

# TIF'S PROCUREMENT WORKING GROUP RESPONSE TO THE PROCUREMENT GREEN PAPER: TRANSFORMING PUBLIC PROCUREMENT MARCH 2021

## INTRODUCTION / GENERAL POINTS

1. The Infrastructure Forum's (TIF) network brings together investors, operators, constructors, lenders and professional advisors involved in the development of Britain's critical national infrastructure.
2. The Infrastructure Forum's Procurement Working Group, which has consulted on this response, comprises members from across the infrastructure sector – within both the public and private sectors – and is chaired by David Ferroussat, Operations Director at Mace. It shares public concern over cost and timing overruns in major projects
3. The Working Group welcomes the consultation on Transforming Public Procurement and are supportive of the document as a whole, as this is an area that needs rationalisation, streamlining and improvement. There are a number of changes proposed within the Green Paper that are welcome in terms of increasing transparency, and the creation of some common principles, which will undoubtedly help simplify public procurement, while at the same time trying to achieve its other targets.
4. The Green Paper does not, however, effectively cover major infrastructure projects. It brackets these together with, and focuses on, transactional procurements of varying sizes.
5. As major infrastructure projects feature large expenditure of public money and attract public scrutiny, the failure to have them in clear focus throughout the green paper is a missed opportunity which should be corrected in further work.
6. The public need more assurance that public procurement systems are first rate, and that procurers' skill sets and alignment with best commercial practice are state of the art.
7. Another area of concern is the Green Paper suggestion of abolishing some standard procedures, and handing significant responsibilities to procurement teams, which then have to apply the principles of "good procurement". This may provide a measure of deregulation, but it places significant responsibility on procurement teams to run efficient and effective processes without the support of standard procedures.
8. Whilst some of the strongest procurement teams might rise to the challenge, the poorer performing teams will not. Even where there are capable and resourced

procurement teams, a plethora of different approaches and models may be developed to respond to the same regulatory requirement. This will inevitably lead to less efficient and more costly procurement, on both the client and supplier side. To take the example of local authorities, with over 300 different organisations, there are likely to be many slightly different models in response to the same requirement.

9. The degree of change that will be needed to deliver this plan should not be underestimated. Simplifying to an aggregated process is at first sight desirable, but costs of change and compliance need to be measured carefully against projected benefits. Change on the scale proposed will increase challenges, and building upon clear examples of best practice may in consequence become more difficult.
10. The proposed approach leaves significant ambiguity. Unless techniques to define value, or how to take into account influence from non-contracting authorities and agencies are clearly specified within procurement processes, the resulting uncertainty and fragmentation of approach could weaken procurement and introduce undesirable complexity and delay.
11. The Infrastructure Forum recommends accordingly that:
  - a. As this work is taken forward it is separated into procurement approaches suited to major infrastructure projects, on the one hand, and to the ordinary run of routine purchasing, on the other;
  - b. The benefits of standardised approaches and templates are more carefully examined, including, for example, the way in which the approach taken to build New Engineering Contracts could be developed and extended;
  - c. An early opportunity is taken to compare the likely cost benefits of the approach proposed in the Green Paper with one building upon existing standard systems and model contracts.

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

12. Yes – The Infrastructure Forum’s Procurement Working Group does agree with the proposed legal principles of public procurement, for example, non-discrimination, transparency & impartiality, and a regime based on transparency, competition and objective criteria in decision making. However, these approaches are well-established and familiar. More attention should be given to fostering innovation, strengthening the use of early supplier involvement or collaboration and more detail should be given on these essential characteristics throughout.
13. The Green Paper successfully highlights which approaches are desirable but spends less time or detail on how they should be achieved in practice.

Understanding best practice in different types of procurement is complex and requires detailed understanding. An example would be the choice whether to 'make or buy'. Understanding the potential of making the most effective use of client maturity in terms of following the principles of Project 13 would assist here.

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?

