Green Paper: Transforming Public Procurement, December 2020
Feedback from Members of NEUPC Ltd
Issued 1st March 2021

The Green Paper extols the virtues of greater flexibilities, unfortunately the over-prescription in relation to reporting, transparency publication and responding to challenges will create:

1. gross detriment to the commercial relationships we rely upon with the suppliers who sustain our operations

2. a disproportionate resource burden, responding to TOMS measurement, publishing pipelines in a central store, uploading files to central databases, responding to bidders’ concerns when their documents are being published against their will, redacting responses to tenders and contracts and liaising with suppliers’ entreaties in this regard, dealing with queries and “ability assessments” from the new central unit and responding to challenges brought through the tribunal system

The opportunity cost of dealing will 2) will exponentially outstrip and overshadow any potential benefit of 1).

The Green Paper is overtly central government department focused and does not take into consideration the nuanced environments and constrained resources and local policy/strategy imperatives of the broad church of contracting authorities to be impacted by these proposals

It is worth noting how the excessive bureaucracy will inhibit the efficiency and innovation the green paper aims to encourage

At times universities, unlike other contracting authorities, are in direct competition with one another. Central government departments and other contracting authorities do not have this dynamic of sometimes needing to keep their powder dry.

Chapter 1: Procurement that better meets the UK’s needs

Q1. Do you agree with the proposed legal principles of public procurement?
Yes, we agree with the proposed legal principles. All laudable content. However, we would add an overarching principle of ‘Principles over process’, given the new competitive flexible procedure increases the risk of legal challenge due to the greater flexibility/ambiguity, whilst endeavouring to encourage public procurers to be innovative. VFM, Transparency, Integrity,
Fair Treatment, Non-discrimination should form the basis of Public Procurement in any advanced nation. The principle of Public Good is fine as a principle and noble in its intent. However, it should not translate into requirements that ward of smaller or innovative businesses (as mentioned later in the paper) into applying for contracts. Any requirements as a result of the Public Good principle must not result in more bureaucracy in the tendering process or requirements that only businesses with large swathes of resources can deliver.

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?

No. That the current Public Procurement Review Service (PPRS) has investigated 1,800 cases and unlocked over £8m in late payments, since 2011, seems limited. On this basis, to create a new unit that would have a significant/meaningful impact would take too much resource/investment. Throwing the onus back on contracting authorities by requiring them to complete the numerous central registers proposed creates bureaucracy, where the purported aim of the new rules is to reduce the administrative burden. By all means establish a set of FREE digital training modules to pass. We have a legislature to follow and an existing process for legal challenge and judicial review. Who determines that the new unit will have an understanding of the various contexts and environments of other contracting authorities? This green paper is clearly written with the Central and Departmental environment in mind without regard to local government or other bodies caught by public procurement law. What does “oversee” mean in practice. What triggers Involvement. What authority do they have to intervene? The introduction of a new “flexible procedure” yet powers will review and intervene, removes any freedom in steering away from standard process. Existing procurement professionals may feel they will be challenged in their own area of expertise within their sector. We all already have internal sign off processes where our Heads of Dept already have the skills and expertise to make decisions based on procurement strategies.

However, a few members flag some positive points if it is in a structured and non-bureaucratic, transparent and open way of assessment and that contracting authorities have the right to improvement before intervention and there is no political affiliation then this would appear reasonable.

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?

A range of suggestions were put forward by members linked to this question: The panel should represent a broad church, not assuming the private sector is ahead of the game. The breadth of the public sector/contracting authorities should be reflected; this green paper seems to assume the procurement resource of central government departments. It should also have diversity, including in terms of ethnicity and disability, with an equitable gender split. The panel’s sanctions might include improvement notices and the right to a ‘live’ review of a subsequent procurement exercise run by an offending contracting authority, to ensure lessons have been learnt and help further instil good practice.
Independent, from Central Government, Blue light services, NHS. Councils, HE Sector and legal provision, private sector and the Chamber of Commerce. Need to know how commerciality capability will defined in order to determine appropriateness of sanctions.

