Public Consultation Response to Green Paper on Public Procurement Reform

Transforming Public Procurement

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Green Paper on Public Procurement Reform

Public Consultation response

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The Green Paper is proposing a significant reform to the current UK public procurement legal framework. This submission will evidence that, despite its claims, the bulk of the changes are not particularly ambitious, nor do they amount to a real simplification. In general, the changes proposed will reduce legal certainty while trading (hard) law for (soft) guidance, effectively amounting to regulatory substitution and not to a reduction of regulation. Furthermore, the Green Paper also shows a lack of understanding of the real practical issues affecting public procurement beyond the confines of central government, as well as a complete disregard for the implications from devolution.

This response will first provide a general overview of the Green Paper and then address the consultation questions in turn.

1. Main issues

Lack of ambition

The first critique to the Green Paper is its lack of ambition. While on a superficial reading it looks otherwise, in practice the changes will be less transformative than claimed. The main changes (the new procurement principles, increased negotiation, guidance over law) are not really new and together they take the system back to 1990[2] instead of moving it forward. This is not a system designed for the 21st century as it mostly re-hashes old ideas.[3] The current mindset remains unchanged, and even what could be construed as new (the more commercial angle) is done in a way showing lack of understanding of why practice is what it is today.

The lack of ambition is evidenced by the focus on changing the law and not the institutions. Changing the law is the easy bit, but not the change that would yield better results. Institutions, on the other hand, are more difficult to implement, not to say more expensive, take longer to bed in but ultimately are more efficient in driving change.[4]

No real simplification

The Green Paper claims to pursue and achieve simplification in public procurement. Replacing regulations with vague principles supported by guidance does not make a system simpler, if anything it makes it more complex. This is due to the reduction in legal certainty arising from the change, since principles and soft law are by default less able to generate legal certainty. At best it

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[2] Sue Arrowsmith, Transforming Public Procurement Law after Brexit: Early Reflections on the Government's Green Paper, working paper available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3749359

[3] With a similar view regarding the lack of transformative effect of the proposals, Albert Sanchez-Graells, The UK's Green Paper on Post-Brexit Public Procurement Reform: Transformation or Overcomplication? (February 17, 2021). To be published in (2021) European Procurement & Public Private Partnership Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3787380.

[4] Leslie Elizabeth Harper, Ana Cristina Calderon Ramirez, Jorge Enrique Ayala (2016), "Elements of public procurement reform and their effect on the public sector in lac", *Journal of Public Procurement*, Vol. 16 No. 3, pp. 347-373. https://doi.org/10.1108/JOPP-16-03-2016-B005.

will simply be a case of regulatory substitution.[5]

Furthermore, the ease of creating new guidance is in of itself a problem as it creates a burden on contracting authorities to ensure they are following the most recent guidance. Proliferation of guidance documents make it is easier to have conflicts between different documents. Once more, this is neither conducive to legal certainty nor to simplification.

In addition, the Green Paper mistakes flexibility for simplification. Providing more flexibility by getting rid of procedural *does not* simplify the procurement system. What it will do instead is create uncertainty for the contracting authorities and a diverging practice. In fact, this will be the opposite of a 'single market' with practice diverging from contracting authority to contracting authority and even inside the same contracting authority depending on which team is running the procurement exercise. As such, providing more flexibility for contracting authorities to design their own procedures will increase transaction costs for economic operators. In consequence, smaller economic operators (SMEs and third sector organisations) will struggle in this new regime.

Lack of understanding of the wider procurement reality

Looking at the Green Paper as a whole, it appears that the solutions proposed in it do not show an understanding of the wider procurement reality. In fact, it can be argued that the changes could potentially benefit the top 1% of contracting authorities but not the remaining 99%. This can be evidenced, for example, by the emphasis on more flexibility as if that was a day-to-day problem for the majority of contracting authorities in England and Wales. It is not, and the benefits will instead only be felt by those authorities with significant budgets, appropriate human resources and a workload which privileges larger suppliers. Everyone else will be worse off since the added flexibility will only increase the number of key decisions that need to be taken by procurement resources already stretched thin.

The same logic is in display on the idea behind the public good principle and the proposal to uncouple the award criteria from the actual object of the contract, even if limited. This will add yet more complexity where it is not needed, not to speak about the implications for devolution of making Welsh contracting authorities have to pursue a public good principle as defined by the UK Government.

2. Potential consequences

Increased complexity

As hinted above, the first major consequence of the changes proposed by the Green Paper will be an increase in complexity of the procurement system. This makes for a system which is harder to navigate and more variable, affecting contracting authorities and suppliers in equal measure. Increased complexity is likely to lead to reduced participation by suppliers, thus affecting competition overall. As for the benefits of increase discretion overall, one just needs to look at the experience with the procurement of ventilators, PPE or the Test & Trace system in England since the beginning of the COVID-19 pandemic.

Increased costs

Once a procurement system becomes more complex, by definition, the costs associated with procurement will increase. For the public sector, these are direct costs, *ie* the costs of running a procedure but maybe overhead costs, associated with a likely increase in the size of procurement teams which are to be necessary. This is not to say that increasing spend in procurement activity is a

[5] As argued by Sanchez-Graells on his response to this consultation, Albert Sanchez-Graells, Response to consultation on procurement Green Paper, 15 January 2021.

bad thing in itself, if anything it is welcome bearing in mind the historical low levels of spend in this area. But it is important to be honest and transparent about the impact of legislative choices.

