this effect, but the principle will act as a guide to a Judge who is weighing up the appropriate action.

## Lifting of the automatic suspension

205. The current test used by the court to determine whether a suspension should be lifted is based on the test for the granting of an interim injunction, which relies on the principles established by the 1975 American Cyanamid case (on alleged patent infringement) and is not specific to public procurement challenges. Official statistics are unavailable but it is believed that in 2017 as an example, around two thirds of hearings to lift the automatic suspension in procurement cases were found in favour of the contracting authority<sup>27</sup>. This potentially reflects the difficulty for a claimant to show that damages are an inadequate substitute for a profit-making contract, especially when set against the delay to contract award exacerbated by the length of proceedings.
206. We propose amending the test to be applied by the Courts when determining whether to lift the automatic suspension so that it is no longer based on the test applied when granting an injunction, but is a more appropriate, procurement-specific test. We would aim for this test to balance public interest, urgency, the upholding of the regulations and the impact on the winning bidder against the right for the claimant to be able to participate in the contract and the alternative available remedies. The introduction of a fast track procedure where required should reduce the need to rely on this test as the reduction in Court timescales will allow more contracts to remain suspended while the case is heard.

## Capping the level of damages

207. Public funds must be spent effectively. The Government does not believe that this principle is upheld by spending large amounts of public money on expensive litigation and/or to compensate losing bidders in the event that the rules are breached.
208. The process whereby damages are sought can be a long and expensive one, with damages hearings usually taking place after the main trial. The losing party will often be required to pay the other side's legal fees on top of any damages. Where the contracting authority has lost the case, this can mean paying its own legal fees, the claimant's legal fees, an element of lost profits to the claimant and, where the contract has been awarded to an alternative bidder, the profit to the company performing the contract.
209. Currently the extent of damages awarded to a supplier for a breach of the regulations broadly amounts to a sum made up of an element of lost profit, together

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<sup>27</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and EU*, 3rd edn, vol. 2 (Sweet & Maxwell, 2018), para. 22-144 (as of 2017)

with bid costs and legal costs. The potential for large payouts can encourage speculative claims from bidders, especially from incumbent suppliers who can also secure valuable extensions to existing contracts while the challenge is being considered, often over a significant period of time. However, this risk has been mitigated to some extent by recent UK court rulings which have set a legal test whereby damages can only be awarded where the breach is 'sufficiently serious'. The spectre of high damages does act as a significant deterrent against poor practices by contracting authorities and encourages them to optimise capability, although conversely this can create risk averse behaviours which render contracting authorities reluctant to try new ideas thereby stifling innovation. There will be less focus on damages in a system which processes claims quickly and makes rulings before contract award, thereby preserving a bidder's opportunity to participate in the procurement.

210. We propose capping the damages that can be awarded for breaches of the procurement rules to legal fees and 1.5x bid costs (with some exemptions set out below). This would recompense the supplier for monies spent on a flawed competition and in pursuing the claim. It would stand as a deterrent against poor procurement practice but not at so high a level as to create inefficiencies and stifle innovation. We are still investigating how to calculate bid costs in a fair and transparent manner and plan to develop a 'should-cost' modelling tool in order to achieve this.
211. Limiting the level of damages payable may be regarded as unfair by bidders who believe that, but for a breach of the procurement rules by the contracting authority, they would have been awarded a contract. This might limit suppliers' willingness to bid for public contracts. Nevertheless, we do not believe that it is an appropriate use of public funds to pay compensation to suppliers for the loss of a 'chance' of being awarded a contract because of unintentional errors made during the procurement process.
212. It will be important to retain the ability to award additional damages over this limit (in line with the current principle of damages for an element of lost profits) in certain circumstances. This includes where a supplier may not have the opportunity to challenge a procurement before award (such as with illegal direct awards, crisis procurements, where there has been a failure to publish a required notice (e.g. in advance of use of the new limited tendering procedure, for contract amendments or as required when using commercial tools such as frameworks)) and where malfeasance has been demonstrated. The focus of the new regime is on improving the ability of the review system to make faster decisions on procurement challenges, and relying more on pre-contractual remedies, so that very few challenges require damages judgments to be made.

