



**Transforming Public Procurement  
Green Paper Consultation Questions  
Submission 10.03.2021**

Consultation Questions

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

Yes, BIVDA members agree with the proposed legal principles as they appear to attempt to rebalance the emphasis on simple open market principles and move towards a more considered holistic approach more in line with national procurement strategy and objectives. The risk with this approach is that whilst the changes to procurement seek to simplify the rules, the expansion of principles add to them and will need to ensure simple and clear definitions and should contain some context particularly where discrimination and equal treatment experience relates to open market competition and will now require often subjective judgement within additional principles and also the new terminology of “Fair” – the principle of “Fair” is entirely different to “Equal” treatment, the definition includes timeliness to review procedures but should also include timeliness for information required for submitting proposals in the tender stage. The definition of “Discrimination” seems only to be in the context of domestic suppliers and is therefore unclear as to how the principle would be applied to international proposals. Within the definitions there should be more emphasis on the principles and obligations that suppliers can expect from contracting authorities in terms of appropriate timelines which recognise the complexity of some tenders and timely provision of information and clarifications clearly required in the governing principles.

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?

Yes, in principle BIVDA supports an independent review unit providing the terms of reference are clear and conflicts of interest are clearly known to ensure trust within the competitive markets they seek to oversee. The proposed panelists are appropriate, and BIVDA would seek assurance that supplier representation is not limited to large multi-nationals, and any supplier representatives are not privy to commercial information relating to their own sector. This panel should be available when suppliers/bidders feel they are not getting an adequate response/engagement during the tender process.

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?

It may be appropriate to consider Trade Association representatives to represent the collective interests of members on a sector basis rather than suppliers directly.

Sanctions should include.

The ability to remove individuals judged to be biased in a contracting process at any time from the point of Tender notice to the award stage.

The ability to re-start the tender process if an issue is found to require redress.

The ability to review documentation and decision making notes and documents.

The ability to require certain levels of expertise and experience for defined sets of contracts.

The ability to audit tenders.

The ability to audit contracting authorities processes and procedures.

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

YES

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

N/A – although the consultative responses of individual sectors should determine this.

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

BIVDA supports the use of only 3 procedures but clear guidance and inclusion of the existing procedure guidance must be included.

The Competitive flexible procedure has minimal rules and whilst this green paper is concerned with transforming procurement law rather than procurement practice, it does not address the complexity in particular market sectors to which the current rules are largely effective in preventing poor practice and unfair awards. BIVDA has some concerns relating moving from MEAT to MAT because there is significant risk that this will result in contracting authorities having difficulty in balancing the perceived risk of contract renewal and changing suppliers which has the potential to reduce competition significantly if the strength of incumbents increases from its already strong position within the current rules. BIVDA does not support Limited Tendering unless the specific limitations and additional remedies are also provided for, since this principle under Regulation 32 is already misused and mis-trusted under the current rules to avoid fair and transparent renewals of contracts to incumbent suppliers and in some instances used as an excuse to avoid competition. NB. The use of Regulation 32 during the Pandemic in BIVDA industry sector was not inappropriate.

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

YES in principle, but there should be a time limit on crisis and there should be time set aside for scrutiny after the initial action with a short time limit with a sanction to not repeat the action undertaken in crisis if it is found that it was un-necessary or there was an alternative option. This would mean that the crisis is dealt with, but the future or additional actions to address the continuation of events resulting from that crisis are dealt with in a fair and transparent manner. Crisis needs to limit the length of time contracts can be let for and could potentially be limited in value.

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

YES – Early market consultations should be mandatory and held in a timely manner to allow the UK's strong and dynamic R&D sector to introduce products that can address contracting authorities' needs. This must include suppliers who do not routinely sell products but develop them from the early design phases. Calls for this engagement prior to tender notices should be used. (Similar to DHSC activity for Covid-19) Contracting Authorities should have to justify why early market engagement is not undertaken. During the contracting procedure itself, technical specifications that are inflexible and do not allow alternatives that produce the same or better output to existing products must be allowed and there should be an evaluation process within certain tenders built in for conditional award or for more strategic timelines for products that are not yet in routine use. Innovative products are often exported from the UK due the inability of the domestic market to accept products for evaluation and then purchase and the requirement for UK routine use stifles innovation. Eg. Must be in use in a UK hospital for a particular number of years. Also, whilst a difficult problem to address, particularly given the reference to point 39 of the National Procurement Strategy and Carillion, companies bringing innovation to public contracting authorities are prevented from getting on to frameworks

and qualifying for tenders due to financial standing due to investment against profit ratios, credit scoring and the size of the business. There should be a government backed scheme, or an award process that enables these suppliers to access the tenders and procurements with different calculations or requirements in terms of financial standing or bank guarantees for example the business bank or government backing for these products allowable in the procurement process itself and not outside of the procedures these companies are working within.

**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?**

Clinical preference and experience with favoured products often determine technical specification which exclude alternatives with the use of MUST rather than should and not allowing variants.

