



CBI

Markets for good

Creating effective public-private partnerships post-Brexit

March 2019

Infrastructure and Energy

Sponsored by

brownejacobson^{LLP}



Contents

Summary	4
Introduction	8
Chapters	
1. The European market for public contracts	10
2. Untapped opportunities to improve public procurement	14
3. Applying the current rules more effectively	26
4. Reducing complexity post-Brexit	32
5. Creating a more effective remedies regime	34
References	38

Summary

The UK Government's Industrial Strategy rightly highlights public procurement as one of the most important levers Government has for driving social and economic prosperity across the UK's regions and nations. But beyond this, effective collaboration across sectors is also at the heart of delivering the high-quality public services and infrastructure that are critical to the functioning of our day to day lives.

Maximising the contribution of the private sector to public service delivery will, however, rely on a well-functioning government marketplace. Previous CBI research has shown that to achieve this government must go further in its efforts to develop more effective partnerships with its suppliers.

Brexit, and the spotlight it is shining on our current regulatory environment may provide an opportunity here, and this CBI briefing paper aims to lay out some steps that the Government should take to ensure that public-private partnerships deliver the high-quality public services and infrastructure that the UK needs.

The European market for public contracts is significant, and UK businesses want continued access to these opportunities

- o The European market for public contracts is significant, and UK suppliers derive substantial benefit from having access to it. Each year, the European Commission estimate the marketplace to be worth €1.9 trillion.
- o The UK Government should seek to maintain as much access to the European market for public contracts as possible, and should avoid significant divergence from the current EU regime.
- o The UK Government should avoid an approach to public procurement post-Brexit, which is based only on the World Trade Organisation's (WTO) Agreement on Government Procurement (GPA).

There are untapped opportunities to improve public procurement, within the existing regulatory framework

- o Many of the challenges faced by government suppliers are unrelated to legislative provisions or regulatory frameworks. Instead, the UK's application—and in some cases gold-plating of the EU rules—is viewed as the primary barrier to public procurement being both more efficient and delivering better outcomes for taxpayers.
- o The Cabinet Office should develop further guidance and case studies for public sector buyers demonstrating how to look beyond cost in public sector tenders. This should include guidance on how to apply the Most Economically Advantageous Tender (MEAT) approach to procurement more effectively, and how to conduct more sophisticated evaluations of quality and whole life value, as well as social value.
- o The UK Government should work closely with business and other key stakeholders as it creates and rolls out the social value framework for public contracts in early 2019.
- o Pre-market engagement should become mandatory for larger or complex contracts across the public sector.
- o For larger and more complex contracts, public sector commissioners should be required to report in detail on the specific pre-market engagement activities that have been undertaken.
- o Public sector agencies should evaluate current pre-qualification processes, framework agreements, and standard forms of contract to identify opportunities to strip out complexity.

Government should focus on shifting commercial behaviours and improving commercial capability, as this would have more impact than regulatory reform

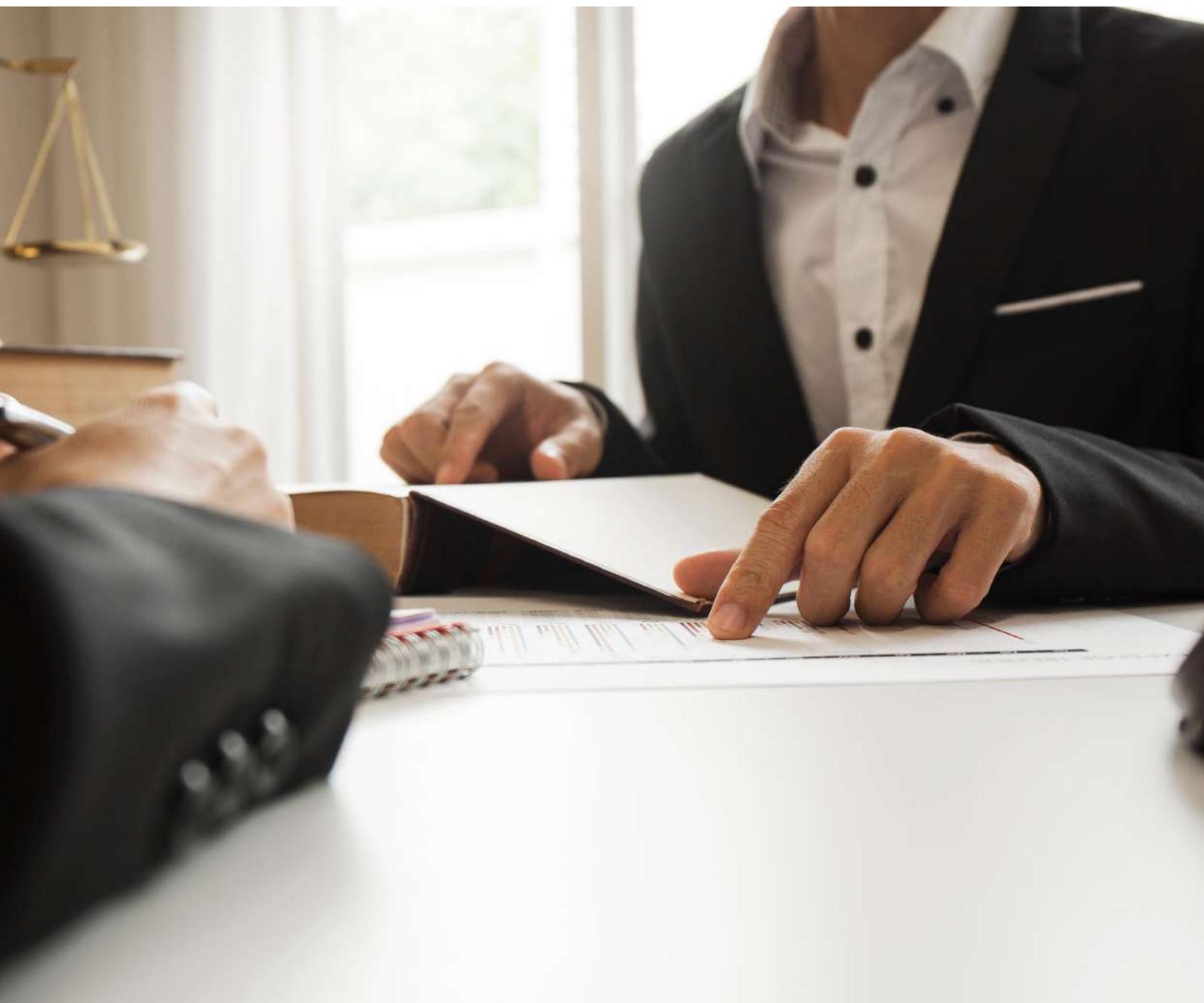
- o Business believes that scarce commercial capability in government has led to an overreliance on process and less innovation.
- o Government should continue investing in improving its commercial capability, not just within central government departments, but across the wider public sector.
- o For more complex contracts, Government should also look to form more multidisciplinary project teams to oversee the end-to-end delivery of key projects.
- o To ensure that public sector commissioners are able to respond to the changing external environment, Government should look to design more flexibility into public contracts.
- o Government should also look to identify and eradicate contracts which enable onerous levels of risk to be transferred to suppliers.
- o Government should provide procurement teams with more clarity on how to apply the procurement rules to a variety of contracts, and should encourage commissioners to consider the full range of procurement procedures at their disposal. This should include Competitive Dialogue and Competitive Procedure with Negotiation, which business believes is currently underused.
- o For more complex contracts, commissioners should be required to report on the procurement procedure they have selected, and outline the reasons for making this selection.

