

The government's green paper on procurement – Aspire's response

Introduction

As a community enterprise that derives the overwhelming amount of its income from the public procurement process through trading contracts, we are delighted to respond to the UK Government's plans for post-Brexit procurement outlined in its Green Paper '*Transforming Public Procurement*', December 2020.

Aspire has used its direct experience of the procurement process to inform this response. Our response considers the Government's objectives and then moves on to provide specific answers to a series of questions posed by the UK Government in its paper.

Government objectives

Improving the quality of services

The UK Government's overall goal is ambitious: "to speed up and simplify the procurement process, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery". The Government seeks to ensure that the new regulatory framework drives a culture of continuous improvement to support more resilient, diverse and innovative supply chains.

Aspire wholeheartedly supports goals that seek to improve public services and reduce inequalities. Never before have public services been so important for the people living in the UK. Strengthening them to bring greater support to the growing number of disadvantaged through reducing inequalities that exist within and between communities are, we consider, an integral and dynamic part of the Post-Covid economic and social recovery.

Strengthening public services through community provision

As a community organisation, we think that community-based organisations can play an important role in reducing inequalities, promoting innovation and helping to shape public services in ways that are more responsive and closer to their local communities.

A mixed economy of provision has always existed between the public and the private sector in parts of the public sector. However, all too often the debate around public services quality is framed within the context of opposing strategies – in-sourcing and preserving services in house or outsourcing to the private sector. This narrative excludes an additional means of public service provision through developing community based services that help to build up public institutions and assets in the public interest. Not all community based services will necessarily strengthen public services as a whole if they are used, for example, to undermine decent pay and good working conditions, and are used as a disguise to reduce ongoing costs of service without ensuring the quality to local people.

Giving local actors greater control over how local purchasing power is used must be an essential part of our post-pandemic economic recovery and building stronger, more resilient, more equal economies across the UK. This involves government, communities and business working together differently to shape the market to promote inclusive growth and the everyday economy.

Procurement has the power to be a strategic part of implementing change, of bringing services that are closer and more responsive to people's needs and delivering public value.

The extent of change and the new framework for procurement

The UK Government wants to comprehensively streamline and simplify the complex framework of regulations that currently govern public procurement. Yet, its freedom to do so is checked by the new framework in which it now operates. The UK Government has signed up to the World Trade Organisation Agreement on Government Procurement (GPA) and the EU- UK Trade and Co-operation Agreement.

While the Agreement ensures that the UK can maintain a separate and procurement regime based on the WTO Government Procurement Agreement (GPA), it also commits that "Each Party shall ensure that its procuring entities may take into account environmental, labour and social considerations throughout the procurement procedure, provided that those considerations are compatible with the rules established by Chapters 1 and 2 and are indicated in the notice of intended procurement or in another notice used as a notice of intended procurement or tender documentation."

At the same time, procurement is currently devolved in the UK. These constrain the ability of the UK Government in its regulatory choices. Yet this is hardly acknowledged within the Green Paper. There is a real danger that if these proposals are adopted without the support of the Scottish, Welsh and Northern Ireland governments that the UK will be left with a fragmented and piecemeal system of procurement. There is much good practice that could be shared within the UK and this could be the driver for cultural change rather than a focus on technological and legal reform which runs the risk of incurring public costs without deriving public benefits.

Ensuring public value

Diversity in delivery should not dilute public policy but should be directed by it. All too often cross-cutting policy objectives are not achieved within local communities because of the absence of a strong policy guidance. So, for example, cost-led procurement in which the immediate price of services is the predominant determinant of commissioning decisions can undermine other broader objectives of government policy.

The UK Government's proposals represent an important step in recognising this. The UK Government proposes including the public good as a principle in procurement law. According to the UK Government, public good procurement should support the delivery of strategic national priorities including economic, social, ethical, environmental as well as public safety. Other principles to be incorporated include value for money, transparency, integrity, fair treatment of suppliers, and non-discrimination. While a number of these principles were enshrined as part of European law, our particular focus is on the proposal to enshrine in law the principle of public good.

We wholeheartedly support such an approach a focus on public good or value. This will help to bring greater coherence within the public purchasing process. We also consider that the National Policy Statement will help to provide direction to national policy priorities. This could be in the form of a simple Bill or published as guidance if the UK Government decides to hold fire on its programme of legal and technological reform.