The pool of panellists suggested seems fair, however there should be an onus on experienced Procurement Professionals (from both public and private sector) being represented on the panel. There should also be some representation from “coal face” procurement operators, to ensure there is a practical understanding of the issues being considered. With regards to sanctions this should include consultation with a senior executive at the contracting authority which will help guard against poor procurement practice being the result of a lack of procurement resources or misunderstandings by other stakeholders. From across the sectors (public, private and not for profit) and a mixture of procurement, suppliers and legal professionals. Would need further detail to determine sanctions, but there should be limited legal sanctions and more best procurement practice recommendations.

Additionally, See Q2, that panel must also have a documented and transparent CV to ensure that they have the acumen to be judge and jury, which must include very recent experience of undertaking tendering processes in the field. Further they should have a duty to throw out cases not based on the legislative framework before they are passed to the contracting authority to defend themselves.

I would also welcome further information as to how the board will find this information. Is this at tender stage? Will the suite of documents be scrutinised? Or is this at category level? Powers to intervene and improve – I can foresee occasions where there will be a difference of opinion based on sector knowledge. All public sector procurement departments are already running at full capacity or lack resource, we do not have time for reviews which could be very lengthy. Also, who, for the contracting authority, has these reviews? The Category Manager or the Head of Dept?

Whilst some training would be very welcomed, particularly around different commodities, I don’t feel asking contracting authorities what sanctions should be in place is very helpful at this stage.

Chapter 2: A simpler regulatory framework

Q4. Do you agree with consolidating the current regulations into a single, uniform framework?
Yes, though we appreciate that having followed the more complex PCR, such a consolidation will simplify the rules for the universities. Others, who have followed the UCR, CCR or DSPCR, will likely experience the reverse, greater complexity. Agree with the principles in the chapter. Having a single framework seems sensible and will standardise processes. It would make things tidy, but it does feel like straightening the curtains. We have better things to do with the public purse, as we would then have to reacquaint ourselves where cornerstone regulations have moved to. The competitive flexible procedure will still have to adhere to most of the principles within PCR15 we don’t feel it will reduce any complexity.
Q5. Are there any sector-specific features of the UCR, CCR or DSPCR that you believe should be retained?
Not qualified to answer, as little experience of the UCR, CCR or DSPCR.

Chapter 3: Using the right procurement procedures

Q6. Do you agree with the proposed changes to the procurement procedures?
Yes, though:

- Unclear as to the value threshold £ at which they kick in
- Concerned about the ambiguity and therefore increased risk of challenge created by the new competitive flexible procedure, hence the ‘Principles over process’ principle proposed in response to Q1
- Greater clarity would be appreciated on how ‘prototype or other practical demonstration’ can be compliantly undertaken, given the difficulties experienced in accommodating IT software pilots; ensuring they do not undermine a subsequent formal competitive procurement exercise. In principle we agree but would need to see more detail on how the flexible procedure would work to determine how we can operate effectively within its parameters. The suggested flexible procedure will reduce unnecessary elements of the tendering exercise and give greater freedom to buyers to achieve the best outcome for their contracting authority.

However:

- Point 68 describes the need for a shift in buyer behaviour. The final bullet point of point 69 details an increased number of legal challenges as the procedures are tested. Buyer behaviour is currently predominantly concerned with avoiding legal challenges. The procedures will not achieve their aims without clear legal underpinning that enable buyers to run competition without constant fear of legal challenges from suppliers. Without clear legal backing the change in procedures would be effectively redundant.
- On Point 69, overall time and costs increasing due to buyers not developing standard practice would not be due to “poor practice”, it would be as a result of a) the strategic direction taken as a result of the green paper and b) because of the ineffectiveness of the new unit suggested in question

The likelihood of professionally qualified public procurers convening to produce “poor practice across the sector is extremely low. Think the flexible procedure is really interesting and will allow for the most appropriate method of appointment to be designed. There will perhaps be some concern from some as a do-it-yourself approach may be a bit daunting. There is also likely to be an increased risk of challenge from suppliers if we use this process but as long as we stick with the basic principle of fairness and transparency, I would be confident we could defend decisions. We will also need to be very clear in documents what we are doing throughout the process so perhaps a section devoted to all the steps and how they will be evaluated needs to be included in tender docs. The 30-day rule still applies so as long as we are clear we should have limited comeback from suppliers. It this would give greater flexibility to the way university money is spent for medium to large procurements.
The lack of clarity really does feel like a social experiment in finding where the rules should be by leaving us (the value chain and the contracting authorities) to self-legislate. It reads like the Cabinet Office is ready for there to be casualties amongst the trail blazers and that some collateral damage amongst the foot-soldiers has been signed-off for the greater good. ... but we will monitor you, and with the tedious clarity of hindsight, give you the lessons learned, you would have identified yourself, as you always do whenever you try something new.

