

Transparency International UK's response to the Transforming Public Procurement Green Paper

Executive Summary

Transparency International UK (TI-UK) has monitored and reviewed corruption risks emerging during the pandemic response. This and our previous work on public procurement in the UK¹ and internationally² forms the basis of our approach to the proposals in the Green Paper.

We welcome this opportunity for much needed reform to the public procurement system. The Green Paper sets out the business case for reform and we agree that significant improvements can be made, particularly in making the public procurement process more open and transparent.

These are ambitious proposals and we are pleased to have the opportunity to inform the Government's new approach to public procurement early in the process. Inevitably at this stage policy is still being developed and some areas lack detail and definition. We look forward to seeing the highest possible standards of transparency, integrity and accountability emerge as these reforms develop, with more information as to what will be included in the guidance and how these proposals will be implemented.

Public procurement is a significant area of economic activity. Before the COVID-19 pandemic, the United Kingdom was spending £284 billion a year on this kind of activity, accounting for a third of all public expenditure.³ This spending must be used well, and it is right that the Government should be able to use public procurement to help achieve wider economic and societal goals, as long as it is done in a way that is transparent and accountable.

The significant amounts of money involved in public contracts also mean that it is a high-risk area for corruption, as has been recognised by the Government's anti-corruption strategy.⁴ We welcome the emphasis on transparency and open contracting in the Green Paper as ways of mitigating the corruption risks, as well as the proposals on debarment that will help to provide a deterrent against corrupt business practices.

Given the scope of the consultation we have highlighted below some of the areas we believe are particularly important to the success of the new approach. This includes areas where new information that can help fight corruption is being included in the public procurement system for the first time, and those where we feel more specific

¹ Transparency International UK, *Counting the pennies: Increasing transparency in the UK's public finances* (September 2016) <https://www.transparency.org.uk/publications/counting-the-pennies>

² <https://ti-health.org/open-contracting-for-health/>

³ Institute for Government, *Government procurement: The scale and nature of contracting in the UK* (December 2018) p.2 https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_procurement_WEB_4.pdf

⁴ HM Government, *United Kingdom anti-corruption strategy 2017-2022* (December 2017) p.26 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667221/6_3323_Anti-Corruption_Strategy_WEB.pdf

safeguards are necessary to ensure that the desire for a modern, progressive and flexible public procurement system can also help rebuild public trust by showing that corruption risks are identified, mitigated and managed where necessary.

Beneficial ownership

The UK Government committed to making beneficial ownership information for overseas companies available in public procurement processes at the 2016 Anti-Corruption Summit in London.⁵ By ensuring transparency over who controls overseas supplier's to public bodies here, the Green Paper's proposals would finally implement this pledge and ensure a more level playing field with UK companies, who already report this information to Companies House.

However, the proposals do not cover how this data will be collected nor any concrete plans on how it will be verified to ensure data quality. As we know from the experience of Companies House, where there is currently no verification the reports it receives, the benefits of using beneficial ownership data in procurement will only be fully realised if it is reliable and up-to-date.

We recognise that this is an early stage of the policy development process but we expect that as ideas develop there will be clear plans for how these reforms will ensure the accuracy of the data being submitted and made publicly available. We also look forward to legislation to introduce data verification and wider Companies House reform at the earliest opportunity alongside the Registration of Overseas Entities Bill.

Debarment

Corruption and fraud in public procurement not only increase costs for government which are ultimately born by the taxpayer, they also undermine confidence in and pose real reputational risks for government. We very much welcome the proposals for a centralised debarment register and believe this would be a significant step forward for public procurement in the UK. However, there are gaps in the existing legal framework which need to be addressed alongside this to ensure the effectiveness of the debarment register.

In particular, it remains almost impossible to successfully prosecute large, complex corporates for serious economic crimes because under the UK's antiquated and sometimes contradictory existing law, prosecutors need to prove a 'controlling mind' of the crime at a senior level. Recognising this issue, the Government commissioned the Law Commission in November 2020 to review the existing law in this area.⁶ Alongside reform of corporate liability law, Government should also introduce a failure to prevent economic crime offence, as exists in the Bribery Act 2010. These measures are critical for ensuring that fraudulent companies do not slip through the gap.

⁵ <http://ukanticorruptionpledgetracker.org/pledges/beneficial-ownership-of-foreign-companies/>

⁶ <https://www.lawcom.gov.uk/law-commission-begins-project-on-corporate-criminal-liability/>

The need for a new transparency culture

We very much welcome the new transparency by default approach set out in these proposals. The introduction of end-to-end open contracting systems and the use of the Open Contracting Data Standard (OCDS) is fundamental to improving transparency and accountability within the public procurement system.

