

TRANSFORMING PUBLIC PROCUREMENT GREEN PAPER

CBI RESPONSE

MARCH 2021

CBI RESPONSE TO TRANSFORMING PUBLIC PROCUREMENT

The CBI is the UK's leading business organisation, speaking for some 190,000 businesses that together employ about a third of the private sector workforce. We work with policymakers to deliver a healthy environment for businesses to succeed, create jobs, and ultimately drive economic growth and prosperity.

As the voice of many public sector suppliers, large and small, the CBI welcomes the opportunity to respond to this Cabinet Office Green Paper and hopes the views of its members will be helpful in ensuring the successful implementation of the proposed reforms to public procurement rules and regulations.

To gather business views on the proposals, the CBI ran a number of member workshops and individual engagements focused on the different sectors in membership including public services, healthcare, defence, construction, professional services, financial services, technology and digital solutions, manufacturing, transport, legal services, social housing providers, and energy providers.

As a result of the discussions within these workshops we have focused our response on the areas of interest and key priorities to members rather than the questions provided with the consultation. This response is therefore laid out in a corresponding order to the Green Paper chapters, with an initial general comments section at the front.

General comments

Industry welcomes the *Transforming Public Procurement* Green Paper which sets out an ambitious and wide-reaching package of reforms for public procurement in England. From embedding elements of transparency and accountability, to reducing red-tape and increasing flexibility, businesses are broadly supportive of the reforms proposed and see the potential for these steps to support a more effective and innovative approach to public procurement.

The proposals laid out show a clear and positive intention to improve procurement rules and regulations, and business is keen to support the vital implementation phase of these reforms.

To truly 'transform public procurement', however it will be vital that these reforms go hand in hand with a robust implementation plan that tackles current capacity and capability challenges and shifts the culture of commercial teams across the public sector moving away from lowest cost to a focus on improving outcomes and long-term value for money. It will also rely heavily on government successfully putting in place the building blocks for more efficient and effective procurement processes – starting with the ambitious centralised data platform for buyers and suppliers.

Given the wide-ranging nature of the Green Paper it must also be acknowledged that for many of these proposals 'the devil will be in the detail'. Currently, too many proposals currently lack the information to be adequately analysed. Publishing additional information and clear guidance for contracting authorities and suppliers in the months ahead will therefore not only be important for further testing with industry, but will be critical to successful implementation.

Government should be open to further feedback on the guidance before and after publication, as some of these documents will have as significant implications for suppliers as the proposals in this green paper. Industry stands ready to support the development of this guidance and to help with the implementation of any reforms.

Furthermore, across the workshops the CBI held with sector experts from across the various public sector markets there were common themes that industry would like to assist in addressing.

The Green Paper could do more to exploit the opportunity to link other policies, particularly the Social Value Framework and the Outsourcing Playbooks. CBI members would like to see these positive commercial policies given further attention or teeth through the Green Paper process.

There are limited proposals which will genuinely drive innovation throughout the procurement and delivery phases of public contracts, and these steps fail to tackle some of the key barriers to innovation like the handling of IP and risk management.

The tone of the Green Paper focuses too much on buying instead of building meaningful partnerships with suppliers. At times it appears overly negative about how public-private partnerships have worked to date, including around the reasons why suppliers challenge contract awards. A greater emphasis and recognition of the benefits of procurement would help create a positive, collaborative framework going forward.

Despite these concerns, the Green Paper represents a significant positive step forward and suppliers to the public sector are above all keen to ensure the best possible reforms are put into legislation. Business will play a critical role in making these proposals a success and the

CBI therefore looks forward to working with the Cabinet Office and its members to take this process forwards in the coming months.

1. Procurement that better meets the UK's needs

- 1.1. Designing a new procurement regime which better meets the UK's needs is a vital goal, and there is no doubt that the overarching objectives included in the Green Paper reforms are widely sensible and supported by business. Supporting local communities, engaging with international trade, tackling corruption and wastage, and ensuring outcomes through a procurement are all essential elements of reform.
- 1.2. Business is universally supportive of efforts to tackle corruption in public procurement from both suppliers and contracting authorities, highlighting the damage that such abuse does to trust in the system more generally.
- 1.3. The outlined principles of public procurement are also widely supported by businesses, as is their proposed inclusion in legislation. There is no disagreement with either the intent of enshrining such principles in law, nor of the proposed principles, which many felt were a vital part of public procurement and would benefit from being even more firmly embedded. Indeed, businesses feel that the clarity these principles bring is a welcome addition for understanding the strategic motivations of contracting authorities.
- 1.4. However, it is disappointing that social value, sustainability, and successful delivery are not included amongst the proposed principles, particularly given the acknowledged importance given to the above elsewhere in the Green Paper or in broader policy reforms being worked on by Cabinet Office.