- More importantly NOTHING in the green paper deals with technology/digital contracts. The PCR2015 and these proposals do not answer the impossible anomalies created by projects which are as costly in development hours, opportunity cost and emotional investment. See below innovation and pilots.
- Where there is silence this is where the problems lie as legally, we cannot refer back to regulation where there is none. I do welcome the ability to design our own process, however I feel the flexible procedure will only exaggerate this.

Q7. Do you agree with the proposal to include crisis as a new ground on which limited tendering can be used?
Yes, though based in part on the Government’s handling of the COVID-19 pandemic, we are concerned about the potential time delay in waiting for the Minister for the Cabinet Office to declare a crisis.

Q8. Are there areas where our proposed reforms could go further to foster more effective innovation in procurement?
We would need to have more detail of flexible procedure to determine if innovation is captured within there. Would like to see more flexibility in procurement for research and development innovation. The changes in procedure need to be backed up by sound legalities and a strong and prominent oversight body to ensure buyers are given the authority and flexibility to explore innovation properly. The paper appears to take us back a step-in relation to the Lord Young reforms? In the PCR2015, there is no prescribed order of things. The green paper infers you have to, in these new procedures, undertake supplier assessment first, then review the award criteria. We evaluate the award criteria first and having identified the preferred partner, assess their company suitability on the basis that we will appoint on the basis of the risk and with every intent of appointing unless there is an over-riding, unsurmountable reasoning not to. On the rare occasion this arises, the bidder is given every opportunity to allay our concerns and only when they cannot be overcome, are they removed from the evaluation and the scores are realigned without their scores affecting the outcome and a new preferred bidder is identified.

Digital e.g., G-cloud – we buy out of box, we don’t innovate, guide us/equip us? Collaborate and share risk? Cabinet Office should showcase how they are innovating... compliantly.

In terms of the consultation, two concrete suggestions (top two improvements over current regulations):
• Re-set the advertising threshold for services based on annual spend rather than contract spend to avoid having to play games about contract length
• Allow post-tender negotiation with the winning bidder i.e., where there is a clear case for VFM overriding transparency in those circumstances. The ability to use some award criteria during selection stage is positive. We could definitely see the benefit of, for example, being able to look at systems during selection stage to down-select suppliers whose systems do not meet our requirements instead of waiting till a later stage to have to do this. We talked about this being similar to the SQ/ESPD and in theory would be useful but foresee quite a lot of management being required if implemented.

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?
Would need to have more detail of flexible procedure to determine if innovation is captured within there. Would like to see more flexibility in procurement for research and development innovation. With regards to point 89; Public Sector buyers understand the different types of value the Government is proposing. Thought needs to be given to how these types of value sit alongside rather than compete with buyers’ current primary concerns of preventing legal challenge and cost pressure due top stretched budgets. Alternative ways that value can be assessed and rewarded in the tender process needs to be explored which can then replace the current practice of allocating portions of tender scoring to these values. This tends to increase bureaucracy and favour large corporations who are familiar with tendering as opposed to smaller more innovative firms who are not as familiar with the tender process. More information is required on what removing the requirement for evaluation to be made purely from the point of view of the contracting authority means. What factors could be taken into account and what impact might that have?

Past poor performance.

Q10. How can government more effectively utilise and share data (where appropriate) to foster more effective innovation in procurement?
Market intelligence data/Framework availability and users/Supplier performance data/Central database of suppliers based on UNSPSC/CPV code data.

While better and more available data would be welcomed it is a misnomer with regards to this point. The government needs to drive better education of suppliers with regards to their understanding of public procurement and how to compete for public contracts. Procurement is generally only deemed newsworthy when there has been mismanagement of large contracts, positive procurement successes aren’t reported. Public Sector procurement is perceived (sometimes fairly) as overly bureaucratic. However Public Sector buyers are generally MCIPS qualified, experienced and contrary to some of the points in the Green Paper commercially aware. How they adapt to any procedural changes is irrelevant if suppliers refuse to engage with tender processes either through lack of knowledge, perception that
Public Contracts are only won by resource heavy bidders or because they are intimidated by the level of information required to submit a tender. As such the government needs to put significant effort into publicising how suppliers can engage with tender processes and assisting buyers with helping to educate suppliers on the opportunities that are available to them.

