



BSA submission ahead of Green Paper on Procurement Reform

July 2020

Ahead of the publication of the Government's Green Paper on procurement reform, this paper sets out a number of procurement reforms which, if implemented, would improve the design, procurement, delivery and management of public services by the public, private and voluntary sectors. BSA members have been playing a vital role in keeping the economy going, delivering services and projects, throughout the Covid-19 crisis. Now, our sector has a crucial role to play in rebuilding Britain's economy. The swift publication and processing of the Green Paper on public procurement would help to support this.

Summary of recommendations

- The Outsourcing Playbook has been well received by the sector. However, it is voluntary and levels of understanding and application of the Playbook vary across Whitehall. Incorporating the Playbook into the Green Paper, and into law, would ensure it is enforced and everyone who procures goods, services and projects for government is working to the principles.
- The 4 sets of Regulations under the EU Procurement Directive could be consolidated into a maximum of two sets of regulations, aimed at the UK priorities, to reduce complexity.
- The Remedies regime requires reform. The BSA recommends the establishment of an independent arbitration body. This new process should be independent, authoritative, transparent, inexpensive and swift.
- One lesson arising from the Covid-19 pandemic for service delivery is the importance of contract flexibility. Contracts need to be able to flex to allow providers to keep with the times and to account for political, economic or social that impact on service delivery.
- Frameworks and Dynamic Purchasing Systems (DPSs) are increasingly popular routes to market for commissioners. Clarification on how Frameworks are to be established and used in a post-Brexit context will be helpful, as well as further guidance for commissioners on using frameworks and DPSs appropriately, along with regular publication of pipelines.
- BSA members are committed to supporting SME and VCSE organisations¹. One way to deliver support is through public procurement, both by improving access to government contracts and through larger organisations. One of the biggest barriers for all organisations, but particularly prohibitive to SMEs, is iniquitous risk transfer.
- Moving away from prescriptive, input-based specifications to outcomes-focussed procurement exercises, coupled with better early engagement with the market, would allow commissioners to seek innovation and organisations to submit innovative bids.
- For a lot of the reforms suggested in this paper, and indeed a lot of the Playbook, implementation is key. Procurement regulations and procedures are important in shaping the landscape but need to be correctly understood and interpreted to be effective, and commercial capability across public sector teams is crucial.

¹ BSA Policy Discussion Paper: Improving public procurement for SMEs and VCSEs - <https://www.bsa-org.com/wp-content/uploads/2020/03/BSA-Policy-Discussion-Paper-Improving-public-procurement-for-SMEs-and-VCSEs.pdf>



Outsourcing Playbook should be fully incorporated into the Green Paper and become law

In March 2017, the BSA published a report by Professor Gary Sturgess, 'Just Another Paperclip? Rethinking the Market for Complex Public Services'. This paper was a key factor leading to the formation of Project Santiago and, in February 2019, the publication of the Outsourcing Playbook.

The Playbook has been well received by the sector and we have spoken to many Government Departments regarding its implementation. However, the Playbook is voluntary and levels of understanding and application of the Playbook vary across Whitehall. Incorporating the Playbook into the Green Paper, and into law, would ensure it is enforced and everyone who procures goods, services and projects for government - at national, regional and local levels - is working to the principles.

The requirements around publication of pipelines and publication of KPIs and baselines should be included in legislation. Risk allocation should also be carefully considered. All central government departments are required to publish their commercial pipelines; legislation would expand this requirement to Arms Length Bodies and the wider public sector and ensure pipelines are published in a timely manner. Inequitable risk transfer is cited by BSA members as the biggest issue with public sector procurement. Greater transparency around procurement, contract management and performance is also a long-standing BSA policy.

Some aspects of the Playbook require flexibility, for example, how to develop collaborative relationships. Options to strengthen these aspects include statutory guidance, mandated policy or a 'comply or explain' strategy for public sector procurement teams accountable to Cabinet Office.

At present, the Playbook only relates to central government and is written with complex outsourcing in mind. However many of its principles are applicable more widely including to Arms Length Bodies, local government, the NHS and the wider public sector, and we would like to see its remit expanded. We understand there is appetite amongst local authorities to adopt the Playbook but that support from central government would be required. On the other hand, we would not recommend the Playbook principles replace NHS standard terms and conditions, which are well understood and work effectively, but ways to bring them together could be beneficial.

Work to upskill commercial teams across the wider public sector to a consistent set of practices is crucial. This is particularly the case for CCS frameworks which are used by a range of government departments and agencies.