## Crisis and Extremely Urgent procurements

213. In [chapter 3](#) we set out the grounds of crisis and extreme urgency which will justify the use of the limited tendering procedure to allow contracting authorities to act quickly and effectively in these situations. We believe that in these circumstances, the public interest is in being able to act quickly. However, we also want to encourage the use of competition where it would not cause delay.

214. At the moment, when a contracting authority chooses to use an informal competition in these circumstances, although there is no requirement for a standstill period, contract award could be delayed by an unsuccessful bidder raising a challenge which initiates the automatic suspension of contract award (as in a standard procurement). This suspension remains in place until the court rules on whether the suspension can be lifted to allow the award of the contract. This risk of delay can deter contracting authorities from holding discussions with more than one potential supplier with an informal competition.
215. The government proposes that any contracts let under the new crisis and extreme urgency provisions would be excluded from the risk of automatic suspension preventing contract award. This would not apply when the proper process for these contracts has not been followed e.g. when the mandatory notice set out earlier has not been published.
216. This approach should encourage contracting authorities to make more use of competition in times of crisis or extremely urgent demand, rather than resorting to the uncompetitive direct award procedure which is not subject to the same risks of delay. Guidance will clarify that informal competition is the preferred approach, where possible, in these situations. Because of the lack of access to pre-contractual remedies, suppliers who win a legal challenge against a regulation breach during these procurements will have greater redress with the ability for the supplier to seek a declaration of ineffectiveness, contract shortening or damages.

## Removing mandated debrief letters

217. We want to make sure that suppliers have full and timely access to the information they need to determine whether a procurement process is being or was run properly, in order to both support any valid legal challenge and to improve their performance in future competitions. We also believe that such access will reduce the number of speculative complaints, started in order for the complainant to be able to gain access to more information than is provided at the end of the procurement process under the current system. Greater access will be delivered under transparency proposals set out in [chapter 6](#), which contains more information about how this would work in the context of the evaluation and contract award process.
218. We propose that the provision of debrief letters is no longer mandated at contract award stage after the introduction of transparency requirements that will require publication of this information as a matter of course.
219. The requirement to provide information to losing bidders, which includes the characteristics and relative advantages of the winner can be complicated and time-consuming and requires a new process of comparing the winning bid to each of the other bids individually while protecting commercially sensitive information. Our proposal is to remove the requirement to provide this comparative information individually given that bidders will be able to access the information on the evaluation of each bid under new transparency provisions and clearly be able to see why they were unsuccessful and the relative advantages of the winning bid. This will reduce the burden on contracting authorities, especially in competitions with large numbers of bidders. It will be covered in guidance that the production of debrief letters is best

practice but will suggest a reframing from the current approach; providing more detailed information relating to that individual bidder's proposal using the information from the evaluation process. This will help suppliers improve their bids in future competitions, still allow them to assess the performance of the procurement process as well as being simpler and less time-consuming for contracting authorities to draft.

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.

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

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?

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

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.

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

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

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

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

# Chapter 8: Effective contract management

**We propose legislating to further tackle payment delays in public sector supply chains and give small businesses, charities and social enterprises deep in the supply chain better access to contracting authorities to expose payment delays.**

**We propose allowing more flexibility to amend contracts in times of crisis, improving the ability of contracting authorities to adapt quickly in these circumstances.**

**We propose introducing a new requirement to publish contract amendment notices so that amendments are transparent and to give commercial teams greater certainty over the risk of legal challenge.**

**We propose capping the profit paid on contract extensions where the incumbent raises a legal challenge.**

## Introduction

220. Effective contract management is key to successfully delivering a contract following the completion of a procurement procedure. The regulatory regime must support contracting authorities in managing the project through to delivery, ensuring the contract can flex to meet new demands and opportunities while ensuring the supply chain is treated fairly and paid promptly.

## Prompt payment

221. Prompt payment is a significant problem for many businesses, including small businesses within public sector supply chains. Long payment terms and late payments can have a damaging knock-on effect on their ability to manage their cash flow and plan for growth. In the worst cases it can threaten their survival. The Government is committed to tackling this problem in the public and private sector and has already taken significant action to improve payment practices and performance.

