



Department for Business, Energy and Industrial Strategy

Transforming Public Procurement

Green Paper Consultation

Submission from CIBSE

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The Chartered Institution of Building Services Engineers (CIBSE)

- CIBSE is the primary professional body and learned society for those who design, install, operate and maintain engineering services systems, including mechanical, electrical, sanitary and safety systems, which are used in buildings and other constructed assets. Our members have a pervasive involvement in the delivery of the built environment in the UK, and in so doing make key contributions to achieving net zero ambitions and to building safety. Our focus is on adopting a co-ordinated approach at all stages of the life cycle of buildings, including conception, briefing, design, procurement, construction, operation, maintenance and ultimate disposal.
- CIBSE is part of Actuate UK the engineering services alliance, which brings together the leading trade, technology and professional bodies within the multi-billion-pound sector
- CIBSE is one of the leading global professional organisations for building performance related knowledge. The Institution and its members are the primary source of professional guidance for the engineering services sector on the design, installation and maintenance of building services systems to deliver safe, healthy, comfortable and effective building performance. Through Actuate UK we work closely with the trade and technology bodies to apply that knowledge across the engineering services sector.

CONSULTATION RESPONSE**General Comments**

This response is submitted by CIBSE to supplement the response from Actuate UK, which we wholeheartedly support. We have therefore restricted ourselves to key supplementary comments on the issues of public safety in the built environment and the contribution of the built environment to achieving the UK's statutory net zero carbon target.

It is our view that given the very significant influence of public sector procurement on the UK economy then the issue of net zero carbon targets should be enshrined across the public procurement system. In addition, given the widely acknowledged need for fundamental building safety reform and the size of the public sector as a client for construction related works and services, all public procurement in this area should be used to drive the delivery of building safety and a clear focus on a culture of safe outcomes that put building occupants and users at the heart of delivery. It is also notable that there is no mention of procurement being judged against its delivery of outcomes that promote health and wellbeing, which is an important facet of many public services and especially of construction outputs.

There is a huge opportunity to harness the power of public procurement to support the building safety agenda. In the executive summary there is a bullet point about enshrining principles in law, without any mention of safety. In the aftermath of the Grenfell Tragedy this is a significant lost opportunity.

Paragraph 7 talks about leveraging the "huge power of some £290 billion of public money" and talks about growth, productivity, recovering from the pandemic and tackling climate change. There is no mention of the importance of addressing the crisis in building safety which sees thousands trapped in unsaleable homes with limited prospects of a resolution to their plight in the foreseeable future. There is a real need for addressing the current crisis in building safety alongside the recovery from the pandemic and tackling climate change, which is mentioned twice in paragraphs 37 and 38. Similarly, while Lord Agnew makes a similar point about net zero targets, there is no further mention of this anywhere in the main Green Paper.

The power of a properly trained and focussed public sector on procuring for safety would help to drive the culture change that Dame Judith Hackitt has called for to transform the approach to building safety. If the single largest client of construction starts to procure on the basis that those who put safety and delivery of net zero targets first stand a better chance of coming first in competitive tendering, then the industry will respond accordingly. There is a real opportunity for the public sector to lead change here, and to lead change now without waiting for the Building Safety Bill to pass.

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

In principle, yes, but the principles do not go far enough and currently miss the key issue of building safety.

In paragraph 27 first bullet there is a reference to safety. Its put alongside four other national priorities. Given the major and entirely necessary emphasis on building safety, there needs to be a greater focus on procuring for safety in the new approach. As it stands, putting safety alongside economic, social, ethical and environmental priorities runs the real risk that it is seen as just another desirable outcome, not an essential requirement of public procurement, and also of causing offence to those who are on the receiving end of the current building safety crisis.

Whenever the public sector procures buildings then their safety must be at the forefront of the procurement process. We would welcome greater focus on safety and believe this should be addressed explicitly in relation to public good. Public procurement of new buildings and constructed assets or of major renewal works should always place safety of the resulting buildings or assets at the forefront of the procurement process. There is an argument that for such procurement the first test of any tender or proposal received should be “will it clearly deliver safe outcomes?”. It should be made absolutely clear to all who tender for public work will be expected to demonstrate and deliver safety on the project and in the resulting asset. This is an essential support to the Building Safety Bill.

