

**A response to the December
2020 Cabinet Office Green Paper;
'Transforming Public
Procurement'**



Introduction

ucisa is the member-led professional body for digital practitioners in education in the UK, representing the majority of HE institutions, a growing number of sixth form and FE institutions and a large number of corporate members. As such, ucisa has a distinctive perspective on the proposals contained in the Green Paper and this response – drawn from collated submissions from a wide range of buyers and suppliers - focusses on the practical and operational aspects of the paper. We have looked at what the proposals will be like to work with and how we can achieve best practice from the new proposals. We have also consulted with other institutional groups that we understand are submitting responses, including BUFDG (the British Universities Finance Directors Group), the NEUPC (North East Universities Procurement Consortium) and the AULPA (Association of University Legal Practitioners) to ensure that our responses address different viewpoints on the Green Paper. We believe that the proposals will deliver much value to us, and we would urge the review bodies to include ucisa as representatives in further consultation.

Chapter 1 Procurement that better meets the UK's needs

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

A1: Yes, we believe that they are an important expression of the desire to implement genuine reform. We do believe, however, that the expression of these in the Green Paper has deterred some smaller suppliers and institutions from fully engaging and we would welcome the opportunity to be part of the process of working with the Government in rolling the changes out as they become established.

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?

A2: Yes, and we would like to recommend that the unit includes within its scope; training, dissemination of lessons learned and consideration of ongoing innovations in technology. The group needs the ambition to empower commercial resource within Contracting Authorities to be creative and flexible, thereby protecting the freedom that institutions have for innovation. We would like clarification at what points the Unit can be involved. We would recommend that such interventions are open and transparent to encourage uptake of best practice and compliance with the new regulations, but we would welcome safeguards to protect against frivolous or unnecessarily vexatious interventions. Any interventions should have the capacity to be significant in scale, as required.

It is essential that the group remains as far distanced as possible from political influence whether from established political parties or from external pressure groups. It must be open to innovation and best practice but clear of purely political pressure in order to maintain integrity and credibility. It would be useful if there was assistance for SME suppliers to understand the role of the unit and show them how it could best help them.

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?

A3: Panelists on the new unit should have members that represent a broad range of commodities and services, including information technology, and ideally have a mix of public and private experience, as well as experience in delivering both small and largescale contract awards. Specifically, we would like to propose that the body has representation from the UK Higher Education sector and from technology procurement so that the unique challenges faced by both can be included. Suppliers could be involved in an advisory capacity, so that live issues and opportunities for best practice could be shared in a responsive and agile way.

It is essential that meaningful sanctions are available to the group, and that judgements are publicly available to deter bad practice. Sanctions could include enforcement orders whereby a contracting body in serious breach could be forced to provide a formal improvement plan for future contracts. Restrictions could be placed upon funding to an authority in extreme cases but this would be an extreme measure reserved for the most serious circumstances.

Chapter 2 A simpler regulatory framework

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

A4: Yes – simplification is an important step in reducing costs and improving outcomes for the public sector, while promoting healthy competition within UK industry and regional SMEs. Technology providers in the Higher Education sector regularly provide feedback that the current regulations are inconsistently applied and create waste through unnecessary and duplicated effort. Tenderers have to provide very similar company data across multiple tenders and have to tender for requirements where the outcome appears already certain. The proposed simplifications should address these issues.

We are very concerned that inconsistency in approach across the regulatory bodies in England, Scotland, Northern Ireland and Wales will increase with time, and we would encourage the government to work towards maintaining common standards.

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

A5. The Utilities Vendor Database (UVDB) allows utilities to achieve more dynamic competitions and deliver better value contracts, and this would greatly benefit the public sector as a whole by reducing costs both in the supply chain and for the contracting authority. This is particularly true in IT Procurement, where innovation and new services happen quickly and the sector needs to be able to respond appropriately. An equivalent to the UVDB would allow new companies and disruptive technologies to come to market more quickly and more efficiently. We would like the new DPS+ to replicate that for the public sector as a whole, and for Higher Education bodies in particular. We would like this to be specifically referenced as an example of good practice within the DPS+ guidelines.