Regulatory reform post-Brexit should focus on removing complexity to drive competition for government contracts

- o The scale of the reforms that will be possible following the UK's exit from the European Union (EU) will depend heavily on the outcome of the wider trade negotiations, and will be limited by our continued membership of the GPA.
- o If the opportunity arises, however, business believes that there are targeted areas where the procurement rules could be adapted to support a more efficient and effective government marketplace.
- o Government should look to adopt a simpler form of the processes and forms laid out in the Official Journal of the European Union (OJEU) as part of the new UK e-notification service, which will replace Tenders Electronic Daily (TED, the EU's online tender portal) post-Brexit.
- o Government should look to expand the requirement for two stage tenders to a wider range of contracts.
- o In the longer term, Government should re-evaluate the current financial threshold above which the OJEU process applies.

Government should make it easier to highlight poor procurement practices, to help promote a fairer and more transparent system

- o Feedback from business suggests that the current remedies system is complex and costly, which can prevent suppliers from highlighting bad practice.
- o Government should look at making the time limits for bringing a legal challenge more consistent, and consider making all time limits 90 days.
- o The Cabinet Office should take steps to bolster the remit of its new Public Procurement Review Service (PPRS), including giving it more power to ensure its rulings are adopted, particularly for lower value cases.
- o Government should pilot a public procurement tribunal to evaluate whether this approach could help could support a fairer and more effective public procurement system.



Introduction

The UK Government's Industrial Strategy rightly highlights public procurement as one of the most important levers Government has for driving social and economic prosperity across the UK's regions and nations.

But beyond this, effective collaboration across sectors is also at the heart of delivering the high-quality public services and infrastructure that are critical to the functioning of our daily lives. Over the last few decades, governments of all colours have recognised this, and today the public sector spends over a quarter of a trillion pounds a year with over 200,000 businesses in the UK and overseas. For some departments, over half of their departmental budget is spent with external companies, large and small, underlining the importance of Government developing effective partnerships with its suppliers.¹

Maximising the contribution of the private sector to public service delivery will, however, rely on a well-functioning government marketplace, and previous CBI research has shown that currently, the potential to improve services through contracting is not being fully realised. Just 5% of businesses believed that current procurement processes incentivised innovation, and almost two thirds of businesses stated that a focus on lowest initial bid cost continues to drive contract awards instead of long-term value for money, quality of service or social outcomes.² In the wake of the collapse of Carillion, a large strategic supplier to government, growing political and media scrutiny has increased calls for services to be taken back in house and made operating in the public sector less attractive to businesses, generating further uncertainty in an already tough marketplace.

Brexit and the spotlight it is shining on our current regulatory environment provide both a risk and an opportunity here. Got right, our exit from the EU offers the opportunity to re-evaluate public procurement processes, shift behaviours and strip out unnecessary complexity in government contracting, with the ultimate aim of delivering greater value for citizens. Got wrong, not only could the health of the UK Government marketplace decline, but UK suppliers could lose the ability to compete fairly in the vast European market for public contracts.

By identifying some key areas for reform, this CBI briefing paper aims to provide a useful tool for government, and its commissioners, as we enter a critical period for both public sector agencies and their suppliers.

These views have been developed in consultation with hundreds of businesses supplying goods, works and services across the public sector—alongside public procurement experts. Particular thanks go to Browne Jacobson solicitors for supporting this work, and to the CBI's Public Sector Partners Council and Public Procurement Working Group for their input into early drafts of this report.



“Effective collaboration across sectors is at the heart of delivering high-quality public services.”

The European market for public contracts

The European market for public contracts is significant, and UK businesses want continued access to these opportunities

As the UK leaves the EU, it must make a number of tough choices. Just one of these is whether we continue to open up the UK public sector market, in exchange for having access to international public sector opportunities.

For business, the choice is clear. The European market for public contracts is significant, and UK suppliers derive substantial benefit from having access to it. Each year, the European Commission estimate the marketplace to be worth €1.9 trillion.³

Across the same period, the value of tenders published in Tenders Electronic Daily (TED, the EU's electronic database for public procurement) was €450 billion, of which well over a quarter was for contracts tendered by UK public bodies. In 2015, this market therefore represented around 3% of EU Gross Domestic Product (GDP), and as high as 5% of UK GDP.⁴

UK businesses also acknowledge that significant divergence from the regime outlined in the 2014 Public Contracts Directive (PCD) could damage wider trading relationships. Other international regimes closely mirror that of the EU, which is viewed as one of the most advanced in the world. Creating entirely new systems could therefore cause the UK to fall behind global best practice. As an earlier adopter of outsourcing, and one of the most developed public services economies in the world, this would be a backwards step for the UK.⁵

Developing different domestic systems would also mean requiring suppliers with an international footprint to duplicate processes, creating further inefficiency and bureaucracy, in an already complex regime. With tight margins in many parts of the public sector, this could either place suppliers under increasing financial pressure, or drive up prices in the public sector—both of which are ultimately undesirable outcomes for citizens.⁶

Depending on the nature of our future relationship with the EU, any decision to move away from EU regulations is also likely to see the UK lose its ability to influence or benefit from the introduction of new EU policies in the years to come. This includes reforms to processes laid out in the OJEU, as well as EU-wide technological advances such as the move to digital-by-default procurement.⁷ This could also mean UK businesses are unable to compete on a level playing field with their international counterparts, and the UK Government will also have to find more money to develop its own systems to drive efficiencies across its domestic public procurement regime.

Recommendation: The UK Government should seek to maintain as much access to the European market for public contracts as possible, and should avoid significant divergence from the current EU regime.

UK businesses are committed to the principles of transparency, non-discrimination and equal treatment which underpin the EU's current regime

The UK has been at the heart of ensuring open competition for public sector contracts, and has led the way in driving forward initiatives that aim to ensure a fair and transparent regime across the common market.

Public sector suppliers have supported the UK in taking this leading role, and remain committed to the EU's core principles of transparency, non-discrimination and equal treatment, regardless of the outcome of the EU negotiations.

Businesses therefore welcome the fact that the UK will now become an independent member of the GPA.⁸ The UK currently participates in this agreement as a member of the EU, and this meant that until recently our future involvement had been uncertain for UK suppliers.

The GPA framework provides similar commitments on non-discrimination and open competition to those found under the EU regime. This helps ensure that UK businesses can access global opportunities.⁹ The provisions of the GPA also provide a useful baseline for the future negotiations with the EU regarding public procurement, as any future UK-only regime will—as a minimum—have to be GPA compliant.

