

Response to Transforming Public Procurement Consultation

ACE Response

March 2021

The Association for Consultancy and Engineering (ACE) champions the built environment, representing the views of around 450 members. Our members employ over 60,000 in the UK and 250,000 worldwide, contributing more than £15 billion to the UK economy, and provide design and engineering skills for the full range of built environment projects. We have contributed widely to best practice work on procurement, through Guidance Notes for members, ACE standard contracts, participation in the Construction Innovation Hub value Toolkit project, and a soon to be launched 'market sounding' service aimed at helping clients engage the market to understand how they can align their needs with what the current consultancy market can deliver.

Public sector capital investment will be at historically high levels over the next few years, and is accompanied by 'Build Back Better' policy goals around social value, and net zero/sustainability. This means we need public procurement to be efficient but also to operate in ways that enable the government to meet its wider objectives.

Through this reform there exists an opportunity adjust the regulations to enable consultants to deliver greater value for the public sector directly and invest in developing our businesses capability to support the Government's ambitions for a global Britain. To illustrate this our benchmarking analysis of our sector shows that the cost of bidding can be 4-5% of total revenue, halving this would enable consultants to double their investment in staff development or innovation.

Our industry is evolving through digital transformation and services that focus on **value** rather than volume are the key to unlocking the broader value that the clients seek from the investment. Add to the mix the advent of technological advancements, automation of traditional services, new opportunities and insights presented by data and data analytics and it is clear that the reliance on the current hours based procurement model and a corresponding time-based pricing model is not fit-for-purpose, but this is still the primary route through which the public sector procures. With a greater variety of services on offer and a more holistic view on a value being championed by Government through the Green Book reform and Social Value act, there is a need to re-think and challenge the procurement framework and process and enhance the capability of the public sector procurement departments, some of which is possible within the existing procurement regulations some of which is not.

We undertake international benchmarking which demonstrate the consultancy costs in the UK are equivalent to those in Europe despite the capital project costs being higher. There are many underlying causes of this of which the current procurement legislation, policy and processes are one.

Key points

- We therefore broadly support the thrust of the proposals, especially:
 - The emphasis on broader definitions of value than narrow lowest cost
 - Simplification of the procurement process to reduce bidding costs
 - Driving poor performers from the market and shifting the approach to support the sustainable growth of businesses who innovate

- However, the way public sector procures determines what it gets, and market disruption in the consultancy market driven by the digital transformation is opening up new services and business models which the public sector can take advantage of, but only if it procures appropriately:
 - Need for efficient structuring of procurement exercise by clients involving early market engagement
 - Quantifiable value definition is key, especially for concepts like social value
 - Client teams must be adequately resourced with the right skills and keep up to date with market developments

Procurement that better meets the UK's needs

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

Broadly yes. In particular including 'public good' as a principle should reinforce that public procurement is about more than just lowest price; as does the reference to 'whole-life' in 'value for money'. There is also a case for an explicit reference to 'reducing carbon/compatibility with net zero' in addition to value for money.

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?

There could be value in a new Unit if it is focused on ensuring that the Playbooks are being implemented. There is a question as to whether such a Unit would have then 'bandwidth' to drive change across the entire public sector procurement terrain. There is also scope to share learning across the different procurement teams operating in different sectors as the sector needs change, for example in the case of professional services the market will move from delivering people based services to a blend of people and technology based services and therefore learning from the technology category leads in how they procure will be increasingly relevant.

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?

Identifying individuals for a single panel to cover all public sector procurement would be a challenge. One option would be a sub panel for construction and infrastructure. Membership of such a panel should include those with expertise in professional services procurement and the changing shape of consultancy markets and business models.

A simpler regulatory framework

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

Yes, provided that this leads to proper simplification (for example as opposed to less legislation but more guidance). One option could be a 'core' document sets out the common elements of the regulations, for example the procurement procedures, with sub-sections specific to public bodies, utilities, defences, etc.

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

No response.

Using the right procurement procedures

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

Yes provided that the detailed implementation of the three procedures does not preclude procurement best practice such as:

- Market sounding and early engagement with suppliers
- aligning rewards and incentives to the clients outcomes

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

Yes, subject to the detail of the drafting.

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

it is important that the final drafting of the competitive procedure provides buyers the flexibility to design procurement processes which are accessible to suppliers of innovative products or services.

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?

Procuring authorities do sometimes discourage innovation because they want a like-for-like comparison or overly prescriptive transparency for example around timesheet on a lump sum contract. Likewise ECI and D&B models used with the wrong incentives aren't good vehicles to promote innovation; they are currently used primarily to offset risk.

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

The use of benchmarking is becoming increasingly important and is recognised in the Construction Playbook. If the Government can be confident in should cost data against input, output and outcome metrics it will provide a strong basis for more sophisticated commercial arrangements and better assurance around value for public money. This in turn will foster innovation and encourage and reward the industry to create value rather than engage in contracts focused on risk management.

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?