Also, specific to the BIVDA industry sector, there is a contracting mechanism for Contracted Out Services (Heading 31 of COS) where the provision of these contracts entails primary contractors making the provision of products and services to NHS Hospitals and Trusts for inhouse and primary care services. These contracts comprise the management and coordination of supplies, equipment, and service for consumption by the hospitals with the contract being held with a single contractor. This primary contractor then sub-contracts to multiple sub-contractors depending on the scope of the contract tendered. This mechanism results in VAT Re-claim for the contracting hospital, but significantly affects competition and innovation because the selection and choice of sub-contractors is not governed by public procurement rules and does not require the primary contractor to participate in any of the processes that public procurement would expect. The contracts often force terms and conditions that smaller companies cannot work with particularly in qualification and insurance and liability requirements and this affects the innovative products because the contracting mechanism doesn't allow the exposure of the products and suppliers, the selection of products or suppliers and also the contracting requirements for suppliers meaning that only established products or suppliers are able to reach end users, and only new products from established suppliers are introduced over the contract term. There could be requirements imposed to undertake particular activity in these processes, or there could be a requirement to exclude certain elements outwith contract scope to allow innovation to flourish.

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

BIVDA members produce a large amount of data that can be used for public health and public procurement objectives. The public are now used to digital with submitting and receiving data online or by phone. The impact of digitization in diagnostics means that some parts of the population may change behaviours by engaging with health via easy to access diagnostics. Government needs to gain the ability to bring all of the separate faculties together and ensure accurate, up to date, interoperable data is held with a way to bring all electronic information together, which includes central care records and commercial data as this will allow standardization, avoid duplication of effort and reduce the burden of inefficiency on suppliers who will then be able to focus on the development and market entry for innovative products which can be derived from the combined data and industry can match the needs which can be identified from this data. The transparency and qualification proposals go some way to achieving this, but linking commercial and health data will be key. A managed rules based framework of data should contain an accepted level of data to satisfy risk considerations which all public authorities should be mandated to use to accept, store and manage this.

It is important to ensure that data that is exempt from Freedom of Information is not inadvertently included within mandatory data provision for qualification and transparency purposes. The Pandemic has shown that collaboration between suppliers and combining technologies has proven successful in BIVDA's industry sector with Test and Trace and the manufacturing coalition and rapid test consortium.

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?

There needs to be clearer and more definitive proposals where the perceived risk associated with supplier engagement and seeking to show equal treatment of suppliers prevents engagement and discussion around use cases and patient experience for fear of challenge or to avoid implying a promise to procure. Perhaps the transparency and fair treatment principles go some way to address this, and more detail or explicit rules relating to mandatory exclusions or other redress options specifically excluding innovation proposals could be beneficial since halting engagement in the name of open market competition is counter-intuitive. A mechanism to ensure that contracting authorities engage with suppliers at all stages of the tender process and refrain from locking out with an obligation to justify the absence of such engagement should be considered.

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

YES

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

BIVDA has some concerns relating moving from MEAT to MAT because there is significant risk that this will result in contracting authorities having difficulty in balancing the perceived risk of contract renewal and changing suppliers which has the potential to reduce competition significantly if the strength of incumbents increases from its already strong position within the current rules. If criteria more aligned with societal and environmental factors are to be encouraged, the quantitative evaluation criteria and a value based framework which allows comparison without subjectivity should be introduced and may be through qualification methods as well as award criteria. The proposals to add clarity are welcome.

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?

YES

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

YES

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

Deliberate Acts such as tax evasion, anti-competitive practice, and deliberate misrepresentation could be added. BIVDA members do not agree that there should be power in primary legislation to include or amend mandatory or discretionary exclusions without a consultation or mechanism to allow time for suppliers to react and adapt.

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

YES but this should be time bound.

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

YES

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

YES

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

YES, providing data protection and mechanisms for removal and challenge of supplier statement are set out properly. BIVDA members would seek to ensure the proposals include a mechanism for suppliers who may be at risk of being placed on such a debarment list have a clear and concise set of criteria that can result in being added to the list, and that there is a mechanism to challenge and/or rectify anything prior to be placed on such a list – in a similar way as self-cleansing. There is concern about who polices this and who has the authority to place suppliers on the list. The ability to place suppliers on such a list which would have a significant financial and reputational impact without a formal approval or audit in advance should not be allowable. Would the list have varying levels of debarment depending on severity?

There should definitely be a time limit and a mechanism to re-dress an issue to a satisfactory level and for a supplier to be removed if the issue is no longer applicable or relevant. Also, there should not be an electronic footprint of such a debarment once it is deemed to have been removed so that it is unable to be removed completely from all records providing the offence does not have to remain as stated in statutory legislation.

There should be a clear demarcation between accidental non-compliance (genuine error principle) and authority to make representations and deliberate attempts to contravene the law or procurement principle requirements.

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

YES, but there should be a set of criteria that past performance can legitimately consider for example.

Key Performance Indicator failure payments made by suppliers across the contract term.

Dates of implementation vs awarded dates of implementation.

Liquidated delay damages paid.

Number of failures for delivery.

Stock shortages.