Procurement Regulations

Under EU Procurement Regulations there are 4 different sets of Regulations - Public Contracts Regulations, Utilities Contracts Regulations, Concession Regulations and Defence and Security Public Contracts Regulations. These could be consolidated into a maximum of two sets of regulations, aimed specifically at the UK market and priorities. This would reduce complexity and give greater clarity and confidence to public procurement teams on which behaviours are or are not permitted throughout the procurement cycle, alongside the Playbook and the Cabinet Office's commercial capability programme. As part of reviewing Procurement Regulations, the number of procurement processes could also be reviewed (more on this below).

In consolidating the Procurement Regulations, it will be important to consult on whether any sector-specific features of the current Regulations should be retained, either within the regulations or through sectoral addendums. For example, the Negotiated Procedure in the Utilities Contracts Regulations 2016 is effectively used by the utility sector, and while it does not feature in the Public Contracts Regulations 2015, it may be worth exploring across the board as it provides a degree of flexibility while continuing to subscribe to the principles of proportionality, transparency and non-discrimination.



Members report experiences of long delays between notification of an opportunity and the commencement of the procurement process, as well as between the submission of bids and contract award. Whilst recognising the many legitimate reasons for delays, they result in additional cost to suppliers in terms of allocated resources and can result in suppliers having to redeploy staff. When the ITT is published, the turnaround times for bid submission can then be extremely tight, potentially reducing the quality of bids. This is challenging for organisations of all sizes. A requirement in any new procedures to provide timely award decisions and meaningful feedback to unsuccessful suppliers following contract award would assist suppliers in understanding the decision and potentially lead to less scope for challenge. It would also encourage suppliers to bid for future opportunities. Management of expectations with regards to timetables enables suppliers to manage their own internal resources.

Remedies regime and alternative arbitration routes

There is broad consensus amongst BSA members that the Remedies regime requires reform. Long processes and delayed procurement decisions and in-service dates can be costly and can drive adversarial relationships. A new emphasis should be on speed of resolution to provide certainty for the procuring authority and bidders, reducing legal costs and costs to the taxpayer.

The BSA recommends the establishment of an independent arbitration body for circumstances when a bidder wants to challenge a procurement decision or to resolve disagreements between contractor and client in a speedy and low-cost manner. This new process should be independent, authoritative, transparent, inexpensive and swift. Its powers need to go further than the current Public Procurement Review Service. One option is the creation of a Procurement Ombudsman.

There may be options to simplify and speed up dispute resolution processes relating to specific areas of public sector spend. Members have suggested establishing a procurement regulator or specialist procurement tribunal, to replace the current Technology and Construction Court process and reduce delays. The Public Procurement Review Service would benefit from having more teeth and could potentially be turned into a more meaningful regulator for the public procurement process. Greater clarity regarding use of Voluntary Transparency Notices would also be useful to mitigate the risk of procurement challenge. Specifically on challenges to a procurement decision, there may be a case to examine what impact disapplying 'automatic suspension' of the award would have. This would lead to a quicker outcome so that contracts are not left in limbo.

Procuring authorities have the ability to cease procurements at any point prior to award, creating a degree of uncertainty for bidders. Organisations invest significant amounts to bid for contracts and need assurances that meaningful recourse is in place should this occur, but also face additional costs associated with procurement delays, one reason for which is legal challenge. A robust and timely remedies regime that works on behalf of commissioners and providers would help in this regard. Thought could also be given to a mechanism which compensates bidders for their often significant bid costs in the event of a procurement being abandoned.

Contract flexibility

One of the lessons arising from the Covid-19 pandemic for service delivery is the importance of contract flexibility. BSA members have acted agilely and played a vital role in keeping the economy going, delivering services and projects. For the most part, this has been possible because of their ability to adapt, the ingenuity and dedication of civil servants and has worked best where contracts can be flexed to meet new and changing requirements.



Covid-19 is, we hope, a ‘once in a generation’ occurrence but it brings to light the impact events can have on services and projects. This is particularly true for contracts of 5 years or longer. It’s in the interest of all parties that there are mechanisms in place to address this in a structured way.

Examples include political or societal trends which can influence policy priorities, leading to changes in service objectives or expectations of organisations delivering services. Technological developments are almost constant, continuously changing what is possible. Often, variables that are outside of supplier control, such as volume assumptions on services or programmes, can impact the viability of a contract. Changes in law and regulation, political change and socio-economic changes impact the cost of delivery and economic balance of fixed price contracts. In particular, government does not yet recognise ‘change in law’ as a risk that may not sit best with suppliers; this area is key in respect of risk allocation and realisation of value for money.

