

Transforming Public
Procurement
Womble Bond Dickinson (UK)
LLP Response to Consultation

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Introduction

Your key contact

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We are pleased to provide our responses to the Cabinet Office Consultation Paper "Transforming Public Procurement".

Womble Bond Dickinson act for a wide range of contracting authorities and utilities – both when acting as purchaser and supplier. We have a well-regarded specialist contentious procurement team as well as dealing with all non-contentious matters.

If you have any queries in respect of this consultation response please do not hesitate to contact Deborah Ramshaw.

1 Chapter 1

Procurement that better meets the UK's needs

1.1 Question 1

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

1.1.1 WBD Response

Yes we broadly agree with the proposed legal principles as supplemented by appropriate guidance. However, we note that proportionality is not expressly referenced and in practice this sits behind many claims, for example, in relation to manifest error.

We also note the "public good" principle which assumes that all contracting authorities' and utilities' policies will align with national priorities and policies and question whether central government control on public procurement policy is needed in the way set out.

1.2 Question 2

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?

1.2.1 WBD Response

It is not clear whether suppliers will nonetheless be able to raise matters of capability under this proposal. This needs to be made clear. If this is the case then the proposal appears to replicate the model in the NHS under the so called Section 75 Regulations (NHS (Procurement, Patient Choice and Competition) (No.2) Regulations 2013) and the powers of NHSI. Where formal proceedings have been brought by a supplier then it cannot also raise a complaint under the NHS provisions – clarity would be welcome on this aspect.

Given the wide coverage of the proposed new regime (public sector, utilities etc) the intervention powers and available remedies would have to be clearly set out as they will be different (we assume) depending on the contracting authority concerned. Centralisation of such a unit arguably goes against the spirit of "cutting red tape" and we envisage that different sectors will not necessarily welcome such a move. Is it intended that there will be any time limits placed on raising issues so that contracting authorities have some certainty on this aspect?

1.3 Question 3

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?

1.3.1 WBD Response

The panel should be drawn from experienced procurement practitioners across the wide sectors – central government, local government, utilities etc. and also from supplier representatives. Care would need to be taken in respect of potential conflicts of interest – for example, if monitoring/intervening in a CCS procurement the panel should have no conflict on advising. In addition, the preparation of the initial report within Cabinet Office should also ensure no conflicts.

2 Chapter 2

A simpler regulatory framework

2.1 Question 4

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

2.1.1 WBD Response

Yes – we believe this has the potential to aid application and interpretation but we note that there is the potential for the NHS to be acting under a different regime which may bring issues of consistency – particularly in social care across local government and the NHS – into play. The consolidation exercise will need to be carefully considered so that there are not numerous sections applicable to only certain types of authorities and/or contracts, as this will not bring uniformity to bear.

2.2 Question 5

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

2.2.1 WBD Response

Utilities rely heavily on qualification systems and the additional flexibilities within the current UCR – the benefits of consolidation should be considered alongside potential loss of flexibilities / systems for utilities.

3 Chapter 3

Using the right procurement procedures

3.1 Question 6

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

3.1.1 WBD Response

Broadly yes but we note the issue of thresholds is not discussed. Utilities currently enjoy much higher thresholds so how will these be harmonised?

3.2 Question 7

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

3.2.1 WBD Response

Yes but agreed that detailed guidance and training will be required. Such a ground will need to be able to react to regional/local crisis as well as national crisis and this is not clearly set out in the proposals.

3.3 Question 8

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

3.3.1 WBD Response

Guidance /clarification would be welcome on entering into R&D contracts where the final product(s) can be purchased without a further competition (as currently permitted under the innovation procedure).

3.4 Question 9

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?

3.4.1 WBD Response

Authorities are reluctant to go to market with a "problem" and invite innovative solutions because of the perceived limitations with various procedures. Clear guidance that such approaches are lawful and can be accommodated under the new regime would be most helpful.

3.5 Question 10

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

3.5.1 WBD Response

No comments

3.6 Question 11

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?

3.6.1 WBD Response

No further comments

3.7 Question 12

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?

3.7.1 WBD Response

To some extent this will depend on the thresholds to be set for the regime overall (see comment at 3.1.1 above).

4 Chapter 4

Awarding the right contract to the right supplier

4.1 Question 13

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

4.1.1 WBD Response

Yes we agree that this would allow authorities to take a broader view in the evaluation of tenders.

4.2 Question 14

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 Government?

