

# Transforming Public Procurement

## Construction Leadership Council response

The Construction Leadership Council (CLC) welcomes the opportunity to respond to the *Transforming Public Procurement* Green Paper. The CLC's mission is to provide leadership to the UK's £155 billion construction industry, with membership drawn from across the sector.

Our response has been prepared following consultation with UK construction trade bodies and other representative groups.

### Procurement that better meets the UK's needs

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

The CLC supports the legal principles that are proposed in *Transforming Public Procurement*, recognising that they reflect - in part - the principles in existing regulation.

We note the inclusion of value for money; and public good, as specific principles. These two issues are linked. We hope that one outcome from *Transforming Public Procurement* is a recognition that achieving public good is an essential determinant to whether a procurement delivers value for money.

We further think that ensuring Public Safety and Carbon Reduction are important enough to be included as standalone principles, rather than being incorporated into Public Good.

We note a potential conflict between these legal principles and the regulatory requirements that are already in place for utility companies that are in scope for the regulations. This potential conflict will need to be carefully managed, and there should also be clear guidance as to which organisations are in and out of scope for any new regulations.

#### **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?**

Suppliers in our sector regularly report difficulties with public procurement that is not in alignment with existing Government policy, with a fragmented system operating across various Government departments. A new public procurement unit offers the potential to tackle these challenges, addressing problems and raising standards. As such, we support the creation of such a unit. However in our response to Q3 we note some points for consideration in terms of the establishment of such a 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?**

We believe that to be effective any public procurement unit needs to be adequately resourced to fulfil its duties. The scale of activities that such a unit may be asked to get involved in should not be underestimated - it will have oversight of procurement valued at £290 billion - so poor resourcing would undermine confidence that the unit.

Recognising this scale, we would propose that the unit should not only be supported by an expert panel but should also have sub-panels for those areas of major public spend including construction.

The Construction Leadership Council works with representatives from across the industry and would support the identification of individuals who can offer impartial expert knowledge to both the main panel and any industry sub-panel.

In terms of sanctions, we recognise that many procurement problems arise out of a lack of awareness rather than poor intent. As such, we would propose that the initial response should be to provide additional support to public bodies to help them improve. More widely, we would expect that the changes that arise from *Transforming Public Procurement* should be accompanied by a proper programme of awareness raising and training for public bodies. We anticipate that industry bodies will provide similar support to suppliers to ensure their readiness.

As noted above, we would welcome absolute clarity on whether organisations are in or out of scope of any new regulations, to avoid scenarios where some bodies fail to apply the regulation through a belief that they do not apply to them.

Finally, we believe that it is essential that the unit treats all public bodies equally. Our industry's experience has been that Government departments and arm's length bodies tend to apply procurement rules more strictly than local bodies and the wider public sector. We think that these rules should apply and be enforced for all public bodies, to ensure that the benefits of good procurement are experienced across all areas of public spending.

#### A simpler regulatory framework

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

The CLC supports moves to consolidate existing regulations into a single framework. However, we also suggest that the framework should be extended to cover procurement activities that are currently below financial thresholds from existing regulations and the Global Procurement Agreement.

We further suggest that consideration should be given as to whether the new regulations can be expanded to cover – where appropriate – elements of those activities currently procured under the Single Source Contract Regulations 2014.

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

Industry would also welcome confirmation of how these regulations will apply to private sector organisations such as utility companies as it may not be appropriate for utilities to be subject to the same set of procurement regulations as public bodies. Such organisations may require alternative arrangements that are like the existing Utilities Regulations.

#### Using the right procedures

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

The CLC is broadly supportive of efforts to consolidate existing procedures into three procedures. We do wish to highlight a couple of issues relating to the proposed flexible, and open, procedures.

