Cabinet Office

Transforming Public Procurement: Government response to consultation

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Transforming Public Procurement: Government response to consultation

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Contents

Overview

Introduction

1. In December 2020, the Cabinet Office set out proposals for shaping the future of public procurement legislation with the publication of a Green Paper, *Transforming Public Procurement*[1]. The overarching goals of these proposals are to speed up and simplify our procurement processes, place value for money at their heart, generate social value and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery.

2. At around £300 billion[2], public procurement accounts for around a third of all public expenditure every year. By improving the way public procurement is regulated, the Government can not only save the taxpayer money but spread opportunity, improve public services, empower communities and restore local pride across every region of the country. A procurement regime that is simple, flexible and takes greater account of social value can play a big role in contributing to the Government's levelling-up goals.

3. Procurement reform is not new but it has always had to work within the framework of EU based regulations. The latest EU Directives were transposed into UK law in 2015 and 2016. Following the UK's exit from the EU, we now have an opportunity to develop and implement a new procurement regime, moving away from the complex EU rules-based approach that was designed first and foremost to facilitate the single market and instead adopt a new simplified approach that prioritises boosting growth and productivity in the UK, maximising value for money and social value, promoting efficiency, innovation and transparency.

4. The Green Paper sought feedback from stakeholders who will be involved in the new regime. This document summarises the feedback received to the consultation and provides the Government's response to each individual question. We have considered carefully all of the comments received. In some instances, there is no change to the proposals set out in the Green Paper; in others the Cabinet Office has clarified or amended the proposals based on the feedback. Details are set out under the response to each of the consultation questions, however these all remain subject to change as we work to finalise the new procurement regime.

Consultation process

5. In developing the proposals for the Green Paper, Cabinet Office officials engaged with over 500 stakeholders and organisations through many hundreds of hours of discussions and workshops. This included stakeholders from central and local government, the education and

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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943946/Transforming_public_procurement.pdf

[2] Combined figure of gross current procurement (£220,428 million) and gross capital procurement (£71,583 million) from the Public Expenditure Statistical Analysis (PESA) 2019

health sectors, small, medium and large businesses, charities and social enterprises, academics and procurement lawyers.

6. The public consultation on the Green Paper opened on 15 December 2020 and closed on 10 March 2021.

7. The Green Paper was circulated to a range of stakeholders and was also made available publicly on the GOV.UK website at the commencement of the consultation in December 2020. The Cabinet Office ran a series of open workshops in early 2021 for public bodies, suppliers and other stakeholders aimed at providing an in-depth understanding of the proposals and to encourage interested parties to respond to the consultation. These workshops were attended by over 600 representatives from contracting authorities and over 300 stakeholders from suppliers, industry bodies and other interested parties.

8. The Cabinet Office has now analysed the consultation and what follows is a detailed review of the responses received. The Cabinet Office is grateful to all those who took the time to respond and for their help in developing the proposals.

Breakdown of responses

9. In total, 619 responses to the consultation were received. There was a mix of responses between contracting authorities who will be responsible for procuring within the future regime and suppliers to the public sector who will be bidding in procurements and delivering under contracts under the proposed regime. There were 226 responses from contracting authorities, 269 from suppliers and 124 from other interested parties such as academics, legal professionals and members of the public.

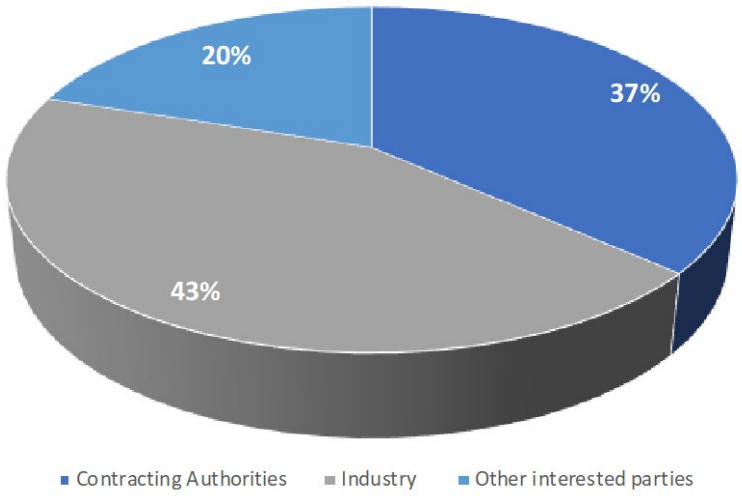

Chart 1 - Responses by respondent category

10. Of the 226 responses from contracting authorities, almost half of these were from local government. There were 32 responses from central government departments as well as representation from housing associations, educational institutions and NHS Trusts.

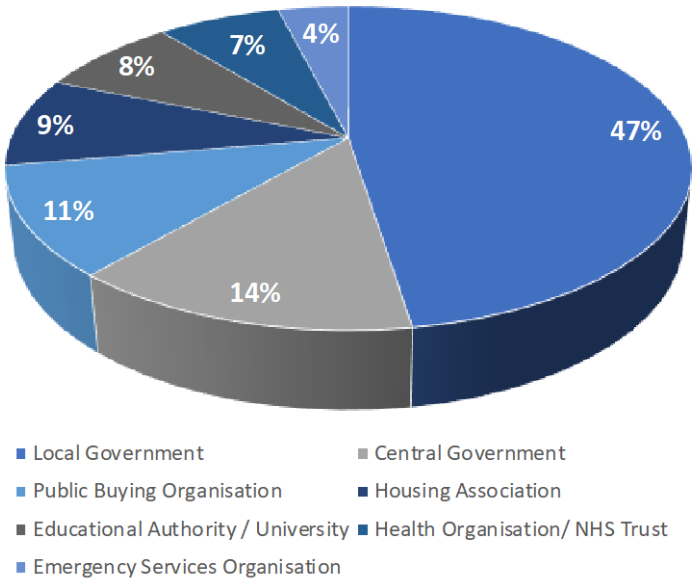

Chart 2 - Contracting authorities by type

11. Of the 269 responses from industry, there was strong representation from SMEs and VCSEs[3]. There were 21 responses from the Government's strategic suppliers[4]. There were 44 responses from the utilities sector.

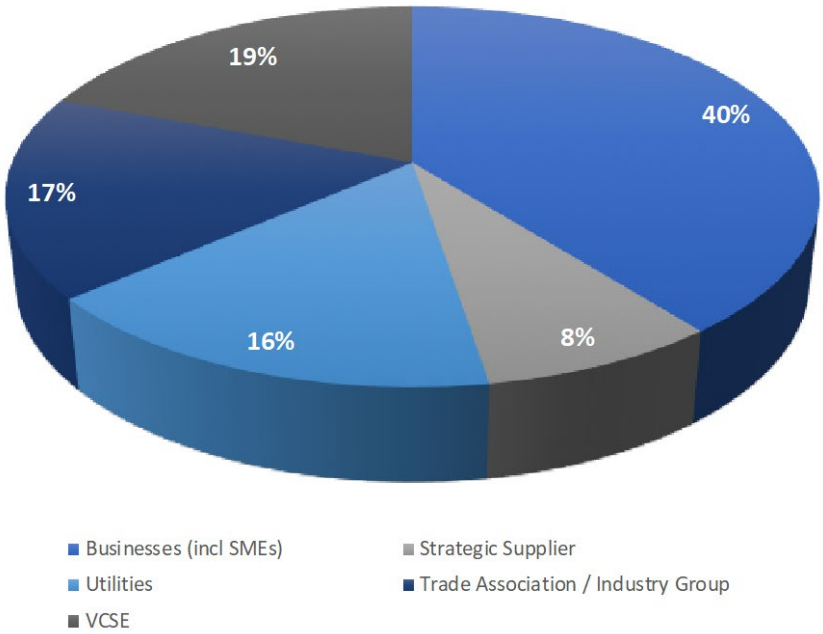

Chart 3 - Responses from industry

[3] SME means Small and Medium Enterprise and is generally defined as an organisation with fewer than 250 employees. VCSE means Voluntary, Community and Social Enterprise.
[4] https://www.gov.uk/government/publications/strategic-suppliers

12. Other interested parties also provided a view, including legal firms, academic experts and professional bodies who responded on behalf of their members. This has provided a range of perspectives from different sectors.

13. The complete breakdown of responses demonstrates that there was a good range of engagement by contracting authorities and organisations who will be impacted by the reforms, and this provides a robust evidence base for the Government to analyse the proposals and take decisions on the way forward.

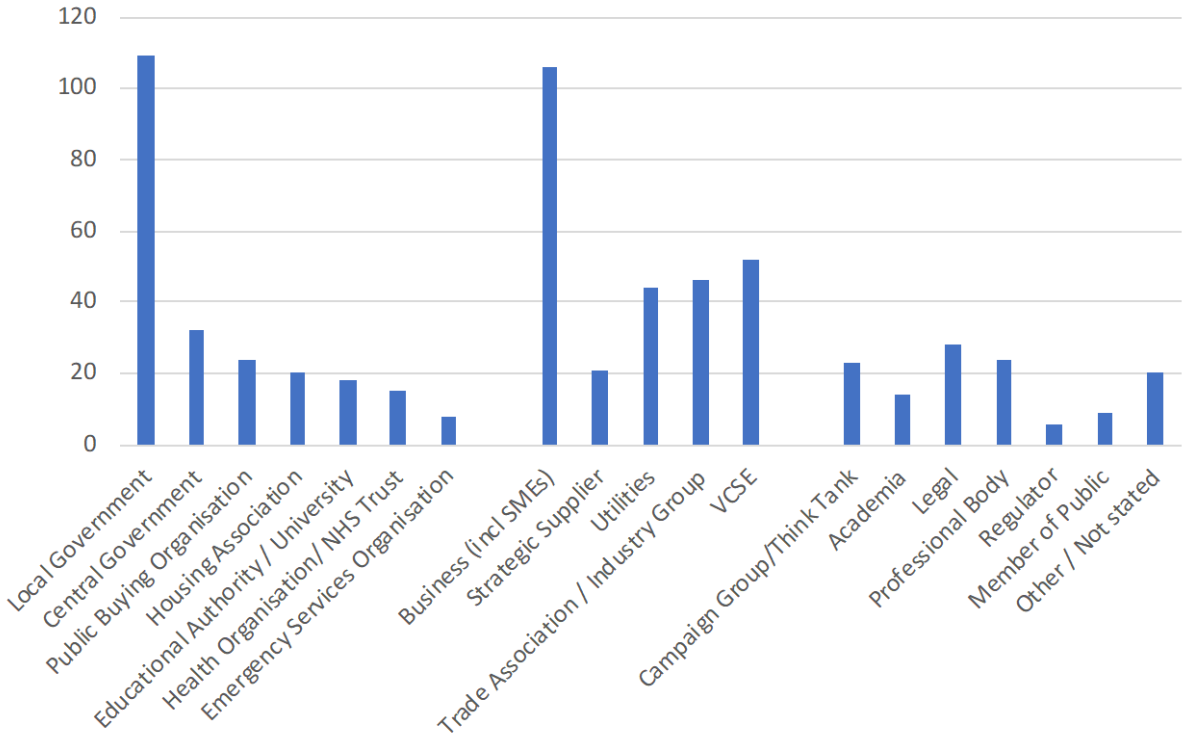

Chart 4 - Number of respondents by type

Key themes

14. Overall, levels of support for the reforms in the Green Paper were high and many responses recognised the ambition and breadth of the package of proposals. The majority of answers to individual questions were positive. A clear majority of respondents agreed with the overarching legal principles of public procurement. Many respondents also recognised that the reforms would present a significant implementation challenge in order to realise the expected benefits.

15. Most respondents agreed with the proposals to simplify the current legislation as far as possible into a single, uniform regulatory framework and agreed this would make things easier for suppliers engaging with the public sector. There were some concerns raised by organisations operating under the Utilities Contracts Regulations 2016 (UCRs) who were keen to ensure existing levels of flexibility within these regulations were retained, particularly with regard to commercial exemptions where they are competing with the private sector. We plan to ensure certain flexibilities within the UCR are retained. Additionally, there were some

concerns around the impact of a simplified regulatory framework on contracts let under the Defence and Security Public Contracts Regulations 2011 (DSPCR). Working closely with the Ministry of Defence, we plan to include a number of exemptions to ensure the security implications for these contracts are considered.

16. The Green Paper proposed the removal of the Light Touch Regime. A number of respondents raised concerns about certain contracts (such as care provision or special education) which, coupled with the proposed lowering of contract value thresholds bringing more contracts within scope of the new regime, would remove necessary flexibility. In light of additional stakeholder engagement, we agree it is helpful to retain the Light Touch Regime, but plan to make some improvements to its scope and application.

17. A series of changes to strengthen the approach to the exclusion of suppliers from procurements for misconduct such as fraud, corruption or poor performance were proposed. Feedback on these proposals was largely positive and we intend to take most of them forward. However, it was clear from the consultation responses and further engagement with stakeholders that in addition to these changes, a wider refresh of the legal framework for exclusions is needed. Many respondents noted that they found the existing regulations unclear and confusing, highlighting ambiguities around the scope of some of the exclusion grounds, the individuals and entities covered by the regime, the process to be followed to verify self-declarations and the purpose of self-cleaning. These concerns were common to all stakeholder groups, but particularly prominent among contracting authorities, who bear responsibility for considering the exclusion of suppliers from procurements on a case by case basis. Recognising these concerns, we intend to introduce a new exclusions framework which will be simpler, clearer and more focused on suppliers who pose an unacceptable risk to effective competition for contracts, reliable delivery, and protection of the public, the environment, public funds, national security interests or the rights of employees.

18. There was broad support for the focus on increasing transparency, with respondents recognising the importance of a transparent procurement regime. However, some respondents raised concerns around the parameters of transparency and the potential burden it could place on contracting authorities, slowing down processes and decision-making. Having considered these views and following additional engagement with stakeholders, we intend to ensure the transparency requirements are proportionate to the procurements being carried out and are simple to implement. Detailed guidance will also be published to support contracting authorities with implementing these requirements.