4.2.1 WBD Response

We agree that award criteria must be linked to the subject-matter of the contract but we have some concerns around Government setting specific exceptions where political factors affect the award of contracts. There must be clear criteria around the use of these powers by Government.

4.3 Question 15

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?

4.3.1 WBD Response

Our concerns are broadly as set out in respect of question 14 above.

4.4 Question 16

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?

4.4.1 WBD Response

Yes

4.5 Question 17

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

4.5.1 WBD Response

None outside those set out in the Green Paper but we note that the additions are contrary to the simplification proposals if all the other remaining mandatory/discretionary grounds remain.

4.6 Question 18

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

4.6.1 WBD Response

Yes

4.7 Question 19

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)?

4.7.1 WBD Response

Yes.

4.8 Question 20

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

4.8.1 WBD Response

We are unclear from the Green Paper as to the clear reasons why this is considered necessary – it also seems to detract from the simplification agenda so we would like to see clearer rationale for this aspect.

4.9 Question 21

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

4.9.1 WBD Response

We agree that this would aid contracting authorities enormously but we have concerns about the complexity of the task and how long it would take to establish such a list.

4.10 Question 22

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

4.10.1 WBD Response

Yes but clear guidance will be critical here in determining "significant" deficiencies in performance otherwise it will be left to the Court to determine the issue on a case by case basis.

4.11 Question 23

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

4.11.1 WBD Response

Broadly yes but there may be significant practical problems with this approach, not least over whether the information provided will always be sufficiently extensive and precise for sensible selection to take place on complex procurements/contracts.

4.12 Question 24

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

4.12.1 WBD Response

Yes but again we would expect information sought to be relevant and proportionate to the contract being awarded and guidance on this aspect would be welcomed.

5 Chapter 5

Using the best commercial purchasing tools

5.1 Question 25

Do you agree with the proposed new DPS+?

5.1.1 WBD Response

It is not clear how the DPS+ proposals relate to the current DPS and qualification systems (utilities sector) already in place. The proposal indicates that if suppliers meet the conditions they "must" be admitted but this seems to us to reduce flexibility in procurement as currently the authority can effectively short-list suppliers.

It is not clear who needs to be invited to participate in a procurement – if it is all suppliers on the system then this is very different to a qualification system and would need further rationale / explanation as again seems to go against the simplification / flexibility agenda.

There is no mention of guidance being issued which we think will be critical for authorities.

5.2 Question 26

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

5.2.1 WBD Response

We would like more understanding of the proposals here as they do not seem to further the flexibility agenda. Longer frameworks are already permitted under the existing regulations if this can be justified.

There is no mention of guidance being issued which we think will be critical for authorities.

6 Chapter 6

Ensuring open and transparent contracting

6.1 Question 27

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

6.1.1 WBD Response

Yes but detailed guidance will be key for authorities. We are concerned that some of the proposals will put a fairly onerous burden on authorities in terms of reporting and taking disclosure/redaction decisions, which would likely require additional involvement of Information Governance colleagues, would not seem to be in line with the simplification agenda.

It is appropriate to only require disclosure of procurement information in line with FOIA, EIR and DPA principles of disclosure, but these principles (including the many legitimate exemptions from disclosure) require complex and timing-specific considerations, so we query how feasible it would be to require authorities to declare with any degree of accuracy in their tender documents (ie in advance of receiving tenders) which information they will and will not publish, as is proposed at para 165.

As is acknowledged at paras 168 and 169, there are numerous legitimate considerations for authorities to take when deciding whether to publish bid information, and we query the value of mandating proactive disclosure of third party bids which may, for perfectly legitimate reasons in line with FOIA and EIR be heavily redacted, particularly if the timing of disclosure is required to be in line with the Regulation 84 notice and contract award, at which point the commercial sensitivity of bids is still very live.

6.2 Question 28

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

6.2.1 WBD Response

Yes but again guidance will be key on transition and timetabling.

6.3 Question 29

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

6.3.1 WBD Response

We agree that this would be extremely helpful but have concerns about deliverability and timescale for implementation which it would be useful for Government to address in its consultation response. This is particularly so where an ambitious IT project is mooted during the UK's COVID-19 recovery.

We have serious concerns about the removal of the requirement for a mandatory debrief to suppliers – whilst removing the burden on authorities (and we know that many clients still struggle with the comparative analysis required under the current regulations) it will nonetheless be very difficult for aggrieved suppliers to work through a huge amount of information in order to assess how their bids were treated in line with the published

tender documents. Our view is that this is a movement too far in favour of authorities and may not allow suppliers to adequately understand the reasons for the success or otherwise of their bids.

