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BSA Response to Government's Green Paper on Transforming Public Procurement

March 2021

Summary and Introduction

The Business Services Association - BSA - would like to begin our response by strongly welcoming the recent publication of the Government's Green Paper on Transforming Public Procurement. It reflects a significant step forward in the Government's continued efforts to increase the value and efficiency of public service delivery - efforts that the BSA and its members have long supported.

BSA members remain deeply concerned that, despite rhetoric to the contrary, too many contracts still over-emphasise cost, rather than best and most sustainable value. This is not the best approach, and it does not achieve the best quality or value in services and projects.

We were therefore pleased to see that many of the areas covered in the Green Paper reflect those outlined in our submission ahead of its publication last year. These include greater transparency throughout the commercial lifecycle, a greater emphasis on wider value, and reforms to the Remedies regime (including proposals designed to speed up the courts process for procurement challenges).

There are however particular areas, such as that of risk allocation, in which further consideration and clarification is required in order to ensure that the proposed reforms and their outcomes remain aligned with the values that underpin them.

The BSA is well positioned to offer insights and feedback on this subject. As a membership organisation it brings together all those who are interested in delivering efficient, flexible and cost-effective service and infrastructure projects across the private and public sectors.

The business services sector includes ICT, facilities management, construction and infrastructure provision and other project delivery and employs 3.3 million people across the UK, accounting for around 1 in 10 jobs. 70 per cent of services are provided business-to-business and 30 per cent for the public sector. A list of our members - including large and small businesses, charities and social enterprises - is included as an Annex below.

Robust, fair and efficient public procurement will be vital both to our immediate recovery from the coronavirus pandemic and to our long-term economic prosperity. It has a central role to play in driving a green economic recovery, delivering world-class public services, levelling up the whole country, and unleashing Britain's potential. Getting procurement right will also enable more SMEs and charities to become involved in providing services and projects.

We hope that the recommendations contained within this response can further support the Government's work in this crucial policy area and have therefore only responded to the most relevant questions for BSA members as set out in the consultation.



Key messages

Risk Allocation

The Green Paper sets out a wide range of procedural changes to public procurement; many of which the BSA and its members strongly welcome. We must, however, recognise that for these procedural changes to be effective we must also address underlying behavioural practices relating to risk transfer.

Inequitable risk transfer and the inclusion of unlimited liabilities in contracts is regularly cited by BSA members as the biggest issue with public sector procurement. It is a driver of negative contracting behaviours and discolours the relationship between client and supplier by taking precedence over more positive actions, such as encouraging innovation and securing value for money. It also distorts market access as a well-documented barrier to greater participation by SME and VCSE organisations.

Government, in collaboration with suppliers, can and must resolve this longstanding issue. We would urge the new Cabinet Office procurement unit to undertake a review into how best to tackle this central challenge, which may include some of the suggestions included in this submission.

Incorporating the Outsourcing Playbook

As a first step to tackling iniquitous risk allocation, the Government must ensure that the Outsourcing (soon to be Sourcing) Playbook is clearly and fully incorporated into the Green Paper and thereby into law.

The Outsourcing Playbook has been well received by the sector and stipulates that risk allocation should be subject to scrutiny prior to going to market with meaningful market engagement. It remains, however, voluntary and levels of understanding and application of the Playbook vary across Whitehall. That disadvantages charities and SMEs as well as the rest of the sector.

The current wording on the Playbook in the Green Paper is somewhat unclear and should be strengthened. Clearly incorporating the Playbook as well as any subsequent iterations, into the Green Paper, and thereby eventually into law, would ensure both that it is enforced and that everyone who procures goods, services and projects for government is working to the Playbook's principles. It is also worth noting that the corresponding Construction Playbook has also been well received by the business services sector and offers a good model for improving the procurement process.

Alignment and Consistency

The Green Paper represents a unique opportunity to ensure that all recent policy initiatives surrounding public procurement are aligned both in their content, terminology, and objectives. Ensuring a clear, unified and consistent approach across the full suite of key procurement documents and other relevant legislation and government documents (including the Outsourcing Playbook, the revised Green Book, Social Value Act, and the Local Government Act) would provide additional market confidence, remove unnecessary ambiguity, and simplify the process for both commissioners and providers at central, devolved, and local levels. This includes ensuring conceptual alignment, such as clarifying existing ambiguities between 'social value' and 'public good' and applying one consistent definition across central procurement documents.

This alignment should also extend so that the new public procurement arrangements apply to all public bodies, specifically including health, defence, local government and the police. This will be key in realising the transformative potential that the proposals contain.