Nonetheless, whilst our accession to the GPA will give UK businesses some access to the public procurement markets of not only EU member states, but also the United States, Japan, and 18 other countries worldwide, it will not provide the same level of access the UK currently enjoys as a member of the EU. UK businesses therefore view a GPA-only approach to public procurement post-Brexit, or in a no-deal scenario, as inadequate, and it is welcome that the Political Declaration, published in November, states that the UK and the EU should provide for mutual opportunities beyond those laid out in the GPA.

In addition to taking steps to independently remain part of the GPA, the no-deal technical notices published by the UK in September 2018 also outlined plans to create a domestic tender notification system to replace TED on the day we exit. Following this, a statutory instrument (The Public Procurement (Amendment etc.) (EU Exit) Regulations 2019) has now been laid before Parliament, which amends the current regulations to take into account the new UK e-notification service which will be launched once we leave the EU.¹⁰ This is a positive step, and in the absence of clarity on the UK's final relationship with the EU, suppliers welcome the development of a system that can help UK businesses maintain visibility of both domestic and international public sector opportunities.

However, while these moves have been welcomed by business, the Cabinet Office, in partnership with the Department for Exiting the European Union (DExEU), should now lay out its plans in more detail, and then work with its suppliers to minimise the impact this may have on their UK operations. In particular, business would welcome a better understanding of how government will ensure continuity in the public sector marketplace in the case of a no-deal Brexit, and an outline of how it might build on the more rudimentary provisions of the GPA, and the more limited market access it will provide.

Recommendation: The UK Government should avoid a GPA-only approach to public procurement post-Brexit, or in a no-deal scenario, as this is viewed as inadequate by UK businesses.

"In 2015 alone, the European market for public contracts was worth an estimated £1.5 trillion."

Untapped opportunities to improve public procurement

Within the existing regulatory framework, there are untapped opportunities to improve public procurement

Many of the challenges faced by government suppliers are unrelated to legislative provisions or regulatory frameworks. Instead, the UK's application—and in some cases gold-plating of the EU rules—is viewed as the primary barrier to public procurement being both more efficient, and delivering better outcomes for taxpayers.

On paper, EU provisions should support—rather than hinder—public sector commissioners to look beyond cost when awarding contracts

A race to the bottom on price continues to be a key concern for businesses operating in the government marketplace. CBI research published in June 2018 demonstrated an ongoing focus on lowest initial bid cost within public contracting. Almost two thirds of businesses surveyed by the CBI stated that this was the factor determining contract awards.

Not only does this have the potential to undermine the sustainability of service delivery, but it hampers government's ability to achieve value for money in the long term. Feedback from business also suggests that this culture of short-termism is stifling innovation, with just 5% of businesses saying public procurement processes incentivise them to innovate.¹¹

While some suppliers stated that procurement officials cite 'the rules' as the reason for this approach in individual contracts, EU regulations do not prohibit commissioners from looking beyond price in public sector tenders.¹² In fact, since 2014, the EU regulatory framework, and associated domestic provisions under the Public Contract Regulations (PCRs), encourage public sector buyers to consider factors other than cost when awarding contracts.¹³

EU guidance, for example, encourages purchasing authorities to award contracts to the 'Most Economically Advantageous Tender' (MEAT), which actually includes numerous factors unrelated to cost. Adhering to these rules should therefore support a more balanced approach to making contract awards.¹⁴

The 'Most Economically Advantageous Tender' (MEAT)

- o The MEAT criteria outlined in the directive and PCRs requires commissioners to assess both quality and cost before making a contract award.
- o The 'alternative' criteria included in this legislation which can be used in a MEAT assessment include: quality, technical merit, aesthetic and functional characteristics, accessibility, social characteristics, environmental characteristics, innovative characteristics, after-sales service and technical assistance.
- o Each criterion used must be given a relative weighting, which must be set out in the tender documents, and the rules stipulate that the contract notice must make clear to tenderers that the MEAT criterion will be used to judge their submission.

This raises the question of why this approach is not widely used in practice. Feedback from business suggests these metrics and other tools are deployed in a way which means that cost is given significantly more weight than other factors. It has also been suggested that the other quality-based metrics used are often very basic, meaning all suppliers score highly. Combined with low levels of understanding of the MEAT approach in commissioning bodies, this inevitably leads to a disproportionate focus on short-term cost reduction in too many public sector contracts.

To combat this, the Cabinet Office should take further action to encourage a more sophisticated understanding of different value metrics across the government marketplace. More specifically, suppliers would welcome the development of guidance and case studies which better explain the MEAT approach and how it can be applied. This should be combined with additional tools to support public sector buyers to conduct more sophisticated evaluations of quality and whole-life value, as well as social value considerations.

On this front, it is important to acknowledge that the UK Government has made some important progress.

In June 2018, government suppliers and the CBI welcomed a speech by the Cabinet Secretary which pledged to put social value back at the heart of public contracts.¹⁵

Following this, in February 2019, the launch of a new Government Outsourcing Playbook, developed in partnership with industry leaders and the CBI, called on public sector commissioners to not just focus on price when awarding contracts. Effectively implemented, business believes this can help support a more sustainable government marketplace in the longer term.¹⁶

By shifting the focus of public contracts onto the value delivered for local communities, business believes that government can help create a more sustainable and effective marketplace, and at the same time support its suppliers to demonstrate the wider outcomes that are delivered through public-private partnerships.

Recommendation: The Cabinet Office should develop further guidance and case studies for public sector buyers which demonstrate how to look beyond cost in public sector tenders. This should include guidance on how to apply the MEAT approach more effectively, and how to conduct more sophisticated evaluations of quality and whole life-value, as well as social value.



Measuring social value in action: Morgan Sindall

For many suppliers, social value is already core to their work, and many businesses have mechanisms to measure the impact they are having in local communities. Below is just one example of this work in action.

For the last 18 months, Morgan Sindall has been working with Simerica, a firm of economists and policy analysts, and Scottish Water to create a tool that provides a monetised social value for 29 core metrics that capture performance and outputs arising from construction activity. This tool is unique in that it is designed for the construction industry, is geographically sensitive, it considers disbenefit and opportunity cost, and provides the value of activities and outputs to three stakeholder groups; the government, businesses, and the individual. All of this is delivered in line with the Cabinet Office Green Book. Furthermore it is an online tool that provides real-time valuation and reporting.

To support the use of this tool, Morgan Sindall has implemented a corporate social value strategy that is driven by a social value policy. The strategy involves the application of two simple tools to projects: a Responsible Procurement Framework (RPF) and a Social Value Charter (SVC). The RPF allows Morgan Sindall to consider and include all strategic priorities for a project, rather than just the traditional ones. The rationale for implementing this approach is that the supply chain will be better able to provide the total deliverable if they are well prepared to do so. The business uses the tender process to share relevant information, including social value requirements with its supply chain partners. This helps ensure that suppliers and subcontractors know what is expected of them. The SVC is a document within which they agree targets and ambitions for social value outputs with the procuring body, with progress being monitored throughout the life of the project.