Sustainable Development Goals

Thinking big should be an integral part of local delivery. But so too should be thinking of the details that impacts on peoples' lives at an individual and group level. Think smaller, thinking local is also thinking smart.

Aspire considers that the UN Sustainable Development Goals are a public value charter for all organisations. They are the framework in which good procurement should sit. They are based on the principle that no-one should be left behind and all of the 17 goals are equal. They aim to stimulate action up to 2030 in areas of critical importance for humanity and the planet. These are big issues to think about.

Local public services working in partnership with the private, not for profit sectors and civic society can identify specific community needs identifying people, places and problems that require local solutions and collaborative working. These needs should help to frame the services provided by public bodies and organisations such as housing associations that provide public services. Working on these requires addressing the detail that constructs individual and daily lives, and thinking that is smaller, less ambitious for scale and more ambitious to make a difference to the lives of real people.

Creating public value should involve the public services and service providers setting a direction and public purpose for public and private actors to collaborate and to innovate to solve societal problems. This provides it with a proactive market shaping role enabling it to dictate the conditions of contract, engaging local people and organisations in the design and delivery of services and in encouraging a plurality of providers within a mixed economy.

Although procurement is a devolved matter within the UK, we consider that by aligning the public good with the Sustainable Development Goals this will provide the golden thread across the UK. In Scotland, the National Performance Framework reflects the local interpretation of the Sustainable

Development Goals and sustainable procurement is a duty in law; in Wales The Wellbeing of Future Generations Act 2015 requires public bodies to carry out sustainable development. Such an approach will include the UK Government's Levelling Up Agenda.

Streamlining the law

The UK government proposes streamlining the current law and providing for three new procedures including a new 'flexible' procedure that enables buyers to negotiate and innovate; the retention of the current open procedure and a limited procedure that could be used in limited circumstances such as in crisis or extreme urgency. Simplifying the law, however, does not necessarily mean simplifying the process.

We are concerned that the flexible procedure - which appears to be based on the current competitive procedure with negotiation that is currently rarely used - will add to the transaction costs of procurement and to the complexity of the process, in particular, for smaller organisations. There is little evidence supplied that this would make it easier for new participants to enter into the market.

This focus on changing procedures ignores the broader demands of shifting the culture and practice in procurement to encourage a bottom up approach that relocates decision making and taking to local people working in collaboration with communities.

The UK Government says that it will, subject to future funding decisions, provide a programme of training and guidance on the reforms. In our view it is essential that a fresh approach that aims to encourage innovation and greater diversity within procurement treats training and equipping procurement and related policy makers and decision takers as a priority. This training should involve the community sector, small business and others in developing innovative approaches for stimulating local markets.

Levelling up

It is disappointing that little mention is made of the UK Government's Levelling Up programme within the context of procurement reform. There is a real opportunity to drive forward a positive programme of public value led procurement linked to the Sustainable Development Goals which includes inclusive growth which would also focus on bottom up development. There is a danger that the Green Paper will encourage a centralised, procedural approach that will involve additional cost with little additional benefits to the procurement process providing little or no public value.

Positive Action Procurement Programmes

As part of the levelling up programme, we are concerned that the document makes no mention of existing law which provides for positive action procurement programmes designed to address disadvantage within the labour market.

Under Regulation 20 of the PCR there are two ways in which contracting authorities can support disabled people and employment and community enterprises and tackle disadvantage. (a) Under Regulation 20 (1) (a) contractors can reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons (b) Under Regulation 20 (1) (b) procurers can make provision for such contracts to be performed in the context of sheltered employment programmes provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

In either of these two cases the call for competition shall make reference to Article 20 of the Public Contracts Directive.

We believe strongly that reserved contracts of such a nature should be maintained as part of the levelling up process. They provide an opportunity for commissioners and community and social enterprises to address institutional disadvantage that is built into the labour market.

Much activity has focused on supply side measures for people who are disadvantaged by the labour market including training and CV presentation, yet all too often the pathway of many is to move into low paid, insecure, “bad employment” which can intensify previous reasons why people are absent from the labour market e.g. mental health and well being reasons. Providing public support to “good” employment organisations could help overcome in-work issues that arise, acting to prevent churn in the labour market. It could also help other programmes such as individual work placement.

