

DCN Response: Green Paper, Transforming public procurement

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About the District Councils' Network

The District Councils' Network (DCN) is a cross-party member led network of 187 district councils. We are a Special Interest Group of the Local Government Association (LGA) and provide a single voice for district councils within the Local Government Association. District councils in England deliver 86 out of 137 essential local government services to over 22 million people - 40% of the population - and cover 68% of the country by area. District councils have a proven track record of building better lives and stronger economies in the areas that they serve. Districts protect and enhance quality of life by safeguarding our environment, promoting public health and leisure, whilst creating attractive places to live, raise families and build a stronger economy. By tackling homelessness and promoting wellbeing, district councils ensure no one gets left behind by addressing the complex needs of today whilst attempting to prevent the social problems of tomorrow.

All district councils will be affected by and have to operate within the proposed public procurement framework.

General comments

We welcome the opportunity to respond to this important green paper. Before turning to the detailed consultation questions, we would first make the following general comments:

- There are significant new administrative and resource implications associated with the proposals, with increased requirements for publication of contract information, awards, and evaluation transparency. More consideration will be needed as government develops its thinking in greater detail to ensure the additional burdens on councils do not outweigh the desired benefits from reform. Where new burdens are unavoidable, government will need to assess these and fund them. The DCN would welcome the opportunity to work with the Cabinet Office to help quantify these.
- The DCN welcomes government providing or funding support, advice and training, but rejects the creation of any "procurement inspectorate" with intervention powers in councils.
- District councils are independent, democratically elected bodies, and it is their own local priorities that should take precedence.
- We reject any move towards greater 'reporting in' to central government: districts are well used to complying with legislation, under which there will remain routes for aggrieved businesses to challenge how contracts have been awarded. We are concerned that the proposals in the green paper increase the risk of challenge, and will not add much value in practice.

- We note the intention for guidance to be developed to support the proposals and ask for government to consult on this guidance as it is being developed, as this will be fundamental to many aspects of the proposed reforms.

Consultation Questions

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

Yes, the DCN does not disagree in principle that there should be a National Procurement Policy Statement and we support the principles of public procurement as described. We welcome the inclusion of tackling climate change and reducing waste as a key outcome – biodiversity is a distinct but equally high priority and should also be included.

However, it will be important that districts' own locally determined policies can continue to take precedence, and districts must retain this flexibility and freedom under any duty to 'have regard to' the statement. It is also reasonable to assume that national priorities will change over time, and so there is a need to retain flexibility.

We have some concerns around the proposals outlined in paragraph 39 requiring publication of commercial pipelines – this is an additional burden on districts. Districts will need to invest in CM/SRM and data capture software, as well as resources to meet new publication requirements and standards. Government could set a threshold over which pipelines should be published.

It will also be challenging to meet the Green Paper's expectations of publishing planned procurements and commercial activity 'looking forward at least 18 months but ideally three to five years' given that recent local government financial settlements have been single year settlements only. Districts would welcome the opportunity to be able to take a meaningful longer-term view, and therefore the Cabinet Office should be making the case to the Treasury of the benefits of a multi-year funding settlement for councils in helping to meet the Green Paper's objectives.

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?

This proposal is difficult to assess without a clearer definition of what government means by 'commercial capability', and how it intends to measure success.

We would welcome district councils being able to access procurement training being provided by central government to assist councils and other bodies in their skills and capacity.

There may be benefits to having a national oversight body in relation to supplier contract performance, fraud, and financial difficulties although, if the guidance is clear, this additional unit should not be needed. However, we are concerned by the suggestion that the new unit will have 'powers to review and, if necessary, *intervene* to improve the commercial capability of contracting authorities'. This may have been wording intended for Government departments and central government bodies. The DCN opposes the creation of a new "inspectorate" with intervention powers in local, democratically elected bodies.

Of particular concern are the intervention powers proposed under paragraph 45 – that the unit would have 'powers to issue improvement notices with recommendations to drive up standards in individual contracting authorities. Where these recommendations were not

adopted, the unit could have recourse to further action *such as spending controls*.” This has been written without regard to the autonomous democratic standing of councils and we would oppose any power to impose spending controls on councils. Again this wording may have been intended for Government departments and central government bodies. We would rather see government focus on funding training, support and continuous professional development, than taking a seemingly more punitive route. The paper does not provide any evidence of the need for a unit with such powers in respect of local government. We do not support any move to see locally elected and accountable district councils ‘reporting in’ to central government. District councils already report to their communities.

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?

As stated, we do not support this approach and cannot see any evidence that it is needed.

However, if government is minded to pursue this approach, then it is critical that the industry professional association CIPS is part of this, as well as local government representatives such as the LGA and Society of Procurement Officers in Local Government.