Efforts to embed social value through the National Policy Statement are welcome, but further clarity and legislative consistency would be welcomed by suppliers.

- 1.5. Business supports efforts to embed social value in public procurement, as noted by the response to [Procurement Policy Note 06/20](#) and the Cabinet Office's previous consultation on the new social value model.
- 1.6. However, as the CBI's [Valued Partnership report](#) highlighted, the complex and fragmented social value landscape we have across the UK and the continuing issue with how social value is applied to the supply of different goods and services. Industry therefore particularly welcomes the efforts to ensure social value is in use across the public sector and that there is consistency around social value priorities.
- 1.7. Many businesses feel this is an opportunity to ensure greater clarity on what social value means in practice and how it will be measured in different scenarios.
- 1.8. However, there are reservations about the use of a National Procurement Policy Statement (NPPS) as being the best tool for embedding social value across the public sector. Specifically, questions exist about the durability of the NPPS and its susceptibility to future changes.
- 1.9. Whilst the NPPS will be secured in legislation and future changes will also require legislative approval, the NPPS could still be changed relatively easily and the

approach to social value across the broader public sector could also change or lose momentum.

- 1.10. Business is also keen to understand more about how the NPPS would be mandated across contracting authorities, with a particular focus on local government and defence contracts. Suppliers see this as critical to driving real change across the market and ensuring a more consistent approach to social value.
- 1.11. The defence sector has particularly struggled to balance strategic and security objectives, as well as domestic and international suppliers and supply chains, with social value or prosperity. Without primary legislation enforcing the requirement, and with greater detail about integration with the Defence and Security Industrial Strategy, suppliers are concerned it may be a long process for social value to filter down to procurements.
- 1.12. There are also unresolved questions about how the NPPS and procurement principles will interact with broader reforms including HM Treasury's Green Book, when it comes to achieving public good and value for money. These include the need for greater clarity on the fundamental principles of different types of expenditure in the public good, and links to the levelling up agenda.

Programmes to upskill the public sector must go hand in hand with rules reform and the new unit must focus on support, not punishment.

- 1.13. Whilst many public bodies, particularly in central government, are increasingly competent buyers, [previous CBI work](#) has shown that a wide variety of businesses describe procurement skills across the public sector as patchy and often poor.
- 1.14. Given the ambition of the Green Paper and the need to embed other commercial policies, including commercial playbooks and the new social value model, significant time and resources will be required to ensure contracting authorities have the commercial capability required to make these proposals a success.
- 1.15. Many members see the benefit in the creation of a new unit in principle, particularly given the vital contributions this body could make to supporting procurement teams with the proposed relaxation of procurement processes and the new more flexible regulatory landscape.
- 1.16. However, given the lack of detail in the Green Paper suppliers would welcome a clearer understanding of the unit's role and function. This includes what its powers would be in monitoring or intervening in procurement processes, from a "slap on the wrist" and naming or shaming, to legally binding decisions. Clarity around the unit's interplay with the new Challenges regime is also needed.
- 1.17. Business also believes that the unit should a positive role, including proactively supporting the implementation and practice of various commercial policies, rather than being focused on enforcement. The challenging questions of risk transfer and effective risk management are potential areas where the unit could

be beneficial, for instance being able to provide a review at the request of either suppliers or contracting authorities.

1.18. To have the most impact, suppliers believe the unit should comprise the following elements:

1.18.1. Policing by consent

- There needs to be engagement with and the support of industry in the unit's actions, with an emphasis on working collaboratively with suppliers.

1.18.2. Not marking the homework but showing how to do it

- The unit should support and empower commissioners and suppliers to deliver the best procurements possible, by sharing best examples and establishing clear guidelines.

1.18.3. Ensuring a local focus despite a centrally driven approach to training and skills

- The unit should use the resources and consistency of a central organisation to help empower commissioners to carry out high-quality procurements on a local level.

1.18.4. Clear terms of reference, membership, and leadership of the unit

- The structure and composition of the unit should be made clear to all stakeholders, to enable a clear understanding of who comprises the unit and how its expertise and impartiality are guaranteed.