Speed and Pre-legislative Work

As the Green Paper acknowledges, its publication represents a significant step forward in providing the structures, procedures, tools and information to contracting authorities; thereby enabling them to focus on innovation as a part of their procurement approach. It also recognises that its implementation will be a ‘major and complex exercise’.

As is to be expected with reforms of this significance, the legislation required to implement it may take time to navigate its way on to the statute-book. Given the significance of proposals contained within the Green Paper, we believe that some of the initiatives outlined in the paper could and indeed should be implemented within the existing regulations.

For example, there is a strong case to be made that conformity with the Outsourcing Playbook should be made mandatory across central government departments before it is eventually applied across the wider public sector.

From a non-procedural perspective, we would encourage a considerable expansion and acceleration of the training programmes for public sector procurement teams. It is well recognised that it will likely take several years to successfully upskill the large numbers of commercial staff across the wider public sector which is why it is key that Government accelerates the rollout and adoption of training modules across the public sector in advance of the reforms becoming formal legislation.

Business Engagement and Collaboration

One of the key lessons learned from the Project Santiago process, and indeed from the coronavirus pandemic, is the value of collaboration between government and business and VCSE organisations. Acknowledgement of the importance of strong working relationships between contracting authorities and businesses and charities should be explicitly incorporated into the Green Paper.

Transparent and cooperative engagement with business and charitable organisations is key to ensuring healthy procurement practices and to unlocking innovation. We have seen this throughout 2020 as contracting authorities engaged with their suppliers to navigate the impact of the coronavirus pandemic and adapt services accordingly. We encourage the Government to incorporate engagement as a key principle in the Green Paper, not just at the outset of the procurement process but throughout the contracts’ lifecycles. This will move us away from a transactional approach, that often sees commissioners and suppliers in opposition to one another, and towards partnership working and the inherent benefits that this approach entails.

To this end, the BSA welcomes the Government’s engagement throughout the preparation of the Green Paper, particularly from colleagues within Cabinet Office, and would like to offer our continued support in the development of public procurement policy as a forum to promote constructive dialogue between government and business.



Chapter 1: Procurement that better meets the UK's needs

Overview

The objectives and guiding principles set out in this chapter are very much welcomed by the BSA. This chapter highlights some of the key challenges that lie at the heart of procurement reform. Ensuring that there is a consistent approach across the wide range of policy documents relating to public procurement such as PPN06/20 on social value in public procurement is crucial to ensuring their proper implementation by commissioners across the public estate.

A clear first step here is to ensure that the Outsourcing Playbook is properly embedded in the Green Paper and subsequently in law. The Playbook principles are vital to successful procurement reform. In addition to this, whilst we await the publication of the National Procurement Policy Statement, it should be clear that the principles set out in the Playbook (particularly those concerning risk allocation) should be clearly separated from the NPPS to ensure that the core principles underpinning effective public procurement practices are maintained.

Questions

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

The proposed principles set out in the Green Paper are to be welcomed however, as discussed above, they must be clearly and consistently defined across the various legislative and policy documents relating to public procurement.

Ambiguity here not only has a negative impact on the efficiency with which public procurement is undertaken but runs contrary to the Government's stated aims of speeding up and simplifying our procurement processes.

Part of this definitional exercise should also involve deciding where risk sits in relation to each of these principles. Ensuring that the Playbook is embedded within the Green Paper will be central to this.

Q2. Do you agree there should be a new unit to oversee public procurement with new powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities?

We agree with the establishment of a new unit to oversee public procurement. For it to be most effective it needs to be appropriately resourced and have properly mandated reach and powers in order to implement both the proposed reforms as well as the broader Playbook principles.

For a lot of the reforms set out in this Green Paper implementation is key. Procurement regulations and procedures are important in shaping the landscape but must be correctly understood and interpreted in order to be effective. The proposed unit should therefore play a central role in ensuring a high degree of commercial capability across the public estate.

It is worth emphasising that this unit should be seen to be an independent oversight body enabled and empowered to take decisions, thus ensuring that the principles of fair, open, and transparent procurement are adhered to consistently.

The unit should also have an awareness of, and a role in overseeing, risk transfer in tenders. It could also offer a route for bidders to escalate unresolved issues with the procurement process pre-award and have the power to pause procurements, or at least to make the recommendation to the Minister for the Cabinet Office, in situations where a significant concern has been raised which requires further investigation.



In addition to this, the Government Commercial Function has played a key role in recent reforms and could continue to do so, alongside the new unit, in order to ensure that the reforms are fully embedded across Whitehall Departments and beyond.

Q3. Where should the members of the proposed panel be drawn from and what sanctions do you think they should have access to in order to ensure the panel is effective?

The expertise of those on the panel should reflect the breadth and diversity of the organisations currently involved in public procurement.

