

## **Green Paper: Transforming public procurement**

### **Warwickshire County Councils response to the consultation questions:**

Warwickshire County Council supports any proposals that will make procurement processes simpler to follow, less bureaucratic and make it easier to find innovative solutions. We welcome any measures that help deliver better and more efficient procurement that safeguards public value for money.

In summary, we believe a number of the proposals will help to achieve these aims and for some, we would need to see more details to comment further. There are, however, some proposals (as noted below) which we feel may work against these aims. In addition, we feel that greater emphasis could be placed on the importance of social value in the context of recovery, growth, levelling up and climate change.

There needs to be some consideration given to the timing and scale of any changes, taking into account the current circumstances that we all are facing; coming out of a pandemic, facing increasing financial pressure and limits on our resources.

We would welcome the opportunity to further comment on revised detailed proposals following the outcome of the consultation before any new legislation is drafted.

### **Chapter 1:**

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

Yes, we agree with the proposed principles which are concepts familiar to local government and considered important, but we think that the current principle of proportionality should be retained as well. The principle of proportionality has success in encouraging SME inclusion and participation in competitive tendering

We are also not clear on the concept of “public good” and how it relates to current legislation around Social Value. Has thought been given to whether these will overlap and how they will be treated? Clarity around this issue will be especially important if social value is to serve a purpose in the context of growth, recovery and the climate agenda.

#### **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?**

We do not support this proposal as currently set out. With respect to Local Authorities, it is not clear how this would operate in practice and whether it could disrupt our ability to deliver statutory services. Anybody which could impose restrictions that could restrict or stop spend in these areas would be unfeasible and could cause local authorities to be in breach of statutory obligations. Further, we do not consider it appropriate for elected bodies at a local level to be subject to intervention and take over by a central unit which is unlikely to be equipped to operate effectively with sufficient local knowledge and understanding of the differing needs and obligations of the various tiers of local governance.

Another concern is whether it will be possible to bring together sufficient expertise and knowledge to understand all levels of public procurement. Procurement activity is already subject to review by the courts which provides adequate oversight and protections.

**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?**

The members of the panel would need to be representatives from all areas of public procurement, with real hands-on experience procurement across each of the sectors including at a local government level. This could result in a very large (and possibly unwieldy) team but perhaps there could be a continuous core membership supplemented by sector experts. Legal involvement would be needed if the proposed unit was to have a remit covering matters of contractual/legal issues.

**Chapter 2:**

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

Yes, we agree with the proposed approach to consolidate the regulations. However, it is important to ensure that all legal requirements are considered and amalgamated to avoid confusions. Local Government Act 1988 and Public Services (Social Value) Act 2012 are notable omissions.

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

Overall, these proposals appear to cover everything, though nearly all our procurement activity comes under the PCRs.

**Chapter 3:**

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

We agree that simplifying to 3 procedures is a good idea, providing that the new flexible procedure has the same flexibility as currently enjoyed in the LTR (i.e., the ability to construct any type of procedure that you need). Though if the new flexible procedure will be the same as the LTR procedure, do we need to specify an open procedure – truly flexible means any procedure (quasi-open, quasi-restricted, with without dialogue/ negotiation etc). If the preference is to still specify the “open” procedure, then it should still specify the “restricted” procedure as well, as this procedure does have a useful role to play. Also, there is a real benefit to negotiated procedures that should be retained albeit the remit clearly defined at law – the risk of removing a clearly defined option is that every procurement not within the “open” category would end up being bespoke with different authorities taking different approaches and bidders having a lack of clarity and increased costs as they need to adapt their processes every time.

As noted in the introduction, a greater emphasis could be placed on how the flexible procedure could drive social value considerations given the current circumstances and the need for innovation to drive recovery and growth.

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

Yes, the current pandemic has shown that a new ground of crisis would be a helpful clarification, however the existing rules already allowed for that. There will need to be clear definition of when the ground applies to avoid costly challenge.

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

Not if the new flexible procedure is the same as the current LTR. We think some additional guidance may be needed for procurement personnel who haven't used the LTR before.

**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?**

As a contracting authority our only issues have been around the difference in approach to risk/ innovation when trying to jointly commission.

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

A central knowledge base which contains information on what other authorities have achieved/ are trying. That way we could share how we ran processes and share any new approaches/ methods. How attractive this will be to the market and whether it will lead bidders to avoid bidding needs to be carefully considered.

**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?**

We don't feel we have any pre-procurement restrictions at present.

**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?**

We would only support removal if the new flexible procedure is an exact equivalent to the existing LTR rules. We would not support more contracts falling within the scope of fully regulated processes as the aim of the reforms is simplicity and this would overly complicate certain procurement areas. We feel that lowering the threshold may cause an additional burden on authorities and social care providers (for example) with additional procurements caught by the full regulations. We have some concerns that this would mean "social and specific services" tenders would be caught by greater restrictions than we currently enjoy and could have detrimental effects on how we can award individual care placements such as allowing the service user the final say on who cares for them (for example). This would potentially conflict with the personalisation agenda in domiciliary or social care.