14. TIF's working group supports the thrust of this plan. It reflects an approach suggested by TIF as long ago as 2014, recommending that a central hub for skills be created for infrastructure in its report Strengthening Commercial Skills in the Civil Service. It recommended that this central hub should "have a responsibility for ensuring that Departments reach a level of commercial skill" to enable the public sector to lead the way on knowledge sharing and investment in skills.
15. TIF's 2019 report Sustainable Procurement: A Vision for UK Infrastructure said that "Government has deployed procurement sector talent at the top of the Infrastructure & Projects Authority, but the pace of change across Government departments remains patchy. The Government should develop an expert procurement team which operates out of the Cabinet Office. This team should work flexibly across Departments and key projects and work closely with the IPA to evaluate and sign off unsolicited proposals and scrutinise the work of Departments effectively".
16. We are pleased that a similar approach has been followed in the Green Paper. As TIF recommended in 2019, a new unit could focus on innovation and upskilling procurement teams in Departments, improving links with supply chains and considering value for money on a whole-life of project basis. A unit could be useful in helping Departments with project procurement, authorising unsolicited proposals, and overseeing specific projects to add continuity through the delivery process, bridging the procurement skills gap across government.
17. Detailed governance of the unit, its exact relationship with the IPA which has existing expertise and authority in this area and with Departments, and its staffing, are not explored in detail in the Green Paper. It is important that all these aspects are subject to detailed consultation with procurement professionals and relevant professional and representative bodies. As we recommended in 2019, part of the talent in the unit should be seconded from the private sector to offer the agility required by such a team.
18. A considerable amount of the unit's work will be of an audit and scrutiny nature and we recommend that the expertise of the National Audit Office be deployed at an early stage in the design process to make sure that this work is done without imposing unnecessary compliance costs, yields rigorous and

measurable results, and does not add additional levels of process to procurements.

19. The new unit should integrate its work with the RAG status provided by the Infrastructure & Projects Authority, focusing on those large infrastructure projects that have received a red rating or otherwise selecting them against clear pre-existing criteria.

20. There may in fact be advantages in integrating the unit wholly within the IPA.

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?

21. Within the proposed panel, it is imperative that there is good diversity from across the value chain. TIF believes that the panel should incorporate relevant experienced public and private sector leaders, members of the legal profession, as well as well-regarded academics. This would bring private sector skills into the Cabinet Office to assist project delivery and enable this knowledge to be shared with the Departments they work with.

Q.4 Do you agree with consolidating the current regulations into a single, uniform framework?

22. It is agreed that there are currently too many sets of regulations with similar and complex rules, that are challenging to navigate for commercial teams and suppliers. A consolidation clearly offers the potential to make the regulations easier to understand, and TIF is therefore of the view that a single set of rules to replace the four sets of regulations that currently govern the public procurement regime (PCR, UCR, CCR and DSPCR), is a good idea, in principle.

23. However, with the range of different sectors and categories of spend covered by these regulations, a one size fits all approach might not work across the board. Additionally, there is the potential that some of the much-needed flexibility in sectors including defence and utilities, would be lost.

24. TIF would strongly prefer that there be a common set of main rules for public procurement with sections that contain any unique rules. This could work in a similar fashion to NEC contracts, where there is a common set of core clauses that cover the generality, but for different sectors, there are differing options.

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

25. As previously noted, with the range of different sectors and categories of spend covered by these regulations, a one size fits all approach might not work across the board. For some projects, the achievement of its core objectives and the opportunity for levelling up might be jeopardised if competitive tenders are

required for key elements of its supply chain. For example, the Sizewell C nuclear project may well be able to repeat previous successes if it is able to replicate key elements of the supply chain deployed on the Hinkley Point project by making direct awards to the relevant key suppliers.

Q.13 Do you agree that the award of a contract should be based on the “most advantageous tender” rather than “most economically advantageous tender”?