In practice

Morgan Sindall is nearing completion of the new, £28 million, state-of-the-art specialist sports facility for Solent University, that will support and enable excellence in sport, health and fitness related degree programmes, and associated teaching and research. To date, the project has delivered 13 workless job starts, supported 11 apprentices and delivered 150 hours of upskilling training for the supply chain. In addition to this, 85% of the project spend is with SME's, and they have engaged with 577 school learners, and invested nearly 2,000 person hours into community investment projects. The forecast monetised social value at project end is nearly £17 million, and the beneficiaries of these social value outputs are government, businesses, the environment and individuals.

Following on from this announcement, the requirement for commissioners to utilise the Public Services (Social Value) Act 2012 in local government will be strengthened and for central government contracts, the Department for Culture, Media and Sport (DCMS) and the Cabinet Office are already working together to create a new social value framework.¹⁷ This will bring together new social value metrics to be included in the evaluation phase of central government tenders, including suppliers' ability to create jobs, support SMEs, and help government achieve its wider objectives on issues including decarbonisation and cybersecurity.

This new framework has the potential to ensure that government tenders are assessed on factors beyond simply cost, and more importantly provides government with a key opportunity to reset the way that procurement teams view their relationships with suppliers, and the outcomes they are seeking to achieve.

Implemented effectively, the new social value framework can help commercial teams maximise the impact of partnerships between the public and private sectors

While suppliers have welcomed the Government's growing focus on social value, they are clear that the real value of this work will only be realised if it is effectively implemented by departments and frontline commissioners. To support this, and to encourage the widespread adoption of the framework, suppliers believe that it should be compulsory for procurement teams to use at least some of the new social value metrics.

To maximise its impact, the framework should also seek to ensure that social value considerations are discussed from the pre-market engagement phase all the way through to contract delivery, rather than just during the tender phase of the procurement process. This would prevent social value from becoming simply a tick-box or corporate social responsibility exercise, and encourage business and government to build meaningful partnerships that support innovation and create real value for communities from the outset.

Government should also put in place processes that can validate the actual delivery of social value commitments in practice. This will not only help highlight positive examples to the wider marketplace, but can also ensure there is still a fair competition for contracts. It is critical, for example, that certain suppliers are not winning bids simply because they are more adept at responding to tenders with a social value focus than other businesses, who are equally committed to investing in local communities.

Before deploying the framework nationally, businesses believe there would also be significant value in piloting it for different types of contracts. This would help both government and suppliers to adequately prepare for the collection and analysis of new forms of data, and also support government to iterate and improve the social value framework so that it delivers maximum impact for commissioners.

Recommendation: Government should work closely with business, and other key stakeholders, as it creates and rolls out the social value framework for public contracts in early 2019.

Commissioners should conduct pre-market engagement more frequently

Suppliers value opportunities for early dialogue with public sector commissioners ahead of the formal tender process. Pre-market engagement gives businesses adequate time to prepare both for the procurement process—which in and of itself may be very complex—and the actual delivery of the goods, works or services. This is particularly crucial for SMEs whose resources can be limited, and who may need to draw upon external expertise or skills when delivering larger or more complex projects. It also enables prime contractors to have early conversations with supply chain partners so that they too can prepare.

To maximise the impact of pre-market engagement activities, it is critical that they are clearly communicated. Contracts Finder, Early Engagement Notices and OJEU Prior Information Notices, for example, should be used more frequently to advertise that public sector buyers will be undertaking pre-market engagement. This can ensure that as many suppliers are involved as possible, and is also an opportunity to encourage new entrants to the government marketplace.

Feedback from business also consistently reaffirms that positive early dialogue helps support better government-supplier relationships. This is critical during the delivery phase of the contract, as it encourages both parties to work collaboratively to manage any issues that arise, rather than resorting to legal action or other formal grievance processes. It can also enable both customers and suppliers to be more honest about how well contracts are performing and, where necessary, take steps to address under-performance.

For government buyers, early engagement is also hugely valuable. Crown Commercial Service (CCS) guidance, for example, acknowledges that pre-market engagement can boost competition: “Early market engagement is known to enhance competition by enabling more suppliers, including SMEs, to respond.”¹⁸ It can also ensure that procurement teams have a better understanding of the market to create an ambitious, yet achievable scope for the contract. This helps to maximise the efficiency of the resulting procurement by reducing the likelihood that commissioners will need to keep amending the tender later in the process.¹⁹

And there are further benefits. To date, commissioners have too often sought to transfer as much risk as possible to suppliers, with little consideration for the type or scale of risk it is appropriate to share. Early dialogue with suppliers enables commissioners to not only better understand the potential risks associated with a project, but it can also give them a sense of the market's appetite for accepting the level of risk on offer.

Despite this, suppliers report that insufficient time is invested ahead of the formal tender exercise. Too often, supplier engagement also occurs too late to influence the design or scope of the contract, or is not harnessed as an opportunity to engage in genuine dialogue with the business community. This not only leads to inefficient processes, but also misses opportunity for greater innovation and doing things differently.

Again, business believes these challenges are unrelated to the regulatory environment. Current EU provisions do not prevent commissioners from talking to potential suppliers before starting the formal process, provided that this does not subsequently prevent a fair competition taking place.

In fact, the more recent 2014 EU directives place greater emphasis on the importance of early engagement and early publication of the tender documents.²⁰ As a result, the domestic provisions under the PCRs also state that engaging with the market before the formal procurement process is considered best practice.

Government's increased commitment to pre-market engagement in its commercial policies is a positive step, and suppliers have already seen a marked improvement in the way that some agencies, such as Highways England and Network Rail, are engaging with the market.

More recently, the need to engage early with the market was also acknowledged in the Government's Outsourcing Playbook.

To ensure these provisions have the maximum impact, pre-market engagement should become mandatory for larger or complex contracts across the public sector, including civil engineering projects, building projects, and equipment and development projects.

The financial threshold at which this policy is triggered should be decided in consultation with procurement officials and industry, so that it strikes the right balance between encouraging improvements in commercial behaviours, and not creating unnecessary bureaucracy.

For these larger and more complex contracts, public sector commissioners should also be required to report in detail on the specific pre-market engagement activities that have been undertaken. This can help ensure it is not simply a tick-box exercise for procurement teams, but viewed as a core part of the contractual process.

Finally, to support this shift in approach to pre-market engagement activities, the Cabinet Office and CCS should work with other departments and their suppliers to create further guidance on how to undertake effective pre-market engagement. This should encourage commissioners to go beyond simply presenting public sector opportunities to potential suppliers, and help them to engage in genuine two-way dialogue about forthcoming opportunities.

The introduction of new guidance should help demonstrate to procurement officials the value that pre-market engagement delivers in the long term. This should highlight examples where earlier dialogue with suppliers has led to improved outcomes for citizens, as well as alignment with cross-governmental objectives, such as greater technological adoption and spending public money with SMEs.

Recommendation: Pre-market engagement should become mandatory for larger or complex contracts.

Recommendation: For larger and more complex contracts, public sector commissioners should also be required to report in detail on the specific pre-market engagement activities that have been undertaken.