Currently, it can be burdensome to make any changes to contracts, even minor changes, and there is often uncertainty as to what changes can be made within the contract terms. When contract changes are permitted, value for money for the contracting authority is improved and an appropriate balance of risk can be agreed.

Another option is to include ‘safe harbour’ provisions in contracts for low value modifications. As it stands, modifications can be made under these provisions where the value of the modification falls below the relevant procurement threshold **and** is less than 10% of the initial contract value for supplies and services contracts or 15% of the initial contract value for a works contract. We recommend both parts of the test should be reviewed and whether the test is applied for each change or annually should be considered.

It will be important that contract amendments are backed up by reliable data, are conducted in a transparent way and are not anti-competitive.

Frameworks

Frameworks and Dynamic Purchasing Systems (DPSs) are increasingly popular routes to market for commissioners and each offer benefits to suppliers too. The current Procurement Regulations have left open to interpretation how Frameworks are to be established and used. In practice, the Crown Commercial Service, has taken a wider interpretation to the parameters on frameworks than, for example, the European courts have. It will be helpful to have clarification on these issues in a post-Brexit UK context. It is important that both frameworks and DPSs are used appropriately in terms of the types services they are looking to procure. Further guidance for commissioners on this would be useful, as well as consultation with the market.

The main difference between frameworks and DPSs is that suppliers can join DPSs at any time, whereas frameworks run for a length of time with organisations successfully appointed onto the framework able to bid for call off contracts, limiting the need to undertake regular, large-scale procurement exercises. There may be circumstances where some form of ‘refresh’ may be required, particularly if there has been significant change in the provider base. One suggestion is for frameworks to be reviewed at the mid-point and potentially for a ‘mini-competition’ to be run to enable additional suppliers to be added, if commissioners deem this to be required.

There are an abundance of frameworks across all sectors, private and public, however the number of call offs and spend through each framework varies a great deal and too often levels of government spend cited for frameworks has not materialised as expected. This means organisations spend a lot of time and resource bidding to get onto a contract that may have very little bought through it. Clear and regular publishing of pipelines would help with this. It would also be useful to have greater transparency around call off contracts, including the value of contracts. This is not always published.



There are also a number of DPSs across all sectors and across Whitehall. Whilst these reflect sector specialisms, greater interoperability and coordination across DPSs could reduce duplication and costs. One way members have suggested DPSs could be improved is to ensure organisations receive regular feedback from commissioners on their offers to allow them to alter or update their information if required and remain competitive.

The way in which frameworks are regulated also varies at the moment. There may be merit in exploring how frameworks used by public sector bodies could all be regulated to a minimum standard, such as through a national standard for frameworks.

Frameworks have been criticised in the past for discouraging SME and VCSE involvement. To encourage SME and VCSE engagement, government should look at ‘framework-light’ options where the bands are of low value or regionally focussed, tendering is less expensive and the demands less onerous on participating contractors. There are some recent examples of similar approaches, such as CCS’ Construction Works and Associated Services framework.

Encouraging SME/VCSE involvement in service delivery

BSA members are committed to supporting SME and VCSE organisations. One way to deliver support is through public procurement, both by improving access to government contracts for SMEs and VCSEs and through larger organisations who have the reach and capacity to partner with smaller ones. They can help support and rebuild SME capacity, by making use of expertise and supply chain management, while smaller organisations bring their strengths to the table and the two learn from each other.

One of the biggest barriers for all organisations, but particularly prohibitive to SMEs, is iniquitous risk transfer. We continue to see contracts which transfer high levels of risk to providers of all sizes. The Playbook begins to address this and is one reason why it is important that Playbook principles are enforced and entrenched across the public sector.

Other recommendations include increasing the threshold values for services and supplies or extending the light touch regime to other areas where SMEs are most active, as well as placing greater emphasis on early market engagement, particularly with VCSEs and SMEs closely aligned with delivery of the services in question. Commissioners should also look at the number of incomplete and non-compliant bids so that they can learn what processes encourage SMEs and which do not.

Collection of organisational and management information impacts is especially burdensome for SMEs and VCSEs. It is also unclear what some of this information is used for and can be repetitive, with PPOs requiring bidders to supply similar information for each tender. This is an area where we have seen some improvement in recent years and we know Crown Commercial Service is working towards a solution to this. Looking at alternative methods, such as changing this to a once-a-year event, would be a quick win. Digital marketplace has made contracting more competitive and accessible by reducing the workload of submitting bids. There may be lessons to learn from this approach.