Similarly, the role of public procurement in driving change to deliver net zero carbon ambitions and legal targets should not be overlooked in the general principles. It is important that these are seen as essential requirements that must be delivered in all case, and not options that can be left out and compensated in stronger responses on other things in some form of “balanced scorecard”.

Q2. Do you agree there should be a new unit to oversee public procurement with new powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities?

Yes, and not just commercial capability.

The unit should be established to encourage and enable and then, if need be, enforce adoption of the principles including focus on building safety and net zero targets.

There is no mention of training the public sector to deliver the new approach. This is another opportunity to embed the principles and new systems and expectations before starting to monitor and intervene. If the public sector wants to procure well it needs to employ people with appropriate skills.

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?

The panel needs to draw on a wide range of knowledge and experience in the procurement of goods, services, buildings and infrastructure, and include those with proven experience of delivering significant carbon reduction programmes. There is a need for sector specific knowledge, especially in the area of building safety and procurement of buildings and infrastructure to deliver long term value not just low capital costs. It is essential that best value is not confused with or exchanged for a drive for lowest cost, which in construction helps to drive the race to the bottom.

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

Yes. They should also be supported by mandatory procedures (including training and competence requirements for procurement officials) and guidance in plain English that can be understood by buyers and bidders.

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

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

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

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

There is a need for further innovation in procurement in the construction and building sector to prioritise culture change, building safety and the net zero transition in the sector in response to the Climate Change Act and Building Safety Bill.

The construction sector needs to undergo fundamental change and the more government can do to make it clear that change is coming, is inevitable and is unavoidable by any serious participants in supplying the public sector the better.

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 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?

Pre-procurement should be used to eliminate those who are not fully committed to the building safety agenda and to delivering low carbon buildings and engineering services.

This is a low cost opportunity to drive the sector to take these agenda seriously now, and to make clear that the public sector is serious about driving them. It will also help to engage public procurement officials in the agenda, as they will need to understand what is acceptable to satisfy the pre-procurement assessment. This may need work to develop a suitable single pre-procurement process.

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?

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

Yes. However, the definition of “advantageous” for awards in the built environment MUST make reference to safety. If the tender cannot convince the evaluation team that it can be delivered safely and operated safely then it is not advantageous. Net zero is also a key element here.

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?

Q15. Do you agree with the proposal for removing the requirement for evaluation to be made solely from the point of view of the contracting authority, but only within a clear framework?

Yes. Awards of taxpayer funded contracts must serve society and the wider public interest, and not just the concerns of the contracting authority.

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?

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

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

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)?

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

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

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

Yes, this is essential to enable those who embrace change to be recognised and rewarded, and to drive the less compliant to consider their position.

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

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

Yes, subject to very clear guidance on reasonable levels of enquiry.

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

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

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

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

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

Yes, we support all these proposals.

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.

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

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?

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

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.

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

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

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

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

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?**

Yes, we agree with all three proposals. In the construction sector at present contractors are cash flow negative from the outset of a project mobilising. Delayed payment drives the low cost, corner cutting that has been exposed in Dame Judith Hackitt's review of the sector. Using late payment as a blunt commercial tool is unacceptable and leads to long term consequences which are far from "advantageous" to the public at large. Payment needs to be made on time when it is due. If work is sub-standard then that work should be challenged, promptly, and clear criteria set for remedying the defects and satisfying the relevant parties of successful and effective remedy. Visibility of payment practices is vital to underpin the changes in culture that are essential in this area. This should also lead to the elimination of retentions in public sector work, as they also undermine the focus on safety and quality that is required.

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

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

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?

Further information. CIBSE responded in some detail to the government consultation on social value (<https://www.cibse.org/News-and-Policy/Policy/Consultations/Closed-Consultations/Social-value-in-government-procurement>). Some of our responses are equally relevant to this consultation exercise.

END

Please do not hesitate to contact us for more information on this response.