To encourage greater competition, public sector commissioners should avoid unnecessary complexity and focus on outcomes

Business believes that a significant amount of the bureaucracy associated with government tenders is also unrelated to the PCRs. Whilst OJEU rules do stipulate the minimum processes that must be followed, suppliers suggest that often UK procurement officials create additional bureaucracy—and with no clear or obvious benefit to the delivery of the resulting contract.

Instead of being a legal obligation, businesses believe this reflects the current culture within many public sector procurement teams. In particular, feedback from business has highlighted examples where officials default to using long and complex tender documents, based on convention and ‘doing things the way they have always been done’. This reluctance to change is often entrenched, and sees public sector procurement teams falling behind industry best practice.

Currently, a disproportionate focus on compliance also means that commercial teams can fail to tailor procurement processes to the programme or services being delivered for fear of getting it wrong. This is regardless of the suitability of these processes to the outcomes they wish to achieve. While business acknowledges that the current regulatory framework does help maintain a fair and transparent process, which is critical to the functioning of the government marketplace, it also sees significant opportunity to design more flexibility in public contracts so they are built around outcomes, rather than process alone.

Shifting behaviours to create a culture which encourages flexibility and openness to change within procurement teams is therefore essential to ensure commissioners don't add unnecessary bureaucracy into the procurement process. Training for all commercial staff around 'Lean' and 'Agile' ways of working, which focus on providing the best value to customers and stripping out non-value-added activities, would be a good first step.²¹ This should not only be delivered to existing staff, but also included in the on-boarding process for new-joiners.

Some standardised documents used by UK Government departments and agencies also continue to be complex and promote duplication. Business, for example, welcomed the introduction of a standard selection questionnaire (SQ) as they hoped it would make it easier for businesses of all sizes to bid for public sector opportunities. In reality however, the SQ is still a complex and lengthy process, particularly for SMEs or new entrants to the market. With new government initiatives around prompt payment set to add to the length of this document, there remains concern that it still requires significant business resource to complete, even at this initial stage of the tender process.

In addition, framework agreements, which were introduced to reduce complexity, still too often create duplication and inefficiency.²² A significant number of suppliers stated that even when they had completed the process to join a framework, they were frequently required to answer further questions, which closely mirrored the original evaluation, in order to actually win public sector opportunities. Framework participants also reported numerous examples of being obliged to respond to mini tenders, even where they might not be suitable suppliers. This leads to resources being wasted, not only by suppliers, but also by the procurement officials who have to evaluate unsuitable bids.

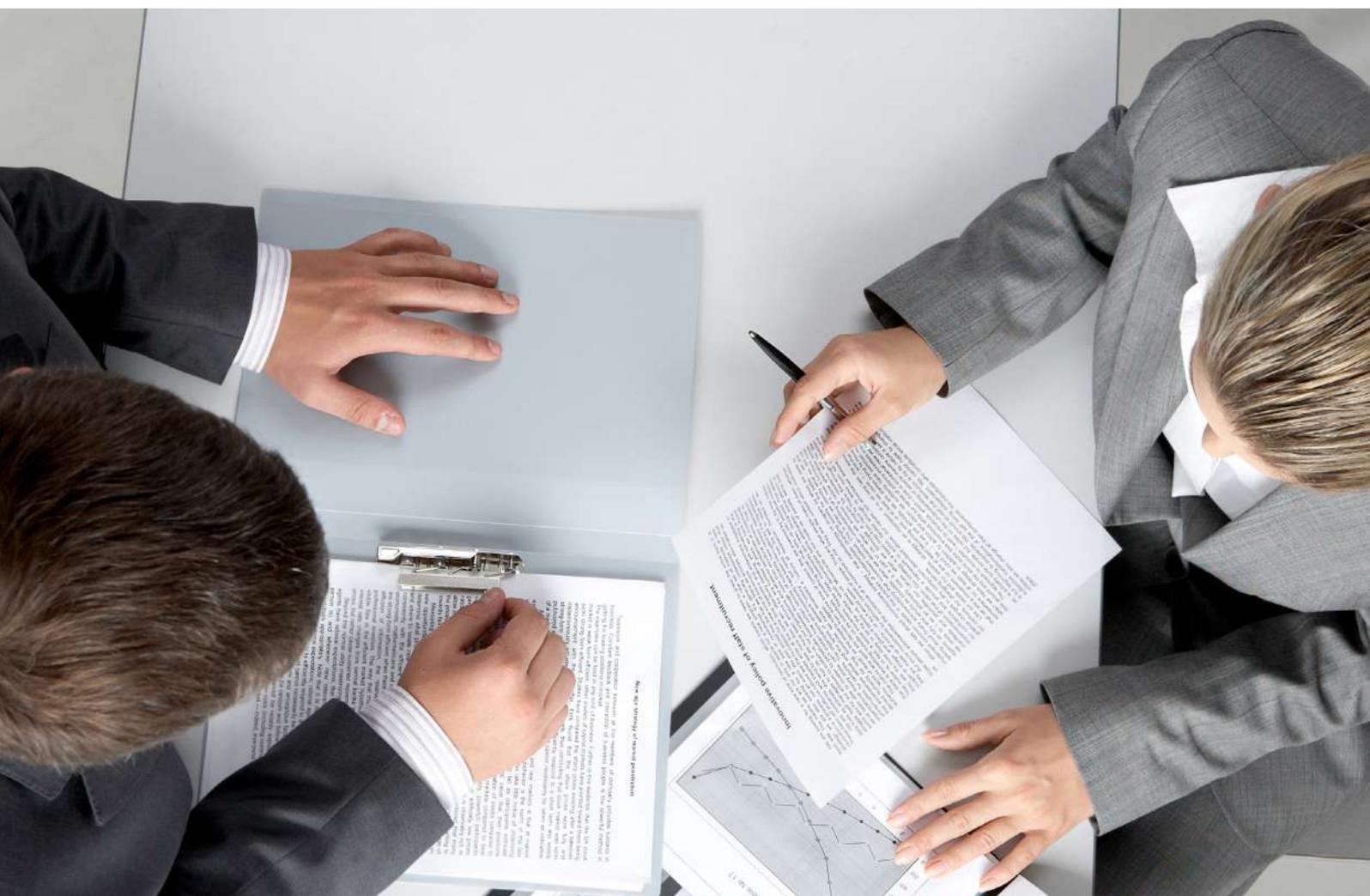
With frameworks being used to procure a significant proportion of the money spent by public sector agencies, it is critical that these issues are addressed. In the first quarter of 2018, 16% of public sector contracts were conducted through frameworks, but these accounted for 60% of the estimated total tender value in this period, which was £105 billion.²³

Public sector agencies should therefore evaluate current pre-qualification processes, framework agreements and standard forms of contract to identify opportunities to strip out complexity. Not only will this reduce inefficiency, but it can help encourage more businesses of all sizes to compete for government contracts, and ultimately deliver better value for money for taxpayers.