Sharing of more cross sector best practice could potentially foster more effective innovation in procurement. Better publication of niche framework s and accessibility. Widespread publication of suppliers who are utilising UNSPSC standard.

**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?**
Keep the current pre-market consultation rules. Increased pre-market engagement would allow more innovation. It depends on what we are trying to achieve. Historically we have been unable to discuss new ideas with the market unless we follow a strict dialogue process which is very lengthy. It is for the government to consider what they are looking to achieve. From a technical perspective, Digital Marketplace was introduced to be able to discuss requirements upfront however this is for out of the box solutions only.

**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?**
Whilst this is not so much an issue for the universities, it might well be for those currently procuring more social, health, education and other services, as the (new) rules, albeit light touch/flexible, will effectively kick in at a lower threshold, down from the current £663,540. No. Unless the threshold for competitive flexible procedure for procurement for Social and other specific services are aligned to the current Light Touch Regime threshold for part A and part B services are reinstated. his depends on what the thresholds are for the new procedures. No, these should be retained. Lowering the threshold for all procurement is the issue, not the removal of the LTR currently members feel the levels should be increased and not reduced down.

**Chapter 4: Awarding the right contract to the right supplier**

**Q13. Do you agree that the award of a contract should be based on the “most advantageous tender” rather than “most economically advantageous tender”?**
This would give a more bespoke utilisation of the awarding mechanism and so yes. The economically bit just reminds the value chain that outside central government, our pockets are not bottomless. That within our budget we want the very best solution available. The “economically”, maintains that sense of “within reason”. The “economically” is also one of the pillars of social value too.

It can be argued that MAT refers to the overall score of the winning bid and not just the price, however I like the term “economically” as it can be referred to in a number of ways i.e., Social
Value is high on the agenda and this can be linked with the economy. Agree that this is better than MEAT and not just because its nicer to say! Removing the emphasis on pricing is positive and allows for greater flexibility in terms of allocating weighting, I would hope that we would start to see the shift on framework agreements, some of which are heavily weighted towards price (higher than we would weight price anyway).

**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?**

Yes, though we question whether the specific national Government exceptions will allow for the 'social value'/wider community benefits as defined by a contracting authority. Provided the specific exceptions are related to the delivery of social policy outcomes. A reminder - what is socially most important in one geography and in one sector will never be the same as in another geography or sector. Members also noted that this feels like a cloaked way of removing devolution and this section is too politically driven and highly at risk of politicising contracting authorities with agenda with no currency for the service users. TOMS is at risk of becoming yet another source of incessant feeding the data monster without having any remaining resource to deliver the great outcomes we intended.

**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?**

Members are in broad agreement. It’s the balance of national vs local social policies. Provided the specific exceptions are related to the delivery of social policy outcomes then yes, we agree that the award criteria should be linked to subject matter. Likely that this may happen from a central position but likely to clash with local agendas and local autonomy these must be factored in with a balanced approach. Allow Contracting Authorities to lead on and own their own procurements.

**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.

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

We believe that tax evasion/avoidance should be a mandatory ground for exclusion.

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

Yes.
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)?
We believe that tax evasion/avoidance should be a mandatory ground for exclusion

Q20. Do you agree that further consideration should be given to including DPAs as a ground for discretionary exclusion?
Yes. But the Supplier needs to be given the opportunity to identify how they are remedying the situation and there is a time framed action plan

Q21. Do you agree with the proposal for a centrally managed debarment list?
Yes, a positive from members generally with some considerations and points below: provided debarment is in line with a clearly defined framework and suppliers debarment period is not punitive, they have the right to appeal and the ability to have time framed action plans to be able to be reinstated.

This would make sense as long as grounds for inclusion are clear and transparent.

Ideally, one member requests that it is only for mandatory and discretionary criteria, not for persistent poor performance, there are way too many subjective variables for “poor  performance”, and it would create a scenario where a supplier who might concede defeat on the grounds of the particular case, would fight to the death to avoid the debarment list as they have nothing to lose.