19. The Green Paper proposed capping the level of damages available to bidders that successfully challenge a contract award decision. There were mixed views on this proposal with some respondents agreeing this would discourage speculative challenges, however others highlighted potential unintended consequences which could slow down procurement processes and ultimately increase the cost to the public purse. Following additional engagement with stakeholders, we will not be taking this proposal forward, but are considering other measures aimed at resolving disputes faster which would reduce the need to pay compensatory damages to losing bidders after contracts have been signed.

20. Proposals on effective contract management and prompt payment were met with a broad level of support overall, with a number of useful comments on how they could be further

improved. A majority of respondents recognised procurement's role in addressing key issues such as tackling payment delays in public sector supply chains.

21. Many respondents recognised the need for a level of monitoring of compliance with the new procurement regime. However, some respondents raised concerns about the proposed new unit that would oversee the integrity of the public procurement system, in particular its interaction with existing governance in local government and the regulated utilities sector, as well as how it would operate alongside a formal route of challenge. We intend to amend this proposal to build on existing powers of investigation by the Minister for the Cabinet Office and to introduce a duty for contracting authorities to implement recommendations to address non-compliance of procurement law, where breaches have been identified.

22. The Green Paper acknowledged that the changes proposed to the regulatory framework would not in themselves deliver faster and more effective procurement, without contracting authorities also having the capability and capacity to realise the benefits. Many respondents raised the importance of training and guidance to support implementation of the new regime, flagging that there was a need for behaviour change, rather than just knowledge transfer. There were a number of suggestions about specific topics that could be included in this training and wider comments on general commercial capability outside the legislative reforms.

Next Steps

23. In May 2021, the Queen's Speech announced that legislation to give effect to the Government's plans to reform public procurement would be brought forward when Parliamentary time allows. Once the Bill becomes an Act, there will need to be secondary legislation (regulations) to implement specific aspects of the new regime.

24. We plan to produce a detailed and comprehensive package of published resources (statutory and non-statutory guidance on the key elements of the regulatory framework, templates, model procedures and case studies). In addition, and subject to future funding decisions, we intend to roll out a programme of learning and development to meet the varying needs of stakeholders.

25. We recognise that the scale of change to the procurement regime is significant, and organisations will need time to prepare themselves to function effectively under the new regime. Although it is not yet possible to confirm when the new regime will come into force, we intend to provide six months' notice of "go-live", once the legislation has been concluded, in order to support effective implementation. In any event, given the timescales around the legislative process, the new regime is unlikely to come into force until 2023 at the earliest.

Devolved Administrations

26. The new regime will apply to all public bodies[5] in England. We are working closely with all the devolved administrations on the development of the new regime. On 18th August 2021 the Welsh Government published a written statement on The Way Forward for Procurement Reform in Wales[6] confirming that provision for Welsh contracting authorities is to be made within the UK Government's Bill. We are in discussion with the Northern Ireland Executive about whether some provisions may be extended to all contracting authorities in Northern Ireland.

[5] And utilities which are not public bodies but which operate on the basis of special or exclusive rights
[6] https://gov.wales/written-statement-way-forward-procurement-reform-wales

Government Response

Chapter 1: Procurement that better meets the UK's needs

27. The Green Paper proposed enshrining in law the principles of public procurement: the public good, value for money, transparency, integrity, fair treatment of suppliers and non-discrimination. We proposed legislating to require contracting authorities to have regard to the Government's strategic priorities for public procurement in a new National Procurement Policy Statement. We proposed establishing a new unit to oversee public procurement with powers to review and, if necessary, intervene to improve contracting authorities' compliance with the procurement regulations.

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

Summary of responses

28. Overall, a clear majority[7] of respondents (92% of the 477 responses to this question) were in favour of the principles. Contracting authorities and the supplier community were almost unanimous in supporting the proposal.

29. There were some specific concerns raised, particularly around the removal of the EU principle of proportionality; 20% of respondents wanted to see proportionality re-introduced, mainly because of the benefits for smaller suppliers and the voluntary sector.

30. Respondents also asked for more clarity in defining the principles and their practical implementation, particularly in relation to the public good that some respondents thought should be broadened to reflect local priorities.

31. A number of respondents, particularly within local government, proposed rewording of "fair treatment" to "equal treatment", indicating that this would be a less subjective criterion.

32. A small number of respondents (8%) expressed some degree of concern regarding the National Procurement Policy Statement and how this might conflict with local priorities.

[7] Throughout this document '[clear] majority' means more than [70%] 50% of respondents, 'about half' means 50% ± a few percentage points, 'some' means 30-50%, 'a few' means 10-30% and 'a small number' means less than 10%.

Government response

33. The Government intends to introduce the proposed principles of public procurement into legislation as described in the Green Paper but with some amendments as set out below.

34. We will refine the proposed wording in the draft legislation on the principles previously proposed into ‘objectives’ and ‘principles’ so that the obligations on contracting authorities are clearer.

35. The response to the Green Paper showed strong support for the increased emphasis on transparency but highlighted some potential additional burdens on both contracting authorities and suppliers. We therefore propose to introduce procedural obligations at each stage of the procurement process setting out more explicit publication obligations that will provide clarity to contracting authorities on exactly what they need to publish. The transparency principle previously proposed will set a minimum standard in terms of the quality and accessibility of information where there is a publication obligation elsewhere in the Bill.

36. The principle of non-discrimination will remain, as it is a legal obligation in the UK’s international trade agreements. These agreements contain obligations for the contracting authorities covered by the agreement to treat suppliers from the trading partner country “no less favourably” than those contracting authorities treat domestic suppliers for the types of goods, services and works covered by the agreements.

37. The principle of “fair treatment of suppliers” will cover both equal treatment of suppliers and procedural fairness during procurement procedures, to provide clarity for contracting authorities. This will require contracting authorities to treat all bidders the same in pursuit of a level playing field.

38. In addition to the principles set out above, other concepts set out in the Green Paper will be established as statutory “objectives”, ensuring that they will influence decision-making in the procurement process. With some limited exceptions these objectives will apply throughout the procurement lifecycle.

39. We will introduce an additional objective of promoting the importance of open and fair competition that will draw together a number of different threads in the Green Paper that encourage competitive procurement.

40. The concept of “public good” will be framed as an objective of maximising the “public benefit” to support wider consideration of social value benefits, and address concerns about any potential conflict with local priorities. Similarly, value for money and integrity will be statutory objectives.

41. The National Procurement Policy Statement, which was published separately in June 2021[8], was drafted to reflect the views of some respondents to ensure that it is clear that local priorities can be considered alongside the strategic priorities set out by the Government.

42. The concept of proportionality is a key concept for the Government, as detailed in the Better Regulation Framework[9]. To ensure this is captured and to address responses requiring more specific detail, we intend to introduce proportionality where it is required in the specific regulations. For example, the proposed legal regime will require the timescales of a procurement procedure to be proportionate to the cost, nature and complexity of the requirement, and that the conditions of participation in a procurement are a proportionate means of checking suppliers have the necessary capability to avoid treating smaller suppliers unfairly.

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?

Summary of responses

43. There were 460 responses to this question, with about half (52%) offering support for the concept of this unit. Of those who offered support, this was qualified with the majority of respondents wanting more information. The greatest support for the proposal came from VCSEs and suppliers to the public sector. Local government and utilities raised concerns about centralised control.

44. Respondents recognised that there was a need for stronger regulatory oversight of public procurement. Some argued that such a unit could replace or strengthen the existing Public Procurement Review Service (PPRS), and have a role in upskilling more generally, improving standards and ensuring greater consistency across the public sector.

45. Reservations over the role of a central oversight body included how it would operate across the public sector and whether it would have the necessary resources and capacity to operate effectively. A number of responses, especially from local government, raised concerns around the potential use of spending controls and the balance of increased monitoring with local decision-making. There were also concerns that the unit would be overly bureaucratic and open to abuse. Some respondents were concerned that intervention would delay delivery of the contract by intervening in individual cases of poor practice. Private utilities argued that they should not be included within the scope of any unit as they are already subject to independent regulation.

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8 https://www.gov.uk/government/publications/procurement-policy-note-0521-national-procurement-policy-statement

9 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916918/better-regulation-guidance.pdf

Government response

46. We have revised the proposals for this new unit. It will be known as the Procurement Review Unit (PRU), sitting within the Cabinet Office and will be made up of a small team of civil servants.

47. The PRU will continue to be able to deliver the same service as the Public Procurement Review Service (PPRS) does presently. The unit will be able to investigate cases of poor policy and practice reported by suppliers and make informal recommendations in the same way PPRS does now, including in respect of individual live procurements.

48. However, the PRU's main focus will be on addressing systemic or institutional breaches of the procurement regulations (i.e. breaches common across contracting authorities or regularly being made by a particular contracting authority). To deliver this service, it will primarily act on the basis of referrals from other government departments or data available from the new digital platform and will have the power to make formal recommendations aimed at addressing these unlawful breaches.

49. The PRU will consult and be advised by a non-statutory panel of subject matter experts appointed by the Cabinet Office.

50. It will oversee procurements subject to the new procurement regime, including utilities and concession contracts, but not those utilities acting under special or exclusive rights.

51. In order for the unit to improve compliance with the new procurement regime on a wider basis, legislation will need to provide limited powers and duties to investigate the procurement functions of contracting authorities subject to the new procurement legislation (except private utilities operating under special or exclusive rights) and, where instances of non-compliance have been identified, provide a mechanism to ensure future compliance by contracting authorities.

52. The Minister for the Cabinet Office already has powers under section 40 of the Small Business, Enterprise and Employment Act 2015 (SBEEA) to investigate the exercise by a contracting authority of relevant functions relating to procurement. We propose these powers should be repealed from the SBEEA, and included and built upon in the new procurement legislation. The Minister will have powers to act on the results of those investigations by issuing reports and recommendations. Therefore, we propose to:

- provide the Minister with a general power to investigate procurement functions carried out by contracting authorities that are within scope of the legislation;
- place a general duty on contracting authorities in scope to cooperate with an investigation;
- place a duty on contracting authorities within scope of an investigation to respond within 30 days to a notice requesting information or documents;
- provide that the Minister may publish the results of investigations.

53. Following an investigation, the unit may make recommendations to the contracting authority(ies) for the purposes of improving compliance with procurement functions under the new regime. These recommendations will not target specific procurement decisions (for example, the unit could not recommend a specific contract should be awarded to a particular supplier, or that particular award criteria for a specific procurement be amended). Instead they will be focussed on actions to ensure future compliance. Examples of valid recommendations might include a revision to local operating procedures which have been found to be discriminatory or that procurement staff undertake additional training in evaluation methodologies.

54. A contracting authority subject to these recommendations to address legal compliance will be under a duty to implement them (unless they can take sufficient alternative action) and to provide progress reports on implementation of those recommendations.

55. For non-central government contracting authorities, our intention is that the powers will only be used with the agreement of the relevant ministerial department responsible for the sector within which the contracting authority operates. Private utilities acting under special or exclusive rights will continue to be overseen by existing regulatory bodies. However, the unit may engage with the relevant regulatory body via existing governance mechanisms, to share relevant information where appropriate.

56. The unit may identify common patterns of non-compliance across a number of contracting authorities which could be addressed through statutory guidance. A power will be introduced in the Bill, to enable the Minister for the Cabinet Office to publish statutory guidance which contracting authorities will have a duty to have regard to when exercising procurement functions under the legislation.

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?

Summary of responses

57. A whole range of options were presented in response to this question. Some suggested that the panel should consist of professionals currently working in procurement as opposed to those that have retired or are no longer in the profession.

58. A number of those responding expressed the need for panel members to specifically have experience of working in or with the public sector, placing an emphasis on fostering collaboration with contracting authorities as opposed to solely focussing on sanctions. Additionally, respondents suggested the panel should have a shared understanding of behavioural factors which influence procurement in order to drive improved performance and capability, sharing best practice and improving value for money.

59. A few responses indicated the need for a panel that is independent from the government, with involvement from appropriate sector and industry experts. Additionally, a few responses made the suggestion of creating separate panels or a rotating panel depending on the type and nature of the procurement to ensure membership includes representatives from different types of contracting authorities e.g. central government, charities, utilities as well as from suppliers and industry experts.

60. With regard to sanctions, about half of responses suggested that immediate punitive sanctions could be counter-productive to fostering an environment of innovation and improvement. Suggestions were made to form an initial position of advising on misdemeanours followed up with performance monitoring with perhaps defined interventions in the event that problems continue.

Government Response

61. The Government acknowledges the need for the panel to have relevant and up to date knowledge and experience; this needs to be balanced against the potential for conflicts of interest when employing panel members. The policy for the PRU and the panel, including the process for appointing panel members, will be developed in due course with the involvement of relevant stakeholders.

62. The final panel will need to have a breadth of expertise, to ensure the PRU can engage with experts relevant to the type of procurements being investigated. Therefore, for each investigation only a subset of panel members with the specific background, knowledge and understanding will be engaged.

63. The panel itself is unlikely to communicate directly with any contracting authorities during the investigation but will advise the officials in the PRU during the process of compiling a report and developing any recommendations. Whilst the views of the panel will be taken into account, it will ultimately be for the Minister for the Cabinet Office to issue, and decide the nature of, any recommendations. The panel will have no specific sanctions available to them.

Chapter 2: A simpler regulatory framework

64. The Green Paper proposed integrating the current procurement regulations (the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and Defence and Security Public Contracts Regulations 2011) into a single, uniform framework.

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

Summary of responses

65. A clear majority (81% of 474 respondents) supported the proposal to consolidate the current regulations into a single, uniform framework although many wanted to know more about how it would work in practice. A small number (8%) opposed the proposal.

66. Respondents believed the proposal would make the regulations easier for suppliers to understand and remove complexities such as utility companies not being permitted to use frameworks set up under the Public Contracts Regulations 2015 and anomalies such as the lack of self-cleaning provisions in the supplier selection regulation of the Defence and Security Public Contracts Regulations 2011 (DSPCR).

67. There were some concerns around consolidation of the current regulations, primarily from contracting authorities against a potentially more onerous and less flexible regime for the utilities and defence sectors. However, there was also recognition from a defence and security perspective that increased uniformity across public procurement is beneficial (for example by those companies that work across the defence and security markets and wider, who will no longer need to navigate a variety of different regulations, even though certain exceptions relating to defence and security procurement will remain). Industry respondents also thought that the consolidation of the current regulations into a single uniform framework could provide simplicity and cost reduction.