It will be important that the oversight body has detailed knowledge of public procurement practices. Those who have previously worked in the sector will be well placed to offer their expertise here, but due consideration should be given as to their distance from the existing market to avoid any potential conflicts of interest. The Crown Representative recruitment model would be a useful starting point for any proposed appointment model. Academics with a combined expertise from across the sector could also offer welcome insights here.

As outlined both above and in relation to the questions in Chapter 7, an overemphasis on sanctions and other punitive measures reinforces an inefficient oppositional arrangement as opposed to constructive partnership working practices.

Chapter 2: A simpler regulatory framework

Overview

The BSA welcomes the Government's efforts to simplify existing regulations. Resolving systemic complexities will undoubtedly lead to improvements in the efficiency of public procurement and encourage greater participation by SME and VCSE organisations thereby expanding the market, encouraging greater levels of innovation, and ultimately delivering better value for taxpayers. Some of the suggestions outlined in Chapter 2 require clarification at this stage.

Questions

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

Simplification of the existing regulations is very welcome, however it remains unclear which of the 350+ regulations will be 'slashed' and we would welcome further clarification here. It should also be noted that the changes will likely lead to some initial familiarisation costs from both a commissioner and supplier perspective. We would also caution against any steps that might lead to a further commoditisation of the process.

Some additional areas of ambiguity also need to be resolved, for example whether this simplification extends to devolved and local procurement and how it relates to procurement by the NHS. On this second point, we would welcome clarification on whether the exemption applies to all procurement from the NHS and what "healthcare services" means. For example, BSA members deliver cleaning and catering services across the NHS and other sectors. If it does apply to all NHS procurement, does this also mean that these are exempt from the transparency rules as set out in later chapters of the Green Paper? If so, this would invite further complications when assessing performance based on the data as made available to each awarding body.

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

We will engage with the Ministry of Defence's consultations on specific defence and security-related elements, as outlined in the Green Paper, in due course.



Chapter 3: Using the right procurement procedures

Overview

The BSA has previously called for a reduction in the number of procurement procedures in order to simplify the process. It is imperative that the available procedures encourage dialogue with suppliers and invite solutions aimed at improving outcomes, pursuing value for money, and enabling innovation. Greater clarity around direct awards, including when these may be appropriate for truly innovative solutions, would also be useful.

As with the proposals set out in previous chapters in the Green Paper, and indeed a lot of the Outsourcing Playbook, implementation will be key. Procurement regulations and procedures are important in shaping the landscape but need to be correctly understood and interpreted in order to be effective. In this respect, commercial capability across public sector teams is crucial along with the production and circulation of clear templates demonstrating best practice implementation of the new procedures. This will also help to lower any familiarisation costs that occur during the transition to the new procedures.

As set out in the BSA's submission ahead of the Green Paper's publication, 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. At the same time, adequate protections need to be put in place for potential suppliers' intellectual capital. Concerns that these ideas may be co-opted during the pre-engagement process act as a barrier to innovation.

Questions

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

Taken as a general principle, reducing the number of procedures is a positive step to simplifying the procurement process. Given, however, that limited tendering procedure is only to be used in specific circumstances, such as a crisis, there remain only two real options which in turn bring us to the behavioural challenges as discussed above.

Whilst the new flexible procedure is strongly welcomed, it will require highly skilled procurement teams to navigate it from a commissioning perspective. This raises the concern that contracting authorities may default to the open procedure as the more familiar and less complex option. There is a risk that attempting to commodify complex services so as to fit the open model will lead to a stifling of innovation and potentially lead to an increase in challenges.

This in turn brings us back to the broader point about embedding capability across contracting authorities. Going down the complex route is likely to incur consultancy and legal costs where contracting authorities lack the necessary in-house skills. To address this, mandating training for procurement teams should be strongly considered as well as the introduction of additional incentives and support to encourage people to utilise the new approach. We also note that it will likely take several years to successfully upskill the large numbers of commercial staff across the wider public sector which is why it is key that Government accelerates the rollout and adoption of training modules across the public sector in advance of the reforms becoming formal legislation.

Establishing an accessible template for the competitive flexible procedure could be one way to encourage contracting authorities to use the newer procedures and thus avoid them defaulting to the open procedure. The template would also help to mitigate some of the familiarisation costs that will arise as a result of any procedural changes.



Early pre-market engagement with business and VCSE organisations, in order to identify which procedure should be adopted before going to tender, should also be both encouraged (whilst also ensuring that suppliers' intellectual capital obtained during this pre-engagement is properly protected).

