

Transforming Public Procurement Green Paper

Formal Consultation Response –
Fusion21 (March 2021)



Introduction

This document contains the response from Fusion21 to the Governments Green Paper for Transforming Public Procurement.

This response contains the views of Fusion21, a proportion of our public sector Members (Contracting Authorities) and our Suppliers, specifically 52 Suppliers and 31 Members have contributed, and their views are represented in this response.

The response is structured initially with an executive summary to summarise some of the key thoughts on the Green Paper, the questions relating to each chapter are then responded to in turn. If a response is not provided to a particular question this is noted as 'N/A'.

About Fusion21:

Providing fully compliant procurement frameworks for property, construction and the built environment in addition to social value services, Fusion21 prides itself on making a real impact – whether that's on bottom-line cost savings for the public sector, or seeing a local community begin to thrive.

Active nationwide, Fusion21 represents over 700 Contracting Authorities and works with 452 Suppliers. Fusion21 has delivered savings worth more than £226 million for its members and won awards for achievements in procurement and social value.

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Executive Summary

The Green Paper is set on the principles of increasing flexibility and reducing red tape across public sector procurement. Whilst these changes for reform are welcomed, some of the proposals within the paper could potentially have the opposite effect.

Whilst we agree that transparency is critically important across the public sector, the proposals for maintaining data, publishing data and maintaining this data on a central register must be considered to ensure this does not go against the principles the paper proposes. Management of the data, responsibility and ownership, the potential to distort competition and the integration with existing systems are key considerations here.

We agree with the simplification of procurement procedures and the three that have been proposed, however the supporting guidance for the new Flexible Competitive Procedure will be critical to ensure the procedure is applied in the right way and is not open to abuse. The general principle of proportionality is notably missing in the new principles set out in Chapter 1, we recommend this is retained as it will also support how the new Flexible Competitive Procedure is applied. Specific inclusion of the 'Public Good' principle is welcomed in underpinning a stronger approach to the delivery of social value through procurement.

The changes proposed for the new DPS+ and longer-term Framework options do not appear to go far enough. Whilst we very much agree with the proposal to retain the existing closed Framework option and direct award call-off opportunities, this response proposes further changes to both the open and closed Framework options.

The proposals for centralising supplier registration are currently unclear in how this would impact existing systems that manage common assessment standards for certain industries, such as PAS91 and Constructionline for works contracts. These systems provide a registration platform to support both procurement assessments and to manage ongoing supply chain compliance which is important and will need to be retained in some capacity.

It is questionable how likely such a central register has of succeeding and working effectively. As an alternative the Cabinet Office could consider better guidance on existing systems with a more standard approach that may have a greater chance of succeeding. Also, there is a possibility of excluding SMEs or those with less resource if there is a need to be centrally registered, there is a risk that this favours larger suppliers due to their ability to provide/manage/maintain data and registrations/accreditations.

Finally, the Court reforms proposed for procurement challenges could potentially create more opportunity for speculative or vexatious challenges, they may also disrupt the implementation of contract awards for critical works and services or be resourced enough to manage the potential volume. Such risks must be mitigated to ensure these reforms do not have a negative impact on procurement practices.

Chapter 1 – Procurement that better meets the UK’s needs

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

No, proportionality is notably absent. This is an important principle and should be retained. Particularly in light of the new Flexible Competitive Procedure which will create a variety of approaches to procurement, proportionality will be even more vital to ensure procurement is relevant and proportionate to the contract.

The inclusion of the new ‘Public Good’ principle is however welcomed; this can have a positive impact on strengthening the delivery of social value through procurement which is critical to organisations delivering smarter procurement across the public sector.

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?

The detail in relation to the new unit, their role and powers is currently too light to fully comment on the proposed changes. What are the key differences between this and the existing Public Procurement Review Service?

If the intent is to provide more intervention in procurement, then it may have the opposite effect and limit commercial capability. Further, as the role of the unit is still unclear, the level of powers will also have an impact on the sector and this needs to be clearer as part of any consultation. For example, if the unit can impose spending restrictions this would likely be a step back on a profession that has seen significant progression over the last 10 years and this progression may be stifled. It may also limit the ability to award contracts, delaying start dates and the delivery of extremely important works and services.