222. The PCR<sup>28</sup> requires contracting authorities to include a term within new contracts providing for payment of valid and undisputed invoices within 30 days and to require

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<sup>28</sup> Regulation 113 PCR.

that this payment term is passed down the supply chain by the supplier and its subcontractors. This currently applies to all public contracts subject to the PCR, unless they are for the procurement of health care services for the NHS or a maintained school or academy. The proposal in this chapter retains this current scope.

223. Under the Late Payment of Commercial Debts Act 1998, where undisputed invoices are not paid within 30 days, interest becomes payable as set out in the late payment legislation<sup>29</sup> or in relevant contractual provisions.
224. The PCR<sup>30</sup> also require public sector organisations to publish statistics each year showing how they have complied with the obligation to pay valid and undisputed invoices within 30 days to their suppliers. Reports should be published on the contracting authority's website. The regulations require invoices submitted by the supplier to be verified in a timely fashion by public sector organisations. There is limited visibility on whether this is happening in practice.
225. Furthermore, private sector organisations report against a different set of metrics to contracting authorities which makes it difficult to compare public and private sector performance. Regulations made under section 3 of the Small Business, Enterprise and Employment Act 2015 (and, for limited liability partnerships, section 15 of the Limited Liability Partnerships Act 2000), introduce a duty on the UK's largest companies and Limited Liability Partnerships to report on a half-yearly basis on their payment practices, policies and performance for financial years beginning on or after 6 April 2017, including how they are performing against payment of all invoices within 30, 60, 61+ days. The information must be published and is available to the public through an online service provided by the Government on GOV.UK.
226. The Government wants to go further in addressing the payment delays faced by businesses throughout the public sector supply chain. There is limited visibility as to whether the minimum 30-day payment terms across the public sector are being adhered to at a subcontractor level. The current regulations do not provide enforcement mechanisms or require contracting authorities to monitor the flow down of payment terms, although these can be provided for in contracts.
227. The Government proposes providing for greater visibility on payment throughout a public sector contract supply chain and ensuring all suppliers in a public contract supply chain are paid within 30 days by:
- legislating to provide clear access for any business to take up payment delays in the supply chain directly with the contracting authority;
  - legislating to provide a specific right to the contracting authority to investigate the payment performance of a supplier of any tier in its supply chain;

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<sup>29</sup> [Late Payment of Commercial Debts \(Interest\) Act 1998](#)

<sup>30</sup> Regulation 113(7) PCR



- aligning public and private sector reporting requirements and publishing payment performance all in one place on GOV.UK to allow greater scrutiny.

## Contract amendments

228. The PCR, UCR and CCR<sup>31</sup> allow amendments to public contracts to be made without triggering the need for a new procurement provided these amendments meet specific criteria. However, these provisions can result in uncertainty for contracting authorities who can find it difficult to confidently determine whether the amendments they want to make would be lawful. This is unhelpful, particularly when being able to respond quickly and effectively to changes is vital to the successful delivery of a contract. The new regulations need to provide greater clarity while at the same time ensuring maximum flexibility to deal with the many challenges and opportunities that arise during the normal commercial cycle. We propose that this also applies to defence and security contracts under the new regulations.
229. The Government proposes including a new provision that would be based on PCR and would:
- permit amendments to be made in cases of crisis or extreme urgency; and
  - reorder regulation 72 so that it is clearer and easier to understand.
230. The Government does not believe that a full overhaul of regulation 72 is necessary and this approach would retain much of the familiarity and usefulness of the current legislation and associated case law while making it easier for contracting authorities to respond to unexpected challenges. It is also an opportunity to consolidate the regulations, using PCR as the starting point. This will lead to greater flexibility in defence and security procurements although in some instances could lead to a reduction in flexibility compared to UCR. However, it is proposed that aligning the regulations outweighs this disadvantage.
231. As discussed earlier in [chapter 3](#), the Government proposes that limited tendering will be permissible in cases of crisis and extreme urgency. We propose to add an additional limb to the regulation to allow contracting authorities to amend contracts where there is a crisis or a state of extreme urgency. This will give contracting authorities and their suppliers increased flexibility to amend existing contracts when they urgently need to do so.
232. The definition of “substantial” in regulation 72(8) could also be reordered and combined with the provisions of regulation 72(1) so that it is easier to understand. To align it with the rest of this provision, this would mean changing it from setting out what is a “substantial” amendment to instead setting out what does not constitute a substantial amendment and will therefore be a legally permissible amendment.