More information is needed about this although agree in principle. How timely would information be added to the list and then communicated to suppliers? Would there ever be an instance where the list has been updated and we exclude suppliers from a tender exercise on this basis and yet they haven’t been told. There is also some ambiguity around self-cleansing. Are all contracting authorities expected to apply same rules/principles and what if there are instances where some industries etc. require a higher level of compliance?

Q22. Do you agree with the proposal to make past performance easier to consider?
Laudable, though it is difficult to see how a centralised database, including (perceived) poor performance against KPIs as well as more cut and dry transgressions, would work effectively, and not lead to supplier challenges and litigation. Contract management skills across the public, and indeed private sector are somewhat patchy. No very subjective. It needs to be flexible to consider SME and new start-ups. Whilst it is clear that the government are trying to make the process easier, in reality we’re not convinced that it will be any easier. Terms such as significant or persistent can be subjective so further guidance and a clear framework would be needed.
Q23. Do you agree with the proposal to carry out a simplified selection stage through the supplier registration system?
Yes, but with some concerns voiced by members
Concerned that we would not be able to apply different evaluation methods (pass/fail and/or weighted, along with a change of weightings) to the supplier information on the central supplier registration systems, to reflect the nature of the contract/size of supply market. Whilst the new competitive flexible procedure allows for further criteria to be applied to further reduce the number of bidders, it is not clear how/if the central register would be used with the open procedure. The principles of this are sound and would in theory reduce the administration burden for suppliers. However, moving all further criteria to the following stage may make the selection stage too prescriptive, allowing it to be more easily gamed by suppliers with more experience and also turn the selection stage into more of an administrative hurdle than a check that suppliers can fulfil the contract.

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, where the verification information to be used for a particular procurement exercise is clearly specific. Yes, we want to widen beyond reg 60, and limits removed.

Clarity on how it would be widened would be helpful.

Yes, but would also welcome guidance on this as the green papers’ states “can use a wider range of information” but then states “by removing the limits” so this is unclear as to whether there will be parameters applied.

Chapter 5: Using the best commercial purchasing tools

Q25. Do you agree with the proposed new DPS+?
Yes. Provided it isn’t onerous and doesn’t introduces to much administration.
The guidance is confused if the “qualification system” available under the Utilities regulations is made available for all, clear guidance is needed how that Qualification system would be applied. Wider category application of DPS is indeed needed. What the CCS is doing with the G-cloud currently, has no place under the current legislation, it neither meets the legislation for a framework, nor does it meet the rules for a DPS.

Q26. Do you agree with the proposals for the Open and Closed Frameworks?
Generally, not in agreement with this, though it would be helpful to understand the latitude for amending the scope of the Open Framework when re-opening, negating the need to re-tender from scratch.

The open frameworks will place a large administrative burden on procurement and the benefits would not outweigh this as frameworks are retendered every 4 years currently. If Open Framework when reopened -would existing need to rebid?, this is at the core of the
increased admin burden and benefit. If limitations of bids is acceptable as utilities ‘qualification system’ it may be more acceptable What benefits does reopening a framework give as the existing providers have to reapply surely that’s just a retendering of the framework with a flashy new sleeve. It potentially reduces the length of the original framework. The spin headline sounds great until you work it through and then it’s just 2 consecutive procurements.

Chapter 6: Ensuring open and transparent contracting

Q27. Do you agree that transparency should be embedded throughout the commercial lifecycle from planning through procurement, contract award, performance and completion?
No - a general agreement across members who wish to help retain uniqueness of bids and minimise the admin burden. The proposals would create excessive bureaucracy, including the need to redact Awarded Contract Information. Public procurers would spend a disproportionate amount of their time dealing with this bureaucracy instead of developing and implementing innovative procurement processes. Innovation and competition might in fact be set back if firms believe their intellectual property (IP) could be published for competitors to see. Contracting authorities could become the subject of legal challenges if they end up publishing a supplier’s valuable.

No. Transparency is necessary to ensure trust that public money is being spent properly and competition between suppliers is fair. However, suppliers are often sceptical of transparency as they fear (with some justification) it will reduce their competitive advantage. Subsequently the levels of transparency proposed will reduce innovation and could ultimately reduce the ability of Contracting Authorities to attract the most suitable suppliers. A side effect of the proposed levels of transparency would be increased administration for both buyer and supplier. Ensuring the procurement process itself is fully transparent and fair should satisfy public need for scrutiny of contracts, with the exception of instances of supplier poor performance which should be published to assist other Contracting Authorities.