We do not believe this unit should be able to apply any sanctions onto democratically-elected bodies such as district councils.

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

Proposals for a simpler regulatory framework are welcome. There are currently too many sets of regulations with overlapping and complex rules. However, we do have concerns that there will be unintended consequences from excluding NHS procurement rules from the proposals – it cannot be simpler to have two different systems in place. This will create difficulties where councils collaborate with NHS on delivering healthcare services. There will be confusion about which set of rules to follow, undermining the argument for simplicity. This will have particular impact for councils with social care responsibilities, but may also impact on districts that are working in partnership with the NHS locally.

We recognise that there are political sensitivities about the perception that the NHS is “for sale” if NHS bodies contract with the private sector for supply of NHS services. However that does not justify an entirely separate set of procurement rules for the NHS. The same rules and principles should apply across all parts of the public sector, without distinction. If there are any areas of NHS activity that the Government wishes to exempt from the rules, that can be spelled out on the face of the legislation.

Any difference between the rules and principles applying to the NHS and to other public bodies may result in greater divergence across buyers, limiting the extent to which standard approaches are developed and increasing the overall time and cost of procurements as well as the risk of challenge due to poor practice.

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

We would refer you to responses from individual districts.

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

The effect of removing the light touch regime means that councils will now have to 'go to tender' for anything above £180,000 when now the threshold is almost £700,000. We are concerned this places a new administrative burden on councils. While this will not affect district councils to anywhere near the same extent as our county council partners, it is an additional administrative burden being placed on local government, at a time when councils are very stretched. This burden will need to be assessed and funded by government.

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

Yes, but we note a relevant 'crisis' would need to be declared by the relevant Minister for the Cabinet Office. We would not want to see a situation where waiting on a decision, and for it to be communicated, caused delay.

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

It is positive that the government is seeking to foster greater innovation. Innovation in evaluation is always a theme for bidder challenge as it is such a subjective area. How will the new regulations overcome this?

We would like to have seen inclusion of new rules relating to contracting between authorities and sharing expertise and resources.

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?

We would refer you to responses from individual districts. However one issue we are aware of is that the current regulations provide some exemptions/exclusions for organisations like the BBC, but not for councils or other public bodies when they are organising festivals (literature / arts), and in some cases for council-owned and run arts venues when booking acts (comedians, artists, authors, poets, etc.). A clear statement that these types of contracts are exempt from the application of the legislation (alongside employment contracts, securities, legal counsel) would be welcome.

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

We would refer you to responses from individual districts.

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?

A clear statement that pre-procurement activity is allowed and encouraged, may be helpful to support councils and bidders to discuss new ways of doing things, and to explore the art of the possible before finalising a specification.

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?

As stated above, we are concerned about the impact on county councils in particular and would refer you to their response.

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, we believe this is common practice already.

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?

The exceptions should not allow only the consideration of national priorities set out by government, but districts’ own local priorities – e.g. such as those set out in their corporate plan. Government should set out in more detail what specific exceptions might be, so that any conflicts with local impacts can be better understood. There should continue to be prior consultation on any exceptions.

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?

It will need to be specific and clear that the evaluation and criteria are still decided by 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?

Yes, we agree this is an area to strengthen, though the conditions of exclusion will need to be clear – will there be a register to check?

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

Agree, and we support the LGA’s proposal to also include tax evasion, data protection, adherence to the Modern Slavery Act and broadening of PCR 57 (8) (c) to cover grave professional misconduct and whether or not it renders the integrity of the operator and/or business questionable.

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

Yes, see answer to Q16.

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)?

Yes.

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

Yes

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

Yes, this has the potential to reduce duplication of effort, though more detail is required to understand how this would work in practice. With any centrally managed list, the practicality of keeping this up to date will need to be thought through.

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

Yes. However, publishing and reporting on performance under contract KPIs will be an additional burden on districts. If it is intended to apply to all suppliers on contracts above the threshold, then this will be significant burden. Additionally, reporting on individual contracting KPIs would be difficult to assess suppliers for different types of contract. A balanced score card system may be better, where suppliers are tested and scored on an agreed set of standards

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

Agree in principle, but we would need more information about how this would work practically.

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

The limits on information that can be requested provide assurance to the buyer should they exclude / disqualify a bidder. By removing these limits, it needs to be clear at what point can the buyer stop and exclude / disqualify a bidder. It needs to be clear what rights bidders have.

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

We think that smaller councils are more likely to shy away from setting up DPS's due to the resource burden. We think there is a risk that the administrative burden of opening and reletting will be increased, and the reporting burden has not been thought through.