68. Some respondents highlighted the need to ensure non-clinical services procured under NHS procurement regulations were within the scope of the new legislation. Some respondents also felt that the regime for the commissioning of public services should be split from the purchasing of supplies to create a system better suited to delivering ‘user focussed’ services.

Government Response

69. The Government intends to combine the current four sets of regulations into a simpler legislative framework as described in the Green Paper, but with some amendments as set out below.

70. We believe a single, uniform framework consolidated to the greatest extent possible will remove duplication and make procurement more agile and flexible while still upholding fair and open competition. There is, however, some specific flexibility in the current UCR and DSCPR which we recognise need consideration.

71. Contracting authorities will find the structure of the new procurement legislation familiar and recognise similarities in its application, scope and definitions. The new provisions on principles, procedures, purchasing tools, conditions of participation, contract award, legal challenges and remedies will be set out in much simpler and clearer language than the EU terminology used in our current regulations. The legislation will also take powers to create secondary legislation where, for example, we might need to update the provisions to reflect changes in technology.

72. The Government is also taking forward reforms through the Health and Social Care Bill, and we recognise the need for integration between local authorities and the NHS (both for joint commissioning and integrated provision across health, public health and social care). The Cabinet Office and the Department for Health and Social Care are working together to ensure a coherent procurement regime for these and other types of user focussed services.

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

Summary of responses

73. Only a few of the 343 responses to this question recommended retaining sector-specific features of the Utilities Contracts Regulations 2016 (UCR), Concession Contracts Regulations 2016 (CCR) or DSPCR.

74. A clear majority of utilities and other organisations which operate under the UCR wanted to retain the current flexibilities of the UCR, specifically with regard to procurement procedures, qualification systems and framework agreements.

75. In addition, some respondents asked for it to be made clear that a contract awarded by a utility that is not undertaking regulated utility activity should be excluded from the procurement regulations altogether, regardless of the value of the contract.

76. The small number of respondents who commented on the DSPCR focussed on national security issues and asked for the specific exemptions in the DSPCR to be retained for national security, co-operative armaments projects and government-to-government purchases.

77. The main concern of the small number of the respondents who commented on the CCR was to maintain sufficient flexibility necessary to award concessions contracts.

Government Response

78. The Government proposes that the new procurement regime will apply to the utilities sector where the following three conditions are satisfied:

- the entity awarding the contract is a 'utility';
- the contract is for works, services or supplies associated with a prescribed relevant utility activity that will generally match the UCRs except for relevant activities in the postal services sector that have been removed as the UK is not obliged to regulate under any free trade agreement; and
- the estimated value of the contract exceeds the relevant financial thresholds that are currently £378,660 for goods and services and £4,733,252 for works.

79. The Government agrees that contracts procured by utilities for the prescribed relevant activities that are directly exposed to competition should be exempt from procurement legislation, as procurement regulations are unnecessary where competition in a specific utilities sector is functioning well and access to the sector is unrestricted. We propose to create a power for the Minister of the Cabinet Office to be able to exclude utilities where they are directly exposed to competition, similar to that previously provided by the EU procurement directive for utilities which sets out a process to allow the European Commission to exclude from the regime those utility sectors that are subject to direct competition in the market.

80. We also agree that a number of the existing exemptions specific to certain utilities should be maintained as competition in those markets effectively provides a safeguard for consumers in terms of service quality, prices and efficiency. Specifically, we intend to include exemptions in the legislation for:

- contracts awarded for the purpose of resale or lease to third parties;
- contracts and design contests awarded or organised for purposes other than the pursuit of a covered activity or for the pursuit of such an activity outside the UK;
- contracts awarded by certain utilities for the purchase of water and for the supply of energy or of fuels for the production of energy;
- contracts awarded to an affiliated undertaking;
- contracts awarded to a joint venture or to a utility forming part of a joint venture.

81. The three procurement procedures proposed in the Green Paper - open, limited, competitive flexible - will maintain the freedom of choice and flexibility that utilities currently experience under the UCRs.

82. The Government proposes the new procurement legislation shall maintain the effect of qualification systems as a separate tool for utilities under similar terms to the UCRs to maintain how utilities currently:

- permit suppliers to apply to be “qualified” suppliers;
- exercise a choice to use a Tender Notice (which replaces the notice on the existence of a qualification system) as a call for competition;
- use lists of qualified suppliers in procurement procedures.

83. The Government also agrees that the duration of closed framework agreements for utilities should be long enough to allow utilities to cater for their business planning periods that includes requirements from their regulators, e.g. Ofgem sets price controls for the companies that operate the gas and electricity network for a period of five years. We are also considering additional flexibility where, exceptionally, contracting authorities and utilities rely on long term investment from their suppliers particularly with regard to the significant capital schemes and investment that they need to make to introduce new technology.

84. The Government proposes to allow utilities to retain the ability to make contract modifications for additional goods, works or services by the original contractor, without any financial cap, if the utility cannot change the supplier under the same conditions as Regulation 88(1)(b) in the UCRs. Utilities require this flexibility on large, complex infrastructure projects. A financial cap could be detrimental to the management of these projects resulting in additional costs. However, utilities, like other contracting authorities, will publish contract change notices to bring about greater transparency in contract management.

85. Aside from these specific aspects, procurements for utilities contracts will be subject to the new core regime.

86. The proposal for integrating the regulations for concession contracts into the core regime will be taken forward, however there will be specific provisions covering the definition of a concession, how a concession contract is to be valued and the duration of a concession contract. These specific provisions address the key points raised by stakeholders responding to the consultation. The Government also proposes retaining the higher financial threshold for concession contracts, the greater discretion with regard to the method of calculating the estimated value of a concession contract, and the express exemption for lottery operating services as well as some other specific exemptions which exist under the current regime. Aside from these specific aspects, procurements for concession contracts will be subject to the new regime.

87. The Government proposes maintaining a full suite of national security exemptions for sensitive defence, security, and civil procurement. The exemptions for international co-operation will reflect the Ministry of Defence's unique range of international collaboration projects. We will ensure that the general provisions on procurement procedures together with defence and security specific parts are flexible enough to meet the needs of urgent operational requirements.

88. In terms of sector specific features, industry stated that it would be important to retain those provisions which necessarily distinguish the DSPCR from the PCR for reasons of national security e.g. in respect of use of the limited tender procedure for reasons of urgency.

89. We are currently considering defence and security sector specific features in the new regime to give greater flexibility around contract amendments and limited tendering. These include options in the event of a single supplier remaining in a competition, addressing gaps in capability, addressing issues around urgency and operational demands, enabling better exploitation of new and emerging technologies during the life of a contract. Additionally, changes to the core rules will be made to better suit the characteristics of defence and security procurement, for example the duration of framework agreements. Elements of the rules may be removed where these areas can be adequately covered within the tender documents themselves, for example specific provisions around security of information or security of supply.

90. In addition to these sector specific parts, contracting authorities will be able to exempt procurements from the requirements of the regime on national security grounds, including to ensure we are able to meet our defence and security needs going forward in line with the Defence and Security Industrial Strategy (DSIS) published in March 2021.

91. Changes to the procurement regime will sit alongside the wider initiatives set out in DSIS, including industry, government and academia working ever closer together to drive research, enhance investment and promote innovation. We will seek to improve the speed of acquisition and ensure that we incentivise innovation and productivity. We will continue to build on the strong links we enjoy with strategic suppliers to ensure we retain critical capabilities onshore and can offer compelling technology for international collaborations.

Chapter 3: Using the right procurement procedures

92. The Green Paper proposed overhauling the often complex and inflexible procurement procedures and replacing them with three modern procedures:

- a new 'flexible competitive procedure' that gives buyers freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors;
- an 'open procedure' that buyers can use for simpler, 'off the shelf' competitions;
- a 'limited tendering procedure' that buyers can use in certain circumstances, such extreme urgency.

93. The Government also proposed including 'crisis' as a new ground on which limited tendering can be used (to provide greater certainty for contracting authorities should there be a local or national emergency). We also proposed to make it mandatory to publish a notice when a decision is made to use the limited tendering procedure (on any ground). Given that the new competitive flexible procedure would allow the majority of actions currently allowed under the Light Touch Regime, the Green Paper proposed to remove the Light Touch Regime as a method of awarding contracts.

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

Summary of responses

94. 50% of the 472 respondents were supportive of the proposal, with only 6% opposed. However, 44% of respondents caveated their answer so that it was not definitive.

95. The key concern raised by respondents was that the new competitive flexible procedure could introduce more complexity into procurements as it requires design and tailoring to the procurement being undertaken. There were concerns that this would require additional effort for contracting authorities as well as creating variances in procedures which could lead to increased cost and complexity for suppliers, particularly SMEs. There were also concerns about a consequential increase in legal challenges, allowing case law to add additional regulations in place of prescriptive procedures.

96. Concerns were also raised about the removal of the Light Touch Regime (including lowering the contract value thresholds) resulting in more services being subject to the full procurement regime. Additionally, some respondents pointed out the need for special consideration for procurements where there is an element of 'service user choice' provided for under separate legislation such as the Care Act 2014 (with the need for contracting authorities to comply with these choice requirements to be reflected in the new legislation). There were also concerns that important flexibility would be removed and contracts for services such as

health/social care would be adversely affected, for example requiring set time limits could delay delivery of services.

Government Response

97. We recognise that use of any competitive flexible procedure may require more consideration by contracting authorities at the outset of a procurement in order to decide the best manner in which to run their procedure. However, it is thought this increased effort at the outset will enable more complex procurements to be better designed and run by contracting authorities. Contracting authorities will be obliged to set out how the procurement process is to function, and this will be laid out in a Tender Notice. The Tender Notice will cover any conditions for participation; time limits for contacting/responding to the authority; evaluation criteria, and the phases involved in any multi-staged procedure. As contracting authorities will have to conduct the procurement in compliance with the Tender Notice, this will provide suppliers with visibility and assurance. It is also important to note that for 'off-the-shelf' or straightforward procurements the open procedure can still be used.

98. In order to ensure consistency and compliance with legal obligations, we plan to issue guidance to support the new competitive flexible procedure. We intend to produce template options for contracting authorities to design their procedures, but without being so prescriptive that it stifles innovation or the use of bespoke processes where deemed appropriate. We will also provide case studies of how different procedures can be used in specific sectors (e.g. utilities) or for certain types of procurement (e.g. research programmes) to support implementation.

99. The Government response on the Light Touch Regime can be found at question 12.

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

Summary of responses

100. 50% of the 462 respondents supported this proposal, with a small number opposing and the remainder asking for further clarification such as an exact definition of what would constitute a crisis and whether this could be applied for local as well as national events. There were concerns about the process for the declaration of crisis and whether this would in fact lead to additional delay in urgent procurements. Finally, there were concerns about transparency to ensure public visibility of how contracts were being awarded during a crisis. Additionally, a few respondents raised concerns about the word "crisis" and whether this would create confusion.

Government Response

101. The Government agrees that the need for contracting authorities to be able to act quickly and effectively in an emergency needs to be balanced against inadvertently allowing too much discretion to directly award contracts under the limited tendering procedure where that is unjustified (for example because there is time to run a competition or call off from an existing framework). The current provision allowing limited tendering in situations of extreme urgency brought about by unforeseeable events (Regulation 32(2)(c) in the PCR) is to be retained and likely to be sufficient to allow for most public contracts required to deal with urgent situations. However, the Covid-19 situation exposed some uncertainty in applying Regulation 32 where the situation is prolonged or evolving.

102. The Government is still considering the best way to address these issues. We plan to move away from the term “crisis” given the concerns raised and the proposal is to include a limited tendering ground, in the form of a new power for a Minister of the Crown (via statutory instrument) to ‘declare when action is necessary to protect life’ and allow contracting authorities to procure within specific parameters without having to meet all the tests of the current extreme urgency ground. The ground would be based on Article III of the WTO Agreement on Government Procurement (GPA) which allows states to take steps necessary to protect public health, etc. It is envisaged that ‘necessary’ means “necessary to (a) protect human, animal or plant life or health, or (b) protect public order or safety”. This is subject to other GPA requirements such as those steps being proportionate and non-discriminatory. Any legislative mechanism such as a power for a Minister of the Crown to be able to declare this ground would only be used extremely rarely and would be subject to parliamentary scrutiny. Contracts awarded under extreme urgency and/or this ground would be notified via the new mandatory transparency notice requirement and therefore may be challenged if the reliance on these grounds is inappropriate.

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

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?

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

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?

Summary of responses

103. Given the significant overlap in the responses we have consolidated the four questions above. A dominant theme was the capability, competence, confidence and willingness of procurement teams in contracting authorities to embrace an innovative approach within the context of the flexibilities of the new regime. Nearly half of those who commented raised the need for learning and development activity to support implementation of the new regime.

104. Some respondents commented that SMEs are more likely to develop innovative solutions and that this should actively be encouraged. There were detailed accounts from a range of respondents of how current procurement and commissioning practice could work against the involvement of SMEs and VCSEs in public contracts. A common theme was innovation being hampered by insufficient or ineffective collaboration through lack of contracting authorities' understanding of the market, lack of effective engagement and negotiation with prospective suppliers before and during the process and post-award. The challenge of managing differing risk appetites, internal processes and governance in collaborative projects was often mentioned.

105. Another commonly raised point covered the timeliness of procurement processes and in particular the need to allow sufficient time for innovative bids to be developed, to run efficiently once underway (with a number of responses highlighting the difficulty of managing delays in the process), and for contracts to run for appropriate time periods, avoiding short-termist thinking or locking suppliers out of swiftly-evolving markets. Barriers to SME and VCSE participation such as lack of resources to service complex and burdensome procurement procedures, disproportionate bidding requirements, excessively large contracts and problems with accessing information about potential contracting opportunities were frequently cited. Also frequently mentioned was the need for contracts to focus on the most appropriate factors in successful delivery: there was criticism of contracting authorities' focus on inputs rather than outcomes and on price/cost rather than broader value considerations. Some responses highlighted the need to prioritise the perspective of service users in the procurement process.

106. Some responses highlighted the desirability of a common understanding of what comprised "innovation"; and the difficulty of evaluating innovation and innovative elements of tenders. Additionally, there was a view that public procurement could be quite restrictive in terms of the contract terms and conditions, with intellectual property rights cited as an issue, and amendments provisions limiting the level of change possible when the scope and requirement may be quite fluid.