Regulation 20 can help to build up a mixed economy and promote economic, social and environmental improvements in the market place through:

- using it as an adjunct to existing in-house provision to support people disadvantaged by the labour market into sustainable and good employment;
- addressing the issue of disability discrimination in terms of both access to employment and the terms of employment experienced by disabled people;
- taking positive action to promote the social economy if an alternative is required as a means of promoted mixed economies which are not solely reliant on profit-led business;
- taking positive action to reserve contracts for women led/BAME or other businesses;

- reserving contracts for people with lived experience, for example, to support the coproduction of services;
- promoting “Good works” suppliers as part of an economic development strategy designed to promote inclusive growth;
- incorporating use of the Article in larger contracts e.g. local authority waste contracts to establish neighbourhood reuse centres as part of the circular economy.

We would argue strongly for the retention of Regulation 20, along with measures to publicise its use. Procedurally this is an easy option for commissioners, as it reduces transaction costs and can be used with all existing procedures.

Further we would suggest that as part of a levelling up exercise voluntary targets could be set for purchasing bodies through the National Policy Statement. Positive Action Procurement (PAP) should not be a forgotten part of the existing procurement procedures, but a vital tool to encourage bottom up delivery of public services that build on the strengths and assets of local people.

Consultation, evidence and outcomes

Given the strategic nature of public procurement in the post-Covid economy we are concerned that the time for response has been limited and that technical proposals are being considered that are not fully thought out within the context of the overall pattern of procurement within the UK. Such a technical approach by its very nature fails to engage effectively with community organisations that are currently disengaged by the procurement process.

Our concern also (highlighted below in our answers to the specific questions) is that many of the changes are neither necessary and that there is existing provision within current legislation or that evidence has not been provided that they will meet the UK Government’s objectives, and therefore the benefits gained by the proposed changes do not provide overall value for money at a time when resources are limited.

There is a danger posed by the Green Paper that the focus of activity will be on procedural and unnecessary legal reform rather than the cultural shift required to realise the UK Government’s ambitions. Aspire’s view is that precious resources should be directed at promoting cultural change within the procurement process as part of the process of meeting the UK Government’s objectives; that learning and exchange should take place between the nations and the regions and within regions of good practice some of which are highlighted in Aspire’s Guide ‘Procurement for Community Public Good’, March, 2020; and that the market shaping role of public authorities should fully address institutional disadvantages that are being reinforced by Covid-19.

Consultation Questions

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

Aspire agrees with the proposed legal principles of public procurement, a number of which are currently provided by the existing legal framework. We support the principle of the public good and consider that wider social, ethical and environmental objectives should be incorporated into the public procurement process and that the golden thread linking the countries and regions of the UK should be the sustainable development goals. We are surprised by the omission of the principle of proportionality and consider that this as a principle should be retained. Our answers to some of the questions below indicate where this principle may be important to consider.

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 UK Government proposes to establish a new unit to replace the current Public Procurement Review Service. This allows government suppliers and potential government suppliers to raise concerns anonymously about potentially poor public sector procurement practice. In Aspire's experience this is a responsive service that has limited powers to intervene. For example, when Aspire sought its intervention in relation to Housing Association practice under public procurement law, we were informed that these were out of scope. However, the Service does currently provide an avenue for free complaint for organisations that experience bad practice and can investigate individual enquiries, of particular benefit to community and smaller organisations such as Aspire.

The UK Government proposes that the new unit would aim to improve capability and practices for the benefit of all contracting authorities and suppliers rather than provide remedies for an individual supplier on a specific procurement. We are concerned that it is being proposed that an important avenue of individual organisational redress is being removed from smaller organisations and community organisations such as ourselves despite the fact that the UK Government is seeking to diversify the market. We do not support the removal of such powers.

The current service also has the powers to investigate late payment, a particular issue for SMEs particularly challenged by cashflow difficulties as a result of Covid-19. It appears that the UK Government is also proposing that this service is to be abolished, replacing it with proposals to enable organisations to take up such issues through their supply chains.

We agree that there is a need to review systemic issues within the procurement system, in particular, focused on how far the procurement process supports the proposed principles including public value for money, but are not convinced that the establishment of a new small Unit within the Cabinet Office would be able to drive through the cultural change required by the UK Government's ambitions.

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 UK Government proposes that an independent panel would review reports from the new Unit. It fails to suggest drawing on representatives from the SMEs and community and social organisations. If a Unit is thus established, we would suggest that it should draw on these sectors to reflect the UK Government's objectives of encouraging diversity of supply within public procurement.

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

We are not convinced that the time and effort required in integrating the regulations into a set of consolidated regulations would deliver significant benefits or provide value for money in the current context.