There is also a question about requisite timescales for implementing the new procedures. Training commercial managers can take a number of years. With this in mind, it would be useful to understand how the new procedures will apply to contracts already let or to framework agreements, for example, and we look forward to seeing further details of the implementation and transition programme.

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

The events of the last year have re-emphasised the importance of allowing agile responses in times of crisis whilst maintaining a level of transparency and fairness that is expected of public procurement procedures.

We therefore support the inclusion of crisis as a ground for limited tendering but would stress that the rules surrounding this should ensure that the two principles of transparency and fairness are kept at the heart of the limited procedure in order to ensure that public trust is maintained.

Finally, we agree with the definition of crisis as set out in the Green Paper, however we would add that clarification needs to be given on when and by whom a crisis is adjudged to have ended.

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

As outlined above, fostering greater and earlier engagement with the market and promoting the use of the competitive flexible procedure where most appropriate to the service being procured, by ensuring capability and providing clear templates, will in turn foster greater levels of innovation.

Again, aside from regulations and procedures, much comes down to behaviours on both sides. As the Green Paper recognises, the fear of challenge drives behaviours of procurement teams. Unfamiliarity with the competitive flexible procedure, and indeed across wider proposals, could increase the fear of 'getting it wrong' by procurement teams which may act as a deterrent from this procedure.

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. Creating a template demonstrating how this model could be used under the competitive flexible procedure, and how to run the procurement, could also help commissioners seeking innovative solutions.

Finally, as already stated, risk allocation remains a central barrier to innovation not only by discouraging existing suppliers from submitting innovative bids but also by acting as an insurmountable barrier to many VCSEs and smaller organisations.

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?

BSA members have witnessed a variety of issues but which typically share some reoccurring themes. Many revolve around a lack of understanding within contracting authorities of the procurement process from a supplier perspective, including the resources needed to bid and review the risk allocation involved in the tender. One example would be where a contracting authority spends a period of 9 months scoping and preparing their models but asks for responses within two weeks of publication.



The points raised here are broadly captured under the best practice principles in the Playbook and we would like to again emphasise how important it is to ensure that the Playbook is incorporated in full into the legislation and is applied across the wider public sector.

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

As the Green Paper recognises, despite good progress in recent years, there remains a shortfall in quality of data in and around public procurement. For instance, according to one analysis of public spending data, around 60 per cent of public contracts are not published in Contracts Finder. It is often difficult to see precisely who has won a contract and by what mechanism the contract was awarded, or what is required of the supplier delivering the contract.

Requiring all contracting authorities to implement the Open Contracting Data Standard and establishing a single digital platform for supplier registration are positive steps forward in this regard. There remains, however, a significant opportunity to conduct much greater analysis of our public contracting, so that we can better understand the impact of the procurement decisions that are being made and deliver much better outcomes for service users and the economy at large.

The Government has the ability to drive growth, increase jobs and reduce carbon with the money it spends with suppliers, but it can only do this if it can access good data on what is spent by public bodies.

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?

Combining a shift away from more prescriptive, input-based specifications to outcomes-focused procurement exercises, with better pre-procurement engagement with the provider market, would both encourage potential suppliers to submit innovative bids and help commissioners to select more innovative solutions.

In addition to this, suppliers may be deterred from sharing commercial ideas as part of any pre-procurement process if these may then be taken and adopted in tenders. These concerns over sharing sensitive intellectual capital have negative implications for innovation in procurement and ought to be properly addressed by ensuring that ideas proffered as part of the pre-engagement process are subject to adequate protection.

The Government should therefore consider new approaches to protecting suppliers' intellectual capital, such as the introduction of 'Intellectual Property Lockers'. This would be a device to ensure that when IP is shared in a pre-procurement discussion, either with clients directly or as part of an industry meeting, that this 'locker' ascribes the rights of ownership to the respective party, which can be called upon should a legal challenge later arise. All parties would agree to ownership at an early stage.

Other options which could be considered include giving suppliers the freedom to collaborate in the early stages of the procurement lifecycle, exploring private sector best practice examples, and the concept of 'innovation labs' as referenced in the Green Paper.

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?

The Light Touch Regime currently has higher thresholds, which would be lowered under these proposals for these services. It will be important to consider why these higher thresholds were put in place and the impact that removing LTR would therefore have.



Chapter 4: Awarding the right contract to the right supplier

Overview

As stated at the outset of this chapter, awarding the right contract to the right supplier is the cornerstone of public procurement and the litmus test for an effective procurement regime. Over the last decade the BSA has consistently called for a greater emphasis on overall value over costs in public procurement, on the grounds that it will lead to improved public service delivery. We are pleased to see that this chapter takes positive steps in this direction, including the shift in emphasis to away from economic advantage, however clarification is needed on some of the measures outlined here.