Contracts Finder is a useful, central portal for government opportunities. However, it isn’t optimised to always provide details of whether a tender notice is suitable for either VCSE or SME suppliers. This means that searching for VCSE opportunities is only going to provide a minority of the opportunities available. Furthermore, documents on Contracts Finder and other platforms are often behind registration forms, so suppliers can’t easily assess the task of responding to bids without first having to complete numerous registration processes and maintain access to many different portals.

Policies on the involvement of SMEs and VCSEs in central procurement should not be overly prescriptive as this creates complexity and could risk supply chain sustainability and innovation. There is a balance that all providers need to strike between utilising a strong and diverse supply chain and ensuring any supply chain is likely to deliver as required.



Innovation

Procurement reform has the potential to unlock new and innovative solutions. Moving away from prescriptive, input-based specifications to outcomes-focussed procurement exercises would allow commissioners to seek innovation and organisations to submit innovative bids. This needs to be coupled with better early engagement with the market to enable commissioners to understand what is possible, to shape the 'ask' and communicate desired outcomes to the market.

A lesson from private sector procurement is that open processes and dialogue between commissioners and suppliers can have transformational effects. Using negotiation/dialogue effectively during procurements and being genuinely open to discussion will help to identify changes that will lead to better contracts, improve outcomes and value for money. The Playbook still directs procuring authorities to stipulate up-front matters which are 'off-limits' for negotiation, which often includes risk and things that impact on price, value for money and innovation.

Under EU Procurement Regulations, there are a number of procurement procedures that can be followed. The most commonly used in the UK are Competitive Dialogue and Competitive Procedure with Negotiation. These procedures can have the effect of enhancing bids to align more closely with commissioner requirements and are flexible enough to allow a discussion with bidders about potential solutions. However, innovation can be hindered if restrictive specifications are imposed or if price becomes a disproportionately large factor in a decision when all bids are high-scoring. When working effectively these procedures can enable innovation and deliver value for money contracts.

The 'Innovation Partnership' procedure in The Public Contracts Regulations 2015 sets out a model when explicitly pursuing an innovative solution but has had only very limited use in the UK since its inception and is not widely understood outside of the ICT and technology sector. Increasing the scope for this procedure to be used could help commissioners seeking innovative solutions.

It would be worth also considering wider use of the 'negotiated procedure' to suit the requirements of the contract. This procedure, most commonly associated with the utilities sector, would bring flexibility and input from industry to the procurement process in a meaningful way, whilst still promoting transparency and fairness. Procurements can be set up so that the process takes place in stages, similar to the Competitive Dialogue but capable of being adapted in a way that suits the particular size and type of procurement.

Price competitiveness can lead to a 'race to the bottom' and limit scope for innovation, something that set-price competitions can help to avoid. A commissioner-offered fair price-for-service, when fixed alongside key quality measures, can encourage sensible offers from the market and stimulate innovative. This is something used regularly in Australia to good effect and could be considered for use in the UK where a truly innovative solution is desired.

Another option is the 'vested procurement model', described as a hybrid business model which focuses on shared values and goals². This procedure has been used successfully in government procurement outside of the UK and has been adopted by some of the world's largest companies including Microsoft, McDonald's and Dell, but it is viewed nervously by some in the UK government. Whilst the benefits of the process are recognised, concerns have been expressed about its alignment to current regulations. EU exit may be an opportunity to enable this model to be more widely used.

² Kate Vitasek, Mike Ledyard, Karl Manrodt (2010) - [Vested Outsourcing, Second Edition: Five Rules That Will Transform Outsourcing](#)



There is an argument to be made for reducing the number of procurement procedures to reduce complexity; in this case, it is imperative that the available procedures encourage dialogue with suppliers and invite discussion of ways to improve outcomes, pursue value for money and enable innovation. Greater clarity around direct awards including when these may be appropriate for truly innovative solutions would also be useful.

Commercial capability

For a lot of the reforms suggested in this paper, and indeed a lot of the Playbook, implementation is key. Procurement regulations and procedures are important in shaping the landscape but need to be correctly understood and interpreted to be effective, and commercial capability across public sector teams is crucial.

The Cabinet Office-run commercial capability programme and training on the Playbook will be helpful and should be both expanded to the wider public sector and properly resourced. However the change needs to come from the top down. The programme also needs to extend into Government Legal quickly and in a meaningful way.

One element of commercial capability that could be improved is the ability of commissioners to spot abnormally low tenders and to scrutinise unrealistic assumptions in bids. Authorities do not always get genuine sustainable value for money when evaluation criteria seek to drive the price down rather than achieve MEAT outcomes. Ability to assess the economic and financial health of bidders in a way that is fair to them is another element.