

# NEPO Submission:

## *Transforming Public Procurement Green Paper Consultation*

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# Introduction to NEPO

Established in 1976, NEPO undertakes high-value procurement in strategic areas of spend in conjunction with North East local authorities and a range of associate members across the UK. NEPO's vision is to "*Achieve benefits through collaborative procurement*", positively impacting a diverse range of stakeholders including suppliers and public sector colleagues.

**The twelve North East local authorities are:**



The wider public sector can access our extensive range of solutions via NEPO's free of charge associate membership scheme.

**Procured by the public sector, for the public sector**, over 700 public sector organisations across the UK utilise NEPO's portfolio of procurement solutions in order to access compliance, choice and value for money.

Our solutions have been used by a wide range of public sector bodies including universities, colleges, local authorities, emergency services, housing associations, NHS bodies, charities and central government departments.

## Stakeholder engagement and consultation

NEPO devised a Stakeholder Engagement and Consultation Plan to identify and maximise awareness. Feedback has been collated to form a blended response on behalf of NEPO's members and key stakeholders.

## Summary of the key themes identified within NEPO's consultation

- There is a strong theme in the agreement of the principles proposed within the Green Paper. It has been, however, difficult to firmly commit to the proposal without a further understanding and the wider transparency intended as there is a strong emphasis on the high-level detail throughout the Paper.

- The Green Paper references the National Procurement Policy Statement however this has not been shared within the consultation period. It is also felt by stakeholders with whom we engaged that this Paper was written with a view of Central government and how they operate with little regard to local government.
- The proposed amendments will offer suppliers of enhanced transparency throughout procurement processes with minimal burden to suppliers. The policy has already been introduced allowing below threshold contracts to be reserved for UK suppliers with effect from January 2021. These proposed amendments will offer further opportunities to encourage participation for local suppliers and SME's which is welcomed.
- The amalgamation of the four regulations into a single harmonised approach is welcomed. This approach will assist in preventing confusion within contracting authorities and supplier markets whilst offering the opportunity to upskill staff and implement flexibilities.
- Resource implications is a consistent theme and concerns identified, to ensure all Contracting Authorities can maximise the opportunities in the new regulatory framework as well as ensure compliance upskilling staff and suppliers is imperative.
- Concerns were noted that the principles do not reflect the constraints of local authorities, in particular, smaller authorities with the necessary procurement and legal resource implications generally where there is a much larger volume of low-level procurements undertaken and the additional data requirements, auditing/ transparency requirements as set out within the paper.
- There is a reference to the establishment of a new unit to oversee public procurement to review and, if necessary, intervene to improve the commercial capability of contracting authorities. Concerns have been identified regarding the powers of this unit and the relevant local authority procurement experience of the unit when intervening.
- There is a strong emphasis regarding transparency, two of the most notable changes proposed are contracting authorities would be mandated to share pipeline tendering opportunities for up to 5 years and details of the procurement outcome would be published in the public domain at the point of intention to award, currently this is published within 30 days of the award. Concerns have been raised regarding additional reporting requirements, the confidentiality of bidders, and the greater risk of challenge from suppliers.
- The additional transparency requirements may also pose challenges to procurement and legal resource within contracting authorities.
- The Light Touch Regime (LTR) which is frequently used to procure adult and children's social care and educational services has been proposed for removal, this raises significant concerns for local authorities.

# NEPO's response to the green paper consultation

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

Broadly, the proposed legal principle is agreed upon. It is, however, difficult to firmly commit to the proposal without further understanding and wider transparency as there is a strong emphasis on the high-level detail contained within the Green Paper.

There are concerns that the principles do not reflect the constraints of smaller local authorities and the resource implications from procurement and legal perspective owing to a much larger volume of low-level procurements that are undertaken and the additional auditing/transparency requirements.

There are also concerns regarding the requirement to publish pipeline opportunities for up to five years, this will be particularly challenging in terms of budget confirmation, subject to external funding and the overview of contracting commercially sensitive agreements. It would also be encouraging for an emphasis on transparency within the supply chain requiring pipeline opportunities to also be published to promote sub-contracting/consortium ventures.

It would have been beneficial to review the National Procurement Policy Statement in conjunction with the Green Paper to fully understand expectations to complement this response.

## 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?

The detail included within the Green Paper is presented at too high a level to sufficiently understand the responsibilities and practical working within this unit. There are questions regarding the potential powers this unit may pose and how this may operate to hinder rather than assist for example:

- The Panel should not be reacting to complaints/challenges at the same time as local authorities receiving challenges.
- What intervention is proposed to assist contracting authorities?
- How will the new unit improve capability and practices for the benefit of all contracting authorities and suppliers rather than provide remedies for an individual supplier on a specific procurement?
- Monitoring - to assess and address systemic gaps in commercial capability and understanding, especially as the new rules are adopted.