107. Respondents provided a number of suggestions for improvement, including: awarding more contracts locally to assist SMEs and foster innovation; using different assessment and/or contracting methods; putting less emphasis on price and more on the suitability of the contract deliverable; and utilising customer testing or prototypes. It was suggested more could be made of gainshare or incentivisation based contracts that encourage collaborative rather than transactional relationships.

108. In addition to providing specific examples of barriers to innovation, respondents also used their answers to highlight other issues they experience with the current regime, or to

predict those that they perceive may arise as a result of the implementation of the proposed new regime. Many provided details of aspects that they would like contracting authorities to take greater account of, for example more focus on social and environmental impact, more transparency, greater encouragement for use of Project Bank Accounts.

109. There were a number of ideas and suggestions of how data could foster innovation and be used to deliver broader benefits. There were three key themes running through these responses:

- creating a more digital and integrated procurement system, linking different data sets using automation and data analytics to increase efficiency, visibility, accessibility, sharing enhanced insights as to what Government is procuring and opportunities for innovation, will deliver exponential value;
- improving the quality, consistency, comparability, governance and management of data to enable more meaningful analysis by standardising, categorisation of products/services and through a mandatory database repository;
- overcoming limitations and barriers such as legal protections to commercially sensitive information, Intellectual Property Rights conditions, confidentiality, in addition to the potential for increased bureaucracy, resource and cost implications on both contracting authorities and suppliers e.g. redacting published information and the use of multiple systems across the public sector leading to data overload, and difficulty to access large volumes of unfiltered data can become unmanageable and therefore of little practical benefit.

110. The majority of respondents agreed that more should be done to promote and encourage pre-procurement market engagement as a key measure to drive innovation. There was a mixed view as to whether the approach should be addressed through further reform of the regulations or if this would limit its effectiveness and instead greater clarity is needed and more guidance should be provided around the process and procedures so as to maintain flexibility. The four key themes running through these responses were:

- early market engagement - the need to promote and encourage timely market engagement to co-design the solution through guidance, training, sharing best practice/lessons learned, whilst also maintaining flexibility in the approach;
- regulatory challenges stifling innovation - the need to address the burdens and restrictiveness of the procurement regulations to encourage and enable innovation;
- innovation events and tools - greater encouragement of and access to innovation events, tools and resources (guidance, virtual/face-to-face demonstration days, workshops, innovation portal to showcase ideas, supplier portal) and mechanisms for incorporating pilots and testing services early into the commercial strategy;
- measures for incentivising innovation investment - driving innovation through incentivisation measures to support R&D and reduce supply side investment risks through funding, grants, gainshare and IPR treatment/protection.

Government Response

111. The Government wants to support innovation through public procurement. Many of the responses to these questions were about behavioural rather than regulatory practice, however within the new legislation we will create the flexibility to allow more innovative procurement. We will put more emphasis on planning and pre-market engagement and this should support effective use of the new competitive flexible procedure (which gives contracting authorities the ability to design and run a procedure that suits the market in which they are operating). The new public notice requirements for planning procurements and early market engagement will provide transparency of contracting authorities' procurement pipelines and processes. We will support contracting authorities through guidance to encourage earlier engagement and openness in procurements to get potential suppliers involved sooner.

112. The competitive flexible procedure will drive greater innovation. Innovation proved critical to the Government's response to the Covid pandemic, for example, the Ventilator Challenge programme resulted in over 15,000 ventilators being delivered in just over four months by UK manufacturers who applied significant innovation to develop new solutions based on their expertise in other areas of manufacturing. The new procedure will be a mechanism for encouraging and accessing innovation to transform the delivery of public services.

113. We will take forward a change from the use of the term Most Economically Advantageous Tender (MEAT) to Most Advantageous Tender (MAT), to reinforce the message to contracting authorities that they can take a broader view of what can be included in the evaluation of tenders when assessing MAT. This is addressed in more detail in question 13. In addition, the Government has already developed significant policy in this area within the bounds of the existing procurement regime through the introduction of a new social value model[10] for central government so that social value benefits are explicitly evaluated in all central government procurement where relevant (rather than just 'considered' as currently required under the Public Services (Social Value) Act 2012).

114. Our proposals on transparency demonstrate our commitment to ensuring that public procurement (and the operation of procedures and decision making) is open, fair and non-discriminatory, and there is appropriate scrutiny and accountability for the use of public money in procurement.

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10 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921437/PPN-06_20-Taking-Account-of-Social-Value-in-the-Award-of-Central-Government-Contracts.pdf

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?

Summary of responses

115. Some (43%) of the 619 respondents did not answer this question, perhaps not surprisingly given that use of the Light Touch Regime is focused in specific areas of the public sector. Of those who did respond, 46% supported the proposal, 29% were opposed and the remainder of the responses were not clear in either direction. The largest reaction was from local government and of those who responded, 42% were opposed and 30% supported the proposal but in some cases that was in support of using the new procedure but maintaining the existing higher threshold.

116. There were a number of detailed responses. A key issue raised was around service user choice and allowing for individual care in cases such as adult and children's residential care, fostering and special education. These are often highly tailored, specialised services which are required in short timescales. The message from those involved in procuring and supplying user-orientated services was very clear that these services for numerous reasons need to be treated differently to other types of public procurement. This was particularly important for local government, the education sector, and in health and social care, as well as, given the nature of the sector, a high proportion of VCSEs.

117. There were also concerns that in lowering the threshold for the current Light Touch Regime services, there would be a considerable increase in the number of contracts subject to the full regime, increasing the administrative burden and costs on both contracting authorities and suppliers. The extra work caused by such a move could cause a significant resource problem for those affected by such a change and could threaten the participation of SME and VCSE providers who do not typically have extensive resources to engage in competitive tendering exercises.

Government Response

118. The Government has carefully considered this feedback and will ensure the new legislation continues to allow certain services to be treated differently. Their treatment will be similar to the existing Light Touch Regime, but will reflect changes in the broader regime such as the noticing and transparency requirements. We are considering scope and whether some services which have never been procured using the Light Touch Regime can be removed.

119. The most commonly raised issue was that the lower threshold and the mandated time periods of the full regime would have a negative impact on the ability to deliver these services. The time periods in particular could delay the delivery of a service which was critical for the provision of care, as stated elsewhere. Key to these reforms is simplicity so while removing

the Light Touch Regime is simpler on the face of it, it could instead build in more difficulties and delay which is not our intention.

120. We have actively engaged with a range of interested stakeholders and are grateful for their continued expert support. This has highlighted an underlying issue which simply reinstating the existing Light Touch Regime would not resolve. The current Light Touch Regime assumes that competition is the default, and while this is absolutely right where possible, where there are legislative obligations for choice such as those in the Care Act 2014 and the Childrens and Families Act 2014, local authorities should not have to navigate inappropriate procurement requirements and build unnecessary bureaucracy into their decision making to ensure they can comply.

121. To address this, we are considering the extent to which we can exempt from competition those services where service user choice is important. Our aim is to ensure that the individual is put at the centre of these procurements, with regulations that are as simple as possible for contracting authorities, not only in terms of the specific procurement obligations but the way they interact with other legislative requirements.

Chapter 4: Awarding the right contract to the right supplier

122. The Green Paper proposed retaining the current 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. It proposed retaining the requirement for the evaluation of tenders to be made solely from the point of view of the contracting authority, but amending it so that, exceptionally, a wider point of view can be taken. It proposed using the exclusion measures to tackle unacceptable behaviour in public procurement such as fraud and exploring the introduction of a centrally managed debarment list. And it proposed reforming the procurement regime to allow past performance to be more easily taken into account in the evaluation.

123. The Government response to questions 16 to 19 has been combined and is set out after the summary of responses to question 19.

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

Summary of responses

124. In total there were 492 responses to this question and a clear majority (77%) of the respondents agreed with the proposed switch from Most Economically Advantageous Tender (MEAT) to Most Advantageous Tender (MAT). Respondents believed this would be an important change and further encourage contracting authorities to take account of social value in the award of public contracts. Respondents also believed the change would help procurements to focus on long term market sustainability and would encourage innovation.

125. There were concerns raised that moving away from the term "economically" would reduce the focus of the evaluation on value for money, and might create barriers for SMEs who might not have the capability or capacity to invest in projects in a way that would score well against a MAT evaluation. and there were a number of requests for guidance and support to help contracting authorities carry out evaluations based on MAT with examples of relevant award criteria that would be consistent with HMT's Managing Public Money.

Government Response

126. The Government intends to introduce the proposal into legislation as described in the Green Paper.

127. Rather than referring to MEAT, contracts will be awarded on the basis of MAT. This change in terminology will provide further clarity for contracting authorities that when

determining evaluation criteria, they are able to take a broader view of what can be included. It will support levelling up by encouraging contracting authorities to give more consideration to social value when procuring public contracts in their areas.

128. To address concerns about the potential burden on SMEs, we intend to ensure that award criteria used are required to be proportionate to the requirement by embedding concepts of proportionality as described in the response to question 1.

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?

Summary of responses

129. There were 424 responses to this question and a majority (69%) were supportive of the proposals set out. Many believed that this measure could help deliver cross-government objectives. There were a number of suggestions for policy areas which would benefit particularly from this measure, for example Net Zero policy and Modern Slavery. Some respondents also indicated that training and guidance would be needed across the public sector to ensure that all buyers have sufficient confidence to carry out evaluations prior to using the exceptions.

130. Those who opposed the proposals stated that this measure could lead to evaluations becoming more complex and expensive if multiple exceptions were introduced into individual procurement projects. Further concerns were raised that there could be an increased risk of challenge where the criteria are ambiguous and it could lead to additional burdens on contracting authorities to robustly justify using such exemptions. Some suggested that the change would be inconsistent with local government legislation (i.e. section 17 of the Local Government Act 1988) which does not allow non-commercial considerations to be applied. A few respondents commented that SMEs and VCSEs may be dissuaded from bidding due to perceived disproportionate requirements.

131. Many respondents also commented that it would be beneficial for the Government to produce a full list of proposed exemptions in order to encourage consistency by contracting authorities in designing evaluations and to avoid the aforementioned concerns around disproportionate requirements.

Government Response

132. The Government intends to introduce the proposals into legislation as described in the Green Paper.

133. We will seek a power in the new legislation for a Minister of the Crown to make secondary legislation to reflect policy priorities that may have the effect of award criteria not being related to the subject matter of the contract. We are still considering whether the Minister will have the power to require contracting authorities to have regard to a relevant policy or whether this will be permissive.

134. The relevant policy areas where such criteria apply will be explicitly set out in the relevant secondary legislation. In order to address concerns raised about increased risk of challenge where such exemptions may be used inappropriately, we intend to include the following provisions in primary legislation:

- the overriding requirement for contracting authorities to comply with the principles of non-discrimination, transparency and fair treatment (equal treatment and procedural fairness) will remain and the effect of any measures must not have the effect of undermining or conflicting with this;
- in exercising their power to allow or require contracting authorities to break the link, the Minister will not amend any other requirements of the award criteria principles, including proportionality;
- award criteria unrelated to the subject matter of the contract will only be implemented strictly as set out by the Minister; contracting authorities will not be able to decide to apply unrelated award criteria in the absence of specific secondary legislation.

135. There were some concerns raised that the proposal to allow the removal of the link to the subject matter of the contract for award criteria in certain situations does not align with section 17 of the Local Government Act 1988. This legislation requires certain public procurement functions to be exercised by local authorities without reference to non-commercial considerations. Therefore, if local authorities are applying award criteria which are not linked to the subject matter of the contract, for example in respect of asking bidders to demonstrate commitment to creating jobs in their local area, this could conflict with the requirements of section 17 as it is a non-commercial consideration. We are proposing to introduce a power to disapply section 17 in certain circumstances, to ensure local authorities have the same freedoms to exercise the reforms as other contracting authorities.

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?

Summary of responses

136. There were 404 responses to this question with the majority (58%) agreeing with the proposal. However, many wanted to see more information on how this would work in practice. Those in support commented that it would help to reinforce social value and give a greater focus on outcomes and solutions for communities, which would be especially helpful for those

local authorities that have established local priorities. Some respondents commented that having this flexibility would allow for a more holistic approach to evaluation of tenders.

137. Those respondents (17%) who disagreed with the approach felt that adding more requirements to the scope of tender evaluation would increase resource pressures on contracting authorities or increase the risk of conflicts of interest or fraud.

Government Response

138. The Government intends to introduce the proposal into legislation as described in the Green Paper.

139. We will make clear that it is for the contracting authority to determine whether the evaluation should be made solely from its own point of view, or taking a broader perspective, for example by taking into account benefits or costs for contract users that may be outside the authority. Recognising concerns about unintended consequences, we plan to publish clear guidance so that procurers are well equipped to implement this new approach appropriately.

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?

Summary of responses

140. There were 377 responses to this question. A clear majority (90%) were supportive of the proposal. Reasons for support were mixed, with some welcoming any measures to strengthen the UK's stance on corruption and transparency in procurement, while others thought that the changes would make procurements more robust. Some felt that the Government should go further and widen the exclusion grounds to include conviction for any kind of fraud, whether against the UK Government or other interests.

141. However, many respondents made their support conditional on the provision of clear guidance on the scope of the new grounds for exclusion, the evidence required to exclude a supplier, and what would constitute effective self-cleaning. This was a particularly prevalent view among some contracting authorities including from local government. A related point made by some respondents was that the proposed new grounds for exclusion, in particular with regard to beneficial ownership, would be difficult to enforce without central government action to align databases and other sources of information in order to allow contracting authorities to easily check which suppliers meet the grounds. Many respondents argued that non-disclosure of beneficial owners should be a discretionary ground instead of mandatory, both because it was seen as comparatively less serious than the other mandatory grounds, and because some respondents thought that suppliers might have reasonable excuses for not

providing this information. This view was particularly prevalent among respondents from the legal profession.

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

Summary of responses

142. There were 302 responses to this question. A wide range of possible exclusion grounds were suggested. The most popular suggestion was tax evasion, proposed by 164 respondents (54%). Other common suggestions included:

- Modern Slavery (65 responses);
- environmental misconduct (34 responses);
- poor performance (23 responses);
- data protection failures (22 responses);
- health and safety violations (18 responses).