1.18.5. Clarity about the remit and the tools available to the unit

- The exact powers and tools that the unit can bring to bear must also be made clear from the outset, to avoid any confusion about how it is permitted to act.

1.19. It is also important to consider the potential for unintended consequences if the unit generates directives or precedents that could have significant repercussions across the public sector. One comparison to consider is with the Commission on State Aid which has published an overwhelming number of binding decisions and precedents for many public bodies. Many public bodies may already have difficulty keeping up with Procurement Policy Notes (PPNs) and Cabinet Office guidance, and business expresses concern about further burdens being placed on contracting authorities.

1.20. Different sectors also have questions about how the unit will interact with various sector specific regulators, such as social housing or healthcare, as well as the existing Public Procurement Review Service. The role of existing bodies such as the Government Commercial Function, and the challenges in empowering a new unit across the public sector more broadly is also unclear.

1.21. There is some concern that a unit strictly overseeing public body performance could also exaggerate the risk aversion of procurement teams, given the potential risk of greater scrutiny or penalties. This would go against the stated principles contained elsewhere in the Green Paper, including in supporting innovative

procurements and fostering collaboration. Clarity on its functions could help alleviate these concerns.

In summary, although the proposal for a new unit to help provide oversight in public procurement is welcome, a far more developed picture of the unit's scope, remit, purpose, and abilities is needed.

2. A simpler regulatory framework

Business welcomes the ambition to create a simpler regulatory regime but believe this may prove challenging in practice.

- 2.1.** Many businesses are in favour of the aim of a simpler regulatory framework for public procurement and express support for the principle of regulatory consolidation as outlined in the Green Paper. These proposals can help improve clarity and reduce the unnecessary bureaucracy that comes with having multiple regulations, as well as the underutilisation of certain regulations compared to others.
- 2.2.** Suppliers also recognised however that a single rule book could prove unwieldy and may be challenging apply across a variety of sectors. Utilities providers for instance have concerns that applying the same rules across all sectors risks creating unintended consequences and increasing bureaucracy within the Utilities Sector.
- 2.3.** Businesses are also keen that the ambition to simplify the regulations is not diluted by the inclusion of too many sector-specific annexes. The defence-sector for example is concerned that there may be too many exceptions laid out for defence contracts even within a single rule book. Clearly there will need to some sector-specific provisions such as those currently dealt with by the Single Source Regulations, but it is vital that government avoids creating too many additions so that they become cumbersome for both suppliers and buyers.
- 2.4.** The intent laid out in the NHS White Paper also suggests significant divergence is likely in coming years around the principles regarding the procurement of healthcare services versus other public procurements. This appears to go against the stated aims of the Cabinet Office regarding procurement reforms and has generated confusion within the market.
- 2.5.** Suppliers therefore feel that it would not be sensible or appropriate for healthcare services to be excluded from any attempts at standardisation, and if the NHS continues to pursue their own approach there should, as a minimum, be a focus on consistency between the revised procurement rules for public procurement and those which will govern healthcare services.

3. Using the right procurement procedures

- 3.1. Businesses see the reduction from seven to three procedures as a welcome and sensible proposal and are encouraged by the focus on increased flexibility and increased dialogue with suppliers within the competitive flexible procedure.
- 3.2. Some suppliers highlight that they are not aware of the different procedures currently available (which reinforces the findings in the Green Paper about how infrequently certain procedures are currently used by buyers). Suppliers believe the three proposed procedures would be suitable to cover most procurements.
- 3.3. Businesses describe the competitive flexible procedure as being particularly useful for many challenging procurements, including large capital projects and innovative technologies. Allowing negotiation and supplier engagement earlier in the process will enable contracting authorities to work out the best suppliers early on and bring people into the final negotiation more quickly.
- 3.4. The removal of the Light Touch Regime (LTR) is largely supported by business, particularly given the proposed changes to procurement procedures.

A focus on effective risk management will ensure the success of any new procurement procedures.