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

We are not convinced that the time and effort required in integrating the regulations into a set of consolidated regulations would deliver significant benefits or provide value for money in the current context.

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

We do not agree that there is any evidence that the introduction of the new flexible procedure will encourage innovation within the procurement process. The UK Government accepts that where there are more flexible procedures currently available these are rarely used by purchasing authorities. The new flexible procedure will give greater discretion for contracting authorities on how they conduct procurements, and this may make the system more complex and less transparent if widely used, particularly to smaller and community enterprises.

We think that the risks are that it will be unfamiliar to buyers and suppliers and that there is no evidence that buyers will choose to take advantage of the increased flexibility and revert to traditional methods, resulting in limited benefits from the new procedure. Increasing flexibility could diminish the quality of the procurement process. It could encourage bad practice. Greater use of negotiations could prolong procurement and lead to the disengagement of smaller enterprises and community suppliers that have limited resources in engaging with the procurement process, leading to the opposite of what the UK Government intends.

There is also a risk that the detailed guidance that the UK Government intends to use will result in the system becoming more bureaucratic and cumbersome particularly for smaller organisations and community enterprise.

There is no reason why the Open Procedure which is currently the most popular method should not be combined with more pre-market engagement and market shaping activities that involve and engage a diversity of suppliers, and where equalities considerations and the scope of the commissioning exercise can be considered.

We are extremely concerned that the UK Government has made no mention of Regulation 20 Positive Action Programmes which reserve contracts to address disadvantage and would want to see these retained in any new system of procurement. It is concerning also, that recent positive moves that encourage organisations to reserve below threshold to SMEs and community enterprises make no mention of Regulation 20 Positive Action Programmes that can apply to above threshold procurements. When questioned about this approach the Crown Commercial Service stated that:

"We opted not to provide an exhaustive list of applicable organisations as there would be too many different types of organisations to mention. Whilst we have not mentioned "economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons" specifically, we do not think they are precluded in any way based on the current wording."

Such an approach seems not to show any appreciation of the importance of Positive Action Programmes within the procurement process or of addressing institutional disadvantage within the labour market through use of such contracts. When questioned further whether Regulation 20 was considered in the issuing of guidance and was then rejected and whether the equalities impact of such as decision was considered the response given was the following: *"The Policy team have advised that the reasons why we did not single out this group of contractors specifically has already been outlined in previous emails"*.

Regulation 20 does not only apply to the nature of contractors but also the ways in which positive action programmes can be carried out to level up. It is disappointing that this lack of appreciation is evident within the response of the central policy makers and that critical tools that can address disadvantage within the labour market are being overlooked or underplayed.

If central policy makers are to be influential in creating a more diverse supply chain existing tools should not be overlooked and suppliers should be treated with respect. Questions that address equalities issues within the policy process are worthy of an answer, however small or insignificant the supplier appears to be within the policy making process. Small change can make big differences at a local level.

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

No we do not consider that there is any need for this. Current provisions within existing regulations provide adequately for urgent procurement.

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

We consider that encouraging innovation within the process is essential to meet the UK government's objectives. We also believe that the current framework could provide this within the context of encouraging greater sharing of practice, more engagement with potential suppliers and greater emphasis on public value. To encourage social innovation, particular emphasis and guidance

could be given on community engagement prior to procurement, on community consultation as part of the commissioning process and of linking specific procurements to the Sustainable Development Goals.

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?

Yes, as a community organisation concerned to provide public value and work in the public interest, our concerns are to consider value for money and current pricing mechanisms appear inflexible within the open procedure.

Similarly many of the services that we provide engage with local stakeholders and there is no process for encouraging social innovation within the lifetime of a contract.

The current Innovation Partnership provides a model but appears too heavily structured and provides no clear opportunity for ongoing research and development as part of a process of dynamic engagement throughout the lifetime of delivering services.

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

Our forthcoming guide to procurement shows that there is a large amount of good practice being conducted within procurement. A central unit could be pivotal in sharing best practice through case studies and electronic guidance. An annual action plan could be drawn up linked to the public good in which new developments / policies could be identified and further activities planned for communications. There is a need to start new conversations which promote innovation and the circular economy, generate post-covid resilience within our communities and use the public procurement process to deliver public benefits at a local level.

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?