143. Some respondents were clear that exclusions should only apply where a relevant regulatory requirement had been breached. A smaller number of responses recommended using exclusions as leverage to advance the Government's priorities and social value goals, with a small number advocating that suppliers should have to positively demonstrate their alignment with the public good in order to be able to participate in a tender.

144. As with the other questions relating to the grounds for exclusion, many respondents called for more clarity and guidance on the scope of the grounds and on how contracting authorities should assess suppliers. Some respondents made the point that local authorities should not be expected to have the resources or expertise to assess suppliers' compliance on complex issues such as tax. A smaller number advocated for abolishing discretionary exclusion grounds, because of the relative complexity and risk of challenge to contracting authorities in using them, and just having mandatory exclusions.

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

Summary of responses

145. There were 359 responses to this question. The majority (75%) were supportive of the proposal that suppliers should be excluded where the person/entity convicted is a beneficial owner. Many supportive respondents stated that this measure would improve transparency and accountability in public sector procurement. Some stated that including beneficial owners

would underline the message that supplier behaviour is often influenced by owners and senior leaders.

146. The most common concern across respondents from all sectors was defining what constitutes 'beneficial ownership', with respondents questioning how this would apply to different types of organisation including voluntary sector groups. As with the other exclusions questions, there was a clear concern from contracting authorities that guidance and support was needed to understand how to apply the exclusions to beneficial owners, and to enable due diligence to be done to verify supplier self-declarations. Some respondents felt that misconduct by beneficial owners should fall under the discretionary exclusion grounds, given the link to the risk posed by the supplier was not always clear-cut. Others felt that this was a matter for self-cleaning evidence to address.

147. VCSEs raised a particular concern around ensuring that the regime did not contravene the ethos behind the Rehabilitation of Offenders Act. They noted that, for many charitable organisations delivering services to people in the criminal justice system, those running the charity were often ex-offenders and may be subject to an exclusion ground for conviction of beneficial owners. Some argued for spent convictions to be exempt from the regulations.

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)?

Summary of responses

148. There were 360 responses to this question. A clear majority (78%) were supportive. Most comments agreed that the proposal would help to simplify the exclusions regime. Some respondents argued that non-payment of taxes should either be a mandatory exclusion ground or discretionary, but not both. Others thought that non-payment of taxes was the wrong standard to apply, and that exclusion should be based on the criminal offence of tax evasion, or on a broader measure of good tax compliance. This often reflected a view that it was not the responsibility of contracting authorities to enforce tax compliance on behalf of HMRC; there was also an argument that exclusion would be disproportionate if only small amounts of tax were outstanding. A clear concern from contracting authorities was that the complexity of tax affairs exposed them to significant legal risk in excluding suppliers for non-payment. Contracting authorities wanted clear guidance on when this exclusion should apply, how to verify the tax status of suppliers – ideally via a central database – and what constituted good self-cleaning evidence.

Government Response to questions 16-19

149. The Government intends to introduce most of the proposals into legislation as described in the Green Paper.

150. However, it was clear from the consultation responses and from further engagement with stakeholders that in addition to these changes, a wider refresh of the legal framework for exclusions is needed. Many respondents noted that they found the existing regulations unclear and confusing. They highlighted ambiguities and inconsistencies around the scope of the exclusion grounds, the individuals and entities which need to be considered for the purpose of applying the exclusions to suppliers, the time period in which past misconduct can be considered, and the process to be followed to exclude suppliers. These concerns were common to all stakeholder groups, but particularly prominent among contracting authorities, who bear responsibility for considering the exclusion of suppliers from procurements on a case by case basis.

151. The Government has listened to these concerns and will address them in the new regime. The new exclusions framework will retain the current concepts of mandatory and discretionary exclusion grounds but will be simpler, clearer and better suited to the UK's commercial and legal landscape. Exclusion grounds will be more focused on suppliers that pose an unacceptable risk to public confidence in procurement, effective competition for contracts or reliable delivery, and on protection of the public, the environment, national security interests, public funds or the rights of employees. We will publish statutory guidance to assist contracting authorities in considering and applying the exclusion grounds, including on the form and manner of self-declarations, the assessment of supporting information and self-cleaning evidence, how to assess whether the exclusion grounds apply and the exercise of discretion to exclude in relation to discretionary exclusion grounds.

152. We have listed below the mandatory and discretionary grounds for exclusion that we intend to specify in the new regime and provided a brief description of the ground. These grounds will be further defined in the Bill by reference to specific criminal offences or specific circumstances or behaviours, as appropriate. The exclusion grounds will also cover inchoate offences relating to the offences listed, such as convictions for conspiracy to commit the offence, for assisting or encouraging the offence or for attempting to commit the offence.

Mandatory grounds for exclusion	**Discretionary grounds for exclusion**
Conviction of offences relating to participation in an organised crime group or involvement in serious organised crime	Regulatory enforcement for serious labour misconduct by way of a labour market enforcement order, a slavery and trafficking prevention order or slavery and trafficking risk order or evidence of modern slavery in the absence of a conviction

Mandatory grounds for exclusion	**Discretionary grounds for exclusion**
Conviction of offences of bribery and blackmail	Conviction of offences relating to incidents causing potential or actual environmental impact which is major or significant
Conviction of offences related to fraud and fraudulent trading	Bankruptcy, insolvency or equivalent situations
Conviction of offences related to theft, robbery, burglary and stolen goods	Professional misconduct which brings into question the supplier's professional integrity, such as dishonesty, impropriety, or serious violation of ethical standards applicable to the supplier's profession
Conviction of offences related to terrorism	Poor performance, comprising either: (i) where a previous public contract has been terminated due to breach of contract, where damages were paid for breach or where a settlement agreement has been entered into in relation to poor performance or breach; or (ii) where the supplier has failed to remedy poor performance or breach in accordance with contractual measures invoked under a previous public contract (such as rectification or improvement plans, breach notices or other mechanisms)
Conviction of offences related to money laundering	Conflict of interest which cannot be appropriately mitigated by other means, which does or could cause unfair advantage
Conviction of modern slavery offences and labour market offences (including offences relating to carrying out of an employment agency or employment business, offence of refusing or wilfully neglecting to pay the national minimum wage, offences relating to gangmasters and failure to comply with a labour market enforcement order)	Conduct which constitutes a breach of competition law, including in the absence of a regulatory decision
Conviction of the offence of corporate manslaughter/corporate homicide	Where the supplier may be at an unfair advantage due to prior involvement in preparing or planning the procurement which cannot be effectively remedied without exclusion

Mandatory grounds for exclusion	Discretionary grounds for exclusion
Conviction of offences related to tax evasion, civil penalties or HMRC decisions relating to tax evasion, fraud or avoidance	Where the supplier has made a serious misrepresentation in supplying the information required for the assessment of the exclusion grounds or the conditions for participation or has provided incomplete, inaccurate or misleading information that may have a material influence on decisions concerning the procurement
Decision by the Competition and Markets Authority or another regulator relating to the most serious breaches of competition law	Unduly influencing a contracting authority or obtaining confidential information that may affect the fairness of the procurement
Failure to provide a complete and accurate list of individuals and entities in respect of which the exclusion grounds are to be considered (where requested by an authority on a particular procurement)	Where the supplier poses a risk to national security

153. In addition to the new grounds for exclusion, we will also make changes to the way exclusions are applied in order to further streamline and clarify the regime. These include:

- applying a five-year time limit for both mandatory and discretionary exclusion grounds;
- specifying that the trigger point for the five-year period for mandatory grounds is the date of conviction or regulatory decision, and for discretionary grounds is the point at which the authority knew or ought to have known about the relevant event or misconduct or, if later, the date of a subsequent conviction or ruling;
- clarifying that the exclusions framework is blind as to whether misconduct happened in the UK or overseas, such that the exclusion grounds apply where there has been a conviction or regulatory decision for a similar offence or conduct overseas or where the relevant conduct occurred overseas;
- clarifying the exceptional circumstances in which there is an overriding public interest which means the contracting authority may allow a supplier to participate in a procurement even if it has met a mandatory ground;
- taking a power to amend the exclusion grounds, if and when deemed necessary, by secondary legislation.

154. The exclusion grounds will cover not only the actions of the bidder but also those of individuals and entities to which the bidder has a close connection. This is an important way of ensuring that contracting authorities take a holistic view of the risks suppliers may pose. The current legal regime does this by specifying that mandatory exclusions apply not just where the supplier itself has been convicted, but also "where the person convicted is a member of the administrative, management or supervisory body of that economic operator or has

powers of representation, decision or control in the economic operator". However, respondents were clear that this formulation leaves considerable ambiguity over precisely which individuals and entities it applies to. It is also unclear the extent to which this type of concept can or should be applied to the discretionary exclusion grounds.

155. In the future exclusions regime, we intend to address this by specifying a set of individuals and entities with a direct connection to the supplier that must be considered for the purpose of determining whether any of either the mandatory or discretionary exclusion grounds apply to the supplier. The set of individuals and entities to be considered are:

- beneficial owners of the supplier, which we intend to define as 'Persons of Significant Control' within the meaning of the Companies Act 2006;
- directors of the supplier, including shadow directors;
- parent companies of the supplier;
- subsidiary companies of the supplier;
- insolvent companies where the company's business has been transferred to the supplier and where one or more of the supplier's directors was a director of the predecessor company when it ceased to trade.

156. We intend to define these concepts by reference to provisions in the Companies Act 2006, where these exist. For suppliers which are not subject to these provisions, we intend to cover individuals or entities which are in an analogous position.

157. It should be noted that there will be separate provisions regarding the application of the exclusions to subcontractors and to other entities on which the supplier is reliant to meet the selection criteria. These will largely maintain the current approach, under which contracting authorities may decide at their discretion to apply the exclusions to subcontractors, but must apply the exclusion grounds with regard to entities on which the supplier is reliant to meet the selection criteria.

158. In order to mitigate the impact of retrospective effect of the new exclusions regime, we intend to provide for a transitional regime for the introduction of the new exclusion grounds. This will mean that only grounds which are the same as, or substantially similar to, exclusion grounds under the current regime will have retrospective effect i.e. suppliers may be excluded on the basis of events which occurred prior to these new grounds coming into force.

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

Summary of responses

159. There were 357 responses to this question. Of these, a clear majority were supportive (72%), with most stating that including Deferred Prosecution Agreements (DPAs) as a ground for exclusion could lead to increased levels of transparency, act as a potential deterrent to

supplier bad practice, and provide greater flexibility for contracting authorities to exclude suppliers.

160. However, some respondents argued that the existence of a DPA should be recognised as intrinsic evidence of self-cleaning and commented that there are already grounds for exclusion based on grave professional misconduct, which could be used in circumstances where a DPA exists. Others raised concerns that as a DPA is not a conviction, it would be difficult to know if the supplier would have been convicted if they had been prosecuted. Additionally, the threat of discretionary exclusion could dissuade organisations from agreeing DPAs in the first place.

Government Response

161. The Government does not intend to introduce the proposal into legislation as described in the Green Paper.

162. A DPA is an agreement reached between a designated prosecutor such as the Serious Fraud Office or the Crown Prosecution Service and a company which could be prosecuted for fraud, bribery or other economic crimes, supervised by a judge. The agreement allows a prosecution to be suspended for a defined period provided the organisation meets certain specified conditions such as payment of a financial penalty, payment of compensation to victims and co-operation with future prosecutions of individuals.

163. The proposal to include DPAs as a discretionary ground for exclusion was intended to clarify the law for contracting authorities and suppliers. Currently, DPAs do not meet the threshold for mandatory exclusions (which require a conviction). However, the circumstances which led to the DPA may fall within the scope of some of the discretionary grounds for exclusion, such as grave professional misconduct.

164. As a number of consultation respondents pointed out, the commitments made by suppliers as part of DPAs typically constitute good evidence of self-cleaning. Reaching a DPA requires the supplier to accept culpability for the offence, cooperate with the relevant authorities, and make reparations for harm caused. Additionally, DPAs will often involve commitments to ongoing monitoring, for example of actions to improve compliance and audit functions within the company, to replace relevant personnel, and to ensure further misconduct does not occur. A specific exclusion ground for DPAs is therefore not justified or appropriate. In most cases, the existence of the DPA is usually an indication of self-cleaning and this should be considered on a case by case basis. Introducing an explicit exclusion for DPAs might also have a deterrent effect for companies considering co-operating with the authorities, who might opt for facing a prosecution if exclusion was seen as the likely outcome in either case.

165. In order to provide clarity on DPAs, we will instead set out in guidance that the circumstances leading to a DPA should be considered in the context of the discretionary exclusion grounds (which we intend to simplify and clarify, as explained above) and that commitments made under a DPA should be considered as part of the assessment of evidence

of self-cleaning. Contracting authorities should examine the specific conditions of the DPA in order to reach a considered view.

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

Summary of responses

166. This question received 413 responses. Of these, 332 were supportive (80%) and 18 were opposed (4%) with the remaining 63 not expressing a clear preference. Local government respondents were most likely to answer in support, with 87 supportive out of the 89 who expressed a view (98%). The main reason given in support was that a debarment list would promote consistent decisions being made in response to supplier misconduct, removing the potential for contracting authorities to take different views based on the same evidence. Local government respondents frequently gave the view that a debarment list would avoid the duplication of effort involved in assessing exclusions for the same suppliers across contracting authorities, while some suppliers agreed on a similar basis. Campaign groups, VCSEs and others tended to support the proposal because they saw it as a means of more rigorously enforcing the grounds for exclusion and preventing unreliable or unfit suppliers from winning contracts. However, some argued that the list would stand or fall based on the resource invested in maintaining it, and on whether it could be linked to regulatory and judicial databases in the UK and abroad so that supplier misconduct was flagged automatically.

167. Many respondents who were supportive also expressed concerns about how a debarment list would operate. Some argued that the debarment list would be unsuitable for assessing certain types of exclusion ground, such as past poor performance, due to the lack of an objectively verifiable means of proof. Others were concerned that a debarment list would inevitably focus on UK suppliers, giving suppliers based abroad a comparative advantage. Some contracting authorities questioned what would happen to procurements which were in train while a supplier was being considered for inclusion on the list, or where contracts were already underway.