#### **Chapter 4:**

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

Yes, using MAT will help make it clearer that a wider range of criteria can be considered in procurements. We would say that at present we think MEAT is more flexible than suggested in the Green Paper.

**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?**

Yes, we agree with this approach.

**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?**

Yes, this will clarify the use of wider impacts and help authorities to take a more holistic view in evaluation and supports collaborative working with other stakeholders such as CCG's and NHS Trusts.

**Q16. Do you agree that, subject to self-cleaning fraud against the UK's financial interests and non-disclosure of beneficial ownership should fall within the mandatory exclusion grounds?**

Yes, we agree.

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

Yes, we agree tax evasion should be added as an exclusion ground. We have also come across instances where companies have been closed in order to escape debts but the owners have subsequently started new companies in the same sector, some method of dealing with these would be useful.

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

Yes, we agree.

**Q19. Do you agree that non-payment of taxes in regulation 57(3) should be combined into the mandatory exclusions at regulation 57(1) and the discretionary exclusions at regulation 57(8)?**

Yes, we agree.

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

Yes, we agree to the inclusion of this as a discretionary exclusion.

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

Yes, this is a good idea as it will be easier to locate information. One note of caution is that this central list will need to be kept accurate and up to date and we would like some protection from challenge if we have used this as a source of information. We have some concerns in terms of resourcing commitments and how this list will be collated and amended – if there is a significant requirement for local authorities to report into the list (as well as the use of centrally available information) this could result in questions over accuracy of the list and extra cost to authorities to resource the information provision.

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

Yes, we agree with the proposals. It will need to allow us to use our own intelligence as well as intelligence from other authorities. We sometimes have difficulty proving poor past performance, so anything that helps is welcome. At present exclusion is only permitted where termination or similar sanctions have been applied – as these options are not always readily employed by local authorities due to cost and risk involved, the ability to consider past performance is limited. Anything that enables persistent or significant failings in performance to be considered in appointing suppliers is welcome and should improve the quality of suppliers and benefit all.

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

Yes, this would be a good idea providing the portal is always up to date and we have the ability to vary the criteria we apply e.g., insurance levels/ financial standing etc.

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

Yes, we agree, however we'd note that the current regulations already allow us to ask for alternative documents in some instances.

## **Chapter 5:**

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

Yes, we agree with the proposals for a DPS+: widening the scope for these will be very useful. There will need to be clear guidance and clarity on use.

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

Yes, for non “social and specific services” this will give a welcome freedom to run better framework tenders. However, if the LTR is removed this would add a new restriction to how we approach frameworks for these services – we usually include the ability to refresh frameworks whenever we choose, rather than just once and therefore have longer contract periods.

## **Chapter 6:**

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

In principle we support transparency but are not comfortable with the proposal in its entirety as set out in the Green Paper. For example, para 166 is likely to significantly increase the burden on procurement teams and increase resourcing requirements disproportionately to achieve the proposed measures. We have concerns that there will be protracted discussions over what can be released and what is confidential, which in turn could delay contract award and the start of new services. Although suppliers can submit Fols, in reality not every supplier seeks a great deal of feedback if unsuccessful. We are also worried that this approach may increase the number of spurious challenges which even if ultimately rejected will cause significant cost and resource pressures to authorities. We would be interested to understand if the supplier respondents to the Green Paper consider that publication of their information in this way would deter them from taking part in procurements.

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

In principle yes, our concern would be whether the existing procurement/contract portals are based on this and what effect there will be if they aren't. We also have further concerns around the need for increased resources to achieve this. While in principle greater transparency is a good thing the proposed open standard could cause issues in that there would be a training and resource issue for both LAs and suppliers, where this Open standard is not well known. Currently Government and our own E-Services advocate .odt (for Word based text docs) and HTML for web content so this would be something new again; unclear why, if anything, they weren't advocated in the Green Paper. Would we inadvertently, by pushing OCDS, be putting off SMEs for bidding for work especially for smaller contracts if they didn't have the resource, training, technical expertise to use OCDS, thereby defeating a major objective of the Green Paper of encouraging SMEs.

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

In principle yes, as this would simplify early-stage procurement activity. However, we would need reassurance that providing it doesn't have disproportionate resource implications for local authorities. References to KPIs also need clarification as not all services/contracts lend themselves to measurement in this way, and in some instances the inclusion of overly complex performance monitoring simply leads to increased cost as bidders price the cost of compliance into tenders. Who would set KPI's, if centrally controlled would they be relevant to LAs with such a one-size-fits all approach and would it end up becoming an industry in itself at a time when we are seeking to simplify procurement routes and KPIs? A register of procurement challenges could be resource intensive and given settlement can often arise from a commercial decision rather than a strict legal

entitlement, it could give a view that certain authorities were “easy targets” for spurious challenge. If the challenge is viable it will proceed through the courts as a matter of public record in any event so it is hard to see what the benefit of a further public register would be.