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 panel should have significant experience of delivering a range of public procurement projects as well as functional expertise of the nature of the contract being awarded. Without functional expertise a panel would fail to understand the requirements of that contract and how / why the procedure has been structured in that way. Particularly considering the proposed Flexible Competitive Procedure and the variety and flexibility in approach to future procurement procedures this functional expertise is imperative for a panel to draw the appropriate conclusions and judgements.

In terms of sanctions, any panel should not be overly authoritarian. It is again difficult to fully comment as the detail of the National Procurement Policy has not yet been set out and any sanctions should align with the objectives set out within the final policy.

For example, if an objective of the policy is to improve commercial capability, the panel should have the power to impose actions on individuals / organisations to improve that capability through the relevant means, such as formal training and development.

Chapter 2 – A simpler regulatory framework

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

Yes, in principle a uniform set of regulations makes sense given the principles of how public money is spent should be the same regardless of sector. It should also reduce ambiguity particularly for organisations that cross sector and do not understand key differences between PCR and UCR for example and would tend to adopt the PCR only.

However, there should be consideration by the Cabinet Office to the potential unintended consequences of bringing in UCR, CCR and DSPCR to PCR in a single approach. There would need to be clarity on what applies to each sector to prevent misinterpretation or abuse.

In addition, there should be consideration to conflicts of law where wider legislation conflicts with procurement regulations. For example, there are current challenges based on the conflicts that exist between PCR and Section 20 of the Landlord & Tenant Act 1985, consideration to address some of these conflicts would be welcomed where possible.

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

N/A

Chapter 3: Using the right procurement procedures

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

Yes. However, in terms of the Flexible Competitive Procedure the intent of this change is to make procurement more flexible and reduce red tape and simplify processes, there is a risk with this procedure that it has the opposite effect. It could result in a lack of standardisation to suppliers and create more lengthy, costly and difficult processes for both buyers and suppliers.

The government suggests guidance will be produced to support how this procedure can be used and this guidance will be crucial in the success of the procedure, it would be beneficial for some insight to be provided on this guidance as part of the consultation process for Contracting Authorities to understand the intent for how this can operate. There is a risk that the approach to flexibility or negotiation favours particular bidders and guidance would need to be clear on how equal treatment will be ensured.

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

Yes, the boundaries for this however would need to be clear. Transparency is important here and Contracting Authorities should publish notices for any above threshold call-off even in times of crisis.

Limited tendering should also link effectively to the modification of contracts regulations to avoid any misuse of the rules.

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

Providing more opportunity to vary / modify existing contracts is one way that could foster more effective innovation in procurement.

Whilst pre-market engagement should be used effectively to understand innovative solutions, shape contracts and outcome-based specifications, the reality is that innovation should not end during that phase. A supplier may develop a more innovative solution during the term of the contract that could have a longer-term benefit on the contract and the price but may not be able to introduce the innovation because they are constrained by existing regulations on contract modifications.

Whilst this would not be an open house to abuse in terms of endless contract extensions, if a supplier can bring true innovation that can provide social, economic, environmental benefit, this should be encouraged and rewarded with a longer-term contract. Transparency is again key and any extension and reasons for this through the innovation should be published in a notice, but it would encourage suppliers to continually seek more effective and innovative solutions during a contract term.

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?

N/A

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

N/A

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?

Current opportunities for engagement in pre-procurement provide ample opportunity to engage and understand potential innovative solutions. Pre-procurement activity can be designed by the Contracting Authority and coupled with the potential new Flexible Competitive Procedure this should create opportunity to shape procurement in a way that can foster innovation. What is critical here is the capability of the procurement professionals to make best use of these opportunities.

Q12. In light of the new competitive flexible procedure, do you agree that the Light Touch Regime for social, health, education and other services should be removed?

Yes, these should absolutely align with the requirements for all Contracting Authorities.

Chapter 4 – Awarding the right contract to the right supplier

Q13. Do you agree that the award of a contract should be based on the “most advantageous tender” rather than “most economically advantageous tender”?