Questions

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 BSA has long called for a shift in emphasis from cost to wider considerations when awarding government contracts and so in principle we fully support the change in emphasis here.

BSA members remain deeply concerned that, despite rhetoric to the contrary, too many contracts still over-emphasise cost, rather than best and most sustainable value. This is not the best approach, and it does not achieve the best quality or value in services and projects.

This change will allow for a renewed focus on quality of service, and value in its widest sense and over the longer term.

There remains, however, a lack of clarity as to what the practical differences will be in terms of considering the “most advantageous tender” as opposed to the “most economically advantageous tender” unless it is coupled with further guidance on the approach.

This also applies to Social Value considerations. There is a risk that ‘social value’ or ‘public good’ will be interpreted in a myriad of different ways and used much more qualitatively rather than quantitatively, making it difficult to assess achievements against tenders and also potentially creating unintended barriers in the way of SMEs and charities looking to provide services.

Under the current proposals on Social Value, buyers on individual procurement teams can choose their own combination of Social Value Themes, which in practice often means that suppliers are unable to substantially invest in building capacity in any of them. One proposal would be that suppliers be allowed to propose two Social Value Themes on a tender, one of which the buyer can choose. This would provide suppliers with an incentive to develop real capacity and capability over time across one or two Themes, which will make it far more likely that Social Value Themes will, in practice, be of high quality, and confidently delivered in practice.

Alternatively, Departments could be encouraged to select a Social Value Theme that will apply to all their tenders for a given period of, say, five years. That way, companies who know that their main customer is, say, DWP, can focus on developing capacity around DWP’s chosen Social Value Theme. Ensuring consistency of terminology and interpretation when it comes to social value will therefore be key to any move away from a cost-centric model as will ensuring proper training and guidance at all levels of government procurement.

In addition to this, it is welcome that the Government is looking at the full costs of public procurement decisions including environmental costs. Currently the focus is on the practice of suppliers; the Government could also look specifically at the products or services being procured.



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?

Further detail is required on this proposal as to how the suggested guidance on when the criteria link can be broken would be enforced.

If it is to be the case that the exceptions referred to here would be those outlined in any National Procurement Policy Statement, it remains difficult to comment on this until further details on the NPPS are published. Government should also be conscious that introducing too many exceptions will serve to undermine the principle at the heart of these reforms of simplifying and accelerating the procurement process.

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?

Further detail is also required here as to what the proposed 'clear framework' would look like in practice.

Again, ensuring adherence to any guidance in this area will be key to their successful implementation.

Q16. - Q20.

See answers below.

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

It is difficult to offer a firm position on the proposal until further detail is available, including what the criteria will be for debarment, how it would be decided when a supplier can be removed from the list, what metrics will be used to determine 'unacceptable behaviours', and the route by which suppliers would be able to challenge being placed on the list if they feel this has been done unfairly.

We would welcome the opportunity to work with the Cabinet Office as these proposals are developed further.

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

It is worth emphasising that poor past performance is different to inappropriate or illegal behaviour and that these in turn should include reflection on any steps undertaken to self-clean or self-correct. Furthermore, when assessing poor past performance, it is important to take into account delivery against performance improvement plans as well as the underlying reason for that poor performance.

In addition to this, assessing KPIs and performance may be made more difficult where these change in contract, as can often be the case. Not only is moving the goalposts unhelpful in its own right but KPIs can often just provide a snapshot of the inputs into a contract and may not accurately reflect delivery against the principles of the contract or indeed the outcomes achieved.

Chapter 5: Using the best commercial purchasing tools

Overview

Frameworks and Dynamic Purchasing Systems (DPS) are increasingly popular routes to market and we welcome the consideration given in the Green Paper to how these tools are used and regulated, as well as transparency around them.



We recognise the issues identified in this chapter, from paragraph 141, regarding the mixed understanding of the deployment of the commercial tools available. Therefore, it would be useful to clarify which tool is most appropriate for the different types of works, goods, or services, and, crucially, what they are not appropriate for. For example, we suggest frameworks may not be suited to the most complex procurements.

We welcome the increased transparency around frameworks and the intent to simplify and collate frameworks through the central portal. It would be useful to understand how widely across the public sector this will apply and if any sectors or bodies are exempt. For example, there are thousands of frameworks in existence, including some that are commercially/privately run but can be used by public sector contracting authorities. It would also be useful to understand where oversight of commercial tools on the central platform sits, and whether part of this will be to identify and help to avoid duplication or overlap across commercial tools.

One area where greater transparency would be welcome is the pipeline of work expected to be tendered through each framework and the number of call offs and spend through the framework. We are already engaging with Cabinet Office on what this might look like within the central platform.