- 3.5. Businesses note that making the most of this flexibility will require contracting authorities to tackle the culture of risk aversion within procurement teams, particularly in local authorities.
- 3.6. Business notes that the current issues arise not only from the procedures but the poor practices from procurement teams in the public sector, including a lack of engagement with suppliers, poor pre-market dialogue, and a lack of clarity on the specifications. A greater emphasis on training and support for procurement teams would help empower commissioners to utilise the procedures more effectively when partnering with suppliers.
- 3.7. Suppliers have a strong belief that given the budget and time constraints on most procurement teams, there would likely be a strong chance of contracting authorities using only one of the procedures as a “catch-all” for most procurements, regardless of the suitability. Again, better training and support would help address this obstacle.
- 3.8. These proposals reiterate the importance of ensuring that reforms are supported by a proper implementation strategy and a thorough embedding of any changes into the working practices of the public sector procurement teams. Business would welcome further information about such a strategy in due course and are keen to play a role, particularly through cross-sector knowledge drops and appropriate commercial secondments.

Efforts to encourage innovation in procurement are welcomed, and suppliers are ready to support any changes to the procurement tools available.

- 3.9. Reducing the barriers to entrants and supporting a focus on innovative solutions when they can deliver better outcomes against criteria are both welcome signposts of the intent of this Green Paper, and businesses are particularly encouraged by these proposals.
- 3.10. There is widespread support for the competitive flexible procedure's focus on greater collaboration between suppliers and contract authorities, including encouraging supplier innovation during the bid process. Technology businesses emphasise how the flexible consumption (subscription) models that many customers now use to procure digital solutions are best suited by the flexibility of procurements.
- 3.11. However, business also believes that there are some barriers to innovation which are not fully addressed by the Green Paper's proposals and which they would welcome an opportunity to collaborate with Government to address going forward.
- 3.12. One such area is the risk aversion of commissioners. Business believes that there is space for a more radical approach to encouraging innovation by supporting public procurement teams in effectively identifying and ascribing risk in procurements. The Outsourcing Playbook's risk management guidance could provide a good starting point for future reforms.
- 3.13. Suppliers also believe that there is a risk that other proposals within the Green Paper on oversight and transparency could also act as a deterrent for inviting bids with innovative solutions given the "costs of getting it wrong versus the benefits of getting it right."
- 3.14. Higher standards of transparency, as in the competitive flexible procedure, can deliver better outcomes but also needs to be managed sensitively to protect innovative solutions or intellectual property of bidders. Industry would welcome opportunities to discuss what a good model for transparency should look like.

Business is supportive of attempts to simplify the procurement procedures but has questions about how these changes will be implemented in practice and how the accompanying culture change can be encouraged and supported through additional training and resources.

4. Awarding the right contract to the right suppliers

4.1. Most Advantageous Tender

- 4.1.1. Most businesses welcome the change from Most Economically Advantageous Tender (MEAT) to Most Advantageous Tender (MAT) as clearly indicating a greater focus on quality, non-traditional economic criteria (such as social value or sustainability), and value for money.
- 4.1.2. Whilst many suppliers believe a “MAT approach” is possible under the existing regulations, it is widely recognised that some contracting authorities continue to make decisions only on lowest price resulting in a “race to the bottom on price”. This means quality, social value, value for money, or whole life costs play less of a role in decision making in procurements. The renewed focus on wider value within this proposal could therefore be a helpful step in tackling this low-cost culture.

Guaranteeing value for money in procurement can be achieved as much through culture changes as new rules.

- 4.1.3. Business questions, however, the difference this change will make in practice, without further training, resources, and support for public sector buyers. Suppliers recognise that the current economic climate that may further encourage buyers to continue using existing award criteria focused on price.
- 4.1.4. Business feels that more training, support, resources, and guidance for procurement teams to enable a more nuanced and consistent approach to evaluating bids through a MAT approach is going to be vital to the success of this proposal. This guidance should also include greater clarity on the role that price plays when evaluating tenders, and how whole life cost would be evaluated or considered in an easily comparable way. To make the role of social value within MAT clearer, guidance should be produced to explain how the social value framework developed by Cabinet Office could support this approach.
- 4.1.5. Industry is eager to engage with Government around this guidance and to offer feedback, insights, and suggestions from their own experiences working with public bodies.

4.2. Exclusion, debarment, and past performance

- 4.2.1. Business supports efforts to stamp out illegal practices within public procurement including fraud and corruption. They also recognise that under the 2015 PCRs there was only a narrow space for mandatory or discretionary exclusions which limited the ability for contracting authorities to act.
- 4.2.2. However, greater clarity is needed on the role of discretionary exclusions, for instance around Deferred Prosecution Agreements (DPAs). Whilst acknowledging the

risks involved in mandatory exclusions, the Green Paper retains a discretionary exclusion ability for contracting authorities that could still lead to a significant impact on markets. Further assessment of the potential risks and unintended consequences of this approach is therefore needed.