168. Suppliers tended to be particularly concerned about the need for due process around the operation of the list, with some noting that inclusion on the list would be likely to bankrupt a supplier. Some suppliers made support conditional on the list not being publicly available, while others called for debarred suppliers to have rights of appeal and opportunities to be taken off the list if new self-cleaning evidence could be presented.

Government Response

169. The Government agrees that a centrally-managed debarment list has the potential to enable a significantly stronger and more consistent approach to applying the grounds for exclusion, including through drawing on the expertise of specialists. The Bill will provide a

power for a Minister of the Crown to add suppliers to a public debarment list if they are assessed as meeting a ground for exclusion and there is insufficient evidence of self-cleaning. The debarment list will cover both mandatory and discretionary exclusion grounds, and both UK and overseas suppliers will be eligible for addition to the list. Contracting authorities must exclude suppliers on the list to which a mandatory exclusion ground applies, but will retain their discretion in respect of suppliers to which a discretionary ground applies. Contracting authorities will continue to be able to exclude suppliers not on the list on a case by case basis.

170. We continue to consider the detailed process for adding suppliers to the list, informed by international best practice on debarment and conscious of the range of concerns expressed by consultation respondents. We currently envisage that the debarment regime will have the following features:

- suppliers will be considered for debarment when they are excluded by a contracting authority during a procurement;
- certain categories of authorities, likely to be central government contracting authorities initially, will additionally be able to refer suppliers they want Cabinet Office to consider to be added to the debarment list, without having excluded them;
- the new Procurement Review Unit will be responsible for considering cases, investigating evidence of misconduct and self-cleaning by suppliers, and making recommendations to the Minister;
- suppliers will be entitled to apply for early removal from the debarment list before the end of the five year period of exclusion, if they can show they have self-cleaned;
- suppliers will be entitled to appeal a decision to put them on the debarment list to the court.

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

Summary of responses

171. There were 435 responses to this question. A clear majority (83%) were supportive of the proposal, with only 9 responses clearly opposed. Respondents generally agreed that the bar for exclusion for poor performance was currently set too high, and welcomed the proposal to lower it. However, most supportive responses were caveated with concerns about how the proposal would work in practice.

172. The most common theme was on the need for clear guidance or a mechanism/framework for measuring past performance fairly and consistently. Respondents highlighted the risk of legal challenge from suppliers that would arise in the absence of such a framework, and the corresponding impact on the willingness of contracting authorities to record poor performance in the first place.

173. Another theme of responses was on the difficulty in establishing supplier responsibility for poor performance. 55 respondents made the point that failure to meet targets or KPIs can

be outside of a supplier's control, and may stem from poor contract management or delivery failures on the part of the contracting authority, or from entirely external factors. Suppliers were particularly likely to make this point, while Government's Strategic Suppliers noted that the threat of exclusion for poor performance might deter them from taking on particularly complex or risky contracts.

174. The proposal for a publicly available register of supplier performance raised concerns around the standardisation of KPIs. Some respondents argued that it would be impossible to devise a set of KPIs that were applicable across different contract types, while others noted that there was a risk contracting authorities would take an inconsistent approach to recording performance against these KPIs. There was also a concern that a register would serve to disadvantage overseas suppliers with no previous experience in delivering contracts in the UK.

Government Response

175. The Government intends to introduce the proposal into legislation as described in the Green Paper.

176. However, we recognise the concerns of many respondents that lowering the bar for exclusion too far risks disproportionate or inconsistent exclusions in situations where poor performance was not sufficiently serious, or where external factors which were beyond the control of the supplier may have contributed to the poor performance. While it will remain the case that all aspects of prior performance on relevant contracts can be assessed as part of conditions for participation, exclusion based on past performance should be reserved for cases in which performance was so poor as to create risks to the delivery of any future public contracts. We intend to provide for a discretionary exclusion ground in cases where:

- a previous public contract has been terminated due to breach of contract, damages paid for breach of contract, or a settlement entered into due to poor performance or breach of contract by the supplier; or
- the supplier has failed to remedy poor performance or breach in accordance with contractual measures put in place by a contracting authority.

177. This will significantly expand the scope of the current poor performance exclusion ground, recognising that contracting authorities are often unwilling or unable to terminate contracts in cases of poor performance and that poor performance rarely results in payment of damages for breach. A more common scenario is financial settlement with the supplier, or the imposition of contractual measures such as performance improvement plans or breach notices. In the absence of termination, damages or a settlement, contracting authorities will need evidence of poor performance or breach not being remedied following a contractual measure being invoked in order to exclude a supplier, meaning that failure to meet KPIs or other performance measures will not by itself give rise to grounds for exclusion.

178. In order to promote transparency and better inform contracting authorities about individual suppliers' performance and wider performance trends, it remains our intention to introduce a Contract Performance Register. This will hold information such as a supplier's

performance against contractual KPIs. We are exploring the potential for the Register to highlight when a supplier may be eligible for exclusion by indicating when a contract has been terminated for poor performance or when suppliers have failed to implement measures imposed in response to poor performance. Contracting authorities will be encouraged to review this database regularly throughout the procurement lifecycle to promote dialogue regarding contract performance and its management.

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

Summary of responses

179. There were 359 responses to the question, with the majority of respondents (56%) supporting the intention of the policy. However, some respondents (36%) raised concerns around the specifics or additional considerations for the implementation phase. Whilst the responses were broadly proportional across categories of respondents, respondents from local government in particular raised more concerns.

180. Some respondents (37%) raised concerns over who would own and manage the system. This included concerns over where liability would lie if incorrect information were used as the basis for a decision, and who was responsible for validation of the data.

181. Some responses (23%) also raised concerns over potential restrictions on the ability of contracting authorities to apply their own criteria in addition to whatever might be covered in the proposed 'Simplified Selection Stage', with concern that this process would be over-simplified and 'broad brush' and thus unable to select based on specialist capabilities relevant only to the contracting authority. However, a small number of responses held the opposite view, that contracting authorities should be forced to keep things open and consider a wider range of suppliers to maintain competition and a healthy market.

182. A few respondents (10%) also raised questions over the extent to which the system would be used, whether it may replicate previous attempts to standardise and simplify and whether it would undermine sector-specific databases.

Government Response

183. The Government intends to introduce the proposal into legislation as described in the Green Paper.

184. The system will effectively be a single point, electronic data storage system that is owned by the Cabinet Office. Suppliers will register on the system and be responsible for the accuracy of the data they input. When a supplier enters a competition the self-declaration that

none of the exclusion grounds apply and that they meet the conditions for participation will be submitted to the contracting authority via the system.

185. The supplier registration system will retain the majority of information required for a procurement, however a contracting authority will have the discretion to request further information, if required for the specific procurement. For the exclusion grounds, there will be no restriction on the supporting information that contracting authorities can request, other than it must be set out in the notice advertising the procurement. For conditions for participation, the details requested must be proportionate to the procurement. In both cases, information should not be requested at the initial stage of a procurement unless this is necessary to ensure the proper conduct of the procurement. Information must be independently verifiable as accurate.

186. The contracting authority will be responsible for setting the criteria for the conditions for participation. The supplier will permit the supplier registration system to provide the suppliers' evidence that they meet those conditions. For example, the contracting authority can set out what financial conditions are required to pass the conditions for participation and the supplier registration service will be able to hold the supplier's audited accounts or cash flow documents so the supplier does not have to upload those financial documents onto a procurement system every time they enter a competition.

187. The supplier registration system will also hold any self-cleaning evidence if any of the exclusion grounds apply. Contracting authorities will be required to notify the supplier if it considers that an exclusion ground applies to give the supplier the opportunity to provide self-cleaning evidence if it has not already done so, or to supplement previously provided evidence. It will be up to suppliers to decide what to submit as evidence of self-cleaning but the purpose of the evidence should be to satisfy the contracting authority that the circumstances giving rise to the relevant exclusion ground have been addressed.

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

Summary of responses

188. A clear majority of responses supported the removal of limits on information requested to verify supplier self-assessments in Regulation 60 (76% out of 345 responses). Of those in favour, 30% caveated their support, primarily in the form of requesting additional guidance and clarity on information requested and why it will go beyond existing regulations, highlighting the need for information to be relevant and proportionate and the disproportionality of implications on suppliers.

189. The main concern of respondents, primarily from suppliers, was that removing the limits will enable contracting authorities to request additional information that could be burdensome for the providers. For suppliers, being continually asked for new information adds

to transaction costs (and those of sub-contractors) and reduces the efficiency of responding to opportunities.

Government Response

190. The Government intends to introduce the proposal into legislation as described in the Green Paper.

191. Contracting authorities should have greater flexibility to determine what evidence demonstrates that none of the exclusion grounds apply and compliance with the conditions for participation. Self-declarations that the exclusion grounds do not apply to the supplier and that the supplier meets the conditions for participation will remain the first stage of the competition, followed by supporting information with regard to the exclusion grounds and evidence that the conditions have been met pre-award or earlier when necessary to ensure the proper conduct of the procurement. When supporting information is required for the exclusion grounds and/or where evidence is required to verify that the conditions for participation had been met, then where possible that supporting information and evidence should be required to be submitted through the supplier registration system on the central platform. However, where that is not possible, the contracting authority is to be entitled to accept alternatives.

192. A contracting authority should be able to accept alternative supporting information and/or evidence provided it is of the view that this demonstrates the exclusion grounds are not met and/or compliance with the conditions for participation (as appropriate). In requesting supporting information that the exclusion grounds do not apply and evidence that a supplier has met the conditions for participation, the contracting authorities must have regard to the importance of including supporting information and evidence that can be easily provided by SMEs and VCSEs.

Chapter 5: Using the best commercial purchasing tools

193. In the Green Paper, we proposed legislating for a new Dynamic Purchasing System ("DPS+") that could be used for all types of procurement (not just common goods and services). We proposed legislating for new options in framework agreements including an option for an 'open framework' with multiple joining points and a maximum term of 8 years.

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

Summary of responses

194. There were 414 responses to this question, the majority of which (70%) supported the proposal for the new DPS+. The main points of concern raised in the responses were on the implications of allowing for the DPS+ to be open for the whole of its lifetime, and the resources required to manage a DPS+ when it included a large number of suppliers. Responses from suppliers requested that guidance and training accompany the DPS+, and concern that a large number of DPS+ may be set up across the public sector.

195. Whilst a few suppliers welcomed the transparency proposed by the publication of an award notice when competitions run via a DPS+ are concluded, some contracting authorities stated that publishing notices would be a burden and suggested that the current flexibility to provide quarterly batches should be retained.

196. Some stakeholders did not agree with the name DPS+, considering it a misnomer, and queried why the DPS+ was limited to the competitive flexible procedure rather than the option to also use the open procedure.

197. The majority of stakeholders from the utility sector stated that the Qualification System should not be superseded by the DPS+ and that the Qualification System is more flexible for those in the utility sector than the proposed DPS+.

Government Response

198. The Government intends to introduce the proposal into legislation as described in the Green Paper but with some amendments as set out below.

199. Taking into account the responses to this question, the name of the tool will be changed to reflect the additional flexibility compared with the current DPS: it will be called the Dynamic Market. Additionally, the tool will not be limited to commonly used purchases and will be available for use with all types of works, services and goods procurements within the scope of

the legislation. Dynamic Markets will be capable of being established and operated by bodies within the scope of the new regime for the benefit of themselves and others.

200. By way of clarification on applicability of procedures, the establishment of the Dynamic Market and the admission of suppliers who meet the qualification requirements is only the first stage. At the second stage, a competition is undertaken and a specific contract is placed via the Dynamic Market. The first stage will be continuous throughout the lifetime of the agreement in order to allow new suppliers to be admitted at any time. There can be multiple second stages as contracting authorities award contracts under the Dynamic Market. As Dynamic Markets will necessarily involve at least two stages (with the first stage being part of a preliminary stage to consider exclusion grounds and conditions for participation), the only suitable procedure is the competitive flexible procedure.

201. As a result of some of the specific points raised in the responses, we are revisiting our proposed measures to permit the use of qualification systems by utilities, as referenced in the answer to question 5.

202. One of the differences between Dynamic Markets and frameworks is that a Dynamic Market will be open to new entrants at any point in its lifetime as with the current DPS. As Dynamic Markets will be fully electronic, and suppliers will be entitled to admission to it if they meet the qualification requirements comprising the exclusion grounds and potentially also conditions for participation, all of which will rely on information provided by the supplier under the supplier registration system, managing a Dynamic Market should not result in unnecessary burdens for the contracting authority and participation by suppliers should not be unnecessarily burdensome. We intend to provide guidance on Dynamic Markets to ensure contracting authorities understand the type of requirement that is best met via a Dynamic Market, and the mechanisms that could be used to categorise suppliers, for example using categories of works, services and goods and filters.

203. The electronic nature of Dynamic Markets and the implementation of the Open Contracting Data Standard will facilitate quick completion of award notices required for over-threshold contracts placed via Dynamic Markets. Award notices will only be required for awards for contracts over the thresholds.

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

Summary of responses

204. Of the 352 responses to this question a clear majority (73%) supported the proposal. However, a majority (64%) of responses from the utility sector opposed the proposal. The main concern raised by the utility sector was the reduction in the duration of a closed

framework as the utility sector relies on long term relationships that would be undermined by shorter framework terms.

205. Some responses raised questions about the capability of contracting authorities to select the best tool for their requirement between the open frameworks, closed frameworks and Dynamic Markets, and requested guidance and training to be made available for contracting authorities. Responses from contracting authorities and some suppliers requested the ability to direct award from framework agreements.

206. Respondents welcomed the proposal for a central register of frameworks, while others observed that often frameworks overlapped and suppliers felt the need to win a place on all relevant ones so as not to lose the opportunity to win business, leading to increased bidding costs for suppliers and potential duplication of available supply.

Government Response

207. The Government intends to introduce the proposal for two types of frameworks into legislation as described in the Green Paper.

208. Regarding closed frameworks, suppliers not appointed at the start of the framework cannot join during its term, so it is effectively “closed” to new participants, whereas open frameworks will be opened at certain points to new suppliers. In response to the concerns raised by the utilities sector about the potential loss of flexibility from the existing regime, we propose to allow utilities previously covered by the UCR to award longer term closed frameworks. For all types of frameworks, a longer term than the relevant maximum term can be set provided the justification is published in the tender notice and is related to the framework itself.