For the private side transaction and opportunity costs are likely to rise as well. The first is certain to happen in the context of more variable procedure practices, particularly if contracting authorities decide to start negotiating on contracts where traditionally they did not do so. Since procedures may thus require more attention and resources from each economic operator, then the decision to commit to one procedure over another will increase the opportunity costs as well, thus reducing the likelihood of a given economic operator competing for multiple contracts at the same time. As such, it would not be unexpected to overall find a reduction in competitive pressure with fewer bidders per contract.

Reduced efficiency

Taken together, the two consequences mentioned above, are likely to lead as well to a reduced efficiency of the procurement system. This will mean either more expensive works, goods and services or a reduction in their quality.

3. Areas not addressed by the Green Paper

Electronic platforms

The first area that is not addressed directly by the Green Paper is that of electronic platforms. These are fundamental for the good functioning of a procurement system in the 2020s and the Green Paper does not include a single line about them. The closest that can be seen is the idea of creating a new central digital platform for commercial data and supplier registration information. This is indeed a good proposal but one which probably should be expanded in terms of its remit, objective and resources.

It is a shame, however, that the Green Paper missed the opportunity to really reconsider the electronic systems used in public procurement, moving from a notice model to that of a transaction one such as those adopted by Ukraine or Paraguay. This lack of emphasis on the digital elements of the system is one of the reasons why I feel the Green Paper to be less ambitious than claimed.

Automation

In connection with the lack of attention to electronic platforms, the Green Paper is a missed opportunity in terms of adopting a new paradigm in public procurement around the automation of activities without added value. As suggested further down, exclusion grounds should be moved to the realm of the supplier registration system and simply automated to the maximum extent possible, preferably by only using mandatory ex

Low competitive pressure for public contracts

The information on the progressive reduction of the number of bidders per contract is not new[6] but remains actual and relevant. It is very surprising thus to not really see measures designed specifically to improve the competitive landscape for procurement contracts. As posited above, the main changes go in the opposite direction thus accelerating the underlying process of reducing the number of bidders per contract opportunity.

Resources

[6] The Economist, "Rigging the bids: Government contracting is growing less competitive, and often more corrupt." Nov 19th 2016.

While it is true the Green Paper only looks at reforming procurement and not the wider public sector, it is evident that its changes when taken together require more resources from contracting authorities. These can take various forms but at the end of the day they boil down to the minimum common denominator and that is money. Where will the money come to pay for those commercial teams or the overall higher transaction costs that the new model will entail?

Chapter 1

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

No. The current set of principles inherited from EU law are a known quantity and provide a good enough balance between in terms of their operation and interaction. It is self-evident that creating a new set of principles in a system with less hard law and more dependent on guidance is an attempt to move from that legal framework and establish a new one. As for the potential benefits of such change in overarching principles I remain unconvinced. Whereas transparency and integrity are not contentious, the remaining proposals for principles warrant some more explicit comments.

Public good

Public good is not a public procurement principle (nor has it been ever connected directly with it) but is instead a general administrative or public law principle and, as mentioned in para 28 of the Green Paper, regulated elsewhere. From a systemic point of view it does not make sense to duplicate it in the context of public procurement.

Having said that, it is arguable that the concept behind the principle of public good as included in the Green Paper (paras 29, 30 and 37) is not one really of public good as conceived above but instead for providing cover so that only the Government can dictate what constitutes public good and force all public bodies to follow its definition of public good and how it is expressed in the National Procurement Policy Statement (NPPS). Since the NPPS is not binding only for central Government, this seems to me an overreach of Government to shape how the wider public sector is to interpret the concept of public good. Once more, this raises issues connected with public law (and the limit to the Government's powers) and, particularly, with devolution as well which have not been thought through thus far.

Value for money

The Green Paper connects value for money indirectly to public good since the definition of value for money is to be defined in accordance to a "strategic case" which aims to ensure a connection with "government priorities" (para.30). In addition the Green Paper considers value for money as "social value for money" (para.31), connecting it to some sort of lifecycle costing (para.32) all while moving the award of the contract from the Most Economic Advantageous Tender (MEAT) criteria to the Most Advantageous Tender (MAT) thus raising the question why the point of elevating to general principle the concept of value for money if it is to be construed differently from how it has been done thus far.

Fair treatment of suppliers

Whereas the current rules require equal treatment between suppliers, the Green Paper proposes instead that they are to be treated fairly, replacing a fairly well established principle with a more nebulous one. If suppliers are to be treated equally and in accordance with the law, that provides more legal certainty to both undertakings and contracting authorities than a wooly requirement of "fair and reasonable" treatment. Note that the proposal is not one to adopt equity (in the English law sense) as a principle of procurement but instead to develop a new principle which appears to be similar or related to but not identical.

It does not help that the concept appears bereft of internal consistency in the Green Paper itself. As mentioned earlier it amounts to "fair and reasonable" treatment (para.35) but apparently also that "decision-making by contracting authorities should be impartial and without conflict of interest" (para.27). Those are two very different things and a concerning starting point for a system

which is to be more reliant on principles and guidance instead of hard law.