The flexible procedure provides a welcome opportunity to design procurements to best suit the subject. However, with this flexibility comes a risk that each procurement becomes, in essence, a bespoke exercise that suppliers must prepare for. This potentially creates a patchwork approach to procurement with no consistency between

competitions. This can drive cost and delay for suppliers. As such, while there should be flexibility, there should also be guidance as to how to operate within this flexibility. This will help to support public bodies, particularly those that are relatively short on resources and expertise, to make sure that the flexible approaches they operate deliver the intended outcomes. This guidance should also reflect how flexible procedures can incorporate sector specific objectives such as those in the Construction Playbook. We believe that the changes should reinforce the requirement for public bodies to implement the Construction Playbook.

We also have concerns that the flexible procedure includes the ability to negotiate during the procurement. While there are significant benefits to this approach, the industry's experience of the use of Competitive Dialogue under existing regulations was that the negotiated elements could lead to long procurement periods and high bid costs. As such, we hope that there will be guidance on the maximum time periods for procurement under this route.

We would also like firm rules to be put in place to avoid the flexible procedure being used as a means to draw the best ideas from all suppliers during the negotiation, only to then consolidate these into a 'Dutch auction' that is won by the lowest price.

We have some concerns about the use of the open procedure for construction projects. The consultation document rightly highlights that the open procedure is appropriate for simple procurements. Yet under existing regulations we have seen the open procedure regularly used for complex construction projects. More than 60 per cent of construction awards in the UK recorded in the *Official Journal of the European Union* in 2019 were via the open procedure. This leads to unlimited bid lists for such projects, meaning suppliers have high bid costs with low likelihood of winning.

We strongly suggest that there should be clear rule provided to public bodies about when it is, and is not, appropriate to use the open procedure.

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

Yes, however we believe that there needs to be a clearer definition of Crisis and Emergency that permits the current procurement process to be circumvented

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

The Construction Leadership Council believes it is important to recognise that the process to adopt innovation in public sector projects should start long before the procurement stage. Projects should be developed with an understanding of the value and outcomes that it is intended to deliver, and there should be pre-market engagement to understand how innovation can help unlock this. The right delivery and commercial model will also create an environment under which innovation can flourish.

As such, reforms need to go beyond "fostering". Public bodies must show leadership drive innovation at all levels in the supply chain

Such innovation may include changed ways of working and behaviours. Future public procurement should lead and encourage a trading environment that encourages such changing behaviours.

We also note that longer term contracts tend to foster the environment under which suppliers can innovate thanks to the longer-term visibility of workload. This may be relevant to any proposals arising from the commercial tools discussion in Chapter 5.

**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?**

We see that more transactional approaches to procurement commonly deployed by the wider public sector including local authorities for construction projects inhibits the potential for R&D investment and innovation to be delivered and measured. Public bodies should adopt the focus on the Most Advantageous Tender, as outlined elsewhere in the Green Paper, as a means of breaking out of this transactional mindset to instead procure on value, which will unlock innovation.

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

No response

**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?**

There is currently very limited guidance for public bodies to support them to carry out pre-procurement market engagement that could drive innovation. We know that many public bodies have concerns about pre-market engagement due to legacy fears about whether doing so would conflict with rules around non-discrimination and market distortion.

The CLC believes that one positive outcome of the *Transforming Public Procurement* consultation would be the development of guidance for public bodies, alongside a more explicit statement from Government that such engagement is not only allowed but encouraged.

**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?**

No response.

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"?**

The Construction Leadership Council strongly supports the move towards Most Advantageous Tender rather than Most Economically Advantageous Tender. This moves procurement further in the right direction away from lowest cost to focus on the outcomes that the project is intended to deliver.

**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?**

The Construction Leadership Council supports proposals that awards criteria are linked to the subject matter while allowing exemptions for 'greater good' issues. We do, however, recognise that implementing this may be difficult without clear guidance on how these wider issues can be included within the criteria.

As such, we support the recommendation that there are only specific circumstances where criteria not linked to the subject matter can be used, and to provide guidance on how this can be implemented.