209. Open frameworks will provide contracting authorities with the flexibility to appoint new suppliers to the framework during its term. For open frameworks lasting over three years, new suppliers should be given the opportunity to join the framework at least once during its term, however an open framework must not be closed to the market for longer than five years. The maximum duration of an open framework is to be 8 years, and it must contain at least two suppliers. These timescales and the flexibility of an open framework look to strike a balance between having longer term agreements whilst not closing the markets for longer than five years. Open frameworks will allow contracting authorities the opportunity to achieve improved value for money and reduce administrative overheads connected with undertaking a full procurement process.

210. For both open frameworks and closed frameworks with more than one supplier, contracting authorities are to be allowed to award call-off contracts either directly to a supplier or following a mini-competition. Where mini-competitions are used the contracting authorities will need to evaluate the mini-competition on the same basis as was applied for the award of the framework, including the evaluation criteria, but they can set out more detailed terms such as detailed sub-criteria within an existing criterion, if they wish.

211. For both open and closed frameworks, contracting authorities will be able to suspend suppliers from being awarded further call-off contracts if any of the exclusion grounds apply. In addition, under both types of frameworks contracting authorities will be able to impose their own maximum limit on the number of suppliers on the framework provided this is made clear in the tender notice.

212. Charging suppliers when they are awarded a call-off under either type of framework or the Dynamic Market will be permitted provided the charges reflect a percentage of the maximum estimated value of the call-off and are set out in the framework agreement/Dynamic Market. Any charges recovered by the contracting authority' must be proportionate and used solely in the public interest.

213. To discourage contracting authorities from putting in place extremely broad and poorly defined frameworks, it will be a requirement to identify in the tender notice or in the procurement documents the nature, scope and overall maximum estimated value of the contracts that may be awarded under the framework.

214. We plan to issue guidance which will provide suggestions on selecting the best tool for different requirements. The guidance will also provide advice on designing framework agreements so that they contain all of the relevant terms and, where appropriate, mechanisms for direct award.

215. The central register of commercial tools will provide a list of frameworks and Dynamic Markets. Bringing greater transparency to the frameworks available to contracting authorities should reduce the current duplication of frameworks.

Chapter 6: Ensuring open and transparent contracting

216. In the Green Paper, we proposed embedding transparency by default throughout the commercial lifecycle from planning through to procurement, contract award, performance and completion. We proposed requiring all contracting authorities to implement the Open Contracting Data Standard so that data across the public sector can be shared and analysed at contract and category level. We proposed establishing a single digital platform for supplier registration that ensures businesses only have to submit their data once to qualify for any public sector procurement.

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

Summary of responses

217. A clear majority (91%) of the 402 respondents to this question were supportive of the proposal, recognising the role transparency plays in providing a level playing field for suppliers, enabling innovation and productivity, developing public trust, driving competition and value for money in procurement and potentially reducing the number of Freedom of Information Act 2000 (FOI Act) requests received.

218. However, of those who supported, some (47%) also raised a number of concerns and caveats to their support. 192 respondents, particularly contracting authorities, raised concerns about how resource intensive the proposed changes could be to implement. Some respondents requested further clarification on the appropriate threshold for publication of information, noting that for transactional, low value contracts, the associated burden may outweigh the value of the information.

219. Some (33%) respondents, notably suppliers, highlighted concerns around the protection of commercially sensitive and personal information, with some raising concerns that public disclosure of certain information may have anti-competitive and distortive implications for the supply market. A small number of respondents (8%) requested further clarification on how the transparency measures would work with the application of the FOI Act.

Government Response

220. The Government intends to introduce most of these proposals into legislation as described in the Green Paper.

221. We have considered the potential impact of public disclosure of information, such as (but not limited to) tenders. The feedback we received from stakeholders was that publishing tenders at this stage could prejudice future competitions that may run if the initial one is aborted and re-run for any reason, as bids will have been disclosed to the competition. As a result, we will not require disclosure of tenders submitted in a procurement.

222. To address the concerns raised about the burdens on contracting authorities in preparing contract documents for publication alongside the contract detail notice, we propose initially requiring the publication (appropriately redacted for confidentiality) above a threshold contract value of £2 million. This threshold may be lowered in the future. As set out in the Green Paper, the Government will provide clear guidance on disclosure of information including appropriate use of redactions and what should be disclosable in accordance with the FOI Act. It is also important to note that the notices will require information which is already gathered and available to contracting authorities when carrying out procurements.

223. In addition to the general notifications required by the Award Notice, we propose requiring the sharing with all participants certain redacted evaluation documents (on the winning bid only) and sending the unsuccessful bidders their own documents privately. This strikes the balance between preserving commercial confidentiality and competition for the market (and future competitions) and provides appropriate transparency as to why the winner was selected. This allows losing bidders to compare the relative advantages of the winning bid against their own, providing sufficient information to permit challenges to the decision.

224. To address the concerns of the potential impact that publishing beneficial ownership and details of all bidders prior to evaluation taking place might have in the event of a restarted competition, we propose to not proceed with the Tender Web Form Notice that was suggested in the Green Paper and incorporate the details relating to beneficial ownership and tenders in the Award Notice instead.

225. We also propose to not proceed with the Web Form (Clarification) Notice and to incorporate the information it contained into the Tender Notice so that information is in one place.

226. To enable greater transparency regarding the performance of public contracts we propose introducing a new notice - the Contract Implementation Notice, which will be the mechanism that brings KPIs into the public domain and populates the register of contract performance.

227. The current planned list of procurement lifecycle notices for procurements above the GPA thresholds are detailed below.

Notice	**Content/Application**
Planning and Pipeline Notice (and Notice of Planned Procurement)	This notice will contain advance information on planned procurements for contracts valued over £2 million. This requirement will only cover contracting authorities and entities that reasonably expect to have more than £100m third party

	spend in any financial year. Where the contracting authority wishes to do so, they can choose to also complete the part of the notice (called Notice of Planned Procurement in GPA texts) that allows contracting authorities to reduce the tendering period.
Pre-Market Engagement Notice	This notice is to be used by contracting authorities if they choose to carry out pre-market engagement (unless there is a valid reason not to publish such a notice).
Appropriate Tender Notice	This notice is to be used to commence a competitive procurement. This notice will perform a number of functions including: ● alerting the market to an upcoming opportunity - enabling the authority to reduce the timescales of the subsequent procurement; ● advertising an opportunity; or ● ensuring transparency of limited tendering depending on the procedure used.
Award Notice	This notice is to confirm the contracting authority's intention to award a contract and: ● notifies the market of the outcome of the procurement process, anticipated contract value and description and identities of all bidders; ● alerts the market to the fact that a contract is about to be signed and in conjunction with a private release of information to any bidders, where required or commenced voluntarily, starts the standstill period.
Contract Detail Notice	Once a contract has been awarded, this notice provides information on the contract including details of the supplier. Separately, if the total value of the awarded contract is over £2m, a redacted version of the contract will need to be published.
Contract Implementation Notice	This notice is for contracting authorities to update a Register of Contract Performance with the key performance indicators on contracts above a value threshold to be confirmed.
Contract Change Notice	This notice is to confirm any amendments to the scope or value of the contract where there is change of 10% of the value for a goods or services contract or 15% for works contracts or an increase in the duration of any contract of 10%. Additionally, this notice commences standstill where one is required or applied voluntarily.
Contract Termination Notice	This notice is to confirm when a contract has ended, either through natural expiry or other means.

228. Lower value contracts for goods, services or works that fall below the relevant thresholds will continue to need to be advertised on a central platform where contracting authorities intend to run a competition.

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

Summary of responses

229. A clear majority (77%) of the 402 respondents to this question supported the implementation of the Open Contracting Data Standard (OCDS). Some respondents (31%) highlighted that implementation of this new standard could require significant system changes (for example, integration between existing e-tendering systems). A small number of respondents (5%) felt that this measure would need to be supported by guidance, learning and development, with a few respondents (17%) citing the need to consider further specifics around disclosure of commercially sensitive information.

Government Response

230. The Government intends to introduce the proposal into legislation as described in the Green Paper.

231. Adoption of OCDS will significantly improve data quality and interoperability. We recognise the important role of contracting authorities' e-tendering system providers in taking this forward and we intend to work closely with these providers in implementing OCDS.

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

Summary of responses

232. A clear majority (80%) of the 425 respondents to this question were supportive of this reform. A "tell us once" approach was welcomed in reducing the administrative burden for suppliers and increasing consistency for contracting authorities.

233. However, of those who supported, many (59%) did so with conditions and caveats (concerns that were also raised by those respondents who were not supportive of this measure). Caveats included concern over the level of centralised control that this reform would entail and the practicalities of building a central digital platform, particularly around how it would be funded. Others wanted to understand how existing services and systems would interoperate, expectations for transitioning to the new platform and if the timings would be realistic. Some raised concerns around cybersecurity, what data would be stored, who can access the data and what would be publicly available.

Government Response

234. The Government intends to implement a central digital platform for commercial data. The platform itself will be centrally funded, and it is our intention that the services would be free for all users.

235. We recognise the challenge involved in integrating a range of different systems into an overarching platform and understand that this is likely to require some additional development work on the part of providers. We will work closely with users and other stakeholders whilst building the system to ensure that the needs of the user community are met. We will be holding digital platform discovery workshops in parallel with the legislative process to ensure the system meets user needs.

236. We recognise that different elements of the digital platform should be subject to different rights of access. Publicly available information on the central platform would be published under the Open Government Licence and would not require registration to view or download, whilst other information on the central platform may require registration to enter or access data. For example, supplier responses to the supplier registration service will require registration to ensure supplier information is protected.

Chapter 7: Fair and fast challenges to procurement decisions

237. In the Green Paper, we proposed reforms to certain Court processes that apply to the determination of procurement disputes, including through the introduction of expedition measures aimed at speeding up the resolution of challenges and making it more accessible. We said we would investigate the use of a tribunal system to determine low value claims and issues in ongoing procurements (and potentially for wider use should the proposed Court reforms not deliver the required benefits). We proposed refocusing redress for suppliers onto pre-contractual remedies which preserve their opportunity to participate in the procurement. We proposed capping the level of damages available to aggrieved bidders, reducing the attractiveness of speculative claims. We proposed removing the automatic suspension for award of contracts let competitively in crisis or extreme urgency situations. We proposed removing the mandated requirement to provide an individual debrief letter to each bidder at the end of a procurement process.

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.

Summary of responses

238. Of the 385 respondents who responded to this question, a clear majority (80%) were in favour, with the proposals receiving particular support from local government. The responses showed a clear desire for a faster and cheaper system (especially among suppliers), but also highlighted a fear that this could lead to more challenges and speculative claims which may in turn lead to capacity issues and negate the benefits. Respondents recognised the role that earlier disclosure could play in speeding up the resolution of procurement challenges.

Government Response

239. The Government recognises the difficulties inherent in improving access to the review system while also trying to reduce timescales for the determination of legal challenges. As a result of some of the detailed feedback provided through the consultation responses, we are continuing to explore feasible options for faster and more accessible routes for valid challenge of procurement decisions. Changes to the Civil Procedure Rules and/or Technology and Construction Court Guidance are intended to align with statutory reform, but will be subject to review by the Ministry of Justice and the Civil Procedures Rules Committee.

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

Summary of responses

240. About half (54%) of the 380 respondents showed support for this proposal. However, many respondents observed that there was not enough detail provided about the proposed review process in order to be able to give a full response to this question. The idea was generally supported by suppliers. Law firms and utility companies questioned how a contracting authority review could work in practice; these concerns centered around the following issues:

- how to achieve impartiality with an 'in-house' review;
- resourcing issues (capacity and expertise), especially in smaller authorities;
- effect on standstill/limitation periods and unduly holding up the execution of new public procurement contracts;
- enforcement and interaction with formal legal challenge (being used as a 'fishing expedition').

Government Response

241. The Government does not intend to introduce the proposal into legislation as described in the Green Paper.

242. While we judge there is merit in the idea of an independent contracting authority review in the event of a dispute, the cost and resource implications involved in making this truly independent and effective (coupled with the adverse impact on holding up new awards) and the difficulty in developing a 'one size fits all' solution across the public sector means this is not something we presently plan to pursue through legislative reform. However, we expect and will encourage contracting authorities to review the merit of challenges made during procurement processes and respond appropriately (for example, with more detailed investigation and/or corrective steps).

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?

Summary of responses

243. Although about half (53%) of 369 respondents to this question agreed with the aim of introducing a quicker and simpler alternative process to hear legal challenges, there were doubts about the use of an existing tribunal to affect this. A small minority of respondents preferred a tribunal-based system for all claims, even though this was not part of the proposal.

244. Respondents liked the idea of an alternative quick process, especially for low value claims (where legal fees can be disproportionately high). However, concerns were raised about how to define what could be heard by a tribunal, and the increased cost to the public purse of having another track for hearing challenges.

245. Those who supported the idea of a tribunal generally did not agree with the specific proposal set out in the Green Paper to expand the scope of an existing tribunal, arguing instead for a procurement-specific body.

Government Response

246. The Government does not intend to introduce the proposal as described in the Green Paper.

247. The objectives of a faster and simpler Court process are targeted instead through the planned introduction of intended reforms to processes such as decisions on written pleadings, early and enhanced disclosure and a dedicated procurement judge. However, we will continue to keep this proposal under review once the impact of the new regulations and Court processes can be assessed.

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

Summary of responses

248. A majority (65%) of the 355 responses supported the proposal and only a few opposed outright, on that basis that bidders' primary objective is to obtain the public contract instead of receiving compensation for losses. Responses identified that primacy of pre-contractual

remedies provided a necessary counterpoint to the proposal to cap damages (see question 35) which we are no longer taking forward. There was a recognition that a faster Court system would allow greater access to pre-contractual remedies, without the same risk of adverse effects on the award of new contracts as exists at the moment. However, other responses emphasised a need to ensure that the primacy of pre-contractual remedies does not apply in all cases, as the rights of challengers to pre-contractual remedies need to be balanced against the public interest in ensuring public services and goods are not unduly delayed.

Government Response

249. The Government does not intend to introduce the proposal into legislation as described in the Green Paper. This is because of the decision not to pursue the proposed cap on damages but also because there will be more opportunity for pre-contractual remedies in a quicker system where the impact of delay is not so great as with current Court timescales.

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.