TI-UK's experience of collating and analysing publicly available contract data during the pandemic has revealed both systemic and operational problems with meeting transparency obligations. Whilst using open contracting and open contracting data standards for the full commercial life cycle have the potential to be transformational, they will not be unless the broader issues that are preventing timely publication of different transparency data sets across government are also addressed.

The 'transparency gap' highlighted by the Information Commissioner in the freedom of information regime also needs to be urgently addressed.⁷ A modern procurement system should be a level playing field and the fact that private companies running public services and exempt from FOI laws means prevents this from being the case. If transparency by default is going to be as meaningful and transformative and we believe it could be, then it cannot only apply to a narrow silo of public procurement data.

Parliamentary oversight and scrutiny

We support the introduction of crisis as a reason for allowing limited tendering. However, while governments need to be able to exercise emergency powers in special circumstances it is essential that there is Parliamentary oversight of the use of these powers. These powers should be exercised using the made affirmative procedure and there should be a sunset clause so that these powers can only be extended with additional scrutiny.

Discretionary powers and the importance of good record keeping

There are a number of elements in this approach which are aimed at increasing flexibility and increasing the use of discretion, for example in seeking to use public procurement for wider public benefits and allowing tax evasion and Deferred Prosecution Agreements (DPAs) to be used as a discretionary exclusion.

We welcome these measures but to ensure that they do not bring additional corruption risks into the public procurement system, there needs to be clear, publicly available evidence of decision-making on how these discretionary powers are used. Where records are not kept, as revealed by the National Audit Office report,⁸ or where the documentation is poor, this undermines transparency in decision-making and erodes public confidence in the integrity of procurement decisions, it takes away a key defence for public bodies against any unfounded allegations of impropriety. Showing considered

⁷ Information Commissioners Office, *Transparency in outsourcing: a roadmap* (March 2015) <https://ico.org.uk/media/for-organisations/documents/1043531/transparency-in-outsourcing-roadmap.pdf>

⁸ NAO, *Investigation into government procurement during the COVID-19 pandemic* <https://www.nao.org.uk/report/government-procurement-during-the-covid-19-pandemic/>

and well-documented decisions behind these contract awards could have helped address a central thrust of the criticisms levelled against the buyer – that they had something to hide.

Responses to the consultation questions

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

Yes. The public good, value for money, transparency, integrity, fair treatment of suppliers and non-discrimination are sound principles for public procurement.

We note that accountability is not included in this list and suggest that it should be, in line with the OECD principles for integrity in public procurement.⁹ A key condition for a public procurement system to operate with integrity is the availability and effectiveness of accountability and control mechanisms. There are elements of accountability within these proposals but we believe it would be worthwhile for this to be made explicit and included as a value. Accountability lies at the heart of democratic government. When it works, it benefits everyone of the people that they serve. Accountability is a part of good governance, and can increase the trustworthiness and legitimacy of the state in the eyes of the public. This is particularly important in rebuilding public trust in the public procurement system.

We very much welcome the commitment in the Green Paper to transparency by default. Cultures that embed transparency and openness help to reduce the risks of corruption. It is important to emphasise that transparency is about making meaningful, machine readable data publicly available, not just within public bodies. We believe this is the intention of the proposals in the Green Paper but this could be reinforced by emphasising the value of transparency to citizens as well as companies and Government. The principles should also be extended across other parts of public office. We note that there are number of important transparency datasets, including registers of MPs' financial interests, that are still not published in machine readable formats despite years of asking by ourselves and the Committee on Standards in Public Life.

Inevitably at this stage policy is still being developed and some areas lack detail and definition. We look forward to seeing the highest possible standards of transparency, integrity and accountability emerge with more information as to what will be included in the guidance and how these proposals will be implemented.

⁹ OECD, *Principles for integrity in public procurement* (2009) <https://www.oecd.org/gov/ethics/48994520.pdf>

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, we welcome the accountability that the new unit will provide. One of the challenges with the current procurement system is that it is very de-centralised. This means that practices can vary considerably between departments with regards to ensuring the proper documentation is kept and contracts are published promptly. This new unit will be able to ensure that the values set out in the national procurement policy are being upheld and crucially intervene where they are not.

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?