Much more emphasis could be placed on market shaping activities and community engagement by procuring authorities including consideration of the following:

What is the problem we are trying to address? What is the state of the current public services market? What are the overarching policies that govern our commissioning? What are the key economic, social and environmental issues? How can we influence the market? What is the service we think we should be offering? Is this a service we can offer better in house? Is this the service that we need? Do we or have we drawn upon the lived experience of users? Is there a ready market of suppliers? Is there a possibility that reserved contracts could create a better market in the long term? Should we consider an innovation partnership as part of a market shaping strategy?

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

No. The Light Touch Regime also provides for reserved contracts under Regulation 77 for mutuals and social enterprises, the effect of removing it would be to remove the right to reserve seemingly flying in the face of the UK Government's objective of providing a diversified market.

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

There is little practical difference between the two and we understand that this is the wording of the GPA so it is consistent with that.

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, in principle, so long as it is clear that the public good is part of the award criteria. However, in practice, the UK Government suggests that it would be for the UK Government to determine in statutory guidance what these exceptions were. This could cut across broader regional policies determined by local authorities that are accountable to local electorates e.g. Real Living Wage areas. This may have the effect of reducing innovation and diversity. We consider, in principle, that if exceptions are made, these should be allowed on the principle of subsidiarity with safeguards in place and with the right of complaint to a central unit. The UK Government could provide guidance on this matter.

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, so long as it clear that the public good can be considered. The UK Government proposes issuing guidelines but not that these would be statutory.

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, we agree.

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

Yes, we consider that tax evasion could be a discretionary exclusion.

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

Yes, we agree.

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, we agree

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

Yes, we agree.

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

We think that this proposal would be costly to manage and potentially disproportionate to the problem identified. Creating and managing a central debarment list would be a complex task and would involve having to collate information from different sources, using up valuable resources which could be more effectively used in building and developing best practice and meeting the UK Government's objective of providing more opportunities for diversifying markets. The UK Government proposes an appeal process which could be costly to manage and lead to long drawn out legal proceedings. It would also need to consider how the same level of information for suppliers outside of the UK could be collected, and again this could be a costly exercise and fail to provide value for money.

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

We consider that due diligence should be an important part of the current procurement process which all too often appears to be a paper exercise in which statements are made by bidders but not verified effectively by procurers.

However, we do not consider that the current system rules out due diligence particularly at the qualifying stage. Our experience is that some authorities do not carry out due diligence which is proportionate. For example, we have been involved in a tender where an award was granted to an organisation that was technically insolvent where the procuring authority had not interrogated the publicly available accounts, and where no guarantees had been given.

We are concerned about the proposals within the Green paper which appear to be taking a sledgehammer to cut a nut. It would take up considerable resource to manage and while the UK Government does not refer to it, there would need to be a right of appeal which could lead to lengthy and drawn out legal proceedings.

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

We do not agree with this proposal and consider that this could restrict the ability of procuring authorities to establish their own qualifying criteria bespoke to their own supplier and contract needs thus inhibiting local approaches to procurement.

Authorities can use this stage to lay down requirements such as Good Working Standards and the Real Living Wage, as part of their process for using procurement strategically. We are concerned that a central and standardised approach would act counter to the public good by reducing the powers of local commissioners to establish qualifying conditions.

Any central register would have to be updated on a regular basis and this could mean that it adds to the bureaucracy faced by SMEs and community enterprises.

The UK Government suggests that any further criteria that contracting authorities wished to apply to further reduce the number of bidders, in line with the competitive flexible procedure, could be applied after this selection stage. This would then end up with a three stage process and add to the complexity of the system.

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, as part of the due diligence process it is important that procuring authorities can interrogate the statements provided by tenderers, so long as this is proportionate to the tender and that the information required and the process of due diligence is highlighted in the tendering documentation.

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

We are concerned that the only way of procuring under the DPS would be through the proposed flexible arrangement which may add to the complexity of the system, and act against the interests of diversifying the market.

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

We have no strong opinions on this matter.

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

Yes, we agree in principle.

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

Yes.

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

In principle, we do agree that a centralised digital platform would make sense in the longer term. However, this should build on best practice rather than drive it. Our concerns are that technology could drive the procurement process rather than be driven by it. We, therefore, consider that the planned changes are too ambitious at a time of limited resources and that the priority focus should be on equipping procurement officers with the training and tools required to promote innovation and diversity within the procurement process, with the introduction of centralised technology processes to follow at a later date, when resources allow.