Yes.

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?

Yes, award criteria should always relate to the subject matter of the contract in order to achieve the target if selecting the ‘Most Advantageous Tender’. More information is needed on any specific exceptions that would be set by the Government; this should be subject to consultation also.

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?

Yes.

Q16. Do you agree that, subject to self-cleaning fraud against the UK’s financial interests and non-disclosure of beneficial ownership should fall within the mandatory exclusion grounds?

Yes.

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

N/A

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

Yes.

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

Yes.

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

Yes.

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

Yes, however consideration should be given to integration with any other proposed centrally managed registration system and e-sourcing systems to ensure the process can be managed in the most effective way.

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

The current use of past performance is extremely difficult to implement. The regulation lacks clarity and presents legal challenges so proposals to make this easier to consider are welcomed. Providing or accessing existing information on a central database could help reduce the burden on suppliers, make the process more evidence based and avoid the reliance on information provided only by the supplier.

The changes here however and the use of data and KPI's presents several questions that need to be considered by the Cabinet Office, these questions include:

- Would there be flexibility in the KPI's that can be used?
- What if the standard KPI's are not relevant to the contract?
- What are the suppliers right to challenge their performance scores in what could be subjective areas?
- Who manages the data and what level of responsibility do they have for that?
- How real-time is the data?
- Will there be data definitions and data assurance?
- How does it impact new businesses and does this create a barrier to entry?
- Does this create unfair treatment to UK bidders for whom information is more likely to be held and also questions around differing laws in other countries?

All of these questions are critically important in the correct application of managing KPI's and performance data centrally. There should also be consideration to the resource requirement on Contracting Authorities on maintaining performance data and issuing such data to centrally managed lists. Some may lack the resource to do this effectively which will create an imbalance on how this is applied across the public sector.

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

The level of information provided here is not sufficient to understand what this change means. There is no information on what would be covered in the Supplier Registration System, is this basic information only, when is it updated, does this replace PAS91¹ for Works procurements or would PAS91 need to align with this? More information is required to ascertain the scale of the change and the potential impact to procurement.

¹ PAS91 stands for Publicly Available Specification for prequalification questionnaires in construction-related procurement. It was commissioned by the Government and developed by the British Standards Institute (BSI) and the Department for Business, Innovation and Skills (BSI).

What is currently very difficult in the existing regulations is how financial performance can be used to exclude bidders, currently the regulations are complex in this particular space, making it difficult criteria to use. There should be a more clarity on how financial assessments can be used in any new regime, providing a less challengeable option for exclusion where high risks are identified.

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

Yes, there should not be limitations to verify this criteria if it is proportionate and critical to the correct outcome of the procurement procedure.

Chapter 5 – Using the best commercial purchasing tools

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

No, the proposed DPS+ does not appear to offer much more than currently exists within the exist DPS structure.

Whilst it is intended to open up procurements to all types of goods, works and services, it seems that DPS's have been established generally for those purposes anyway, particularly in the built environment sector. Again, whilst call-offs should continue to be via further competition and this approach is agreed with, stating that the new Flexible Competitive Procedure must be used does not really offer much than would currently exists; what currently prevents Contracting Authorities from designing their own further competitions if the terms permit that?

The greatest challenge with DPS's is the volume that can be created and subsequently the resource involved when having to invite all suppliers to a further competition. This is not feasible for Contracting Authorities or suppliers themselves when competing on mass and the cost involved to suppliers when the chance of success is so low.

Consideration should be given in how competitions can be restricted to maximum numbers based on objective criteria to make the competition manageable, not overly onerous or an administrative burden. This could align with Procurement Policy Note (PPN) 11/20 for example for geographical restrictions or specific pass/fail criteria for that procurement. Again, it is critical such criteria is objective as there is a risk that the process becomes open to abuse, distorts competition and creates barriers to suppliers which could have a knock-on impact for any potential new unit overseeing procurement and pressure on procurement tribunals.