Non-discrimination

The Green Paper proposes a puzzling definition of non-discrimination as a principle applicable to public procurement. First, in para.27 it is described as "decision-making by contracting authorities should not be discriminatory" which is in itself a terrible definition since it built on a negative and does not add any density to the concept. Then, in para.36 it states that "contracting authorities cannot show favouritism among domestic suppliers" and that foreign suppliers may benefit from such protection as well if covered by an international trade agreement.

Taken together it seems that non-discrimination only binds contracting authorities, thus allowing discriminatory approaches arising elsewhere, for example in the law or guidance. This can be seen already for example in the possibility of restricting participation in contracts below thresholds to suppliers based in certain postcodes present in the PPN11/20.[7] Once more it would have been preferable to retain the known definition of non-discrimination instead.

Finally, the proposed list of principles omits competition which is a key principle of public procurement and one that was finally recognised as such in Directive 2014/24/EU and the Public Contracts Regulation 2015. Not including this principle sends out a signal that procurement is no longer about finding the best bid for a given contract in a competitive environment but something else instead. In that sense it is in line with the principles of public good and the deformed non-discrimination.

I am not sure this is a positive development and frankly it constitutes yet another concerning sign of the potential changes that the new regime may herald. Once competition is taken out of the procurement equation, the route to arbitrariness of procurement decisions with obvious risks for integrity and management of public funds is short and slippery. I would posit that the "unintended consequences" of this change (in conjunction with public good and MAT) are significant and that not enough care is being taken to address them.

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?

Reading paras 44 and 45 it is unclear of what exactly is to be achieved by this unit. It seems its remit is to monitor commercial capability and to intervene if necessary, issuing improvement notices with recommendations that would be backstopped by compliance tools, but not a control of legality like the Danish[8] or Swedish[9] competition authorities. It appears thus that this amounts to a "stick approach" to improve commercial capability of contracting authorities.

With that in mind, the proposed unit makes no sense since it starts by the end, that is reviewing and eventually trying to enforce behaviour change. What the Green Paper is bereft of is i) an understanding of the lack of commercial acumen in the public sector; ii) actual and measurable proposals to help contracting authorities go from the proverbial zero to one in having the commercial capacity.

As for the first it is easy to point out a number of issues that explain the current state of affairs: depleted budgets from a decade of austerity, lack of human resources, lack of human resources skills, organisational silos, wrong incentives/KPIs and procurement being seen as part of the financial/auditing/control arm of an organisation instead of being considered strategic. In addition, the national fetishism with making procurement cheap (ie, not spending much in the act of

[7] Cabinet Office, Procurement Policy Note 11/20: Reserving below threshold procurements, 15 December 2020
[8] Danish Competition and Consumer Authority, https://www.en.kfst.dk/
[9] Swedish Competition Authority, https://www.konkurrensverket.se/en

procuring *and* not spending much in what is being sought) is an additional factor as well. Changing the law is easy and cheap, while changing the organisational culture is not and only the latter may yield the results the proponents of this enhanced commercial mindset are looking for.

Getting to that commercial mindset costs significant sums of money. Therefore, it is puzzling that other than the usual platitudes about "upskilling commercial teams" there is not a real commitment to invest the money needed to achieve the stated goal. Instead, the Green Paper proposes a stick under the guise of this new unit.

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?

I do not think that the proposed unit will be able to be successful in the terms proposed by the Green Paper and note - once more - the emphasis on sanctions. What I would welcome instead would be a body similar to the Danish or Swedish Competition Authorities which have the powers to intervene in public procurement. If the Government wishes to improve the commercial capability then it could add the remit it is currently proposing. In this scenario the country would have a single unit with the capacity to intervene in both legal and eventually commercial issues during the procedure so that it would be possible to improve procurement.

I shall add that Denmark has a well functioning competition authority + tribunal system which would make for a good blueprint for this approach and this proposal ties in well with the tribunal suggestions from Chapter 7.

Furthermore, what I note the absence of any reference to research in public procurement. One of difficulties with improving public procurement practice is the dearth of empirical and experimental research being done in public procurement. Sharing "best practices" is not really an answer since more often than not what is being passed as such are nothing more than "first practices" or "practices which have not gone horribly wrong". However, once more, all this costs money and implies that the Government is able to understand that spending more in improving procurement leads to net positive results in the long run.

Chapter 2

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

Merging multiple different regulatory regimes into a single consolidated text has some benefits, such as consistency of terminology and concepts or lower probability of boundary issues between the various regimes. However, these benefits are frankly minor and affect a minority of users.

The beneficiaries of such consolidation are of three types. The first will be of legal practitioners who advise multiple types of contracting authorities and as such would prefer to have a single regime to work from. The second will be those (few) contracting authorities which straddle two or more regimes depending on what they buy, mostly public sector and utilities. The third are suppliers which also work in sectors covered by different rules. For the latter it must be stated though that a move from detailed rules divided into multiple Regulations and a vague single regulation refined by guidance will be net negative.

Having said that, the proposed consolidation amounts to the creation of a public procurement code or of a public contracts code depending on the emphasis. It is ironic that legal codification is a continental invention and a common feature of modern civil law jurisdictions, including in the field of public procurement

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

No comment.

Chapter 3

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

No. Reducing the number of procurement procedures does not really achieve the stated outcome of simplification. First, having a larger number of more detailed procedures allows for some standardisation and as such provides for legal security and predictability of behaviour. As argued in the introduction the more standardisation we have in public procurement, the simpler the system is to use for those which interact often with it.