Summary of responses

250. A majority (60%) of 315 respondents agreed that development of a procurement-specific test would be a positive move to ensure greater balance between supplier and contracting authorities' interests given the current test is often thought to be skewed in favour of contracting authorities. However, support for this was contingent on the detail of the proposed replacement test for American Cyanamid and was given in the Green Paper context of a stated primacy of pre-contractual remedies and implementation of a damages cap. Respondents were keen to ensure that the impact of suspension on public service delivery would continue to be taken into account in any move away from the ‘adequacy of damages’ test (which is the aspect of the American Cyanamid assessment that makes it very difficult for suppliers to succeed in maintaining suspensions).

Government Response

251. The Government intends to introduce a new test into legislation as described in the Green Paper.

252. We believe that it would be helpful to all parties to clarify the test for use in a procurement-specific context. We are still working through the potential options but envisage that the new test will be a simple, single limb test which provides for suspensions to be lifted

where there are overriding consequences for the various interests concerned. This will include the impact on public service delivery.

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

Summary of responses

253. Of the 376 respondents to this question, there were mixed views in response to the proposal to cap damages available to aggrieved bidders at 1.5x bid costs. Some respondents (especially among local government) welcomed the suggestion in order to disincentivise speculative challenges and limit spending of public money on compensatory damages. Others had significant concerns about unintended consequences which they suggested could increase the cost to the taxpayer and outweigh any perceived savings achieved by the cap. It was also asserted that the premise for the damages cap was flawed, given relatively few challenges resulted in contracting authorities paying large compensatory damages. There were concerns that the introduction of the cap would lead to an unbalanced system and unnecessarily fetter the discretion of the Courts to adequately determine damages in accordance with long-standing case law principles.

Government Response

254. The Government does not intend to introduce the proposal into legislation as described in the Green Paper.

255. Having undertaken further research and consultation with experts, we agree the implementation of the cap could result in unintended consequences which are more problematic than the issues the cap was attempting to address. These include a potential increase in the number of overall legal challenges which would offset the benefits of reforms to speed up the court process. Further, the cost and time delays if contracting authorities are unable to lift the automatic suspension (if damages are no longer seen as an adequate remedy owing to the cap), could result in contracting authorities being drawn into a cycle of re-running procurements. We also acknowledge that existing case law principles already mitigate against the risk of unjustified compensation payments. In addition, the design of the new regime overall should allow for more challenges to be resolved before new contracts are placed, meaning less scope for compensatory damages without the need to implement a cap.

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

Summary of responses

256. There were 351 responses to this question, with around a third of those (96 respondents), largely from contracting authorities, calling for a clearly defined system based on the cost of bidding against established day rates or a benchmark. A few asserted assessment of damages in the context of applying a cap should be based on potential profit and/or contract value. Some raised the suggestion that bid costs could be submitted as part of the tender.

Government Response

257. As set out above, the Government does not intend to introduce the proposed cap on damages and therefore we no longer need to determine a uniform approach to calculating bid costs for the purposes of the cap.

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

Summary of responses

258. A clear majority (70%) of the 360 respondents who answered this question were in support of this proposal, recognising contracts awarded using the limited tendering procedure in a crisis or situation of extreme urgency almost always need to be placed without any delay. However, many respondents qualified their support by linking back to answers on question 7 and the need to ensure that such provisions are clearly defined and not open to abuse (and without removing the ability for these contracts to be challenged if awarded contrary to procurement law). Some support was given in the context of requirements for notices in advance of contract award with a clear statement of (and justification for) the use of crisis and extreme urgency provisions.

Government Response

259. The Government intends to introduce the proposal into legislation as described in the Green Paper.

260. As noted above, we agree that the terms for urgent contracting need to be clear, measured and proportionate. There will be a requirement for a notice prior to (or concurrent with) contract award which will ensure greater transparency and scrutiny of contracts relying on these measures for extreme urgency. This will be followed up by the publication of a notice containing details of the contract. Due to the absence of a standstill requirement with these contracts, the remedy of ineffectiveness will remain available where suppliers can show that the grounds have been relied upon inappropriately.

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

Summary of responses

261. Of the 420 responses to this question, a few (20%) respondents supported the proposal and some (30%) opposed it. However, about half of all respondents were uncertain and requested more clarity on how the transparency provisions in chapter 6 would impact on the amount of information provided at the start of the standstill period in order to make a firm statement on the proposal.

262. Those who were opposed were concerned that this proposal would mean that bidders would not be given enough information either to determine whether the procurement process had been carried out fairly and properly. There was also concern that debrief letters historically have provided a useful narrative feedback for suppliers and the transparency proposals would not give unsuccessful bidders with information to help them improve responses to tender in future competitions. A few respondents (10%), mainly from contracting authorities, questioned the burden of preparing information on the relative advantages of a bid at the end of the process. A small number, mainly suppliers, were concerned about publishing sensitive commercial information which may compromise their commercial position.

Government Response

263. The Government intends to introduce the proposal into legislation as described in the Green Paper but with some amendments as set out below.

264. We acknowledge the concerns raised about removal of the debrief letters and reiterate that the intention is not to provide less information to bidders at the end of the process. We have reassessed the information we believe ought to be released at the start of standstill (in competitive procedures) in light of the concerns raised and will include this as a part of the transparency requirements as set out in the response to Chapter 6.

265. We intend the process to work as follows for competitive procedures:

- the Award Notice will confirm the authority's intention to award a contract and notify

the market of the outcome of the procurement, anticipated contract value/description and identity of all bidders. It will also detail the standstill period;

- when the contracting authority releases the Award Notice signalling their intention to award a contract, they will additionally provide participants with certain evaluation documents for the winning bidder (redacted for commercial sensitivity);
- all bidders will be provided with their own, unredacted, evaluation document(s) to enable them to compare the relative advantages of the winning bid against their own;
- contracting authorities may, if they choose, provide individual covering debrief letters to bidders (which may include feedback on improving performance) but this may not be appropriate or possible in all circumstances.

266. We are still considering what information should be released relating to call-off contracts under framework agreements or Dynamic Markets. This will need to be enough to provide sufficient transparency to demonstrate legal compliance and allow bidders to improve future bids without placing a large burden on contracting authorities navigating such commercial tools with high numbers of participants, particularly where their operation is intended to be agile.

Chapter 8: Effective contract management

267. In the Green Paper, we proposed legislating to further tackle payment delays in public sector supply chains and give small businesses, charities and social enterprises deep in the supply chain better access to contracting authorities to expose payment delays. We proposed allowing more flexibility to amend contracts in times of crisis, improving the ability of contracting authorities to adapt quickly in these circumstances. We proposed introducing a new requirement to publish contract amendment notices so that amendments are transparent and to give commercial teams greater certainty over the risk of legal challenge. We proposed capping the profit paid on contract extensions where the incumbent raises a legal challenge.

Q39: Do you agree that:
• businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?
• there should be a specific right for public bodies to look at the payment performance of any supplier in a public sector contract supply chain?
• private and public sector payment reporting requirements should be aligned and published in one place?

Summary of responses

268. A clear majority of respondents on balance supported the proposals in this question, with 79% of 332 responses supporting the proposals overall. Within this, each of the three specific proposals also had a majority positive response. Of those that provided a response to each sub-question:

- 70% of 319 responses supported the proposals to allow businesses access to contracting authorities to escalate payment delays;
- 86% of 307 responses supported the proposals to grant contracting authorities a specific right to investigate payment performance in their supply chains;
- 87% of 279 responses supported aligning public and private reporting requirements.

269. Overall there was support for these measures that respondents felt would increase visibility and transparency of payment issues in the supply chain as well as shining a light on public sector payment performance.

270. There was support for a specific right of investigation into supply chain payment performance, which respondents felt had been lacking from previous regimes. It was felt by some that this would increase the confidence of SMEs in bidding for work in government supply chains.

271. With regards to allowing businesses in the supply chain the ability to escalate payment delays to contracting authorities, the most common concern raised was around maintaining

privacy in a contract. It was also suggested that the proposals are not clear enough on what the contracting authority would be obliged to do once a payment issue had been escalated and what enforcement powers would be in place.

272. Similarly, on the issue of contracting authorities investigating payment delays, whilst the principle was supported, there was concern over how often the right would be exercised in practice, given resource constraints in organisations.

273. With all three proposals, some respondents felt that contracting authorities would unnecessarily become arbiters in disputes between private companies, and some responses suggested the Procurement Review Unit would be best placed to handle supplier investigations.

Government Response

274. The Government intends to introduce these proposals into legislation as described in the Green Paper.

275. Taking into account the feedback we received in the consultation responses, we propose additionally requiring evidence from subcontractors that reasonable efforts have been made to resolve the payment delays directly prior to escalating to the contracting authority. This will help mitigate against contracting authorities being drawn into contractual disputes between suppliers.

276. Through guidance, we will provide clarity on how escalating payment complaints will relate to wider functions (such as PPRS and the Procurement Review Unit) and set out the options for suppliers to raise concerns anonymously.

277. We will also provide clarity on what information the subcontractor will be required to provide and by when. For example, spot checks will focus on the payment performance of supply chain members as part of a specific contract and look at the most recent payment performance to subcontractors as part of the check. In addition, we will set out any expectations on the contracting authority and specify clear metrics, including the frequency of publication for payment reports on the proposal to align public sector payment reporting with key metrics from private sector payment reporting.

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

Summary of responses

278. A clear majority (74%) of 320 respondents to this question agreed with the proposed changes to amending contracts, with local government showing the strongest level of support. Increased transparency was referenced as a positive step towards determining and evidencing value for money. There was also support for retaining much of the policy that underpins the current PCR on contract amendments. Only 38 respondents commented on the new proposal to permit amendments to be made in times of strictly-defined crisis but the majority of these were supportive.

279. A few respondents (17%) commented that the proposals on contract amendments were not sufficiently flexible, especially for construction or utilities contracts. Moreover, while utilities and users of the UCR were generally supportive of the proposals, there were concerns with the removal of measures that give them flexibility within the current regime.

Government Response

280. The Government intends to introduce the proposal into legislation as described in the Green Paper, with the exception of the proposal to cap profits on contract extensions which are entered into because an incumbent supplier has challenged a new contract award (see the response to question 42 below).

281. In addition, we are considering including in the regime a new provision specifically intended to assist in the amendment of complex contracts. We accept the points raised by respondents on the matter and recognise that more complex public procurements can be subject to developments outside of the contracting authority's and supplier's control which require a (sometimes significant) amendment in order to facilitate continued delivery of that contract. We acknowledge that the provisions in the current legislation can leave the contracting authority unclear on the appropriate way ahead which ensures compliance with the regulations, and continues to meet pressing operational needs. We are exploring options to provide a new 'safe harbour' in legislation to assist with those circumstances, so that contracting authorities will in future be able to manage these changes more effectively and in a transparent way.

282. Following feedback from utilities and other users of the UCR, we are considering options to maintain the position in the UCR and not include the 50% cap on contract amendments for utilities.

283. Noting that they are often complex and/or sensitive in nature, or are required to respond to changing threats and operational demands, for defence and security procurements

we intend to provide as much freedom as possible to amend contracts, to ensure maximum flexibility to respond to MOD requirements and the characteristics of the defence and security markets with limited procedural constraints on our ability to make such amendments.

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

Summary of responses

284. There was a clear majority (76%) of 392 respondents who were supportive of the proposal but there were a number of concerns and caveats.

285. Concerns were raised by some respondents that the task of completing and publishing amendment notices would be resource intensive. A few were concerned that the thresholds above which publication of notices would be required are too low. A small number also expressed discomfort with the position that a period of standstill will be mandatory when a change notice is published, with the increased opportunity for challenge that would bring. Others, however, believed this could be beneficial.

286. Some suppliers from the defence sector said that they did not see the benefit of mandatory contract change notices which they thought would add additional process and administrative costs for little benefit. There was also concern that this could become a burden in the case of large contracts, especially those which are technologically complex, where there are a significant amount of amendments. This requirement should also recognise the usual commercial and operational sensitivities.

Government Response

287. The Government intends to introduce the proposal into legislation as described in the Green Paper but with some amendments, as set out below.

288. Mandatory publication of contract amendment notices (or “contract change notices”, as they will be termed in the legislation) will be a step forward in providing greater visibility of how public money is spent during the life of the contract. As well as providing third parties with sufficient knowledge to potentially bring a challenge against the amendment, the publication of contract change notices will also give the contracting authority greater legal certainty that the amendment will not subsequently be challenged after the expiry of the standstill period.

289. Having listened to concerns raised by respondents that contract change notices may place an administrative burden on contracting authorities, we discussed with key stakeholders on the exemption thresholds (outlined in paragraph 255 of the Green Paper) above or below

which mandatory publication of these notices are required. We considered the matter thoroughly and while we will be implementing those exemption thresholds, we now intend to take a power for a Minister of the Crown to amend those exemption thresholds if necessary.

290. We are currently considering some derogations from the rules on contract amendments to meet the needs of MOD procurements and those of other contracting authorities operating in the defence and security sector, including removing the requirement to publish certain transparency notices.

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?

Summary of responses

291. The majority (67%) of the 371 respondents who answered this question supported this proposal. However, this support was caveated with 22% of respondents agreeing to it in principle only, and many requesting further analysis of the problem and details as to how such a system would work in practice.

292. Questions over whether the proposal alone would alleviate challenges were raised by respondents, with concerns that:

- the differences between sectors and levels of acceptable profit would need to be investigated thoroughly, in order to prevent a standardised cap putting pressure on specific industries and sectors;
- challenges could be legitimate; the principle of fairness should apply to contracting authorities and suppliers;
- the imposition of a cap could itself could have unintended consequences and lead to costly disputes or legal proceedings.

293. A few respondents (14%) felt that this issue was not a significant concern across the public sector, believing that few suppliers raise challenges with the intention to profit from contracting authorities in the short term. This was highlighted in particular by contracting authorities and respondents from the legal sector.

Government Response

294. The Government does not intend to introduce this proposal into legislation as described in the Green Paper.

295. After further analysis of this proposal, we have concluded that the level of analysis that would be required to establish profit rates for each of the market sectors covered by the full

suite of public procurement regulations was disproportionate to the scale of the problem. For example, it would be impractical to establish a standard government rate for the diverse range of services commissioned by local authorities.

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