We welcome recognition in the Green Paper of issues relating to fees or levies charged for participating in commercial vehicles, and the proposals for rules around this. It would be useful to understand how widely this applies, as frameworks can be set up by independent organisations, and how it will be regulated.

Questions

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

The new DPS+ proposal has merit, building on the premise of DPS' which are widely understood and are often easier for SMEs, social enterprises and VCSEs to engage with than other procurement routes. As suggested in our submission ahead of the Green Paper, bringing DPS' across Whitehall together could reduce duplication and cost.

It would be useful to understand more about what procurements Government envisages the DPS+ could be used for beyond common goods and services. It is important that the most appropriate procurement route is used, particularly for complex procurements, and guidance should be produced to help clarify the scenarios in which DPS+ may not be appropriate.

The proposal to conduct procurements under DPS+ under the new competitive flexible procedure could help encourage greater SME access to public procurement, however, as noted above, we would recommend comprehensive guidance and possibly a template for contracting authorities on how to use this procedure effectively. Lengthy or bureaucratic procurement practices could act as deterrents to joining DPS+ if the procedure is deemed to be complex.

We would be keen to discuss with Cabinet Office how feedback on bids submitted through DPS+ would be shared. For suppliers, especially SMEs, timely feedback enables them to understand how to improve their offer to contracting authorities and remain competitive.

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

We welcome the aim of the proposals to encourage competition, enable longer-term relationships to be built and innovation to be sought through framework agreements, and to enable new entrants at points during the lifetime of the framework. For open frameworks, it is right that the same requirements and evaluation criteria are applied when a framework is re-opened, and that those already on the framework are able to update their bids. We would welcome further clarity on the circumstances in which each should be used.



Further detail would also be useful on how the open framework would work in practice, particularly regarding re-opening. If our understanding is correct, the arrangements could cause complexity and risk for suppliers.

For example, where there are a limited number of suppliers on a framework, re-opening the framework would require all those already on the framework to be re-evaluated whether they update their bids or not under the current proposals. In effect, this could therefore be viewed as a maximum 3-year framework, plus an option for up to five years subject to being reselected.

Chapter 6: Ensuring open and transparent contracting

Overview

The BSA has long called for greater transparency throughout the commercial lifecycle and the proposals outlined in this chapter set out a clear direction of travel. We are pleased to see a clear drive to address the issues raised in the Green Paper around inconsistent transparency measures across contracting authorities, multiple registrations to bid, and data inconsistencies and interoperability.

There are many benefits to transparency and data sharing beyond analysing spend, managing suppliers and ensuring compliance. It enables greater integration of public services, can enable communities to be more involved in local decision-making, encourages continuous improvement and can help to shape a healthier marketplace where organisations of all sizes from the public, private and VCSE sectors can compete fairly. It can help to showcase the positive stories of public services being delivered well across the UK and the value of partnership working. These should also be the objectives of reform in this area.

Questions

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

As stated above, the BSA has long called for greater transparency throughout the commercial lifecycle and it will be important to get the messaging right around why we need transparency and what it will help to achieve. The data that is shared needs to be useful and tangible, and the reporting requirements on both contracting authorities and suppliers should be proportionate.

As the Green Paper recognises, there also needs to be a consistent approach around transparency to ensure that the principle of fair treatment of suppliers is upheld. Transparency requirements should not encroach on suppliers' intellectual capital or genuinely commercially sensitive information, carefully defined. Suppliers' ideas, or intellectual capital, are often not considered in the same way as patents or Intellectual Property. Guidance on good practice would be useful.

Further clarity and guidance from Cabinet Office, or the ICO, as to what constitutes commercially sensitive information is required here. This should be drafted in close consultation with suppliers and determined before increased transparency measures come into force. The guidance will need to be clear and give technical definitions to ensure that it is understood and applied consistently. We welcome the decision to link transparency measures to existing legislation, providing a legal basis and common understanding around transparency requirements.

Transparency measures should be reciprocated, with transparency around contracting authorities' performance and behaviours in procurement, as well as where a service is delivered by the public sector, including KPI publication. The former is included to some extent as an additional functionality of the central platform but could be strengthened.



Publication of KPIs would also require a degree of contextualisation. For example, a novel transformation that has never been attempted before carries much higher uncertainty on forecasted benefits. Suppliers may be required in the contract to sign up to achieve challenging performance goals in what are later revealed to have been entirely unrealistic timescales but achieve these within a more realistic timeframe.

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

Yes. Not only will this aid data sharing, interoperability and comparison, it will also help to ease the burden of data collection for suppliers. It would be useful to clarify whether the legislation will apply to all contracting authorities and if there are any exemptions, as there are to the new regulatory framework. If so, Government should encourage any authorities that are exempt to implement OCDS.