However, it is true that the overlap between competitive dialogue and competitive procedure with negotiation is excessive and does not help a contracting authority when deciding to use one or the other,[10] so getting rid of one would be perfectly acceptable.

Limited tendering procedure

As for the proposed limited tendering procedure, it does not amount to a procedure at all. It is simply a shell for contracting authorities to project into whatever they desire to achieve. This means that, potentially, each limited tendering procedure used in practice will be *sui generis*, composed of the different components and leading to different practices. It is likely that the practice in each contracting authority will coalesce around a specific way of using the limited tendering procedure to reduce the cognitive load of procurement officers using it on a day-to-day basis. Even then, what this will lead to is to a number of procedures that equals the number of contracting authorities in the country. This means wildly differing practices between contracting authorities, pushing the compliance cost with it into the undertakings taking part in those procedures.

It must be said that this is one of those significant changes which will benefit mostly a finite number of contracting authorities at the top of the "procurement capacity pyramid", in line with the 2014 introduction of the competitive procedure with negotiation and the innovation partnership. In fact, one should question exactly what kind of worthy objectives will be possible to pursue with this limited tendering procedure which aren't with restricted procedure, competitive procedure with negotiation, competitive dialogue or innovation partnership. What types of good procurement behaviours on the part of the contracting authority are hamstrung by these procedures? If the answer is around negotiation, then a further question must be asked about what is currently wrong with the competitive procedure with negotiation that requires changes.

It should be added that adding more negotiation into public procurement and the discretion it entails is not a particularly good idea. Negotiations add complexity to procurement, are hard and require specific skills to do well.[11] Larger undertakings will be in a better negotiating position than

[10] Pedro Telles and Luke Butler, Public Procurement Award Procedures in Directive 2014/24/EU, in Francois Lichere, Roberto Caranta and Steen Treumer (eds), *Novelties in the 2014 Directive on Public Procurement*, Djof, 2014. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443438

[11] With a similar view, focused on the administrative burden With a similar view regarding the lack of transformative effect of the proposals, Albert Sanchez-Graells, The UK's Green Paper on Post-Brexit Public Procurement Reform: Transformation or Overcomplication? (February 17, 2021). To be published in (2021)

the contracting authority since they have more resources to allocate to the negotiation and the contracting authority team will have to negotiate with multiple undertakings. On the flipside, smaller undertakings will struggle with negotiations since that is an additional skillset to master in addition to expertise in whatever is being bought. Furthermore, adding negotiations into public procurement will increase the cost associated with each procedure - both in the public and private sides of the table. That is not necessarily bad of course if it leads to a better outcome at the end, but it is important to be intellectually honest about the trade-offs it entails.

Then one must consider the unintended consequences of a move to increase negotiations in public procurement. How will the procurement landscape look when each and every contracting authority is engaging in more negotiations than now? The logical consequence is going to be a reduced participation rate since the number of parallel negotiations an undertaking can have at any given time is going to be smaller than not having to negotiate at all and only write a tender. In addition, every single procedure with negotiation will take longer as we have seen in the past with the competitive dialogue for example. The UK is already a country which struggles to do procurement processes quickly, how will contracting authorities cope when they fall into the trap of including negotiations into their procurement practice. Or worse, when they are mandated to by the new unit proposed on Q2 so that their procurement is "more commercial"?

If one investigates the private side it is self-evident that a net increase in negotiations will increase the transaction and opportunity costs for all undertakings, but there will be winners and losers. The winners of this move will be the larger undertakings since they can absorb those costs better than SMEs and third sector organisations which will not.

In conclusion, reducing the number of procedures to include a "shell procedure" will increase transaction and opportunity costs for both sides of procurement. An emphasis in negotiations which appears to be behind this move will further compound that increase and significantly advantage larger undertakings at the expense of smaller ones and the public sector as well.

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

No, as the current rules around extreme urgency provide enough flexibility already. They are clear, reasonable and limited. In addition to Regulation 32(2)(c) of the Public Contracts Regulations, PPN 01/20[12] provided with a fairly clear and easy to use guide for the purposes of awarding contracts based on extreme urgency grounds.[13]

Confusion arose in relation to COVID procurement from contracting authorities wanting to use the extreme urgency grounds for use beyond the scope of the law and guidance. We have already seen in the various NAO reports the consequences of a generalised use of non-competitive bidding in COVID public procurement, without even discussing if the extreme urgency grounds were met or not. Widening the scope of application of exceptional rules to any "crisis" as determined by the Government or the contracting authority will only contribute to the erosion of good governance and compliance principles in public procurement, introducing more discretion and lack of accountability where it is sorely needed. Does the UK really need more procurement disasters such as the ventilators (links) or PPE (links)?

European Procurement & Public Private Partnership Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3787380.

[12] Cabinet Office, Procurement Policy Note 01/20: Responding to COVID-19, 18 March 2020.

[13] Pedro Telles, UK Government publishes Procurement Policy Note on dealing with COVID-19 (telles.eu, 18 March 2020)

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

Over the last decade or so, innovation in public procurement has become a key reason to justify changes to procurement legislation. This is, in my view, misguided. As for the current Green Paper, what is the reason to ask for more innovation in public procurement? What gaps, issues or problems have arisen from current levels of innovation in public procurement that could be solved with more innovation? If the proponents cannot provide evidence of those limitations *and* that they would be solved with more innovation, then this is simply a policy objective without any real justification for it. I would posit there are much more significant issues in public procurement which would warrant attention before innovation would be at the top of the pile of issues to solve.