Objectively considering past poor performance is necessary for informed procurements, but debarment should be reserved only for serious breaches of law.

- 4.2.3. Businesses recognise the need to ensure public money is spent wisely with responsible and effective suppliers, but there are concerns about the proposals regarding past poor performance and a potential debarment list within the Green Paper.
- 4.2.4. There is significant uncertainty on how the debarment list would be governed and to what extent it was practical to manage this centrally across so many contracts. Some businesses and contracting authorities see the debarment list as likely being very conservative and public bodies being “extraordinarily cautious” due to a fear of legal challenges but more detail is required.
- 4.2.5. Other key questions about the debarment list which would need further clarification before an informed opinion could be made include:
- What the bar is for getting onto the list, and what steps are required to get off the list?
 - What would the appeal process be before getting on the list, and once on the list?
 - How would consistency in reporting be ensured? (e.g. currently there could be a 150-question audit or 10-point questionnaire in a contract)
 - How are foreign firms or new market entrants fairly considered versus incumbents?
 - Would debarment be affected by company ownership changing or significant changes within senior leadership roles?
- 4.2.6. Providers in the adult social care sector flag one comparison with the role of the Care Quality Commission (CQC), and the catastrophic consequences for adults in social care that a CQC notice could have if preventing bidders from participating in a market.
- 4.2.7. With the proposed removal of the Light Touch Regime likely increasing the number of public sector tenders being carried out, suppliers are also concerned that the quality record of one provision could impact the opportunity for other public sector work.
- 4.2.8. There is also the potential for wrong decisions about debarment having significant and long-lasting problems for suppliers and authorities. Greater understanding about what measures would be put in place to reduce the risk of erroneous decisions would help alleviate this uncertainty.
- 4.2.9. Industry similarly recognises the need to consider past poor performance, particularly given the demands on contracting authorities to ensure value for money,

and there is widespread agreement that current processes and procedures can too often “hide” past performance from public sector clients.

- 4.2.10. However, business believes that the regulations should make a clear distinction between poor past performance and poor, inappropriate, or illegal behaviour and to delineate between the two categories and what should be considered.
- 4.2.11. Business highlights the potential for past poor performance to become politicised by contracting authorities, including local authorities and other public bodies, and being used – or abused – beyond the scope of the intent. For instance, a business could be challenging a contracting authority one day, and then lose a contract based on alleged past poor performance the next.
- 4.2.12. Firms have questions about how poor past performance would be objectively assessed, especially if that evaluation would be based on Key Performance Indicators (KPIs) which can not only change mid-contract but are often divorced from reality, particularly given the aforementioned concerns about the commercial skills and capabilities of the public sector.
- 4.2.13. Businesses emphasise how they are often brought in to turn around struggling contracts or take on high-risk projects with aggressive timelines or a high risk of failure. A greater emphasis on poor past performance would make such contracts increasingly unattractive and therefore disincentivise firms from getting involved given the high risk involved. There is the potential that this may lead to reduced competition for public contracts, and ultimately a danger of less value for money being delivered in the riskier parts of the market.
- 4.2.14. The Green Paper also fails to recognise that poor performance can also be driven by poor procurement itself and a failure on behalf of both parties to perform well. Businesses refer to concerns about being penalised for a past contract which had been badly conceived or implemented. On complicated contracts, a significant amount of time can be spent simply arguing about who is responsible for poor performance happening which is impossible to reflect in a KPI.
- 4.2.15. How this data on poor past performance would be collected also requires more detail. Many suppliers and contracting authorities will be unable or unwilling to provide information which deliberately opens them up to criticism. The new central platform with performance data would be vital to ensure an open and fair approach to past performance but significant and detailed criteria would need to be put in place to ensure that data is collected and stored efficiently and securely.
- 4.2.16. The burden of providing data should also not fall on suppliers as this would particularly prejudice SMEs. Consequently, there is general support for a simplification for how suppliers can provide information, via a central platform.

In summary, whilst the principles behind many of the changes proposed are supported, there is a clear need for more details around past performance and the debarment list, and a greater understanding of the implementation strategy for these proposals. Further guidance will be vital.