7 Chapter 7

Fair and fast challenges to procurement decisions

7.1 Question 30

Do you believe that the proposed Court reforms will deliver the required objectives 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.

7.1.1 WBD Response

Yes so far as speed is concerned, especially if those reforms are backed by an increase in specific judicial capacity to ensure that cases can be dealt with expeditiously. Reforms to the availability of standard disclosure in procurement claims will materially impact upon costs too, although claimants will wish to ensure that no unintended consequences (e.g. loss of oversight over contemporaneous conduct of authorities) results from that.

7.2 Question 31

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

7.2.1 WBD Response

In principle, and to the extent this is really compatible with improving the speed and efficiency of the review yes. In practice, we suspect this will become a further battleground; claimants will pursue disclosure of documents relating to the review and rely upon any distinctions in the conclusions reached by the review as compared to those reached originally. Clear legislative guidance would be required to establish the remit, purpose and authoritative consequences of the review. The pilot proposal is therefore sensible.

7.3 Question 32

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?

7.3.1 WBD Response

Clearly it is worth investigating but the suitability of this forum is on its face limited to low value/low complexity claims. We question whether ongoing competitions, especially significant ones, could be dealt with in this way too; these are likely to require sensitive applications of judgment (cf the Rail franchising litigation) and appear apt for TCC involvement accordingly.

7.4 Question 33

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

7.4.1 WBD Response

Yes – we consider that the fundamental purpose of the procurement regime should be on ensuring that the contract is placed with the 'right', i.e. successful, bidder, with suitable sanctions to dissuade poor authority conduct. Improving and strengthening the range of remedies available pre-contract is consistent with that view and focusses bidder attention on putting forward the best possible bid.

7.5 Question 34

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.

7.5.1 WBD Response

It is slightly unclear from the Green Paper how substantively the proposed new test differs from the current test given that the Court is already required to conduct an assessment of the balance of convenience (taking into account the public interest, urgency, etc). We would be concerned by steps that make it easier for a contract to be suspended absent clear indications that the case being brought against the authority has some merit; that said, many of these concerns would be alleviated by an accompanying requirement on the Court/tribunal to put in place an abbreviated timetable to an expedited hearing

7.6 Question 35

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

7.6.1 WBD Response

Yes, for the reasons given in our response to question 33 above

7.7 Question 36

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

7.7.1 WBD Response

As a proportion of contract value, or as an average of all bidder costs for a specific contract opportunity

7.8 Question 37

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

7.8.1 WBD Response

This is difficult: the effect is to give a significant and valuable power to authorities to circumvent ordinary oversight principles and as such is a power that should only be permitted to be used sparingly and subject to very strict conditions being met, including exemplary sanctions in the event it is established that the power has been misused.

Set against that, we do recognise that in some circumstances, it is necessary (eg for public protection/safety) for service continuity or service provision to take precedence, as the existing rules also recognise.

7.9 Question 38

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

7.9.1 WBD Response

Please see our response to Question 29.

8 Chapter 8

Effective contract management

8.1 Question 39

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?

8.1.1 WBD Response

- There may be some concern for contracting authorities of an additional burden on them if legislation allows supply chain providers to have direct access to the contracting authority – this will need to be carefully considered in terms of the overall aim of simplification
- In general we think that contracting authorities will welcome this addition but the change should also drive better contract management by authorities and a clearer steer on 30 day payments throughout the supply chain may assist with this
- It is not clear how this would be achieved in practice but as a minimum it would be helpful if private providers published payment reporting on the same basis as the public sector, in respect of public sector contracts the provider holds.

8.2 Question 40

Do you agree with the proposed changes to amending contracts?

8.2.1 WBD Response

Clearer guidance on what constitutes a substantial modification would be very helpful for all procuring authorities.

8.3 Question 41

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

8.3.1 WBD Response

It is not clear what the additional benefits would be for this proposal and it could lead to substantial burdens on authorities who routinely make numerous minor changes to contracts – proportionality needs to be carefully considered here otherwise we can see an argument that the new regime has added to the administrative burden on authorities rather than reduced it

8.4 Question 42

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?

8.4.1 WBD Response

In principle we can see that this would be welcomed by authorities as, in the case of challenge, the authority can find itself in a ransom situation where service continuity is essential.

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