It is true that public procurement has a significant weight in the economy and that in specific sectors such as healthcare it is the primary buyer. But the truth of the matter is that most procurement is carried out to service day to day needs. Most money and most contracts simply solve mundane issues. This is not to say these cannot be improved upon of course, but that is different from widely defined 'innovation'. Innovation is a niche objective in public procurement and should remain so as it is irrelevant for vast majority of contracts awarded.

It is not surprising then that the usage of the procedures which may enable innovation more easily has been limited. Competitive dialogue, competitive procedure with negotiation and innovation partnership were not used more widely since 2015 because simply there was no need for them. And at least in the case of the innovation partnership, it includes a wide margin of discretion and for negotiations that seem to be the driving force for the current changes in the number of procedures as per Q6.

With the frameset of regular procurement established, it is evident that trying to increase more innovation into day-to-day procurement is misguided. That was the approach taken in 2014 Directives (and the 2015 Public Contracts Regulations) and as we have seen without much success in general. However, the UK is currently a leading light in this regard (reference Sascha) so at least the current rules are not disadvantaging those contracting authorities which want to push the boundaries.

Where to increase innovation: centrally

Taking into account what is argued above, there is however another area where pushing for innovation in public procurement makes perfect sense and that is centrally. If the Government really wants to increase innovation in public procurement it should set up a central body explicitly with that remit or extend the remit of an existing body for example. This body should be able to commission research and innovative work by itself, be tasked and measured with disseminating this information and - crucially - be available to be hired by contracting authorities to help them with procurement procedures where innovation is necessary or would be welcome. This approach that the costly development of competences in this area was centralised in a team that could help out the wider public sector, therefore avoiding the cost associated with forcing every single contracting authority in the country to develop and incorporate such skill.

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 we have seen in the current legislative framework, it is not for the lack of procedures for innovation (innovation partnership, competitive dialogue, competitive procedure with negotiation) or other mechanisms (outcome-based specifications, design contests) that there is not more innovation in public procurement. In other words, it is not because of the law. Therefore, the reason

for the allegedly low levels needs to be found elsewhere. I would posit however that more innovation in absolute terms overall is not necessary but that does not mean we should not look for the reasons behind its current levels. In short, the difficulties faced in practice boil down to two main factors: incentives and resources.

As for the incentives, contracting authorities do not have the right incentives in place to foster innovation in public procurement. This is part due to the organisational structure and where public procurement sits in the organisation as well as how all stakeholders are measured, from politicians down to commissioners/clients and procurement officers. Changing this state of affairs cannot be done by fiat or at the stroke of a pen via procurement law. This would imply a much more significant change in the operations of public bodies beyond the scope of a change in procurement law which, as I argued above, it is not necessary since it is not by the lack of legal support that contracting authorities are not doing more innovative procurement.

Since the incentives are not aligned to make innovation in procurement a priority for public bodies (nor do I think they should) the fact of the matter is that resources are not allocated to such objective. In addition, resources for procurement are always in short supply and without investment in that area it will not be possible to improve their efficacy vis-a-vis whatever objectives are set forth in the law for them.

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

Building upon the answer to Q9, it is arguable that if the innovation efforts are centralised it will be easier to collate the information and data for sharing across the wider public sector. In addition, more and ongoing empirical research is needed to ensure what really works in terms of innovation in public procurement. This is a far cry from the usual "best practices" approach taken thus far.

As for data itself, we should treat the data generated from a contract performance to be public by default, particularly for services that are to be retendered periodically. That is, all the data collected by the economic operator should be handed over to the contracting authority so that it can be made available to future bidders, effectively reducing the incumbent advantage and levelling the playing field. This should not be construed as commercially sensitive or constituting a trade secret since it arises naturally from the contractual relationship between the parties and not from the previous work done by the economic operator that would warrant protection. However, there is no such thing as a 'free lunch' and it is very much possible that contractors would price in this enhanced data disclosure.

A good example of this policy in action can be seen from what the Barcelona City Council has been doing with mobile telecom services provided to the council.[14]

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?

The pre-procurement measures which could be conceived to increase innovation via public procurement all imply an increase in transaction costs. This is valid for both the economic operators and the contracting authority. Economic operators' interest in pre-procurement engagement is self-interested and perceived as a means to enhance their relative position vis-a-vis the competition. If it gives them an edge, they will want to be involved. This is the kind of pre-procurement engagement

[14] Wired, Barcelona is leading the fightback against smart city surveillance, 18 May 2018.

that needs to be stamped out and where frankly the current EU rules are very disappointing since by definition the economic operator who helps the contracting authority discreetly will have a sizeable advantage over the competition.

What business does not want is the type of pre-procurement engagement which is more beneficial to the contracting authority: wide, transparent and where those ideas could be 'cherry picked' to draft technical specifications. This is one of the reasons why business was always so reluctant regarding the competitive dialogue and pushed for constraints on cherry picking or use of information by the contracting authority when drafting those technical specifications. Non-discriminating technical specifications are the great leveler of procurement.