5. Using the best commercial purchasing tools

- 5.1.** Industry welcomes the proposals to ensure the public sector has the best tools available for purchasing goods and services. There is room to improve frameworks and Dynamic Purchasing Systems (DPS) to better match the requirements of contracting authorities and suppliers, as well as the solutions which suppliers can bring to the market. The proposals in the Green Paper show an effort to embed those much-needed improvements.

- 5.2.** Many suppliers and contracting authorities may not be aware of what frameworks or DPS exist and can end up using an ill-suited tool. If suppliers are also afforded access, the proposal for a new central register showing all frameworks and DPS will therefore help bring clarity to the landscape.

- 5.3.** However, our consultation with a wide range of members elicited a mixed response to these particular proposals. The CBI has therefore compiled a summary of the reactions to the various proposals relating to commercial purchasing tools to try to assist the Cabinet Office with taking this complex area forward:

Business comments on different proposed and existing commercial purchasing tools

Commercial purchasing tool	Positive comments	Negative comments
Dynamic Purchasing System	<ul style="list-style-type: none"> • Flexibility for supplier • Simplicity for contracting authorities • More open marketplace than a framework 	<ul style="list-style-type: none"> • Administrative burden for suppliers and stakeholders • Reduces collaboration between buyer and supplier
Dynamic Purchasing System +	<ul style="list-style-type: none"> • No limit on supplier numbers • Competitive flexible procedure helps encourage dialogue between supplier and buyer • More suited for digital solutions than a DPS or Framework 	<ul style="list-style-type: none"> • Could have permitted the use of a direct award to speed up procurements • Charging of fees could increase prices involved • The DPS+ could be too ambitious in what types of products and procurements will be available and risks simplifying complex partnerships to a transaction
Current frameworks	<ul style="list-style-type: none"> • Security for suppliers • Clarity of costs for buyers • Ease of access • Guarantee of complying with regulations • Qualification of suppliers 	<ul style="list-style-type: none"> • Inflexible in updating supplier offers • Can fail to recognise buyer needs • No guarantee of work despite significant requirements to getting onto the framework
Open Framework (up to 8 years)	<ul style="list-style-type: none"> • Greater flexibility for suppliers entering and leaving framework • Enabling a changing marketplace • Reducing the risk of artificial competition • Ensuring transparency and consistent standards across procurements 	<ul style="list-style-type: none"> • Unclear how the regular openings will affect incumbent suppliers on framework and whether it could disadvantage those who choose not to update their bids • Likely will not provide opportunities for changing solutions on framework
Closed Framework	<ul style="list-style-type: none"> • Security for suppliers • Consistency for buyers 	<ul style="list-style-type: none"> • Long-term closed frameworks can stagnate the market

A streamlined approach to qualification will help grow the market and encourage SME involvement, but lessons should be learnt from existing industry experiences around potential challenges.

- 5.4. The proposed changes around frameworks are largely supported by suppliers if the current benefits of frameworks – such as supplier security and ease of purchase for buyers - are maintained.
- 5.5. Suppliers feel that the current frameworks are unsuitable long-term and often fail to reflect the demands and requirements of customers or the best offers of suppliers, particularly around innovative solutions. Long-term closed frameworks stagnate the marketplace and mean suppliers are often unable to respond to the current fast-paced commercial environment due to the restrictions, despite having the capabilities.
- 5.6. There is consequently broad support for the new open framework and the flexibility combined with security for suppliers that this approach offers. Being able to join or leave a framework at more regular intervals is largely supported by businesses across multiple sectors.
- 5.7. However, CBI members seek clarity on whether the frameworks being discussed were only Crown Commercial Service (CCS) or also included privately-run frameworks.
- 5.8. Furthermore, a thorough assessment should be carried out by Cabinet Office to understand the impact of introducing the new contracting frameworks, particularly in more mature markets such as employability.
- 5.9. A data-driven qualification system, like the Achilles system and others currently in use, is widely seen as an effective means of improving public procurement for both suppliers and buyers. Streamlining the qualification process could significantly reduce the cost in terms of both money and time for procurements.
- 5.10. Looking ahead industry would welcome more detail about how such a qualification system would encompass different accreditation standards and whether such a system would end up creating a published list of mandated suppliers, thereby restricting market access.
- 5.11. The impact on SMEs is also questionable because whilst a system could simplify qualifications, it could simultaneously exclude smaller firms lacking the understanding or access to this system. Business is keen to share their experiences of using registration or qualification systems in practice to help ensure this new system is as effective as possible for suppliers of all sizes.