Experience of ACE members selling consultancy services is that to the built environment sector is that clients are often quite traditional in their approach preferring the classic input based model (e.g. payment based on the hourly rates for the professional services inputs) through a combination of familiarity; an ability to more easily compare with previous or other tenders and the desire to be confident that they are getting value in terms of longer service.

in practise though consultancy market is being disrupted on new ways of working an additional transformation leading to a wider range of consultancy service offerings and business models. Clients can take advantage of this but need to work with the market to understand the full potential of the Go-To-Market offer exploring:

- Why am I seeking the service and what do I want to achieve (outcome)?
- What service am I seeking and what are my options?
- How do I best deploy my suppliers and in what role/delivery model to deliver the service?
- How do I best reward my suppliers (payment and/or incentives) to enable their deployment to achieve the outcome?

The forthcoming consultancy playbook should support this shift and give greater market access to public consultancy contracts in turn delivering better value for money. Many consultants will primarily work in the private sector because of the noticeable difference in approach.

These approaches will be adopted more quickly if procurement is less siloed within the public sector. For example, IT services may be procured in more innovative ways within a public body (ego 'software as a service'), whereas consultancy services for built environment projects in the same public body may be procured in a very traditional, input-based way.

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 response.

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. Many ACE members often see tenders weighted 60-70% on price, and it needs a concerted effort by all parties, to promote a more rounded approach to value definition. Therefore we strongly support the thrust of the proposals in this section of the Green Paper, and the emphasis is very much in line with the CIH Value Toolkit which we also strongly support. However our members day-to-day experience is that implementing such a wider approach to value can be challenging, for example social value is often either not defined properly at all, or over-specified (e.g. some London Boroughs that will only count apprentices employed if they are resident within the Borough).

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

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?

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?

No response

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

No response

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)?

No response

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

No response

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

No response

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

Yes we fully support this. The aim must be to ensure that contracting authorities have access to comprehensive information on past performance against contractual KPIs and there is a culture whereby past underperformance will be a visible and legitimate factor to be taken into account in future procurements. Proportionality is also needed though, the underperformance needs to be material if it is to be taken into account. Getting the detail of regulations right here will be challenging and the should be based on quantifiable performance metrics not qualitative feedback in order to give a robust and transparent system.

The proposed central digital platform could play a role as a repository of performance information, reducing the need for bidders to secure references or provide data again for each new bid.

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

No response

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

No response

Using the best commercial purchasing tools

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

In principle yes. While there is a risk that DPS approaches can lead to a heavy workload for the contracting authority which can undermine good quality procurement, our members have also seen examples of where DPS systems have worked well.

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

Broadly yes. 4 year closed Frameworks can work well. We agree with the need to allow new entrants to join after this time, not least to avoid situations where firms get on Frameworks but then lose interest and do not bid for work, in effect blocking access for others.

While we see the benefit in allowing a framework to run for up to 8 years (with joining points in the second half of the term), it should be recognised that 8 years is a long time in the economy and in the consultancy market and market conditions, costs, appropriate fee levels and even business models can all evolve over that time period.

We would also emphasise that while Frameworks are a useful way to avoid the cost and market inefficiency of constant retendering, they require honesty from both sides to avoid common frustrations such as:

- mismatch between actual (as opposed to expected) level of work available through a Framework and the cost of bidding to be on a Framework
- Lowest cost consultant getting on a framework despite poorer quality work, and then their fee level becoming the benchmark for what the client will pay
- Client exaggerates volume of work to encourage bidders to lower overall fees
- Frameworks requiring further mini-competitions which are almost as onerous
- Clients sometimes require SQ and ITT together even though bids may not progress to ITT stage – extra work.

ACE Benchmarking analysis of our sector shows that the cost of bidding can be 4-5% of total revenue, halving this would enable consultants to double their investment in staff development or innovation.

It is also worth considering how the incentives on a framework can be more than financial, our research has defined 3 areas of incentivisation which are applicable for consultant firms:-

- Repeat business, where performance is rewarded with a reliable future pipeline of work.
- Financial, where performance is rewarded with a monetary incentive.
- Data monetisation, where information-based products and services are exchanged for legal tender or something of perceived equivalent value

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?

Yes provided this commercially sensitive data is not required to be disclosed.

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

No response

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

Yes if this avoids suppliers having to reregister.

We agree with the principles, and in particular the benefit to suppliers of only having to register once not multiple times. However the risks and challenges associated with the implementation of such a system would need to be carefully managed. To add value, the new platform would need to combine user-friendliness with a high level of data quality.

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.

No response

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

No response

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?

No response

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

No response

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.

No response

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

We are not sure this would be straightforward to implement.

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

No response

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

No response

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 do not support this. Debrief letters have an important role in ensuring that suppliers have a clear understanding of the evaluation process and also help ensure evaluation is carried out in a fair manner.

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?*

We support this proposal, though may need to be limited to the higher tiers to avoid over burdening contracting authorities.

- *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?*

No response

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

No response

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

We'd like to see greater flexibility in relation to amending contracts, although our preference is to have extensive market engagement on the proposed terms before the commencement of the procurement transaction there will be occasions where a contract needs to evolve during its use. We are supportive of the proposed legal principles of public procurement and believe that where a supplier is performing well and has the capability to deliver increased scope under the same contract, contracting authorities should have the flexibility to amend the contract as they see fit. It feels counterintuitive to run a new procurement with overhead burden which may not deliver the same level of value to the tax payer. Clearly any such proposal would need to clarify that such amendments would only be permissible for substantially similar scope.

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

No response

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?

No response

Further information

For further details about this written evidence please contact:

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