Therefore, I do not really see a wholesale way to improve pre-procurement practice to enhance innovation in the UK other than the suggestions made on Q9. Occasionally it is surely possible to use pre-procurement market engagement to improve the design of the specifications, but this needs to be done in a transparent way and with a firm commitment that any idea offered by prospective economic operators needs to be considered as available to be included in the technical specifications so that any economic operator is free to bid on it. It is almost as the process of designing technical specifications was being open sourced and done in a more collaborative way. Otherwise, these will be a waste of time (and resources) for anyone involved.

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?

Yes, they should never have had a specific regime for themselves in the first place. There is nothing specific or fundamentally different about those sectors warranting the different treatment other than inertia and lobbying power of the organisations representing economic operators in those sectors.

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"?

Reading paras 100-102 together it is unclear what really is the logic of this change, since the Green Paper claims that what it wants to be achieved with MAT could already be done under MEAT. So, is this a deeper change or simply a rebranding?

In para 100 it is claimed the current MEAT criteria can be mistaken to mean lowest price. This is an illogical assertion since MEAT was created precisely to move away from using lowest price as the sole criterion. If MEAT is not being used as widely as perhaps it would be preferable it is because it implies two things: a more complex assessment model, with more variables and discretion; moving away from lowest price which makes any decisions more expensive and inherently more difficult to defend. Therefore, changing the name from MEAT to MAT will not have an effect in the reasons that explain the lack of use of MEAT over lowest price.

Paras 101 and 102 taken together try to square the proverbial circle. Adopting MAT will lead to more complexity in the assessment process, particularly with the emphasis on social value and that means less efficiency and higher transaction and opportunity costs. It does not help that in para 102 the Green Paper warns against "gold-plate" contracts especially if Government or Parliament have decided such provisions should not apply to the voluntary or private sector. Since we are talking about award criteria which are supposed to be non-discriminatory, how will have award criteria which apply only to a subset of economic operators which present their bids?

Adding non-core objectives to a contract is not 'gold plating' but simply using procurement to achieve outcomes that are not relevant for the contract at hand without knowing if it is being

done efficiently or not. As argued in the introduction, this will increase complexity and costs so it is important to honestly acknowledge the tradeoffs it implies instead of trying to square a circle.

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?

No. This is an extremely problematic development and one clearly connected with the idea of creating a public good principle which is to be defined by the Government. In addition to the issues raised in Q1, it is important to mention here that this change is orthogonal to the purported objective of simplifying public procurement.

By creating award criteria not connected with the subject-matter link of the contract, the complexity of the assessment will increase for procurement officers doing the day-to-day tasks of applying procurement rules. It will also increase costs since by definition it will mean procuring something the contracting authority is not looking for, on top of what it really needs. Furthermore, it will also sever the link between the buyer (or beneficiary) and what is being bought, creating incentive issues where there currently are none.

On the private side, it will increase costs and complexity for economic operators, since they will now have to comply with what the contracting wants from them in terms of contract deliverables as well as whatever extra award criteria are included. As argued before, this is a move which disadvantages SMEs and third sector organisations more than larger economic operators.

If this change makes it into the law, it will lead to a more complex, expensive and less efficient procurement system.

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?

No, for the same reasons put forward on Q14. I would add, however, that this is yet another example of the proposed reform not considering the implications from devolution and how Scotland, Wales and Northern Ireland may have different priorities to pursue than that of the UK Government.

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?

No comment.

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

No, to achieve real simplification, the system should not have discretionary exclusions and only mandatory ones assessed and managed centrally in conjunction with the debarment list of Q21.

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

No comment.

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

All exclusion grounds should be made mandatory, so either that junction makes them important enough to be mandatory, or if that is not the case then they should all be abolished instead.

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

No, to achieve real simplification, the system should not have discretionary exclusions and only mandatory ones assessed and managed centrally in conjunction with the debarment list of Q21.

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

Yes, if it means the centralisation of the process leading to the inclusion of economic operators in the list. This is an area where effectively it is possible to do much better than until now. Debarment is complex and the assessment it entails (in addition with self-cleaning) is better served if done centrally and separate from a procurement process, thus reducing the likelihood of litigation of the procurement procedure.

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

In theory yes, but as ever, the devil is in the details. This is one of those areas that I am yet to see a scalable solution which works since it is very difficult to implement in practice in a non-discriminatory way.

One of the ways to do so would be to request contracting authorities (and economic operators) to provide feedback on every contract to be included in a central repository. Such repository should then become the only source of past performance information. This does not have to be a publicly facing repository of information and could be made available only to contracting authorities and economic operators, in the case of the latter only the entries pertaining to themselves.

However, the tendency of a system like this is for the parties to default into a minimum effort (and risk) by giving high marks and not including the real, honest feedback. In addition, taking into account the low compliance rate with the publication of contract award notices, it is hard to see how this system could be made to work without some sort of compliance mechanism since for the purposes of a given procurement officer this would be a ‘public good’ and not an action it would derive benefits from individually.

It is posited however that this mechanism could be done in a ‘complexity neutral’ way. Assuming a compliance mechanism is found, the effort of inputting feedback information into the system would be compensated with an easier assessment of prior performance in future procedures since all contracting authorities would be providing information into the system (hence the qualification of it as a public good).