26. TIF’s Sustainable Procurement report noted that “procurement on a lowest cost basis fails to capture the value which the private sector is capable of adding to the delivery of infrastructure projects and outsourcing of services”. The move to award of contracts based on a broader criteria (MAT) is welcome for that reason, making it easier for authorities to procure on the basis of long-run value for money, and recognising the long-term efficiency in higher build quality. The welcome revision and clarification of HM Treasury’s Green Book, also previously recommended by TIF, is a further desirable step in this direction.
27. This is also consistent with government’s increasing focus on social value, something that TIF advocated in its 2020 report ‘Social Value: Moving on From the Green Book’. Allowing social value to be part of the evaluation of public procurements is especially important given the scale of the net-zero challenge. Social value considerations would allow procuring authorities to pay more for solutions that are less carbon-intensive and generally more sustainable, explicitly recognising those non-financial externalities.
28. In terms of environmental, social and governance characteristics, each of E, S and G should be separately assessed.
29. Translating a new approach to procurement into a system wide, objective, consistent, and transparent evaluation will be a major but necessary challenge. Guidance as well as scrutiny will be necessary to ensure that the new approach is applied consistently across government procurement. It will be desirable for the House of Commons to monitor experience through its relevant Select Committees.
30. Past practice tells us that procurement officers in government regard the financial economics of bids as their biggest differentiator, and it will of course take time for the necessary culture shift to be fully embedded.
31. It is slightly concerning that the deregulation set out in the Green Paper will see procurement teams adopt a range of different approaches, many of which will add no value in complex procurements. Although, from the point of view of a supplier, clarity from the outset about the nature or basis on which an award would be made is the most important thing, and is more important than absolute consistency between procuring authorities.

Q.14 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?

32. The idea behind this is important, as it is consistent with taking into account impacts, or benefits, or consequences that lie outside the direct immediate interest of the procuring authority. The risk is that such a framework could become too prescriptive over time missing opportunities to extract value.

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

33. A centrally managed debarment list is attractive in principle. Clearly proper governance of the process and careful calibration of criteria for disbarment, together with a properly independent appeal system or accessible legal remedies to ensure a fair and transparent basis will be required.

34. These issues should be the subject of early consultation.

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

35. The proposal to give buyers the tools to properly take account of a bidder's past performance and exclude them if they clearly do not have the capability to deliver is attractive.

36. Currently, from the client side, there are very limited abilities to remedy matters as procurement progresses. A system in which underperformance will be a visible and legitimate factor to be taken into account in future procurements will oblige suppliers to contemplate the future consequences of underperformance as well as those which may arise under the current contract.

37. The infrastructure market has argued for some time that long-term partnerships for the delivery of major infrastructure should be encouraged, which in turn requires multiyear relationships between supply chains and infrastructure buyers. A stop start, slate wiped clean approach to procurement where cost is the only thing considered is inimical to these partnerships. The desirability of establishing long term relationships is another reason why TIF supports a wider range of measures to make past performance visibly consequential.

38. Proper professional and legal standards are necessary if the approach is to be seen as fair, objective and hence likely to endure. Consensus on appropriate techniques for the assessment and calibration of past performance will be desirable, not least to prevent the technique becoming an arbitrary negotiating weapon in the hands of procuring authorities.

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

39. Yes – this would save on the current system of having to go through multiple submissions of common documents, for example health and safety policy, reducing the administrative burden, particularly for SMEs.

40. However, this would need constant upkeep and annual refreshes. Suppliers would also need a level of assurance that the correct and most up to date version of a document was being used in any given tender, so a list of such documents held would need to be verified by the supplier at the time of bidding.

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

41. The idea of establishing a central digital platform for commercial data is welcome on the basis that it will provide greater efficiency and lower costs for bidders who currently have to recycle the same information into different formats for different procuring authorities.

42. There is no obvious reason why such a database could not be updated directly by each supplier with confirmation of the update's accuracy.

43. This system could also allow registration of new products and services.

44. It would not be practicable to have central approval of each data submission. A contract awarded on the basis of defective data should be subject, as now, to risk of forfeiture and other penalties.

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.

45. A specialist tribunal system is attractive if its establishment is justified by the caseload and if it is designed to achieve measurable savings in cost and time together with the deployment of demonstrable expertise. This may require it to lean towards arbitration approaches rather than traditional court procedures. The deployment of judges specialised in procurement in the Commercial Court is an alternative.

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

46. This idea has support if intervention is timely.