We welcome the oversight that the proposed independent panel will bring to public procurement. However, we do not believe it is appropriate for suppliers' representatives to be members of the panel. They should be consulted regularly to review the effectiveness of the national policy framework and be involved in policy development, but membership of the independent panel opens up risks of conflicts of interest and policy capture. This has already been seen with other expert panels; for example, with Amazon advising Government on policy where it is also benefitting from contracts.¹⁰ Perceived conflicts of interest such as this undermine public trust in the system and give rise to allegations of wrongdoing.

Policies do not always have the effects that are intended when they are drafted. If a policy were found to be anti-competitive this could well be in the interests of some suppliers and something they may not want to reveal. To ensure the integrity of the independent panel therefore we recommend that suppliers representatives should not be included.

Given the importance of value for money in public procurement we believe it would be appropriate to include the National Audit Office a member of the panel.

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

Yes, we believe this will provide greater clarity in public procurement.

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

No comment.

¹⁰ <https://www.mirror.co.uk/news/politics/amazon-secret-government-panel-helping-22904790>

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

We support the general approach, which has the potential to be transformative, and look forward to more detail about how the values will be embedded within the system, as the proposals are developed.

However, we note that there are a number of areas in these proposals which increase the use of discretionary powers and these open up opportunities for abuse. It is essential that where there are risks of corruption these are both identified and managed. For example, it is not enough to simply register conflicts of interest, they need to be actively addressed. Unregulated conflicts of interest in procurement increase perceptions of, and the risk of actual, corruption and destroy trust in decision-making around public expenditure.

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

Yes and in particular we welcome the inclusion of public health as a reason for triggering limited tendering rather than just unforeseen circumstances. However, it is essential that there is both effective scrutiny of the decision-making process and proper record keeping on why decisions are made.

TI-UK's scrutiny of contracts issued from February to November 2020 has revealed that in most cases where direct tenders were used the paperwork simply referenced the regulation rather than explaining why the use of this power was necessary and how it was 'unforeseeable.' The new transparency by default approach should ensure that this cannot happen again. We understand that the details of how this will work in practice are still being developed. We propose that there should be a template for justification of limited tendering/direct procurement, that this should take a question and answer format to demonstrate the reasoning, and should be made available to the public within the 30 days of any contract award. The usual requirements for documenting all aspects of these procurements should continue to apply, as they do in non-crisis situations.

The use of the power to declare a crisis should also be subject to parliamentary oversight. It is right that in exceptional circumstances, such as in a crisis, direct awards can be made, and that the normal procurement procedures can be suspended. However, as we know that public procurement is one of the biggest corruption risks in government it is also important that there is scrutiny over the decision to declare a crisis.

We recommend that the initial decision to declare a crisis should be made using powers that allow a speedy response to emerging events whilst allowing some parliamentary scrutiny; for example, the made affirmative procedure. We further recommend that there should be a sunset clause in the motion so that the emergency powers can only be used for a limited time without further parliamentary scrutiny.

The experience of procurement during the pandemic has shown how easy it is for mistakes to be made and for the correct procedures to not be followed. One area of

particular concern is ensuring that allowing for limited tendering does not limit or undermine requirements for record keeping and transparency. This was a key feature of the recent National Audit Office report into public procurement during the pandemic.¹¹ It is also very easy in an emergency for the culture of public procurement to shift from uncompetitive tendering being allowed in extreme cases because of the crisis, to direct awards becoming established as normal practice. We should learn from the experience of the pandemic and use the opportunity of the new policy on public procurement to rebuild public trust by demonstrating that additional safeguards are being put in place.

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

We note the Government's logic to exclude the proposed Advanced Research and Invention Agency from transparency and disclosure rules¹² stands at odds with its plans to increase innovation and flexibility through the reforms in this Green Paper. Withholding information about the use of public money and permitting unusual procurement practices also significantly increases the risk of taxpayers' funds being misused for private gain. Furthermore, exempting ARIA from public procurements rules on the grounds that these processes inhibits flexibility undermines trust in the Government's own reforms before they are even implemented.

To mitigate corruption risks, provide assurance over the use of taxpayers' money and show confidence in its own reforms, Government should subject ARIA to procurement and freedom of information rules, as is the case for most other public bodies.

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?

The Information Commissioner has identified an important 'transparency gap'¹³ that currently exists between how the freedom of information regime operates when public services are delivered directly by the government and when the same services are outsourced and contracted. The fact that information held by suppliers cannot be accessed using a freedom of information request is a significant accountability gap and prevents there being a level playing field in public procurement. This transparency gap also risks inhibiting innovation and certainly limits accountability within public procurement.