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

Yes, any and every decision that can be automated should be automated away. Where in point 130 it is stated that "[c]ontracting 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" this should translate into an automation of the process.

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

As formulated, this question shows a lack of understanding on how regulation 60 currently operates. There is no such limit on what information can be requested to verify supplier self-assessments, instead what we have are contracting authorities reacting to the incentive of not asking for extra information due to the extra costs involved with its processing. This is evidence that contracting authorities do not see the verification of exclusion and selection grounds as being value adding enough to warrant allocating resources to it. As such, changing the law in the proposed fashion (which is not really a change at all) will not lead to a change in behaviour.

Chapter 5

Q25. Do you agree with the proposed new DPS+

Yes. Dynamic Purchasing Systems are an excellent tool, more modern and more competition-friendly than framework agreements. Therefore, improving on them is the right approach. Once more, however, it is important to consider a 'live' system for automatically assessing the exclusion grounds. As argued earlier, this should be done centrally and separately from the work of the contracting authority.

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

In general, the standardization of frameworks rules is a welcome development and once more an indication that real simplification arises from standardisation and not discretion passing of as flexibility. The proposals warrant a few comments, however.

First, open frameworks should not have a closed period at all, as otherwise they will operate as a closed one for almost the same time. Therefore, for the purposes of improving competition it would be preferable that open frameworks are effectively open from the first moment, that is from year one onwards. This is a reasonable compromise to expect from contracting authorities which will have the validation/certification cost of new participants just once a year and can thus organise their workload accordingly. Traditionally, the constant validation of participants was pointed out by contracting authorities as a downside of dynamic purchasing systems.

Second, neither the open nor closed framework models fully address what is for me the key issue with them: lack of transparency once they are set up. It is true that on para 155 there is an indication that transparency will be improved, but the compliance with this transparency obligation cannot remain on the hands of the contracting authority to be done manually and instead needs to

be done automatically via the electronic platforms which should populate the information in the central registry automatically as it is suggested in the answers to the questions on Chapter 6.Q27. Do you agree that transparency should be embedded throughout the commercial lifecycle from planning through procurement, contract award, performance and completion?

Chapter 6

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

Yes, we should adopt transparency by default but with caveats. Transparency is necessary for accountability and to instill confidence in the system at certain points in the commercial lifecycle: planning, beginning of procurement, contract award, performance and completion. A more extreme view of transparency may include full transparency during the procedure itself as well, but that has significant downsides from a competition perspective point of view which negate any advantages arising from the enhanced transparency during the procedure. So how should transparency be implemented overall?

Planning

During the planning stage of a procurement procedure, transparency is required for two purposes. First, it allows the contracting authority to know better what it wants to buy from the market. Second, it gives the market early information on what may happen soon, increasing the likelihood motivated economic operators will be interested in the contract. What this would avoid is the current situation where the contracting authority will discreetly reach out someone in the field to get information about what they should be buying, effectively giving a single economic operator the advantage of influencing the technical specifications before they are made public.

This is not to say that being transparent at this stage does not entail competition risks. By providing more information to the market before competitive pressure is applied, it gives the chance for economic operators to coordinate their behaviours to the detriment of a contracting authority and in breach of competition law.

The best way to engage the market is by setting up an online communication mechanism which logs all the information shared and requested, improving the audit trail of the process. This kind of forum should be public for all interested parties but deprived of any identifying information from the participants, possibly requiring manual moderation of messages before they are made public in the system.

The name of the participants in any discussions at this stage should not be made public, once more because that will allow them to find out who else interested and potentially coordinate their behaviours. That does not mean the information on identity should not be collated, of course, since that might be important for investigations by the CMA in the future.

Beginning of procurement

I do not think extra transparency is necessary at the beginning of the procedure and if, anything, the concern should be from attempts at reducing it via mechanisms such as the proposed crisis ground for awarding contracts directly.

Contract award

It is fair to say that contract award transparency is not working well at the moment. The

reasons for that are simple and once more can be reduced to incentives. Whereas the lack of compliance with transparency obligations at the beginning of a procedure has an effect on the possibility of leading to litigation by the market at large, not complying with the award notice obligation has no consequences whatsoever. As it is a manual task without consequences, it is no surprise compliance with it is low. There are three potential solutions to improve on the current proposal.

First, since publishing contract information is a menial task that does not add value to the contracting authority, this is yet another example of what could easily be automated away. Since the information is included in the electronic platforms used by the contracting authority it is collected already and should be automatically forward to the appropriate central registry. This is, to me, the obvious way to solve the problem, since it is automatic and also avoids manual errors that could be introduced.

Second, Paraguay achieved a compliance rate of 100% by leveraging the single electronic platform in the country as a mechanism to generate a unique payment code so that monies can be disbursed by the Finance Ministry.[15] This is done only after the relevant information has been inputted into the electronic platform and is valid for the contract award and any future modifications. Therefore, all financial data is captured automatically by the system.

Third, manual compliance can also be achieved via a change in the incentives. Portugal has achieved a high compliance rate with contract publication by making it illegal to disburse a payment for a contract before the award notice is manually uploaded to the central registry. This is not a perfect system since it relies in imposing consequences on the individuals making the payment since they would be personally responsible and in full for the monies.

Contracts and contract modifications

Contract information should be public by default as suggested and this is a significant departure from the current system. However, I feel it does not go as far as it should and there is scope for improvement in the proposal.