## **Chapter 7:**

**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.**

Yes, we believe that some of the proposals would achieve that objective and bring clarity and consistency to the process, which in turn would enable us to manage this better. We agree that court process can be long but it is important that courts receive disclosure of all relevant evidence and consider it before deciding whether an authority has acted unlawfully. Given the penalties of such a finding it does not feel appropriate to “dumb down” the process in the interests of speed. The data given re length of proceedings is unhelpful given the usual remit of the TCC is high value complex, construction and engineering and technology claims which by their nature require considerable documentation, witness and expert evidence and lengthy trials in some cases. Such bread-and-butter matters for the TCC skew the statistics and reliance on these numbers as evidence of length of procurement decisions is unsound in our view.

However, we do acknowledge that giving a stronger footing to the TCC guidance on procurement claims and including it within the CPR would be a useful case management tool and allow judges greater authority to intervene where such cases were not managed appropriately by the parties. The concept of a faster track and dedicated procurement judge is welcomed provided rigour does not suffer in pursuit of speed, as are tighter rules on pleadings and disclosure to improve efficiency. The TCC registry in Birmingham has always proved excellent and its use should be encouraged.

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

Yes, it would, most of our contracts already include an escalation process but by including it in the regulations it would help clarify how the process should work and be managed, including how to manage challenges to this process/ outcome from the process. The resource requirements of an internal independent review system need to be considered. It is assumed this would be similar to a second stage internal review for information complaints.

**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?**

Given the specialist nature of procurement, we think a more bespoke body would be needed to manage lower value challenges in a more efficient manner. If this were workable then a process that saw speedier resolution whilst retaining the rigour of evidence found in court proceedings would be helpful. However, our concern is that by reducing the cost and barriers such a system may have the unintended consequence that more suppliers may seek to submit opportunistic challenges even if they have no real grounds. As identified above spurious challenges still result in significant cost in terms of staff resources, cost and time to rebut them (even before they become formally issued challenges) and enabling more challenges to be brought without a clear threshold has the potential to place further burdens on authorities. In addition, procurement requires clarity and swift resolution of challenge. Using existing tribunals could see procurement challenges caught within existing caseloads and delayed as a result – precisely what the Green Paper seeks to avoid in terms of its position on the TCC in earlier paragraphs. If the current 30-day limit for challenge was to be extended, authorities could potentially find themselves in breach of statutory duties if unable to proceed with certainty and speed.

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

Yes, we agree with the proposal. This would allow us to better manage any risk and then be able to re-run a procurement to address any issues. Most aggrieved bidders are generally wishing to win or retain a contract in any event.

**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.**

In principle a more procurement specific test would be appropriate. We would want to see the proposal and comment on its detail however before taking a definitive view as failing to lift a suspension can cause delays that may lead to authorities being in breach of their obligations to deliver statutory services and/or leave residents without critical support and the authority unable to move forward with delivery.

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

Yes, we agree – in view of it being public funds that are at stake, the level of damages should be capped.

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

Suppliers should be made to evidence their bidding resources and the cost of these resources for each specific bid.

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

Yes, we believe this would encourage some level of competition in these circumstances.

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

Yes, the proposals would remove the need for the debrief letters, however, see our earlier concerns around the requirements of para 166. The requirement for debrief letters seem less onerous than the new proposals and we feel it should remain, instead of the new proposals. These could however be clarified further to ensure more consistency with such letters and give greater weight to CCS guidance.

**Chapter 8:**

**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?**

Yes, we agree in principle as these proposals would help achieve the prompt payment objective. However, we have some concerns that this may result in the need for increased resources to if the whole supply chain is contacting the Authority to resolve payment issues. There also needs to be clarity that this does not mean the contracting authority becomes liable for supply chain payments.

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

Yes, making the regulations clearer and easier to understand is a welcome move. The inclusion of “crisis” is a good idea as well. We would also like to see greater flexibility around the current limits on increases, this would allow us to manage the inevitable changes that occur in contracts, as we have to adapt to changing circumstances for example around NHS/ PHE initiatives, changing demands of our customers. Particularly in the case of longer term or complex contracts the current limits of flexibility are often insufficient for changing circumstances. Further guidance on when changes result in a contract becoming “materially different in character” would also be welcome.

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

Whilst we can see the benefits in terms of transparency and providing increased legal protection for contract modifications, we have some concerns over the impact of a notice and standstill period on the ability of Authorities to effectively manage their contracts and bring about improvements in response to changing circumstances, especially if this then results in more challenges. The requirement for additional notices will bring a requirement for increased resources as well.

**Q42. Do you agree that contract extensions which are entered into because an incumbent supplier has challenged a new contract award, should be subject to a cap on profits?**

Yes, we agree. It’s a good idea that no-one is unduly rewarded during such periods and would deter any unscrupulous activity.

Responses to be submitted to: [procurement.reform@cabinetoffice.gov.uk](mailto:procurement.reform@cabinetoffice.gov.uk)

The Consultation closes on the 10<sup>th</sup> March 2021 at 11.45pm.