We further believe that one area that may not be directly linked to the contract is how a supplier is contributing to securing the future relevant skills and workforce. The public sector has huge buying power to influence suppliers to invest in their workforce, yet typically this is only applied at the contract level. This not only drives potential perverse outcomes (such as apprentices that are taken on for projects as a requirement of the procurement only to be then jettisoned immediately afterwards) but also misses the opportunity to set industry workforce development as a strategic priority across all public buyers. Future award criteria should include measures relating to training, graduate/apprenticeships recruitment, inclusion and a requirement for high levels of direct employment.

**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?**

As in our response to Q14, we are supportive of this approach but recognise the challenges of implementation.

For this to be successful, there needs to be clear guidance to public bodies on the social, economic and environmental outcomes that the UK Government wants to achieve, and how these can be assessed appropriately during procurement.

We also believe that guidance should be provided on how to manage situations where the most advantageous tender for the project and/or local area conflicts with the most advantageous tender from a UK Government policy point of view.

**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?**

We agree with this proposal.

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

No response.

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

We agree with this proposal.

**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)?**

We agree with this proposal.

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

No response.

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

We agree with this proposal. We think that the prospect of being placed on a central debarment list will be a powerful incentive to avoid the behaviours outlined in this section. We add that it is important that the Government provides definition on the process for 'self-cleansing'.

We also believe that there needs to be clarity on the nature of activities that would lead to debarment. The infractions raised in the consultation paper all appear to sensible, and few would argue that those guilty of such offences should be debarred. But the

consultation document also suggest that the debarment list could be 'developed'. Where additional categories for exclusion are added, there should be clear guidance on these new exclusions so both public bodies and suppliers are aware of any changes.

We would also welcome clarity on how to deal with existing suppliers if they are subsequently added to a debarment list.

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

The Construction Leadership Council broadly supports this objective, as it will make it easier to prevent persistent poor performers from winning public work.

We do, however, recognise that the poor performance of a project does not necessarily reflect the poor performance of a supplier. Often the root cause of a project failure can be found in the way the work was designed and developed, rather than its delivery. As such, any criteria for poor performance would need to be intelligently drafted to focus only on the specific poor performance of a supplier. This would also help to avoid legal disputes that would otherwise arise as suppliers seek to dispute that it was their performance that was poor.

The CLC also suggests that this measure could be expanded to consider exclusions of poor performers in the supply chain, rather than solely those directly contracting with public bodies. Again, the challenge here will be to develop a fair system of identifying poor performers.

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

The Construction Leadership Council recognises the enormous burden on public sector suppliers relating to supplier accreditation and pre-qualification. It is estimated that for our industry alone this could cost companies as much as £1 billion each year. As such we strongly support steps to simplify and harmonise this process wherever possible.

We do, however, recognise that industry has invested substantially in platforms that assist with this supplier accreditation process. As such any supplier registration system should develop data sharing capability with these existing supplier registers to avoid exacerbating the problem that this proposal seeks to address by creating yet another system in the market. Proper data sharing could mean that suppliers data in one system was portable and would only need to be updated once whether they were working for public or private sector clients.

In terms of the selection questions themselves the construction industry has developed the Common Assessment Standard, which has been agreed by the Construction Leadership Council as the standard approach to asking key supply accreditation questions. We would strongly recommend that the Common Assessment Standard questions are incorporated intact into any supplier registration system to help ensure proper data sharing.

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

No response.

Using the best commercial tools

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

The Construction Leadership Council recognises the benefits of the DPS+ model to give visibility of capacity in the market, and allows entry to markets to innovative suppliers who may be restricted by closed frameworks.

Equally, properly structured frameworks can drive innovation by providing suppliers with a guaranteed or expected workbank that they can invest in R&D against. The open nature of a DPS means that suppliers do not have the same security of forward orders to carry out such investment. A DPS+ may be most suitable to less complex procurements such as the supply of commodities and single discipline works packages, with frameworks a more appropriate route for complex procurements such as large construction projects and programmes.