Business is broadly supportive of the efforts to ensure commissioners have the best commercial purchasing tools available and that qualification and the cutting of red tape will support suppliers, yet there are still concerns that these changes could have unintended consequences if not implemented properly.

6. Ensuring open and transparent contracting

- 6.1. Business supports embedding transparency in public procurement and is largely in favour of the proposals outlined in the Green Paper, including the creation of a central platform for supplier information.
- 6.2. A “tell us once” approach would be a significant administrative benefit to suppliers, who often state that current Standard Questionnaires (SQs) do not work particularly well because the details are always slightly different and therefore require a significant amount of tailoring to each tender.
- 6.3. It would particularly helpful if it contained regularly required information such as Modern Slavery, and suppliers of all sized recognise that SMEs would especially benefit from this ease of market access.
- 6.4. The ability to register once for procurement systems used by public bodies would likewise deliver significant benefits to suppliers, particularly those with limited capacity or resources, and would encourage new market entrants.

Transparency is a fundamental part of good procurement and if fleshed out, the new platform could solve many problems.

- 6.5. Whilst welcome in principle suppliers would welcome more detail around how the platform will work in practice. This should include:
 - What data would be placed on the platform?
 - How that data would be interpreted?
 - Who would be able to access that data?
 - How would the administrators ensure consistency given the wide range of data collected?
 - How and how frequently would necessary updates be handled?
 - How would this platform work with the existing pre-qualification of suppliers onto CCS frameworks?
- 6.6. The proposed guidance in this area is awaited eagerly, and business is keen to help provide insight and experiences into how to build and operate the platform.
- 6.7. To be effective believe the platform must contain both buyer and supplier data. This will be critical given the interconnected role of suppliers and contracting authorities in understanding contract performance, and can also help tackle some of the negative public/media perceptions about the performance of public-private partnerships.
- 6.8. It is also vital that Government thinks carefully about the administrative burden that comes with greater transparency, including what extent of redaction would be required for confidential information in tenders and the impact on suppliers and contracting authorities.

- 6.9. There is also a danger that greater transparency encourages contracting authorities to be more risk adverse given the greater level of scrutiny, as well as slowing down the procurement process. Some suppliers might also self-select to not enter a tender because the transparency burden is considered too high. These issues should not be a barrier to increasing transparency but should influence the approach taken to carefully balance greater openness with flexibility and supporting a thriving public sector market.
- 6.10. There is a concern amongst members that the introduction of a register of complaints about public procurement practices of contracting authorities could have the unintended effect of stifling feedback and complaints. Whilst many businesses see the benefit in the publication – particularly if the complaint resolution will assist all suppliers – there are some concerns about all complaints being registered, particularly as some may contain commercially sensitive or otherwise confidential information. Questions also arise as to how quickly information about the complaints and their resolution would be published.
- 6.11. Finally suppliers believe that government must be precise about platform ambitions. By being more focused it will be more likely to succeed (i.e. focusing solely on storage of supplier credentials and basic information, compared to complete performance data). Suppliers also recognise that it is likely that a programme of this size would take some time to scope, procure and deliver and suppliers would welcome more detail and clarity around the proposed time frame for this.

The successful delivery of this project will depend on whether lessons can be learnt and embedded from previous government IT projects, such as the Digital Marketplace. The most valuable elements of this platform for suppliers will be clarity around access to the data, how the data is searchable, and how that data can be employed.

7. Fair and fast challenges to procurement decisions

- 7.1. Previous [CBI research](#) has shown that the current remedies regime is slow, complex, and hugely expensive for suppliers. It is positive therefore to see proposals which seek to make remedies more accessible to a wider range of businesses, with less barriers and fewer administrative hurdles.
- 7.2. There is broad support across businesses for faster challenges, reviews, and remedies, including via a tribunal system, although information is required about its scope.
- 7.3. Businesses also support simpler mechanisms for facilitating challenges, particularly if those processes uphold the right of remedy without having to go to court. For many suppliers, the last place they intend to end up is in court with the customer, contrary to some of the statements in the Green Paper about the 'perverse incentives' for suppliers in bringing legal challenges.
- 7.4. As the CBI have called for previously, many businesses feel there is a vital arbitration step earlier in the process which is missing in the current approach and is not clearly outlined in the proposals either. The tribunal approach for lower-cost or simpler challenges, whilst lacking detail, is appreciated. There will still be a place for the high court and detailed examination of procurements.
- 7.5. Pre-contract remedies are also welcomed by suppliers. Businesses across a range of sectors explain that embedding remedies during the pre-contract negotiations is far easier and less resource intensive than going through an otherwise lengthy process.