In key sectors like construction, standard industry forms and pre-qualification processes have also failed to keep pace with more modern or efficient ways of working. Build UK, for example, a leading Trade Association in the construction sector, estimate that the current pre-qualification system costs the industry up to £1 billion per year. Their analysis also found that many of the questions included in pre-qualification were unnecessary at this stage, and failed to help public sector bodies adequately screen suppliers. To address this, they have therefore been working with suppliers to create a standardised and streamlined approach to pre-qualification. This new system has been strongly welcomed by the construction industry and will be soft launched in early 2019, with the aim of rolling it out more widely later in the year.²⁴

Government should also consider whether the approach taken in construction could be applied across the wider public sector market. Where appropriate, it could work with relevant membership organisations and businesses to take this forward.

Recommendation: Public sector agencies should evaluate current pre-qualification processes, framework agreements and standard forms of contract to identify opportunities to strip out unnecessary complexity.





"The current pre-qualification system costs the construction industry up to £1 billion per year."



Applying the current rules more effectively

Government should focus on shifting behaviours and improving commercial capability

Scarce commercial capability has led to an overreliance on process, and less innovation

Despite significant government investment, improving commercial capability within the Civil Service remains a key challenge, and is vital if current regulations are to be applied effectively.

Business acknowledges that the creation of the Government Commercial Function (GCF), and the roll-out of online training for an estimated 30,000 civil servants across government, has already led to some improvement.²⁵ Suppliers recognise, for example, that commercial staff within the GCF have been able to provide valuable support to departments embarking on complex projects, and that commercial guidance has been developed to support a more standardised approach to similar contracts.²⁶

In the longer term, suppliers are also confident that this investment will make government a more intelligent and effective customer, with many commercial staff gaining confidence as they become experienced.²⁷

Investment in commercial capability at the centre of government has, not, however been matched by similar levels of investment within local authorities, the NHS and other public sector agencies. In fact, CBI research suggests that capability in these agencies has deteriorated in recent years as a result of cuts to public spending.²⁸

Suppliers also report inconsistency of personnel due to high staff turnover. This can lead not only to relationships breaking down, but also to a reduction in accountability, with those designing public sector tenders often having little incentive to ensure their effective delivery. In particular, suppliers are concerned about the lack of end-to-end oversight of public sector contracts.

While the financial settlement for local government in next year's Comprehensive Spending Review is unlikely to provide more money for many of these public sector bodies, business believes that strategic investment in public sector commercial functions can deliver greater value in the long term. In particular, government should look to attract external commercial talent into management positions within the Civil Service. This can help upskill the wider workforce on the job, rather than relying solely on time-limited training programmes.

To maximise the impact of government's investment in commercial training, it is also vital that it is combined with equipping staff with other key skillsets and knowledge.

Currently, for example, commercial training is not often accompanied by programmes to improve technical knowledge about the goods or services being procured. This can lead to commercial principles being applied in a vacuum, with little or no industry expertise to contextualise the programme being delivered. While for off-the-shelf goods this may not be problematic, successfully procuring more complex goods or services relies on a clear understanding of the objectives being sought. Many businesses report that they had been involved in tenders where it was unclear what a good outcome would look like to the commissioning authority.

The issue of individuals lacking broader skills is compounded by the fact that commercial personnel are too often siloed and not sufficiently integrated with operational and policy teams. This combination of abilities is again particularly critical when departments are purchasing complex services, or running large infrastructure and construction projects.

To address this, government departments should look to form multidisciplinary project teams. These teams would oversee the end-to-end delivery of key projects, and could not only ensure that commissioners are able to achieve the results that they seek, but also that the actual users of the contract are involved from the outset.

In addition, greater use of multidisciplinary teams could support departments to better integrate commercial training with other forms of upskilling.²⁹ This is a model that has been successfully adopted by the Government Digital Service when designing the Digital Marketplace, an online platform which helps public bodies find cloud technology and specialist services for digital projects.³⁰

Recommendation: Government should continue investing in improving its commercial capability, not just within central government departments, but across the wider public sector.

Recommendation: For more complex contracts, Government should look to form more multidisciplinary project teams to oversee the end-to-end delivery of key projects.

Boosting confidence and developing technical capability within procurement teams could encourage commissioners to apply procurement rules more flexibly

Both suppliers and buyers have raised concerns about a lack of flexibility during the delivery phase of public sector contracts. This not only prevents public agencies from tailoring contracts to respond to changes in the external environment, but also hampers efforts to innovate when new technologies have come to the market after the contract has been awarded.

Since 2015, the PCRs have provided greater clarity about when, and to what extent, contracts can be amended without the need to re-advertise on OJEU. Previously, the 2006 PCRs and resulting case law had created significant uncertainty about what was—or wasn't—permissible without re-tendering.

As the 2015 PCRs lay out, carefully designed contracts can give commissioners the flexibility to respond to the rapidly changing environment: “Permissible grounds for amendment include the existence of suitable “clear, precise and unequivocal” review clauses in the contract or a need for additional supplies or services where a change of supplier is impossible and would cause significant inconvenience.”³¹

Government therefore does have opportunities to create additional flexibility during the delivery phase of public contracts. This however, requires public sector bodies to have a long-term commercial strategy and a good understanding of the external market, and how this might change over time.

Uncertainty amongst procurement officials has also contributed to a culture of risk aversion, where commercial teams fear legal challenge and focus their efforts on compliance instead of designing flexible contracts around achieving better outcomes. In turn, this encourages public procurement officials to transfer disproportionate amounts of risk to suppliers—regardless of whether they are best-placed to handle it.

Suppliers report that they continue to ‘no-bid’ on public sector opportunities containing unlimited liability or termination for convenience clauses. This practice reduces competition and ultimately government’s ability to be confident it has selected the best supplier for the project or services being procured. The CBI therefore welcomed the fact that suppliers’ concerns about risk transfer were recognised in the recent publication of the Outsourcing Playbook. Government should now look to use this as a catalyst to identify and eradicate contract terms which enable onerous levels of risk to be transferred to suppliers.

Recommendation: To ensure that public sector commissioners are able to respond to the changing external environment, Government should look to design in more flexibility to public contracts

Recommendation: Government should look to identify and eradicate contract terms which enable onerous levels of risk to be transferred to suppliers.

Insufficient clarity about when the current regulatory framework applies can lead to ineffective and inefficient procurement processes

There is a need for greater certainty as to when the public procurement rules do and do not apply, as well as additional clarity about how to apply the regulations to different types of procurements.

The current regulatory framework provides a wide range of tools which, used appropriately, can enable public sector buyers to tailor processes effectively to the goods or services being procured. Feedback from business however, suggests that these tools are not being deployed effectively. Too often, for example, the best procurement routes are not deployed for different types of contract, leading to unnecessary complexity or insufficient engagement with industry partners.

In particular, suppliers are frustrated that the Open Procedure, which does not include a pre-qualification stage, is the default position for government procurement. While this procurement procedure is often quick and less complex than other options, it allows no time for negotiation and can lead to very high numbers of bidders. This can lead to suppliers being asked to commit significant resources to a process, with little understanding or confidence, of how likely they are to secure a commercial opportunity.

Feedback also suggests that Competitive Procedure with Negotiation is underused, and the possibility of using Competitive Dialogue is frequently not considered. Whilst it may not be appropriate for commissioners to use these more complex forms of procurement when purchasing off-the-shelf goods or services, business believes that they can support greater flexibility, and help government and industry to co-design solutions to complex problems. In the long term, this will help save taxpayers money and ensure public services are delivered more efficiently.