Chapter 3 Using the right procurement procedures

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

A6: Yes, the reduction in procedures is an essential step in simplification of the regulations. We believe the new flexible procedure will be extremely powerful for contracting bodies but we are concerned that the very flexibility that gives it value means that it will take some time to bed in, if adoption is linked to legal test cases and sharing of best practice. We would like to recommend that work is done ahead of approval of the regulations to test examples and potential challenges, thereby fast-tracking adoption of the new procedures. This should be done in consultation with bodies like ourselves, who represent the people who will use these procedures on a regular basis.

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

A7: Yes, with the caveat that abuse of these grounds is directly and openly addressed by the new public procurement unit. We would like some clarity on exactly how a state of crisis will be declared.

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

A8: Yes – although we would like to clarify what is meant by innovation in this sense. Innovation in technology can be more granular in description to separate out and highlight areas such as digital, labs, etc. The reforms should provide tools and empowerment to so commercially experienced staff within Public Sector Procurement can enable innovation within the market. There should be ongoing consultation with technology procurement professionals because our market changes very quickly – as an example, the contractual basis for Software as a Service, Platform as a Service and Infrastructure as a Service are rapidly evolving and poorly served by existing processes.

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?

A9: We believe that the market should be allowed and indeed encouraged to collaborate with Contract Authorities before a long-drawn out process. There should be allowance within the regulations for this to be done in a compliant manner.

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

A10: It is essential that contracting authorities have access to accurate and timely data from across the public sector. A lack of such data limits our ability to establish and share best practice, to seek advice from other bodies with similar challenges to our own, and to highlight poor practice where it exists.

This data collection will introduce an administrative burden at point of award, as some contracting authorities do not currently publish accurate or timely data in full. This is a concern for some members. A secure technological solution should be used to minimize this workload and encourage compliance. Likewise, the updating of information should be easy. We would also like some clarity on how the data will be made available, and what search tools will be available for use with it. The creation of data is one thing, but the effective and appropriate use of the data is also important.

Contracting Authorities can also benefit from learning of innovation from solutions delivered by the market in the private sector, which can be applied to future requirements. This could be shared through case studies and webinars from the Cabinet Office to Contracting Authorities by subject area, i.e. Facilities, Technology or Cloud Services.

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?

A11: Innovation can be discovered through good pre-market engagement, so adding formal processes and additional red tape to stages before competition will hinder this. This is particularly true in the procurement of new and innovative technology.

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?

A12: Yes.

Chapter 4 Awarding the right contract to the right supplier

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

A13: Yes, but the weighting should be at the discretion at the Contracting Authority and responses should be in the schedules of a contract, so bidder’s non-economic representations can be delivered through good contract management. We are concerned that there may be unintended competition under the new regulations between different regions or sectors. For example, a university in one city may encourage suppliers to provide social value to that city or region, to the exclusion or detriment of others. Best practice guidelines should be used to highlight where this maybe appropriate but also where it should be avoided.

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?

A14: We would like to request further clarification on exceptions.

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?

A15: As long as the Contracting Authority can lead and own its own procurement and set an evaluation criterion on its point of view and commercial interests, if related to the contract and/or 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?

A16: Yes.

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

A17: CCJ awards against late payment could be added.

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

A18: Yes

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)?

A19: Yes

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

A20: Could this be Mandatory?

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

A21: Yes, subject to details on how it is managed and maintained.

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

A22: Yes, if at the Contracting Authority's discretion and with the understanding that inappropriate application of this measure could be challenged either by the supplier or the new procurement unit described in Chapter 1

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

A23: Yes – we are very much in favour of this and ideally this could be used as a vehicle for pre-qualification questions against a list of suppliers generated in a DPS+, such as the Utilities use for UVDB. The Contracting Authority should have the freedom to write their own questions, relevant to capability and capacity for selection. We would also like flexibility on the Terms and Conditions that will be used, so that contracting authorities will

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

A24: Yes – but we would welcome guidance as the Green Paper is not clear on whether there will be parameters applied.