The suggestion in the Green Paper of publishing a timetable for implementing the OCDS is useful and will help contracting authorities and suppliers to work towards full compliance in good time. As part of this programme, it would be useful to share case studies from early adopters.

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

The intention and direction of travel here is right. A central platform collating procurement information would be extremely useful, not least for potential new entrants into public service delivery. The single supplier registration form will be welcomed by suppliers of all sizes, especially SMEs, as will the annual publication of pipelines. These are both something the BSA has been speaking to government about for some time. Pipelines would ideally be updated on a more regular basis with an increasing degree of detail added as the relevant start-dates approached, particularly if pipelines only look forward 18 months. This should be the ambition over time.

The BSA is already engaging with Cabinet Office on scoping the platform and will be arranging discussions with members as practitioners in order to feed into its development. Not only will this help to ensure that the platform is useful for suppliers, but it will also help with buy-in.

Looking at the scope of the central platform it is an ambitious programme, especially if you include the additional functionality listed under paragraph 179. To ensure optimum effectiveness of the central platform, it would be useful to prioritise and sequence the development of the programme, and to understand the intended timescale for the programme.

One of the challenges underpinning the central platform is that first there needs to be a comprehensive list of public entities from which to determine which will have access to the platform and which will be exempt.

Chapter 7: Fair and fast challenges to procurement decisions

Overview

We are pleased that measures have been proposed to speed up the courts process for procurement challenges and we agree with the ambition behind the proposals. We raised in our submission ahead of the Green Paper that long processes and delayed procurement decisions are costly and encourage adversarial relationships.

It is important to note that challenges impact heavily upon suppliers and commissioners, both in terms of the costs involved (be it financial, time-spend, or from human resource perspective) as well as the relational damage accrued during these challenges.



It is also clear that fear of legal challenge can drive certain negative behaviours in public procurement and have led to a decline in engagement and dialogue. We suggest that careful consideration is given to the idea of a tribunal system, as well as to the powers that could be afforded to the Cabinet Office unit with oversight of procurement and commercial capabilities to be able to act against the poor behaviours that can lead to legal challenges.

While this Chapter is primarily focussed on post-award and late-stage challenges, it seems clear to our members that earlier interventions will inevitably save costly challenges later in the process. As discussed above, some of these interventions could be within the remit of the new oversight unit within Cabinet Office.

Questions

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 proposals move a long way towards achieving these objectives, however members consider that more detail is required on how the proposals will work in practice in order to fully assess their potential impact. The proposals on Civil Procedure Rules are sensible, though the reforms around disclosure rely on transparency data being readily available within the central portal as a source of information to mitigate challenges. Therefore, it is important that the central portal is established and running well, with sufficient quality data being shared in a timely way, before the Court reforms come into effect.

There is a risk that changing too much of the current system too quickly will create confusion. It would be useful to understand the timescale and transition programme associated with the proposed Court reforms, and the guidance or training that will be available to support the changes.

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

Yes, although there will need to be clear guidance on who would be an appropriate person within a contracting authority to conduct the review and transparency around the process so that suppliers can have confidence in it. It should also be as quick as possible to prevent even further delays should the case then be escalated after the review.

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. This is a well-established dispute resolution process that will be familiar to many suppliers, thereby potentially improving access especially for SMEs. The speed of resolution is key, and this route would offer a quicker and simpler process. Considering this route for a subset of procurement challenges is a sensible proposal.

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

A focus on remedies within the procurement process would be helpful and could help to weed out speculative claims. The focus of all those procuring services or delivering services on behalf of the public sector should be on delivering the best possible service.

Q34. Do you agree that the test to lift automatic suspensions should be reviewed? Please provide further views on how this could be amended to achieve the desired objectives.



There are clear benefits to reviewing the test and considering a procurement-specific test. However, the 1975 American Cyanamid case on which the current test is based has been used for decades and has associated case law, so this could be a substantial change. Further detail would be needed to comment fully on this question.

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

It may be appropriate for an independent body to assess these costs. The calculation should be based on evidenced spend in each case rather than a theoretical model. Bid costs can be influenced by a number of factors including being a new market entrant or a new client.

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

Yes, so long as the process remains fair and transparent. We also propose that the Government considers future planning for a variety of crisis scenarios and pulls together the procedures and lists in advance of the event, whilst ensuring that these are as open and fair as possible. Possible scenarios may include pandemics, floods, cyber-attacks, earthquakes, and industrial action.

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

Members have noted that debrief letters are widely used and well-understood, however their limitations are also recognised. If debrief letters are no longer mandated, we would expect to see a decline in their use, even if they are recommended as best practice.