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<sup>31</sup> Regulation 72 PCR, regulation 88 UCR and regulation 43 CCR.

## Contract amendment notices

233. Contract amendment notices are currently only required to be published for certain types of amendments.<sup>32</sup> This means that contract amendments have the potential to breach the regulations without it being apparent to third parties that a contract has been modified. Equally, this makes it difficult for commercial teams to actively manage their legal risk, as interested parties may not be aware of amendments that have been made.
234. The Government proposes requiring, subject to certain exemptions, that contract amendment information should always be published. This requirement will be subject to exemptions similar to the exemptions in the Freedom of Information Act 2000 and the Data Protection Act 2018.
235. Publishing notices for the majority of contract amendments is a decisive change from the current procurement regime. We propose that contracting authorities will only be exempt from publishing a contract amendment notice if the amendment(s):
- increase or decrease the value by less than 10% of the initial contract value for goods and services or 15% for works;
  - increase or decrease the initial contract term by less than 10% of the original contract term; and
  - do not change the scope of the contract.
236. Any amendments that fall outside of this exemption, including any amendments relating to the scope of the contract, will require a contract amendment notice to be published. Therefore, all amendments to the scope of the contract will require a contract amendment notice to be published.
237. With the exception of amendments where there is a crisis or extreme urgency, a standstill period of ten days will apply to all contract amendments which require the publication of a contract amendment notice. This means that contracting authorities and their incumbent suppliers would need to wait ten days after publishing the contract amendment notice before they can enter into the amendment. The remedies regime will apply to breaches in relation to making contract amendments and the notice requirements (including automatic suspension and ineffectiveness).
238. The usual limitation period would start from the date of the publication of a contract amendment notice. This means that, even if the amendment is unlawful, the contract amendment would not usually be at risk of challenge (under the regulations) after 30 days, provided that a contract amendment notice is published, the notice provides sufficient information and nothing changes in the period after publication of the notice. This has two advantages: it provides suppliers with sufficient knowledge to bring a challenge where there are grounds for one; and it provides contracting authorities with certainty of when the limitation period starts and therefore when they are likely to no

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<sup>32</sup> Under regulation 72(3), notices should be published for amendments made under regulation 72(1)(b) or (c).

longer be at risk of a legal challenge. Contracting authorities who are not required to publish a contract amendment notice by the new regulations, may choose to do so voluntarily.

239. Voluntary Ex-Ante Transparency (VEAT) notices can be used by contracting authorities for a range of purposes, one of which can be to notify the market that a contract has been amended. This proposal is different from the current approach to publishing a VEAT notice for two reasons. First, VEAT notices are voluntary (and, currently, contract amendment notices are only mandatory for certain types of amendments) whereas the proposal for the publication of contract amendment notices will be mandatory for all amendments (unless an exemption applies). Second, an invalid VEAT notice offers very little protection from a legal challenge and the authority remains exposed to the risk of a declaration of ineffectiveness. Combined with the proposal to mandate notices following limited tendering in [chapter 3](#), this new contract amendment notice will replace the need for VEAT notices in the future.

## Reduce over-payments made during suspension period

240. A period of contract award suspension may require contracting authorities to put interim measures in place to provide for the continued delivery of goods or services. This often takes the form of an extension to an existing contract. These extensions are often made at short notice and without any competition which means that there is a risk that prices may be considered to be relatively high. In some cases, this might offer a perverse incentive for incumbent suppliers to raise a challenge in order to benefit from higher profits during the suspension. We would like to reduce the incentive where it does arise and the costs that fall to the public sector in this period, by reducing the ability of suppliers to receive higher than standard rates of profits through such extensions.
241. Therefore, in the event that an existing contract has to be extended in order to provide continuity of supply whilst the award of a new contract is suspended due to legal challenge, the Government proposes limiting the amount that is payable under the contract extension. This is an approach that is currently used in the defence sector under the Defence Reform Act 2014 and the Single Source Contract Regulations 2014. An appropriate rate of profit would be determined based on a government standard rate and the profit payable during the contract extension would be calculated using that rate for the duration of the extension. This would remove any perverse incentive, perceived or otherwise, for incumbents to challenge contract awards where they have been unsuccessful in order to trigger the automatic suspension and benefit from the profits of the extension.