Persistent failure

Performance review issues and resolutions.

BIVDA members would also strongly support the requirement for contractual Key Performance Indicators to be derived and included in the procurement and contract that are achievable and if a supplier raises concerns or is able to prove that the method of record is unreliable, unachievable or not material to the subject of the contract, persistent failure or compensation payments which may be unenforceable cannot be considered. It will be imperative if contract performance is to be considered in this manner, that the measurement criteria is legitimate and some guidance and rules should be provided. In addition, if there is acceptance or agreement formal or informal about the acceptability of a performance level within the term of the contract, the contracting authority may not use that measurement criteria to exclude that supplier upon renewal.

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

supplier registration system?

YES on condition that it is a single system with centrally agreed criteria that all contracting authorities are required to use and additional criteria that is not contained in the system will not be allowed. Similarly, any criteria or information contained in the system should be relevant and proportionate to the standing of the supplier and/ or the subject matter of the tender.

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

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

YES

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

BIVDA strongly agrees with open frameworks where suppliers can join at certain points and that the term will be extended to 8 years in the interest of innovation and market access for new market entrants, but clear guidance of this needs to be produced so that suppliers know when and how they can get onto frameworks that they did not originally apply for. Similarly, suppliers that are on the framework should not be disadvantaged by open frameworks and should not be penalized by the introduction of new suppliers. By being afforded the same opportunities to update and improve their proposals, the suppliers should not be at risk of losing their original framework place considering new suppliers should be assessed on the same terms, so an option to update only pricing should be given to existing framework suppliers as well as an option to resubmit completely, in which case the current proposals to evaluate their bid in the same manner and subsequently risk not being appointed is appropriate.

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

YES, particularly given the BIVDA view of criteria set out for evaluating past performance of Key Performance Indicator failure payments made by suppliers across the contract term.

Dates of implementation vs awarded dates of implementation.

Liquidated delay damages paid.

Number of failures for delivery.

Stock shortages.

Persistent failure

Performance review issues and resolutions

so this needs to be transparent and in the public domain.

Also to ensure that VFM and integrity can be assured.

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?

YES providing data protection and mechanisms for removal and challenge of supplier data are included. BIVDA members would seek to ensure the proposals include a mechanism to challenge and/or rectify any data held if it inaccurate or misleading. There is concern about who ownership and authority to use the data due to significant financial and reputational impacts. The information held would need to be compliant with the Freedom of Information commercial or other relevant exclusions. If data is held, it should not be requested again in a different format

or include additional requirements locally by a contracting authority.

There should definitely be a time limit and a mechanism to re-dress an issue to a satisfactory level and for a supplier to amend data in real time. Also, there should not be an electronic footprint of data if a supplier withdraws such data or it no longer considered relevant..

There should be a review and audit process, but suppliers should not be inadvertently disadvantaged if the data is subject to a genuine error.

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.

YES. However the remedies associated with the Court reforms need to allow genuine damages for unlawful procurement and pre-contractual remedies should not have primacy. The objective of a faster, cheaper and therefore more accessible review system is welcome, but this should not affect the award of justified damages. The issue will still remain that a potential supplier or bidder may still feel unable to bring a challenge due to the potential impact on the likelihood of success in a tender process.

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

YES

Q32. Do you believe that we should investigate the possibility of using an existing tribunal to deal with low value claims and issues relating to ongoing competitions?

YES

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

NO – Genuine damages should still be a remedy for breach of procurement rules, however the pre-contractual remedies if managed correctly and successful in implementation to avoid reaching the point of traditional court proceedings. Particularly if the independent review body is afforded the necessary sanctions to monitor public procurements.

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

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

NO

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

Activity Based costing which is clear and evidenced and should include administration, cost to serve and time spent on the bid which will capture the varying levels of complexity.

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. Crisis and urgency should not be excluded from scrutiny, rules and redress and

in general terms, the pandemic had shown that existing rules can be followed at pace and the criteria for these are adequate. Therefore the remedy should remain largely similar to current PCR's.

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 these should remain as part of the process with the same remedies associated. This mechanism is vital for suppliers to ensure that they have had every opportunity for transparency and whilst the introduction of the transparency mechanisms are welcome, in practice it is difficult to deal with a tender issue during a tender and a final opportunity to assess, review and consider the final decision with all aspects of the proposed award and reflections to be provided in the same manner as the current PCR's.

Q39. Do you agree that:

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

YES although difficult to implement as per answer for Q9.

- 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?

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YES

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

YES

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

YES, although further clarity about transparency of changes to contracts due to extreme urgency and the remedies available for an unlawful change due to extreme urgency needs to be set out.

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

YES

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

YES, however if the challenge is upheld for genuine tender conduct then the cap on profits could be off-set and considered as damages. Incumbent suppliers should not be held to contractual or performance requirements if they are forced to enter into extensions of contracts due to a challenge by another supplier. Suppliers are unable to invest in instrumentation and at the end of contracts, instrumentation is old and ready for replacement so should be exempt from performance metrics, particularly considering the proposal for past performance being assessed for future contract awards.