¹¹ NAO, *Investigation into government procurement during the COVID-19 pandemic* <https://www.nao.org.uk/report/government-procurement-during-the-covid-19-pandemic/>

¹² <https://www.gov.uk/government/news/bill-introduced-to-create-high-risk-high-reward-research-agency-aria>

¹³ Information Commissioner's Office, *Outsourcing Oversight? The case for reforming access to information law: Report of the Information Commissioner to Parliament* (2019) <https://ico.org.uk/media/about-the-ico/documents/2614204/outsourcing-oversight-ico-report-to-parliament.pdf>

The disparity also undermines public trust in the system. Polling by the Information Commissioner's Office found that although roughly 80% of people think this kind of information is important, only 23% felt that information about the activities of private companies delivering public services was accessible.¹⁴ Addressing this asymmetry would fit well with the aspirations of the Green Paper and the creation of a more progressive and open public procurement system.

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

The Government can more effectively utilise and share data by ensuring that all government data is published in machine readable formats. The proposal for using the Open Contracting Data Standards is very welcome but public procurement must not become a silo of good data practice. It should also be possible to link different data sets. For example, the proposed new single supplier register should be linkable with the UK companies register and beneficial ownership data, along with other government systems such as HMRC databases.

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?

No comment.

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

No comment.

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

Public procurement is a very significant area of economic activity and it is right that the Government should be able to use this to reflect and support other public policy goals. However, it is important that the priorities driving decision making are clear to both companies seeking contracts and the wider public. For example, if a contract is being awarded to one company because of specific environmental commitments this should be clear in the publicly available paperwork. The new 'most advantageous tender' criterion is adding in new levels of discretion to the procurement process. This is needs

¹⁴ Information Commissioner's Office, *Outsourcing Oversight?* p.6

to be accompanied by increased levels of reporting and transparency to ensure that any corruption risks are minimised.

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?

We do not yet have enough information about how the specific exceptions could be applied and what accountability mechanisms there would be to take a view.

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?

We support allowing public procurement being used to also fulfill wider policy goals as long as there is a full audit trail that explains what has been taken into consideration in the contracting decision.

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

Yes. Hiding the beneficial ownership of companies helps those who wish to launder money or commit other serious economic crimes. Companies that either knowingly facilitate the movement of the proceeds of corruption or who refuse to work within transparency regimes that help to prevent corruption should not be able to benefit from public procurement contracts.

UK companies are already required to provide beneficial ownership information. The Persons with Significant Control register managed by Companies House is freely available as machine-readable, structured data. This represents a significant step forward in the UK's work fighting money laundering. However, the weakness of the data has always been that it has been unverified. The need for identity verification checks on this data is well known and supported by Companies House. We look forward to them being introduced at the earliest opportunity alongside legislation for the Registration of Overseas Entities Bill.

Making non-disclosure of beneficial ownership information a mandatory ground for exclusion would 'ensure a level playing field between foreign and domestic companies in respect of requirements to provide beneficial ownership information'¹⁵ as agreed to in the 2016 Anti-Corruption Summit Communique. Learning from previous experience in

¹⁵ Anti-Corruption Summit Communique 2016
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522791/FINAL_-_AC_Summit_Communique_-_May_2016.pdf

the UK, it is important that there is clarity about how this data will be collected and verified and that it is well integrated with existing data sources.

Where exclusions are made on these grounds, records should be kept and published as machine readable data. This will help with compliance as there are seen to be consequences for not doing so as well as changing the cultural norms. It will also help to build public trust in the integrity of the public procurement system as it can be seen that the rules are being enforced.

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

No comment.

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

Yes. Information relating to convicted persons/entities that are beneficial owners should be made public and also added to the centrally held debarment list.

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

No comment.

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

Yes. We welcome DPAs being used as a reason for a discretionary exclusion.

However, we think it is important that the way discretionary powers are used is well understood and open to scrutiny. Therefore, we recommend that where a company has entered into a DPA in seeking a public procurement contract, there should be a publicly available record of the decision-making process as to whether the DPA should be a reason for exclusion. This will help ensure consistency, give companies clarity on what to expect from the process, and demonstrate that risks of corruption are being well managed.

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

Yes, we very much welcome this proposal and see it as one of the important ways in which integrity can be manifested within the public procurement system. The centrally managed debarment list should underpin the process of excluding companies from individual procurements and should also be able to cope with subsidiaries and related

companies within and outside the UK. The proposed new UK register should also be integrated with international debarment registers.