In part, business believes this is due to a lack of understanding about what is possible within the current regime, and the need for a cultural shift away from relying on more simplistic procurement methods.

Government guidance from 2012, for example, introduced a presumption against the use of the Competitive Dialogue procedure, except where its use can be justified.³² This followed concerns that this form of procurement was too often being used in place of pre-market engagement. Suppliers suggest that this has contributed to competitive dialogue being underused and ignored in instances where it could add value—although business also acknowledges that this decision is sometimes driven by the higher cost of this form of procurement.

At the pre-qualification stage, procurement teams are still sometimes unsure about how to apply the financial threshold test. CCS guidance states that this test should not be a 'hair trigger' for excluding bidders, but too often it continues to be a deciding factor, and this prevents smaller businesses in particular from competing for more opportunities.

Guidance also encourages procurement officials not to rely on credit reference agencies to assess whether the financial threshold has been met, as often credit ratings are not transparent. Many buyers however, remain unsure about which alternative measures of financial stability to use to effectively screen potential suppliers. As a result, credit ratings can still too often be the default, meaning that suppliers can be unfairly disqualified from some tender processes. Again, this is particularly true for SMEs.

Procurement teams require more clarity as to how to apply the procurement rules to a variety of different contracts. Promoting existing guidance is an easy first step to achieve this, but government must also look to more creatively engage commercial staff so that they are more knowledgeable about the wide variety of procurement tools at their disposal. Case studies should also be compiled to help procurement officials to better understand what good looks like in practice.

Recommendation: Government should provide procurement teams with more clarity as to how to apply the procurement rules to a variety of contracts, and should encourage commissioners to consider the full range of procurement procedures at their disposal, including competitive dialogue which business believes is currently underused.

Recommendation: For more complex contracts, commissioners should be required to report on the procurement procedure they have selected, and outline the reasons for making this selection.

A photograph of two men in a meeting. The man on the right is writing on a whiteboard with a marker. The man on the left is holding a tablet. The image has a green and blue color overlay.

“Insufficient clarity about when the current regulatory framework applies can lead to ineffective procurement processes.”

Reducing complexity post-Brexit

Regulatory reform post-Brexit should focus on removing complexity to drive greater competition for government contracts

The scale of the reforms that will be possible following the UK's exit from the EU will depend heavily on the outcome of the wider trade negotiations and will be limited by our continued membership of the GPA.

There may, however, be some opportunities to create a more flexible regime, and CBI research suggests that there is appetite from industry for some change. Of the businesses surveyed in early 2018, only 30% stated that they would like to see continued adherence to all EU procurement provisions post-Brexit.³³

While many of businesses' priorities for change are behavioural rather than regulatory, there are targeted areas where procurement rules could be adapted to support a more efficient and effective government marketplace.

Business would welcome efforts to remove duplication and complexity within OJEU processes

OJEU notifications can be complex and repetitive, and simplifying these could be an easy way for procurement teams to strip out bureaucracy for suppliers, whilst also making their processes more effective.

These notifications are also increasingly uniform, making it difficult for suppliers to distinguish between the opportunities they should invest time in bidding for, and those which they are unlikely to be suitable for. This poses the risk that suppliers, which are often operating on thin margins, waste significant resources on the wrong tenders. In turn, it could also see government faced with an unfiltered list of potential suppliers.

A simpler form of OJEU notice should therefore be adopted as part of the new UK e-notification service which will replace TED post-Brexit. This should focus much more clearly on specific information such as the nature and value of contract, and any pre-requisites such as experience, professional accreditation or insurance requirements. This can help ensure suppliers bidding for contracts are suitable for the opportunity being advertised.

Expanding the requirement for commissioners to hold two stage tenders to a wider range of contracts could also encourage competition and reduce the upfront burden on suppliers. As previously highlighted, for many suppliers, open competitions are an unattractive prospect, and require significant resources to be committed without any real idea of whether a positive commercial outcome can be achieved.

Whilst unlikely to be achieved in the short-term, business believes that the financial threshold above which the OJEU process applies should be re-evaluated. This would help more businesses—and SMEs in particular—to compete for a larger number of opportunities without being subject to significant procedural requirements.³⁴

Recommendation: Government should look to adopt a simpler form of OJEU notice as part of the new UK e-notification service which will replace TED post-Brexit.

Recommendation: Government should look to expand the requirement for two stage tenders to a wider range of contracts.

Recommendation: In the longer-term, Government should re-evaluate the current financial threshold above which the OJEU process applies.



Creating a more effective remedies regime

Government should make it easier to highlight poor procurement practices, as this can help promote a fairer and more transparent public procurement system

The current remedies system is complex and costly which can prevent action being taken over bad procurement practices

Ensuring the UK's public procurement system operates fairly requires a robust and accessible system for challenging bad behaviour. While the EU provisions lay out a number of remedies, feedback from suppliers suggests they would welcome access to quicker and simpler grievance processes.

We heard from a number of businesses that the cost of bringing a legal challenge can be prohibitive. On average, it will cost at least £20,000 just to bring a challenge, although some suppliers reported fees in excess of £100,000 even before a substantive court hearing had taken place.³⁵

The amount charged is only tangentially related to the size of the contract, which is particularly challenging for smaller suppliers who may stand to make much smaller sums in the event of overturning a contract award. Multiple challenges may also need to be brought if further misconduct is identified as the process unfolds, adding to the overall financial burden on suppliers.

Secondly, the time to bring a challenge is too limited. For some remedies, suppliers have just 30 days to bring a challenge, while for others it can be a maximum of 90 days. This drives the wrong types of behaviours from both suppliers and public sector agencies, and sometimes encourages both parties to quickly resort to legal proceedings before considering other dispute mechanisms.

Knowledge of these processes across the supplier community is also patchy. A number of suppliers, for example, stated they were often unsure of the time limits within which they needed to bring a legal challenge. Again, this disadvantages SMEs in particular, which reported to us that they had sometimes missed their opportunity to raise a valid grievance with the courts. Business would therefore welcome the creation of a short guide which lays out when and how suppliers can challenge poor procurement practices in the public sector. As the commercial heart of government, the CCS would be well placed to produce this document.

Most parts of the PCRs also only apply to above threshold contracts, meaning the options for lower value procurements can be very limited.³⁶

Alternative mechanisms for raising complaints—such as the Cabinet Office’s Public Procurement Review Service (PPRS—previously the Mystery Shopper programme) and the Small Business Commissioner—currently lack teeth, and awareness of these initiatives is low, particularly amongst SMEs. The PPRS cannot be used at the same time as a legal action, which further limits its scope. Suppliers suggested that the combination of this system and the current time limits lead to businesses running out of time to bring a legal challenge if the action taken by the PPRS doesn’t have the desired impact.³⁷

Finally, the application of the remedies system by the judiciary is also inconsistent, causing further uncertainty for both government buyers and suppliers. This creates significant differences in the way the law is interpreted, leading to vastly different outcomes for similar kinds of cases.