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

Direct Awards

Firstly, the intent to maintain direct award opportunities is supported. However, the wording in the paper (*'Direct award within framework agreements remains permissible if it is possible to objectively determine a single supplier capable of meeting the requirement'*) need clarifying as it is currently unclear whether this means direct awards are permissible only where one supplier can be identified as capable of delivering the requirement, or whether it is reiterating the existing rules. If it is the former, this significantly goes against the intent of reform to provide flexibility, reduce bureaucracy and simplify the rules.

Retaining the existing 4-year Framework option

Retaining the existing 4-year Framework structure is also supported as it creates opportunities for the public sector to combine their buying power and deliver value for money and create social impact through their procurement activity. Framework Agreements that align to the National Procurement Policy will also create an opportunity for

standardization in how this policy is delivered and how Contracting Authorities are supported to deliver across the public sector. Consideration should however be given to how the offer within closed frameworks can be refreshed, particularly from a commercial perspective, suggestions for this have been provided in the paragraph further in this chapter, headed 'Fusion21 alternative proposals'.

New open Framework option

We do not agree with the proposed change for a new longer-term option with the ability to reopen the competition every 3 or so years. This does appear overly different or more beneficial to conducting a new procurement at that time. It appears when reopening the competition, you can allow existing suppliers to submit a new bid, however they risk losing their position on the Framework if they do. There does not seem to be much reward for existing suppliers in doing this compared to the risk, so we would be surprised if existing suppliers took up the option to do this and it therefore would create a new option for the sake of creating a new option, that is never utilized in practice.

Also, as the evaluation criteria must be the same as the original procurement, the re-opened competition would have to be the same as 3 years previously and then, potentially, 6 years previously if it is re-opened again; this means buyers would be confined to conduct the exact same procurement under the same criteria rather than refresh it at that point in time when a lot has potentially changed in the market.

Fusion21 alternative proposals

The Cabinet Office should instead consider allowing the Framework process to issue a new pricing model at the point of opening up the competition, keeping quality requirements the same, and allowing new entrants. Existing suppliers would not have to re-submit their pre-qualification information as this should be managed on an ongoing basis during the Framework term anyway by using supplier registration tools such as Constructionline².

There should however be restrictions allowed on the number of new entrants to the Framework. The benefit of Framework Agreements is that it provides the opportunity to develop relationships with a suitable number of suppliers, balanced against the need to have sufficient competition and options of a streamlined route to market; this must be maintained. Reopening the competition in a way that can freshen up the competition within that Framework but still maintain those principles is key. The Green Paper suggests that to limit numbers all existing suppliers would have to re-apply, there seems no logical reason for this.

Benefits of this suggested approach include:

- Refreshes the existing framework offer with a new price model;
- Opens up the opportunity to new entrants;
- Suppliers do not risk losing their Framework position completely but would risk the order of their position – this still places a pressure to ensure they are competitive;

² Constructionline is a register for pre-qualified contractors and consultants used by the construction industry of the United Kingdom. The database contains details for over 46,000 suppliers and is accessed by more than 4,000 buyer organisations.

- Does not become overly burdensome to the suppliers or Contracting Authority; and
- Maintains competition in the event of attrition / loss of suppliers / capacity challenges during the Framework term.

It would also be beneficial for the existing 4-year closed Framework Agreements to be able to issue a new pricing model at year 2 if required, but without reopening the competition to new entrants. This could be written into the Contract Notice for transparency and would ensure the cost models remained relevant, fit for purpose and can maximise commercial outcomes for the public sector. This would also support the principles of the reform in terms of flexibility and reducing red tape.

Central Register

The proposal to maintain all information relating to Frameworks and DPS's needs further clarity. Specifically, the level of data to be maintained and the responsibilities for that. Consideration also needs to be given in how this Central Register integrates with tendering portals to reduce the administrative burdens to the sector.

Chapter 6 – Ensuring open and transparent contracting

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

The general principle of transparency is supported; however, the expectation is currently light in terms of detail to fully understand the implications in how this will be managed; who takes ownership on data accuracy? Has the cost and resource burden to Contracting Authorities been considered?

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

The information in how this will be applied, the integration with existing e-sourcing systems and level of detail to be published needs to be clarified before a view is provided on this. For example, some of the detail such as notices, tender documents, bidder details and details of award are published anyway through mandatory notices and e-sourcing systems; how much integration would exist to avoid duplication and help manage resource?