The UK loses up to £22.6 billion¹⁶ at central government level to ‘fraud and error’ annually, with procurement fraud the dominant type of fraud detected, and up to £2.7 billion¹⁷ at local government according to recent government estimates. Yet there are few consequences for companies that subvert public procurement through corruption and fraud, so suppliers may believe that they can act with impunity. This must change in the new public procurement system.

Debarment is increasingly recognised globally as an effective tool to protect the integrity of public contracting and prevent corruption and fraud. To ensure that the debarment regime is effective, there needs to be proper expertise for assessing evidence of wrongdoing and self-cleaning; information-sharing from overseas foreign contractors; and debarment based on convictions for corporate offences, such as existing failure to prevent bribery and tax evasion offences and a new failure to prevent economic crime offence. These proposals would be a significant step forward and we welcome their inclusion in the Green Paper.

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

In principle yes. The awarding of contracts to companies which have previously failed to deliver contributes to undermining public trust in the procurement system and creating the perception of wrongdoing. However, there would need to be clear criteria as to how success is being measured and safeguards to ensure this was done fairly so that it did not become a barrier to entering the market for SMEs.

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

We have no comment other than the supplier registration system should require companies to provide details of their beneficial ownership and legal identification numbers to provide transparency over their legal identity and controlling parties.

¹⁶ Cabinet Office, *Cross-government fraud landscape annual report 2019* (February 2020)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864268/Cross-Government_Fraud_Landscape_Annual_Report_2019_WA_1_.pdf

¹⁷ Ministry and Housing, Communities and Local Government (MHCLG), *Review into the risks of fraud and corruption in local government procurement* (June 2020)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890748/Fraud_and_corruption_risks_in_local_government_procurement_FINAL.pdf

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

No comment.

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

No comment.

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

No comment.

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

Yes, we very much welcome this proposal and have previously called for end-to-end open contracting systems to be introduced.¹⁸ Transparency is a cornerstone of public procurement in the UK. It provides a critical safeguard against corruption, helps ensure the integrity of the process, and enables accountability over the use of taxpayers' money. TI-UK's analysis of contracts awarded from February to November 2020 has identified both systemic and performance issues which limited the levels of transparency in public procurement.

Although contracts are published navigating and extracting the data from the various sources is very challenging. Even when the data is collected this does not cover the full lifecycle of the project. There is no publicly available data for performance and completion that can be linked back to the contract award. This data can be requested on a contract by contract basis using Freedom of Information requests but this is time consuming and often falls foul of limits on how much it would cost a department to find the information. This actively prevents detailed analysis across different areas of public procurement. The systemic issues identified by our research could be alleviated by the proposals in the Green Paper but there will need to be cultural change alongside the new procedures if they are to be effective to also address the performance issues.

There is substantial evidence, including the National Audit Office report into procurement, legal action taken by the Good Law Project and TI-UK's analysis of the publicly available data that shows that legal obligations to publish contracts within 30 days were not met during the pandemic. We recognise the past 12 months have been a particularly difficult time when departments were not only having to procure products quickly but also adjust to working in different ways. Some initial delays in publication of transparency data, whilst not inevitable, are understandable. However the evidence

¹⁸ Evidence to the Public Accounts Committee inquiry into Government procurement and supply of personal protective equipment <https://committees.parliament.uk/writtenevidence/18733/pdf/>

show that the departments that were consistently late in publishing contract data, such as the Department for Health and Social Care (DHSC), have a track record of being late publishing other forms of transparency data.

It is Government policy to publish the details of all departmental spend over £25,000 monthly. Data collected by the Institute for Government show that almost all departments failed regularly to publish this data on time even before the pandemic hit. From February onwards the DHSC – the public body contracting the most COVID-19 related goods and services during this period – fell behind even more with its disclosures, and as of 3 December 2020 had failed to publish three consecutive months' worth of payments data.

This trend can also be seen in other transparency data sets. TI-UK publishes Open Access¹⁹ an online database that facilitates scrutiny of ministerial meetings data, which are disclosed by departments quarterly. Our analysis has found that the time taken for this data to be published is getting progressively later. In 2018, it took on average 90 days for the data to be published after the last day a Minister could hold a meeting in a given quarter. In 2019 it took on average 97 days for the data to be published, and in 2020 it took on average 123 days. In some departments the delays are considerably longer: both Her Majesty's Treasury and the Foreign and Commonwealth Office published their quarter 4 2019 data over 300 days late.