Changes to the Challenges regime are welcomed but must be more reflective of the existing landscape.

- 7.6. There is some criticism of the tone of the proposals and the stated reasoning behind the reforms. Many businesses feel that suppliers are being painted as pursuing frivolous challenges and unnecessary damages, when in fact the opposite is true. Businesses believe the Green Paper therefore at times presents an overly negative impression of the usual relationships between buyer and supplier and the high levels of collaboration and partnership which are present in most contracts.
- 7.7. Whilst the increased availability of pre-contractual remedies is welcome, there are still some issues that arise only after the award of the contract and so cannot be remedied during the life of the tender. Caution against unjustifiably limiting suppliers' ability to access justice in these circumstances is therefore needed.
- 7.8. Suppliers were confused by the 1.5x bid cost cap, including why that value was chosen and the intent behind this proposal. Business believes this change therefore needs further investigation.
- 7.9. Damages and legal costs are a concern for contracting authorities, but less so for suppliers who predominantly seek the procurement re-run rather than any financial

rewards. Notwithstanding this, suppliers should be entitled to seek appropriate redress if they have concerns about the conduct of and/or award of a procurement.

- 7.10.** Businesses have concerns about the potential curtailing of the rights of suppliers, particularly with regards to the proposal to limit the amount payable under a contract extension agreed with an incumbent which is challenging the award of a new contract. Many suppliers state that ‘frivolous’ or ‘vexatious’ claims are very rare and the proposals risk penalising incumbent suppliers by limiting the amount they can receive under a contract extension when challenging an award.

Understanding good risk management can help mitigate some of the fears around challenges, damages, and remedies.

- 7.11.** Considering the emphasis on effective risk management in the Outsourcing Playbook, business would like more emphasis on how risk would be distributed under these new proposals.
- 7.12.** Business understands that the government does not want to spend taxpayers' money on contract extensions and damages. However, it is equally important that contracting authorities can be held to account for poor practices. This includes by retaining the risk that damages may be paid in circumstances where the procurement rules have been breached. Some business feel it is unclear why such risk must shift to suppliers and have concerns that this will have the effect of disincentivising legitimate challenges.
- 7.13.** If mandatory debrief letters (MDL) are to be removed then business believes there must be a detailed replacement. MDLs currently provide a degree of integrity of the evaluation process and their removal would make the procurement process less transparent for suppliers. Further information about how the transparency requirements will work in practice will be needed before the implications of the proposed removal of debrief letters can be considered properly.
- 7.14.** Some members also query the benefit of introducing a tailored fast track system, when their experiences suggest that, for instance, the Technology and Construction Court (TCC) handles the conduct of such claims well. Again, businesses welcome further detail about this fast-track system and its potential interplay with the TCC and the proposed tribunal.

As with other elements of this Green Paper, the changes to the challenges process are welcomed and business is keen to see the focus on ease of access and simplicity of process which these proposals outline. Ensuring these proposals are embedded effectively will require a strong partnership and buy-in from both suppliers and buyers, and if done correctly could deliver significant benefits for public procurements going forward.

8. Effective contract management

- 8.1. CBI members are in broad support of all proposals designed to improve contract management and ensure better relationships between suppliers and contracting authorities. Contract management is often where the most value for money and best outcomes are delivered or not.
- 8.2. Efforts to publish contract amendment notices are welcome given the significant changes which can occur during the life of a contract and which often are not reflected in the available data.
- 8.3. However, there is not enough information or detail in the Green Paper to comprehend what good contract management looks like. Whether linking to existing policies, such as the Outsourcing Playbook, or providing more specific examples of how the rules and regulations can be amended to better empower commissioners to ensure effective delivery during the life of the contract, there are still lots of grey areas.
- 8.4. Business would be keen to work with Government to help design and embed this guidance across public procurement and public-private partnerships, including through existing policies such as the Outsourcing Playbook.

Business is keen to see the same attention paid to the whole life of the contract as is paid to procurement and are willing to share examples and experiences wherever possible.

For queries or further information about this consultation response, please contact Dr Joshua Pritchard at joshua.pritchard@cbi.org.uk.