Q30. Do you believe that the proposed Court reforms will deliver the required objective of a faster, cheaper and therefore more accessible review system?

As a bidder within the procurement market we have experienced the imbalance of power and resources as a small community enterprise challenging the process, when we have considered that poor practice has taken place.

In one example, where the evidence was that an abnormally low rate had been submitted we submitted detailed evidence as the incumbent and requested an internal review from the Chief Executive who refused to deal with us direct and referred our request to the procurement consultants who had carried out the procurement on their behalf. After they acceded to our request, they refused to carry this out when the time for a legal challenge meant that we had to lodge a case with the High Court, even though we requested that they agree to a stay of proceedings. In another case, we have used High Court proceedings to bring about an independent review and were successfully awarded a contract when the proceedings were stayed and an independent review was carried out. All this has come at a huge financial price for a small organisation.

The UK Government says that it wants to bring about fundamental changes to the way procurement challenges are heard and managed, increasing accessibility for suppliers and reducing the impact of sometimes long and expensive court cases on contracting authorities, businesses and ultimately the taxpayer. We wholeheartedly support its ambitions, and we strongly believe that the method of challenge should not normally be through the Technology and Construction Court (TCC) but through alternative methods of review, mediation and arbitration which will help to save on the public purse.

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

Yes, as we have indicated we have used such a system before voluntarily but unless the deadline for cases to be submitted was extended which we recommend to three months, any review would need to be carried out speedily because there are only 30 days from the decision to apply to the court. This is not necessarily practical nor feasible. An extended deadline for submission could also be accompanied by new procedures and guidance on internal review, followed by agreed methods of mediation or arbitration and a stay of proceedings to be submitted by both parties with an automatic suspension of the contract until the finalisation of review. Such an approach would help to keep cases out of the TCC and provide greater redress for challengers.

While it could be argued that this could encourage a larger number of suppliers to challenge the system, it could also help to raise procurement standards and any poor practice consistent with the UK Government's objective. It would also provide for a more equitable procurement process where smaller organisations would be respected more within the process, while ensuring that the raising of

procurement standards would be consistent with ensuring greater parity between procuring authorities and larger commercial organisations where sometimes the latter are the drivers of the process.

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?

We fully support the introduction of a tribunal for smaller claims and believe that many low value claims could be redirected away from the TCC, leaving larger claims for the law courts. We consider that a specialist tribunal should be considered, that could be composed of practitioners and lay representatives.

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

Yes, we agree with this proposal.

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.

Yes, we agree with this proposal, a further criterion to be considered could be the nature of the organisation and/or how the contract is to be carried out, as outlined in Regulation 20.

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

No, we do not consider that this is a proportionate approach.

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

We do not have any particular view on this.

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

We do not have any strong views on this matter.

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

No. We are opposed to this. These are essential in providing bidders with an explanation of the process applied in relation to them, and the first part of the ability to challenge. The UK Government has already pointed out that disclosure of information is a major and costly part of TCC litigation. This is often because information is retained on the grounds of commercial sensitivity. The so-called confidentiality ring into which all information would then flow, would leave smaller organisations with less control and even less resources to consider challenges.

Q39. Do you agree that:

businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?

In principle we agree with the proposal but think it is unlikely to be widely used.

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?

Yes, we are in agreement with this proposal

private and public sector payment reporting requirements should be aligned and published in one place?

Yes , we agree with this proposal

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

We are not convinced by these proposals or that they provide value for money.

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

We do not agree that this is proportionate in all cases.

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?

We consider this of interest; if this could be applied to contract extensions it poses the question whether it could be more broadly applied within the procurement process more generally to deliver the public good.

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heart of procurement

About Aspire

For over eleven years, we have been primarily trading within the public procurement process experiencing the good, the bad and the indifferent. We have challenged in the High Court, worked with authorities to review their decision making when we felt it was unfair, and have experienced the highs of success and the lows and financial burden of failure. We have been frustrated by technical specifications that draw on the past and fail to integrate sustainable development and public value into their processes. Our lived experience (exclusively of the English system of procurement) is that change is required to enable greater dialogue, collaboration and innovation in developing public services in partnership with local communities. As part of that process we set up a small Commission and have provided a guide to procurement for public good, to add our voice to the need for change. This response draws upon the work of the Commission.

FURTHER INFORMATION

about Aspire: www.aspirecommunityworks.com

Campaign for Fair Procurement

www.betterforus.org.uk

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