Chapter 5 Using the best commercial purchasing tools

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

A25: Yes, we warmly welcome this change – Higher Education Procurement is significantly held back by not having the use of a pre-qualified supplier list similar to the utilities vendor database. New entrants are currently blocked from long term frameworks because of the lack of entry points for new suppliers. A pre-qualified supplier list would allow for more competition than standard frameworks and will create fewer barriers for innovative and disruptive suppliers to submit proposals for award, for all works and services. This is particularly true for technology procurement where the market can change significantly over the duration of a typical framework under the current regulations. We would like confirmation that the notice period would work as with the current UVDB.

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

A26: Framework terms, including Direct Award, should be set-out in the issuing of frameworks. Would like clarification if the scope and Terms and Conditions can be improved during an Open Framework, as there is a risk that not updating frameworks with a small group of suppliers for 8 years will not provide best value for the Contracting Authority. We would encourage the review bodies to research appropriate contract terms for new technologies such as Software as a Service. There should be a balance in the new frameworks between formal terms and conditions and flexibility for individual contracting authorities to adapt to their own needs.

Chapter 6 Ensuring open and transparent contracting

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

A27: Contracting Authorities need to be empowered to make decisions – there is a risk this suggesting could lead to more admin, red-tape and delays to delivering contracts, while increasing internal costs.

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

A28: We are concerned that this could be an unnecessary additional overhead that will drive the wrong behaviours in Contracting Authorities, moving us away from commercial acumen towards generating a lot more administration.

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

A29: This could be very useful if, for example, it was linked to the DPS+, if it was maintained as a managed and up to date resource, and if it was simple and easy to use. For some larger companies, competing across many tenders, there would clearly be efficiencies of providing data only once, but some SMEs may lack the resource or expertise to maintain a complex and difficult to navigate portal. There are excellent examples in other areas of UK Digital Government which could be examined for best practice in data collection. We would, however, like some clarification on levels of detail,

i.e. specific KPI performance. We would also like some clarification on how the data will be made available and how it will be searchable, to avoid some of the trivial and vexatious queries we see under FOI.

Chapter 7 Fair and fast challenges to procurement decisions

Q30. Do you believe that the proposed Court reforms will deliver the required objective of a faster, cheaper, and therefore more accessible review system? If you can identify any further changes to Court rules/processes which you believe would have a positive impact in this area, please set them out here.

A30: This could be a driver for spurious challenges that could add costs to Contracting Authorities in delays.

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

A31: We would like some clarification as we have a concern this could add delays.

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?

A32: Yes.

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

A33: Yes.

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.

A34: N/A

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

A35: Yes – capped at the cost of the bid.

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

A36: There should be full a breakdown and transparency on every element of what goes into bid and should be benchmarked against like-for-like bids from that market.

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

A37: Yes.

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

A38: General data can be misinterpreted; debrief letters can benefit bidders with specific feedback that will help them improve in the future. It should be clear that this feedback can be provided in a number of ways but contracting authorities have to be mandated to provide specific feedback in order to increase the effectiveness and competitiveness of UK industry as a whole.

Chapter 8 Effective Contract Management

Q39. Do you agree that:

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

A39: Yes. If we are to foster competitiveness within our supply chains, then we this is essential. We often see examples in Higher Education where sub-contractors for largescale construction works, particularly technology providers, can be subject to extended payment periods and unreasonable contract changes by the main contractor.

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

A40: Yes.

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

A41: No – some contracting bodies have established practice whereby Contract Change Note (CCNs) are often an effective way of solidifying improvement in the delivery of a contract and articulating the outputs of effective contract management. In cases where there is not an amendment where the values have increased the total value of the contract by 15% or more, the publication of CCNs can be an unnecessary administrative burden to the public sector that is already under resourced in personal with commercial experience.

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?

A42: Yes, subject to some worked examples of the likely impact of this on large and small contracts.



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www.ucisa.ac.uk

Registered Company No. 09349804

Please contact:

**Deborah Green
ucisa Chief Executive
ceo@ucisa.ac.uk**

or

**Dr Robert Moore
Chair of ucisa Transforming IT Procurement Working
Party
r.m.moore@leedsbeckett.ac.uk**