Debrief letters provide the opportunity for suppliers to learn both from a best practice perspective as well as looking at any potential shortcomings. This is particularly the case on more complex projects that have taken significant investment to compete for. Good debrief letters, which are both specific and meaningful, ultimately help suppliers to improve and help prevent the repetition of mistakes. This has proven especially useful for new entrants and SMEs to help familiarise themselves with the market.

If the decision was to remove the mandation of these letters, then there would need to be an appropriate mechanism installed to ensure that these lessons could still be shared. Better access to information at an earlier stage would go some way to mitigating the concerns about not mandating debrief letters but may not prove an appropriate substitute. Again, the proposals here rely on the transparency proposals and central platform outlined in Chapter 6 being in place, and information being available to a sufficient quality and in a timely manner.

Chapter 8: Effective contract management

Overview

The BSA broadly welcomes the measures set out in this chapter, however further clarification is needed on how supply chains are to be taken into account in the context of prompt payment commitments. As we have called for earlier in this response, the measures set out in this chapter will all be greatly enhanced by conducting a 'lessons learned' exercise looking back at contract management over the course of the coronavirus pandemic.

Questions:

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?*

As the Green Paper rightly raises, prompt payment can be an issue for many organisations and much progress has already been made in this area, including through the Prompt Payment Code. We recognise the disparities between public sector and private sector reporting too. There may be merit in exploring whether the Code could be expanded to include private sector transactions as well as public sector. It would also be useful to publish data on prompt payment of suppliers by public sector bodies in a timelier and more joined-up way.

The BSA welcomed the strengthening of the Prompt Payment Code. We support the principles it set out and were pleased to see many BSA members signing up to the Code. To be paid promptly when delivering a service is an important underlying principle for future economic success. It will also help to ensure that the UK remains, and grows as, an attractive place to invest. Indeed, some larger organisations are going beyond the requirements of the Government's Prompt Payment Code, which itself being strengthened so signatories are obliged to pay small businesses within 30 days.

In looking at prompt payment in general, a useful exercise for Government would be to look at the approaches taken under PPN02/20 and PPN04/20 during the pandemic. The changes were put in place quickly and there may be lessons to learn.

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

We welcome the proposals to make regulations on contract amendments clearer and easier to understand, and to permit amendments in cases of crisis and extreme urgency. This is a clear lesson from service delivery throughout the pandemic.

As the Green Paper recognises, many external factors can arise during the commercial cycle. The proposal to define what does not constitute a "substantial" amendment would give a greater degree of flexibility to contracting authorities.

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

Yes, transparency is important in pursuing a healthy, competitive market as well as accountability. The exemptions proposed are largely in line with 'safe harbour' provisions in contracts and will therefore be familiar thresholds to work with.



List of BSA Members, March 2021

3C3 Ltd	Incentive FM
3SC	Ingeus
Accenture	ISS UK Ltd
AECOM	KBR
Amey Plc	KPMG
Aramark	Kier Group Plc
Atkins	Maple Strategy
Atos	Maximus UK Ltd
Baachu	Mears Group
Balfour Beatty Plc	Medallia
BAE Systems	Mitie
Barclays Corporate	MTC
Bellrock Ltd	NatWest
Bevan Brittan LLP	NCG
Bouygues Energies and Services	OCS Group UK Ltd
Business 2 Business	P3
Bright Network	PHS Group
Browne Jacobson LLP	Pinsent Masons LLP
BT Group Plc	Polar Insight
Capita Plc	Purpose Led Performance
Catch 22	PricewaterhouseCoopers UK
CBRE Ltd	Quenby Support Services
CGI	Robertson FM
CH & Co Group	Salisbury Group
Chillblast	Seetec Group Ltd
Clyde & Co LLP	Serco Group Plc
CMS Cameron McKenna Nabarro Olswang LLP	Sharpe Pritchard LLP
Community Models	Shaw Trust
Compass Group Plc	Sodexo Ltd
Connect Assist	Sopra Steria Ltd
Corndel Ltd	Space Solutions
CSG	Spend Network
Deloitte	Strictly Education
DWF LLP	TerraQuest Solutions Ltd
Elior UK Ltd	The Gap Partnership
Eric Wright FM	The Grichan Partnership
Fujitsu UK	The Palladium Group
G3 Systems Ltd	The Sustainability Group
G4S Plc	Trowers & Hamlins LLP
Glaston Consulting	Veolia
GoodPeople	VINCI Facilities
Hinduja Global Solutions	VPS Group
HCP	Wand Consulting
HP	Wates Group
IBM	Willmott Dixon