## Using feedback to drive supplier excellence

242. Contracting authorities should be providing regular feedback on performance to suppliers. Transformative gains could come from using this feedback to drive suppliers to continuously improve, innovate and deliver value for money. The Government can act to improve the functioning of markets so that suppliers who deliver faster and better than expected are rewarded by winning more contracts - and not just in the public sector. Outstanding businesses, charities and social enterprises

should secure more market share, delivering better value for taxpayers, increasing productivity, and boosting UK economic growth.

243. In 2017/18, the Crown Commercial Service and the Behavioural Insights Team studied the collection of simple feedback from public sector buyers on their purchase of IT and office supplies. They asked buyers whether the product was delayed, whether it was delivered in full, and for their overall satisfaction (measured as a five point star rating). The study found:

- The overall response rate to requests for feedback was 10.8%, compared to rates of 2-5% on other major business-to-consumer platforms;
- Three quarters of suppliers said they found the feedback useful and wanted it to continue;
- smaller suppliers were more likely to receive four and five star ratings and less likely to receive one star ratings, compared to larger businesses.

244. We want to look at how we can use performance data to give suppliers feedback on how they perform and incentivise them to continuously improve the quality of their products and services. Realising this ambition will require design, testing and monitoring to ensure that the underlying data is robust and representative of overall performance.

Q39. Do you agree that:

- businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?
- 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?
- private and public sector payment reporting requirements should be aligned and published in one place?

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

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

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?

# Annex A: Current Procurement Procedures and Thresholds

245. There are four main sets of regulations that implement the EU Directives on public procurement in the UK:

- Public Contract Regulations (PCR) 2015 regulate the award of most contracts for works, services or supplies by central government departments and the wider public sector.
- The Utilities Contract Regulations (UCR) 2016 regulate the award of most contracts for works, services or supplies by public authorities and private sector bodies which have been granted exclusive rights by public authorities and which undertake certain activities associated with regulated water or water and sewage companies, gas and electricity transmission and distribution, district heating networks, ports and airports, transport services and postal services.
- The Concessions Contract Regulations (CCR) 2016 regulate the award of most concession contracts where the contracting authority appoints a supplier for execution of works or services, the consideration of which consists (at least in part) in the right to exploit those works or services.
- The Defence and Security Public Contracts Regulations (DSPCR) 2011 regulate the award of contracts for military and sensitive equipment, works and services.

## Procurement procedures of the PCR, UCR and DSPCR

246. The following procedures are available across the current PCR, UCR and DSPCR:

### **Open procedure**

247. A single stage process without a separate selection stage where the contracting authority invites all interested bidders to submit tenders for the contract that are evaluated and the contract is awarded without negotiation. This is not available under the DSPCR.

### **Restricted procedure**

248. A two-stage process where any bidder may request to participate in the procurement but only shortlisted bidders invited by the contracting authority following a selection stage may submit tenders for the contract which are evaluated and the contract is awarded without negotiation.

## Competitive dialogue procedure

249. Where, after a selection stage, the contracting authority invites all shortlisted bidders to take part in a dialogue process with the aim of identifying the solution best suited to meet the contracting authority's needs. Bidders may be further shortlisted at various points following evaluation of tenders. When the dialogue process is complete, final tenders are invited from those bidders remaining in the process. Negotiation is permitted with the successful bidder in order to confirm and finalise its tender; provided this does not distort competition or cause discrimination and provided its tender is not materially modified. For procurements subject to the PCR and DSPCR, this procedure is only available in certain circumstances and must fulfil one of the conditions in regulation 26(4) of the PCR (e.g., the project is complex or the contracting authority requires an innovative solution) or regulation 19(2) of DSPCR. For procurements subject to the UCR, there are no restrictions on its use.