Please refer to: https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042903/fs_50554846.pdf

It’s not in the public interest, and the ICO agreed!

Q28. Do you agree that contracting authorities should be required to implement the Open Contracting Data Standard?
Agree with the use of universal standards, but not the onerous list of requirements. This appears to be an unnecessary additional overhead that will drive the wrong behaviours in Contracting Authorities away from commercial acumen to more administration.

If this also includes KPIs under contract management, how are we ever going to encourage under-performing suppliers to agree to action plans or superior suppliers to agree to stretch targets, if they are potentially then going to have to share their acknowledgement of
underperformance and if they agree to going the extra mile for one contracting authority it potentially exposes them to an inference that they should provide equal treatment in all contracts, when the benefits/risks matrices under others’ contracts might be wholly different.

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

Yes, though we have concerns with contracting authorities publishing contract performance/KPIs- see answer to Q22 above. As for centralised supplier registration information, we have concerns about the inability to apply different evaluation methods to the supplier information dependent on the nature of the contract/size of supply market- see answer to Q23 above. Yes, this would be hugely beneficial.

For the most basic parts of the dataset, only, but with holding companies with 30 very similar business unit names this can be a minefield.

Central Digital Platform – as my previous comments.

Commercial data – again, very central government focussed. Those “strategic, gold” contracts are legally requested to publish KPIs. I fear this could encourage bad practice and where a supplier may be falling short, there could be many reasons for this. Could drive perverse bidding behaviours.

Chapter 7: Fair and fast challenges to procurement decisions

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.

Yes.

Provided there is an intermediary which quickly assesses claims for a legitimate legal basis, before they are heard. We must avoid ambulance-chasing chancers and must develop the framework to avoid that mentality. Please approach the development of this with utmost rigour, challenge and caution.

Faster, maybe. Cheaper, only for the bidders. It will encourage challenge. The challenge is then reviewed at least TWICE by the contracting authority (once internally, maybe again with legal dept, again with the Court Reform). The green paper advises there would be a tailored fast track system that tailors the process of the individual challenge; therefore, this is not a consistent, unified approach so will take time to develop.
Q31. Do you believe that a process of independent contracting authority review would be a useful addition to the review system?
There are a number of advantages and disadvantages to this, a final decision would only be possible with further details. Essentially yes but with caveats. Provides a protection to avoid court proceedings and provide mediation to reduce this. Needs to be balanced with any increase of bureaucracy.

Dispute resolution simplified would be the end goal for low value disputes. This should be in place before Court procedures are allowed to proceed. Would need to know criteria to go through this process in long term but mindful of positive efforts for Contracting Auth and suppliers currently resolving matters during alcatel stage.

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?
Yes. The driving reason for cautious public sector procurement is fear of a legal challenge. This inhibits the contracting authority but also weights procurements towards larger organisations who have the necessary resources to lodge a challenge. In order to tackle this, I would contend that this tribunal as much as possible should act as a first stop dispute resolution chamber for disagreements between contracting authorities and tenderers. This tribunal should have the ability to pass judgement and suggest remedies to disputes with legal cases only being a course of last resort for disputes that cannot be solved. This would help contacting authorities conduct more efficient and less cautious procurement exercises as fear of legal challenge isn’t the primary concern, and also help inspire confidence in a fair process from suppliers who won’t need to spend excessively on legal fees if they would like to have a tender award reviewed.

Yes, however transferring a subset of challenges not before brought to the court – this could be lengthy and therefore not speed up the process. The whole point of this is to move to a quicker review system.

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

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.
In principle yes, it does depend on what changes are proposed to the remedies directive and at what point. If pre-contractual remedies take precedence over post-contractual remedies will automatic suspension still exist? If they do then we agree that the test to lift automatic suspensions should be reviewed to include where the contract is to fulfil a social requirement and suspension would cause public harm.
Q35. Do you agree with the proposal to cap the level of damages available to aggrieved bidders?

To be honest, from a contracting authority perspective, we would be happy with such a cap. However, taking a more objective view, it does not feel quite fair and could lead to contracting authorities taking a more cynical view in balancing the risk of a legal challenge against the reward of getting a contract awarded; with the risk rapidly diminishing in proportion to the value of the contract.