As such, we support the development of the DPS+ as a tool for public bodies and recommend that it is promoted with guidance as to when it is appropriate to use.

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

The Construction Leadership Council sees frameworks as a hugely important tool for public bodies to use for procurement. However, there is a vast gulf between the way that frameworks are used by exemplar clients (where they enable better early engagement with suppliers, an improved focus on securing value, and supporting a sustainable supply chain) and industry's frequent experience of poor frameworks that appear to merely be a procurement avoidance exercise with little strategic intent, and zero guaranteed work for suppliers. Well-structured and designed frameworks offer an opportunity to support public sector procurement bodies with capability and experience in procurement and can support in addressing some of the concerns raised in Q2, 3 and 6.

We have concern that open frameworks risk stifling long-term relationships, leading to increased supplier and client costs and undermining collaboration and innovation.

There is currently a review under way of construction frameworks led by Professor David Mosey which will hopefully provide useful further guidance on how to make sure framework deliver optimum outcomes.

As a minimum, effort should be made to ensure that where frameworks are procured, they don't do so in duplication with other frameworks covering the same type of activity and/or geographical area, and that all framework should have an element of guaranteed workload associated with them to underpin the cost for suppliers in securing places on the framework in the first place.

This is also an area where the new Public Procurement Unit may have a role to test proposed frameworks prior to procurement to ensure that they do meet the above criteria.

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?**

We support this proposal. However we propose that any move towards greater transparency should only apply to non-confidential, and non-market-sensitive, information

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

We support this proposal.

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

The Construction Leadership Council sees the development of a central digital platform for public procurement as hugely ambitious. This level of ambition is potentially concerning as any difficulties in the implementation of the platform have the potential to act as a barrier to the timely delivery of procurement by public bodies.

The development of such a platform should be implemented progressively, with only basic functions at launch, building over time as each element is embedded. A centralised supplier registration functionality has its own merits and could sit as a separate linked database module to the commercial data.

Ideally, the platform would act as an aggregator of local data sets, pulling data in from local ERP and or devolved cost systems, with algorithms to provide analysis and insights. This federated approach would be more rapid and proportional. The centralized data would therefore be non-mutable allowing commercial workflows to still take place at a local level, where there may be existing integrations with other asset management systems.

The platform could also facilitate the creation of a national cost benchmark library with further opportunity to integrate with other databases such as DNAR, which would provide additional insight on the retained estate.

Mindful security should be recognised as a fundamental requirement of any centralised solution.

Fair & 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.**

The Construction Leadership Council sees the proposals relating to challenging procurement decisions to be a missed opportunity.

Instead, the CLC believes that efforts should focus on a fast and cost effective tribunal system. This would mean quick resolution of issues and would be more accessible for small businesses, also reducing the cost of defending claims for public bodies.

Progressing claims through the courts should be an exceptional event, rather than the primary route for claims.

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

Yes although the review process must be transparent and made public.

**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?**

As noted in our response to Q30, we believe that a fast and efficient tribunal system should form the basis of addressing future procurement challenge, rather than managing this through courts.

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

No response.



**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 response.

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

The Construction Leadership Council supports this proposal, which ensures that businesses can recover their costs associated with successfully challenged procurements, while avoiding the impact of the prospect of very large damage claims on public bodies.

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

This is a complex calculation and could include costs that should not be included. Further consultation should take place with the creation of a method of calculation that provides transparency. This may include the development of sector benchmarks based on project value, complexity and procurement route.

**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 response.

**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, assuming that the new regime provides as a minimum the information currently required. It should be noted that many CAs do not comply with the current regulations with respect to debrief letters and suppliers have little power to request this information. Standardising debrief information across all Government departments would be a major step forward.

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?**

Yes.

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

No response.

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

No response.

**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?**

No response.