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

For centralising supplier registration, it is currently unclear how this will impact existing systems that manage common assessment standards for certain industries, such as the use of PAS91 through Constructionline for works contracts. These systems provide a registration platform to support both procurement assessments and to manage ongoing supply chain compliance which is important and will need to be retained in some capacity.

In terms of maintaining wider commercial data, centralising performance and contracting data may create issues with a lack of standardisation in approach and how the information is collected; either data is not uniform and redundant due to variation or everybody within the public sector will have the same approach and thus restrict innovation.

It is questionable how likely such a central register has of succeeding and working effectively. As an alternative the Cabinet Office could consider better guidance on existing systems with a more standard approach may have a greater chance of succeeding. Also, there is a possibility of excluding SMEs or those with less resource if there is a need to be centrally registered, there is a risk that this favours larger suppliers due to their ability to provide/manage/maintain data and registrations/accreditations.

Chapter 7 – Fair and fast challenges to procurement decisions

Q30. Do you believe that the proposed Court reforms will deliver the required objective of a faster, cheaper and therefore more accessible review system? If you can identify any further changes to Court rules/processes which you believe would have a positive impact in this area, please set them out here.

It will deliver those objectives yes, however careful consideration must be given to the negative impacts of creating a more accessible review system, in particular that it:

- Creates an opportunity for speculative or vexatious challenges;
- Disrupts the implementation of contract awards for critical works and services;
- May not be appropriately resourced enough to manage potential volume; and
- Impacts on the risk appetite of the public sector to make better commercial decisions.

The paper proposes a focus towards re-running procurement rather than aggrieved bidders seeking damages. In a more accessible system suppliers that are not successful will consider this route in the hope of being given ‘another shot’ at the contract.

We strongly recommend that the existing 30-day limitation period for challenges is maintained under the new rules to avoid longer term speculative claims and impacting successful and justifiable contract awards.

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

This would be difficult to implement on a standardized basis due to resource challenges particularly of smaller Contracting Authorities which could then create inconsistencies in how the internal review would be applied across the public sector.

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, but the response to Q30 applies here also.

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

Yes

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

N/A

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

Yes

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

A methodology should be established that considers average day rates of the professions involved in preparing a bid within each sector and the reasonable time that should be spent preparing a bid. This could have a range dependent on value and complexity of the contract. This should then be applied as standard.

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

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

If it will be a requirement to publish all evaluation information anyway then it makes no sense to duplicate this through the debrief letters. However, the change seems to be the need to publish anyway in a central system rather than individually to suppliers, so the resource requirement remains the same if not increased under the new transparency proposals. It is still creating an industry in itself, like the debrief process does now. The resource implications should be considered further to ensure there is a fair balance between resource and transparency, such as providing more detailed feedback on request which supports procurement decisions and offers a continuous improvement opportunity to bidders.

Chapter 8 – Effective contract management

Q39. Do you agree that:

• businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays? • there should be a specific right for public bodies to look at the payment performance of any supplier in a public sector contract supply chain? • private and public sector payment reporting requirements should be aligned and published in one place?

Yes, implementing the correct payment terms throughout the supply chain is good practice and should have a positive impact on strengthening cash flow through the supply chain and support smaller businesses.

There should be clarity on the implications of failure to achieve prompt payment terms and how perpetrators would be held to account.

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

Yes, complete reform is not necessary here but clarity on application of modifications is welcomed.

Clarity is needed on whether the modifications are exclusive to contracts or whether they can also be applied to Framework Agreements and also whether the three criteria set out in the paper have to be achieved for a modification, or whether it is at least one of the criteria.

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

Yes.

Q42. Do you agree that contract extensions which are entered into because an incumbent supplier has challenged a new contract award, should be subject to a cap on profits?

Consideration should instead be given to allowing call-off in 'extreme urgency' here to avoid incumbent suppliers speculatively challenging a contract award where they haven't been successful and are seeking to extend their delivery of the contract.

Capping profits and evidencing through open book arrangements will likely be difficult to administer.

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