First, it should not be mapped out to FOI rules and exceptions. If it was, then this would amount simply to an 'automated' FOI publication which would do transparency a disservice. Publication of contract information has traditionally been disconnected from FOI and there is no reason to change it. In fact, in countries such as Portugal[16] or Slovakia the full contract is disclosed as a matter of routine, going well beyond national FOI rules.

Second, with the above in mind, the only bits of a contract that should be redacted are exclusively trade secrets narrowly construed. Redacting is an exception to the principle of transparency and in consequence should be interpreted narrowly. In effect, this would mean that all information from an economic operator should be considered as publishable except for trade secrets. On the definition of what is considered a trade secret, either the Government maintain current precedents set by the courts or, instead, it could adopt its own definition of trade secret for the sole purposes of contract disclosure.

Third, whereas trade secrets should be protected because they lack any other legal protection, intellectual property rights should not be protected via non-disclosure. Any material or information covered by copyright, design rights, trademarks or patents are already protected by law and with strong enforcement mechanisms available to their beneficiaries. These are legally mandated monopolies which allow the holder recourse to the courts for enforcement. They do not need the extra protection afforded by non-disclosure of contracts.

What is said above for contracts is valid for contract modifications as well.

[15] Open Contracting Partnership, A case study on how Paraguay could save millions by reducing late payments in public procurement, 22 February 2019.

[16] Portugal publishes the contracts in full, albeit in PDF format, on the Government procurement portal, www.base.gov.pt.

Performance and completion

Collecting data on performance and completion is important for benchmarking and considering future improvements to the system. It is not necessary to publish that information however. It may be relevant to publish if there is an intent in improving accountability in procurement, in case for example of low trust in the behaviour of public bodies.

As for payments however, that is a different matter and as can be seen from Paraguay, there are real accountability benefits in making payment data transparent as well.

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

Yes and in full.

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

Yes and this is probably the most interesting and potentially most ambitious part of the Green Paper. To do it well, however, it will require significant resources and a different mentality on how to organise public procurement.

As can be seen in multiple answers above, I believe any operation which does not add value to public procurement should be automated and severed from the running of an actual procurement procedure. Exclusions, debarment, selection(maybe), contract award and modification notices, data collection all should be automated and dealt with by systems and not procurement officers. This is the most significant change that could simplify procurement for those involved on the day to day running of procurement procedures.

The lack of a central digital platform is a significant oversight of the current architecture. This has meant that electronic platforms can evolve individually without the need to consider data collection that could be fed automatically to a central repository for processing. Even for the CMA, increasing the ease of access to the data would give it an edge for its investigations.

Chapter 8

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.

The current approach of using the courts to adjudicate disputes arising from public procurement does not function particularly well. The yearly number of cases is quite low for the size of the UK procurement market but that is more of an indication of the costs involved with litigation and the propensity for private settlements than a real measure of problems arising from public procurement. It seems unlikely that tinkering at the margins would do much to change the situation.

In addition, the 2002/2004 administrative court reform in Portugal functions as a cautionary tale of prioritising public procurement cases over other disputes. It did not take long until the court system was clogged with those public procurement cases leading to long delays in adjudication of all types of disputes.

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

Yes, if it was given proper investigative powers and the budget to do such work. A good example of this type of authorities can be found in the competition authorities of Sweden and Denmark, which can intervene during the procedure. In Denmark, procurement disputes are dealt in first instance by the procurement board which is a fast review mechanism akin to a tribunal.

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?

Yes, and that should be combined with perhaps a competition authority with a remit similar to that of Sweden and Denmark, or in alternative, with a procurement ombudsman such as that of Canada.[17]

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

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.

No comment.

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

No, since that would give the wrong incentives to contracting authorities in terms of compliance. As mentioned on Q30 the yearly number of procurement court cases is low anyway so why should the damages be capped? Aggrieved bidders are resorting to the court because of presumably illegal behaviour by the contracting authority, and in the absence of any illegality no damage would be payable anyway.

Furthermore, if the proposed changes to speed up the remedies system perhaps with a tribunal would lead to a significant proportion of cases being dealt before contract is awarded, what would this cap achieve?

This suggestion would affect the assessment of illegal award decisions where the illegality only became obvious with the debriefing, for example, because an award criterion not previously disclosed was used. While still possible to challenge the decision before the contract is awarded, there may be situations where that does not happen, or the review decision comes after the contract has been entered into.

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

[17] Office of the Procurement Ombudsman (Canada).

This is one of the areas where it would be relevant to pay attention to decisions by the General Court of the EU. How to quantify damages (including bid costs) has been assessed in multiple decisions. Those depend on the damage and casual link, therefore all damages need to be proven. With this in mind, the question seems wrongly formulated. Damages should not be 'fairly assessed' they need to be proven by the party invoking them.

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

No.

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

As formulated, this question conflates two similar yet distinct ideas. One is that of enhanced transparency, the other giving to the bidders the means to understand specifically why they were unsuccessful in that instance and important information if they want to challenge the decision. As such, the debrief letter serves its own purposes inside the context of a public procurement procedure and those are distinct from wider transparency.

Q39. Do you agree that:

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

No.

• 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?

No.

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

No.

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

No comment.

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

All need to be published, see answer to Q28.

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?

Unsure, risk of unintended consequences.