The requirements for just one procedure to be used is restrictive.

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

Councils have been adding value by collaborating on the procurement of common goods, works and services through framework contracts let by Professional Buying Organisations like ESPO and YPO for more than forty years.

We are not convinced that the introduction of an 'open' framework will add much value, particularly given the proposals for DPS.

Opening frameworks to new entrants could be used to stimulate local economies by encouraging local and SME participation, rather than contract opportunities being closed to them for 4 years. There is an opportunity for framework contracting authorities to generate income that could be reinvested in services, projects, and to generate social value etc.

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

While we support transparency, we are concerned that the proposals will see additional new administrative burdens on councils to publish all documentation from suppliers, and that this

will cause issues around commercial confidentiality. This is another new burden requirement.

Publishing this information may have a beneficial impact in reducing the number of challenges to decisions, as bidders will have a better understanding of why their bid was not successful.

However, there remain questions around how councils would balance transparency with respecting the commercially sensitive information of bidders, particularly a winning bidder. Government should work with districts and the LGA to develop guidance on this.

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

This is a positive aspiration - A single standard would help councils be more strategic in using data to manage markets and categories.

However, it will place a greatly increased administrative burden on local authorities. The pre-planning will require additional resources and post contract data publication will also require additional resources and data systems. There will need to be a transition period in place to allow for implementation, and government should cover the costs of amending current systems.

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

This is a positive aspiration, as above, though we are concerned that councils will be required to 'report' centrally through this platform. We do not want to see this platform creating additional burdens on officers' time and resources.

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.

We agree with the need for a more balanced remedies regime to remove some of the litigious culture/delays.

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

This could be a positive addition but we would need to understand who the reviewing authority would be and what powers they might have to resolve issues without the need for court action.

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?

The consultation does not define what the government means by 'low value' – further clarification of this would be helpful.

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

Agreed although this could result in vexatious complaints and multiple rerunning of tenders.

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.

Agree, though depending on how the new test is applied, we are concerned that fewer automatic suspensions may be lifted, preventing the authority from proceeding with its procurement. The capacity of courts to make fast decisions in respect of ongoing procurement will be a key factor here.

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

Yes, this could reduce the number of speculative claims.

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

This will need to be done according to clear and strict criteria, relating to the procurement in hand only.

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

Agreed the urgency of the crisis should take precedence.

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 note that bidders find feedback helpful to inform future bids, and may still approach councils for feedback. Suggestions that government will need to design, test and monitor to ensure that the underlying data is robust and representative of overall performance indicate more reporting in to central government, and we would not support this. It would also represent a greater administrative burden on councils.

Q39. Do you agree that:

• businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?

This should be dealt with through contract management between the contracting authority and the contractor. We do not agree that legislation is needed.

• 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?

Contracting authorities should monitor this routinely through contract management and where issues are identified work with suppliers to improve payment performance.

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

We think this final point will be difficult to enact, and we are unclear on the benefits it will bring. Government should also align the reporting requirements on private sector businesses to the same frequency and standards as the public sector for at least any public sector contracts they hold.

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

Agree

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

This again increases the administrative burden on authorities – if the circumstances and limits for amendments is clearly defined then this should not be required.

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?

We are unclear how this would be determined where profit isn't known?

Other issues

Paragraph 42 refers to the Procurement Policy Notes issued by the Cabinet Office. While we appreciate that Procurement Policy Note 11/20: Reserving below threshold procurements is only advisory for local government, we welcome the intentions behind it as public bodies, central, regional or local, should be able to reserve procurements to a specific area that is not the whole of the UK, so long as that would still allow adequate competition.

However we feel strongly that the approach outlined, that reservation can be “by county (metropolitan or non-metropolitan) to tackle economic inequality and support local recruitment, training, skills and investment” and “only a single county may be reserved” is not right. This approach is defective because not all parts of England have counties – take London for example. And as a result of local government reorganisations, some areas have moved away from the pattern of metropolitan and non-metropolitan counties established in the Local Government Act 1972, which means that the effect of PPN 11/20 is not uniform across England (for example, Cheshire has now been split into two counties; and is it the case that the boundaries of mayoral combined authorities are always aligned with the former metropolitan counties?). Moreover the approach fails to recognise functional economic geographies, which are rarely aligned with county boundaries, or that some public bodies to which PPN11/20 may apply cover more than one county area: for example, many NHS trusts and local enterprise partnerships.

Thus we would urge that PPN 11/20 should be amended to permit reservation by geographic area in a more flexible way, which could be by reference to the area for which the body has operational responsibility; to a recognised functioning economic geography; or to an appropriate geography that includes the area of one or more principal councils and/or a combined authority or the Greater London Authority.