Most feel it would be a very welcome development and would help encourage more bold and innovative procurement knowing that legal challenges (that often relate to technicalities rather than contravention of the principles of procurement) are less likely to be lodged.

Smaller contracting authorities are adversely impacted by caps. Wherever a cap it set smaller authorities are proportionally more deeply affected. If we consider personal driving fines, they are now set to acknowledge that if you can drive a supercar, the old fining system had no impact. A point to consider, a small contracting authority with an over-stretched small team of governance experts with a tiny budget should not be treated in the same way as a ministry with bottomless funds and advisors on tap, the judgement should be relative to the infraction, but also to the scale of budget and resources available which should have prevented the error occurring.

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

A full range of suggestions were put forward including: The cost of those involved in preparing the bid, where there is a guide as to the typical number of hours required of staff of the various levels of seniority, by category/industry.

Suppliers should provide evidence on an open book basis on time spent on bid and cost within tender response; this should then be benchmarked against other bidders’ costs and the average used as a means of calculating damages. The supplier should suggest what the costs were, but this should be subject to scrutiny by both the Contracting Authority and an independent body (e.g. an auditor). It would also be beneficial for data on bid costs to be collated from suppliers where possible by a Central Body as this would help inform decisions on these costs. This data could also potentially be analysed with a view to advising suppliers on how to make their bid process more efficient. Suppliers should provide evidence of the costs they have incurred in submitting a bid, this should be benchmarked and a limit put on the amount of damages that can be awarded. Open book accounting of cost is the only way to do this fairly. If a number of bidders are affected, then benchmarking should be done to agree a fair price. Fixed percentage of the median/mean tendered sum of the tenders received for the contract under consideration. Keep the standstill, the only loss is the cost of tendering.

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

Yes.
Q38. Do you agree that debrief letters need no longer be mandated in the context of the proposed transparency requirements in the new regime?
Emphatic No agreed. We believe that the time/resource necessitated by the proposed transparency requirements would far outweigh the current time/resource invested in drafting debrief letters, at the same time providing bidders with less meaningful explanation/information. We believe debrief letters allow lessons learnt for suppliers especially SME’s and we are likely to get more claims for damages if we are not transparent about why a bid was not awarded. Would like suppliers to state up front if they are challenging or just seeking feedback. It’s also a negative due to the reasons previously raised on transparency. Debrief letters aid the overall procurement process and ensure it is transparent. The suggested transparency requirements would result in more bureaucracy for suppliers and buyers and would be a regression from debrief letters removal of mandated individual feedback letters is welcome although more information is needed on what the new requirements are and where they will be published.

Chapter 8: Effective contract management

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, but sensible limits need to be placed on public bodies’ rights/responsibilities in this regard. The concern is that the public body is expected to be the adjudicator on a contractual dispute further down the supply chain.
- private and public sector payment reporting requirements should be aligned and published in one place? Yes and introduced at the same time to have a clear reality check of what is equitable for small and large private sector organisations and contracting authorities

Q40. Do you agree with the proposed changes to amending contracts?
Mixed concerns here, cost and bureaucracy of doing this are a major concern along with clarity on what constitutes a change along with clear guidance. How does this relate to iterative purchases under frameworks? Each purchase is the contract, not the framework

10% is way too narrow surely it should relate to modifications beyond those accounted for in Reg 72 Re-set the advertising threshold for services based on annual spend rather than contract spend to avoid having to play games about contract length

Q41. Do you agree that contract amendment notices (other than certain exemptions) must be published?
The principle of this is fine, however consideration should be given to widening the increase/decrease contract values in order to reduce unnecessary administration for
contracting authorities. Clarity on thresholds and impacts would be needed to really understand how this might work.

The paper is proposing we issue an amendment notice where we increase or decrease the value by more than 10% of the initial contract value for goods and services or 15% for works.

- increase or decrease the initial contract term by less than 10% of the original contract term.
- do not change the scope of the contract. We would therefore require closer contract management and this would potentially encourage specifications to be incorrectly inflated. Only point of concern is in relation to contract amendment notices which is a new requirement. The majority of our amendments will fall outside of the exemptions listed and this therefore need a notice and a standstill period. Further clarification is needed as to whether this includes standard term extensions that were included in the original contract.

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?

Members are in agreement, cap on profit would be the right thing to do where the incumbent is being divisive so yes where there is a valid complaint and court proceedings are imminent.