The pandemic may have exacerbated problems with publishing transparency data but it certainly did not create it. We very much welcome the transparency by default approach taken in these proposals. It is important that if this approach is to be successful the broader issues that are currently preventing transparency data from being published on time as a matter of course are addressed.

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

Yes. The inclusion of OCDS standard is particularly significant in enabling accountability and interoperability. As TI-UK's research shows, collating and tracking data about contracts across different platforms is currently very challenging.²⁰ This makes scrutiny and accountability very difficult to achieve. If the transparency by default approach outlined in the Green Paper is to be effective, then consistent data standards are essential.

However, it is important to note that OCDS provides no guidance about what should be published, rather it shows how something should be structured when published. As previously stated, while the direction of travel is very much welcomed, more detail is needed about how this will work in practice. Without exact guidance on what will be required to be published, information can be lacking in coverage and quality or even unusable even if it is in OCDS format. We recognise that this is not the intent, but it is

¹⁹ <https://openaccess.transparency.org.uk/>

²⁰ Transparency International UK, *Counting the pennies*

important that these risks are managed at this early stage in the policy development process.

More guidance on what data points should be included is important to achieving one of the overarching aims of this green paper, standardisation of processes. The Green Paper mandates the publication of an 'Award notice' and provides only suggestions of what may be included within these, such as 'Winning bidder information'. Whilst one contracting authority may include key data points such as a Company identification number and the name of company aligned exactly to that on the central portal, another Contracting Authority, using the same guidance, could just input the company name as it appears on a google search (e.g. not standardised). Without more specificity about disclosure requirements and controls on data entry, there is a risk of unstandardised data entering the system, which adversely affects the ability to deliver new insights.

We share the desire for greater data standardisation in the public procurement process and welcome the proposal to use OCDS which could significantly improve transparency and accountability. However, without more detail of how exactly the transparency process will work, the Green Paper could potentially be undermining the impact of OCDS and leaving public procurement more open to abuse or poor practice. We look forward to seeing more on this as the policy develops.

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

Yes.

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.

One further change that should be considered is allowing an option of a public interest challenge to a decision.

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

Potentially. To be effective and meet transparency and integrity standards there would need to be a clear audit trail and the result of any review would need to be recorded and available to all contracting authorities.

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?

We believe that the level of specialist knowledge required warrants a dedicated tribunal. This will help facilitate a speedy resolution and ensure value for money for the taxpayer.

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

No comment.

Q34. Do you agree that the test to list automatic suspensions should be reviewed? Please provide further views on how this could be amended to achieve the desired objectives.

No comment.

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

No comment.

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

We don't have a view on the assessment process but as it involves taxpayers money and involves a failing in the procurement process, the data on costs incurred should be made public. This would aid transparency, integrity and accountability in the procurement process.

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

No comment.

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

We believe that this information should be in the public domain but we are open to alternative ways in which this could be done.

Q39. Do you agree that businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?

Yes.

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?

Yes.

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

Yes. We believe that information on the performance of both suppliers in paying their subcontractor under publicly funded contracts and contracting authorities paying their suppliers should be made publicly available.

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

In principle yes, as long as there is transparency about the amendments to contracts.

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

Yes, we believe that this is an important element of improving transparency in the procurement process. It should also be possible to understand from the publicly available data why the change to the contract has been necessary. Again this is an area where transparency can help an authority defend itself against allegations of impropriety.

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

No comment.

ABOUT TRANSPARENCY INTERNATIONAL UK

Transparency International (TI) is the world's leading non-governmental anti-corruption organisation. With more than 100 chapters worldwide, TI has extensive global expertise and understanding of corruption.

Transparency International UK (TI-UK) is the UK chapter of TI. We raise awareness about corruption; advocate legal and regulatory reform at national and international levels; design practical tools for institutions, individuals and companies wishing to combat corruption; and act as a leading centre of anti-corruption expertise in the UK.

We work in the UK and overseas, challenging corruption within politics, public institutions, and the private sector, and campaign to prevent the UK acting as a safe haven for corrupt capital. On behalf of the global Transparency International movement, we work to reduce corruption in the high risk areas of Defence & Security and Pharmaceuticals & Healthcare.

We are independent, non-political, and base our advocacy on robust research.

CONTACT

Alex Runswick, Senior Advocacy Manager

alex.runswick@transparency.org.uk

Steve Goodrich, Senior Research Manager

steve.goodrich@transparency.org.uk