Under the current system, a legal challenge could result in either the procurement being held up for a short time while the claim is evaluated, or alternatively the contract award going ahead whilst the supplier seeks damages. Though the law makes no recommendation as to which of these routes should be pursued, the latter option is often the default approach.

With many suppliers, and also public sector buyers, not interested in seeking financial remedies, this leads to a disconnect between how the process works in practice, and what users of the remedy system want.

Taken together, these issues make the current remedy system not only costly and complex, but also difficult to access and ineffective for its users.

Business would therefore welcome the introduction of new grievance procedures, which could help bad practice to be challenged more easily

Being able to challenge bad practice is essential to ensure that there has been a fair competition for taxpayers’ money. It can also help promote supplier confidence in the effective functioning of the government marketplace, and this in turn helps government clients represent an attractive proposition for businesses of all sizes.

In the short-term, business believes that steps should be taken to bolster the powers and remit of the Cabinet Office’s new PPRS. In particular, business would welcome the PPRS publishing examples of bad practice, and being given more power to ensure its rulings are adopted, particularly for lower value cases. Independence from the Cabinet Office will be critical to the success of this body, in order to ensure that Government is not perceived to be ‘marking its own homework’. The success of the PPRS will, however, rely on the body having enough capacity to be able to act with sufficient speed, and being given adequate power for its rulings to be perceived to have ‘teeth’.

In the longer term, business believes there would also be merit in the introduction of an arbitration-style tribunal with lower costs, and the power to make administrative orders such as annulling decisions, re-running a competition or rectifying errors. The tribunal would sit between more informal complaints mechanisms (like the PPRS) and applying to the High Court, but would have limited powers to award damages. This would follow steps taken by other European countries, such as Germany.³⁸

Recommendation: Government should look at making the time limits for bringing a legal challenge more consistent, and consider making all time limits 90 days.

Recommendation: The Cabinet Office should take steps to bolster the remit of its new PPRS, including giving it more power to ensure its rulings are adopted, particularly for lower value cases.

A new route to raise grievances would support a more transparent system, but must not encourage frivolous or vexatious challenges

The introduction of a new complaints system should, however, not lead to an increase in frivolous claims. Suppliers recognise that there is the danger that new processes could introduce further inefficiencies into public procurement, and may also delay the delivery of important public services or infrastructure projects.

Business must therefore use any processes or procedures responsibly, and not to gain a competitive advantage in particular procurements, or across the public sector market as a whole.

At present, business acknowledges there is unlikely to be sufficient resource or capacity for government to undertake this work. Piloting a public procurement tribunal, however, would be a welcome first step, and could help government to better understand the potential benefits—and also disadvantages—of this approach.

Recommendation: Government should pilot a public procurement tribunal to evaluate whether this approach could help support a fairer and more effective procurement system.



"A new route to raise grievances would support a fairer and more transparent public procurement system."

References

- 1 *Government Procurement: The scale and nature of contracting in the UK*, Institute for Government, December 2018
- 2 *Partnering for Prosperity*, CBI, June 2018
- 3 *EUROPEAN SEMESTER THEMATIC FACTSHEET PUBLIC PROCUREMENT*, European Commission, November 2017
- 4 *Consequences of Brexit in the Area of Public Procurement*, European Parliament, March 2017
- 5 *Choice and Competition in Public Services*, Institute for Government, August 2012
- 6 'UK outsourcers at risk of financial contagion', *Financial Times*, 16 December 2018
- 7 *Guidance on E-procurement*, European Commission, May 2017
- 8 *Government Procurement Agreement: UK participation after EU Exit*, Department for International Trade, February 2019
- 9 *Public-sector procurement after a no-deal Brexit*, Cabinet Office, January 2019
- 10 *The Public Procurement (Amendment etc.) (EU Exit) Regulations 2019*, HM Government, January 2019
- 11 *Partnering for Prosperity*, CBI, June 2018
- 12 *DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL*, Official Journal of the European Union, February 2014
- 13 *The Public Contracts Regulations 2015 & The Utilities Contracts Regulations 2016, Guidance on Awarding Contracts*, Crown Commercial Service, October 2016
- 14 *Public Procurement Guidance for Practitioners*, European Commission, 2015
- 15 'Businesses welcome focus on long-term value, not just costs', CBI, June 2018
- 16 *The Outsourcing Playbook*, Cabinet Office, February 2019
- 17 *Chancellor of the Duchy of Lancaster speech at BSA Annual Chairman's Dinner*, Cabinet Office, November 2018
- 18 *Procurement Policy Note - Updates to guidance on Transparency in Procurement and Contracting and implications for use of Contracts Finder - Information note 07/11*, Cabinet Office, July 2011
- 19 *Procurement Policy Note – Procurement Supporting Growth: Supporting Material for Departments - Action Note 04/12*, Cabinet Office, May 2012
- 20 *DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL*, Official Journal of the European Union, February 2014
- 21 *Going Agile: The new mind-set for procurement officials*, Deloitte, May 2017
- 22 *CECA Frameworks Report: Directions in Policy for the UK's Infrastructure Sector*, CECA, November 2018
- 23 Tussell, a data provider on public contracts, 2018
- 24 *Reforming the pre-qualification process*, Build UK, 2018
- 25 *Chancellor of the Duchy of Lancaster speech at BSA Annual Chairman's Dinner*, Cabinet Office, November 2018
- 26 *Commercial operating standards for Government*, Government Commercial Function, February 2016

- 27 *Chancellor of the Duchy of Lancaster speech at BSA Annual Chairman's Dinner*, Cabinet Office, November 2018
- 28 *Partnering for Prosperity*, CBI, June 2018
- 29 *Public Procurement for Innovation*, OECD, May 2017
- 30 *'Digital Marketplace turns 4: what we've achieved'*, Government Digital Service, November 2018
- 31 *Guidance to Amendments to Contracts During Their Term*, Crown Commercial Service, October 2016
- 32 *Procurement Policy Note – Procurement Supporting Growth: Supporting Material for Departments - Action Note 04/12*, Cabinet Office, May 2012
- 33 *Partnering for Prosperity*, CBI, June 2018
- 34 Our continued membership of the GPA will mean the same thresholds as under the EU regime continue to apply
- 35 *Procurement Challenges*, Clarks Legal, 2018
- 36 *The Public Contract Regulations 2015*, HM Government, February 2015
- 37 *Scope and remit of the Public Procurement Review Service*, Cabinet Office, November 2018
- 38 *Procuring Economic Growth: An Overview of Procurement Law Reforms Essential to Recovery*, Society of Conservative Lawyers, February 2014



March 2019
© Copyright CBI 2019
The content may not be copied,
distributed, reported or dealt
with in whole or in part without
prior consent of the CBI.

Printed by Colourscript on Amadeus 100
pure white silk, containing 100% recovered
fibre certified by the FSC®. Colourscript
is certified to ISO 14001 and ISO 9001

Product code: 12443

Produced by the **Infrastructure and Energy** team
To share your views on this topic or ask us a question, contact:

Elizabeth Crowhurst
Principal Sector Adviser
elizabeth.crowhurst@cbi.org.uk