### **Competitive procedure with negotiation (referred to as the negotiated procedure in the UCR and DSPCR)**

250. Where, after a selection stage, shortlisted bidders are invited to submit initial tenders and to take part in a negotiation process to improve their tenders. As with competitive dialogue, suppliers may be further shortlisted following evaluation of initial and subsequent tenders. The possibility of negotiations after final tenders have been submitted is not expressly provided for. This procedure is available in the same circumstances as the competitive dialogue procedure for procurements subject to the PCR. There are no restrictions on its use for procurements subject to the UCR or DSPCR.

### **Negotiated procedure without prior publication**

251. Where the contracting authority awards the contract directly to a supplier (i.e. without advertising the opportunity or undertaking a competition). This procedure is only available in the specific circumstances laid down in regulation 32 of the PCR, regulation 50 of the UCR or regulation 16 of DSPCR, e.g.:

- where the normal procurement timescales cannot be complied with due to extreme urgency brought about by events unforeseeable or attributable to the contracting authority; or
- where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered or where there is a need to protect exclusive rights).

### **Innovation partnerships**

252. Were designed to procure goods, services or works that did not yet exist on the market. When setting up an innovation partnership under regulation 31 of the PCR or regulation 49 of the UCR (these are not available under DSPCR), there is an initial selection stage and only shortlisted suppliers are invited to participate in the procedure. This procedure is available where the contracting authority has identified the need for an innovative product, service or works and wishes to appoint a supplier

(or suppliers) to carry out the development work. Provided it meets the contracting authority's needs and is within the maximum price set, the contracting authority may purchase the resulting products, services or works without further competition. In other words, the procedure allows for a further phase after the research and development phase where the contracting authority can select one or more of the suppliers to provide the goods, works or services.

### **Design contests**

253. Allow the contracting authority to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after being put out to competition. Design contests either can be part of a procedure leading to the award of a public service contract or can involve prizes or payments to participants. They are not available under DSPCR.

## **Procurement under the CCR**

254. The CCR does not impose different procurement procedures and instead gives contracting authorities and utilities freedom to organise the procurement procedure, subject to complying with certain requirements under regulation 37 of the CCR which are:

- The concession contract must be awarded based on the award criteria set out in the concession notice as long as: the tender complies with any minimum requirements; the bidder complies with the conditions for participation; and the bidder is not excluded from participating in the award procedure.
- The contracting authority can limit the number of bidders to an appropriate level, on the condition that this is done in a transparent manner and based on objective criteria. The number of bidders invited must be sufficient to ensure genuine competition.
- The contracting authority must be transparent about the description of the envisaged organisation of the procedure and an indicative completion deadline, and any modification to that procedure or completion deadline. To the extent that any modification concerns elements disclosed in the concession notice, the contracting authority must advertise it to all bidders.
- The contracting authority must provide for appropriate recording of the stages of the procedure using the means it considers appropriate.
- The contracting authority may negotiate with bidders but the subject matter of the concession contract, the award criteria and the minimum requirements must not change.

## Financial Thresholds

255. The financial thresholds for supplies, services and works in the regulations are derived from thresholds set out in the GPA expressed in Special Drawing Rights and converted into domestic currencies. There are separate thresholds for small lots in the PCR, UCR and DSPCR. Where a lot has a value below these thresholds, contracting authorities can award contracts for individual lots without applying the rules, as long as the aggregate value of the lots awarded does not exceed 20% of the aggregate value of all lots. The current 2020 thresholds are:

Description	Threshold
<b>PCR</b>	
<b>Supplies and services</b> (except subsidised services contracts)	
Central Government contracting authorities	£122,976
Sub-central contracting authorities	£189,330
<b>Subsidised services contracts</b>	£189,330
<b>Works</b> (including subsidised works contracts)	£4,733,252
<b>Social and other specific services (Light touch regime)</b>	£663,540
<b>Small lots</b>	
Supplies and services	£70,778
Works	£884,720
<b>UCR</b>	
<b>Supplies and services</b>	
All utilities	£378,660
<b>Works</b>	
All utilities	£4,733,252



<b>Social and other specific services (Light touch regime)</b>	
All utilities	£884,720
<b>Small Lots</b>	
Supplies and services	£70,778
Works	£884,720
<b>DSPCR</b>	
<b>Supplies and Services</b>	£378,660
<b>Works</b>	£4,733,252
<b>Small Lots</b>	
Supplies and Services	£70,778
Works	£884,720

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