It is suggested that the unit should also promote good practice for contracting authorities and celebrating successful delivery, encouraging innovative practices that can be replicated.

## 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 broad mix of practical expertise within the proposed unit is a mandated requirement to ensure that central government and local authorities are equally represented. This should also include representatives from the relevant subject matter experts with a detailed understanding of the contract/category content.

There is a nervousness regarding the introduction of new sanctions that currently are not already in existence. It was questioned whether there would be protection given to contracting authorities with clear guidance to prevent the opportunities for frivolous challenges leaving contracting authorities open to abuse by disgruntled tenderers.

The proposed unit should also offer legal support to widen the scope of their role ensuring that the unit is not only overseeing concerns but assisting Authorities as well. It would be beneficial for contracting authorities to be offered continuous learning development support through the proposed unit to ensure there are not conflicting outcomes - this could be done through a central repository with cross-coverage of exposure to all forms of regulations and the sharing of lessons learned.

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

Yes, with the exception of the procurement of healthcare service not being considered as part of this green paper in principles harmonisation will enhance knowledge and consistency, it must be a fundamental requirement that each regulation will be adequately represented within the reformed regulations.

However, the key impact to address will be the threshold values. Concerns have been identified that revised threshold values will be onerous and difficult to interpret especially when encompassing the Utilities Regulation threshold values or may at the opposite extreme fail to address complex contracting requirements. The reduced threshold values may have a detrimental impact on certain sectors, increasing the need to advertise to an open market unnecessarily when a closed quotation process could suffice.

Flexibility is key, especially due to the potential decommissioning of the Light Touch Regime (LTR), to assist counteract challenges encountered by contracting authorities when procuring services that fall within this remit. There are concerns regarding the intention to remove the procurement legislation for healthcare services when authorities have joint commissioning functions that apply principles like NHS patient choice i.e. special educational need placements.

Clarity of scope is required regarding 'Healthcare' exclusion required for local government contracting authorities who undertake shared healthcare-related procurement activity at a local level.

Procurement, legal and supplier resources will require an adequate transition plan that will ensure robust and sufficient training and support can be carried out to successfully implement and apply the proposed changes in regulation.

Clear guidance is also required to determine transition measures that minimise the risks to contracting authorities and suppliers so as to safeguard and future proof existing contractual arrangements awarded in advance of the proposed changes. The retrospect application of some of the principles set out in consultation is one way in which this risk could be reduced.

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

The restricted procedure should be retained as a separate entity rather than to be captured within one of the new proposed procedures. Concerns are expressed that the loss in the restricted procedure may increase the risk of legal challenges encountered by contracting authorities with the rationale applied in the possible narrowing of competition when undertaking a process (PCR 18). It would be of utmost importance to contracting authorities for the regulations to offer clear guidance regarding the restricted procedure offering transparency, consistency and protection as is currently available.

There are concerns regarding the proposed GPA Thresholds and realigning to industry-specific contracting arrangements, for example, the existing complex thresholds when compared to the current UCR concession. Can Cabinet Office confirm there will be no exceptions or industry-specific

thresholds?

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

In principle yes, there is an agreement to the proposed regulations however further clarity is required to review the revised uniformed regulations and understand the constraints.

The Flexible Procedure implies a two-stage process, reflecting 30 days EOI followed by a subsequent 25 days for ITT. It would be beneficial to have the option for a single-stage process (especially due to the removal of LTR) when the market would not require a selection stage due to market limitation.

There are concerns that the proposed procedures may pose significantly difficult challenges for LTR activity with enhanced complexity and increase external advertising via tender rather than allowing a closed quote with a local market (social care and education settings) whilst offering a much lower threshold in comparison to the current LTR £663k.

Under the current PCRs, innovation can be considered and applied under the LTR scope of procurement activity. This can lead to a flexible procurement solution being established which may comprise of a mix of DPS and Framework aspects. For example, Primary Care arrangements for GPs and Pharmacies where pre-qualification requirements are required for service user choice thereafter. It is questioned if the proposal for the new flexible procedure is to be considered for LTR activity, could addition flexibilities or less prescriptive requirements restricting the commercial tools for such categories of procurement, i.e. DPS+ and Open/Close Frameworks be considered to reflect the supply market and call-off aspects?

There are concerns regarding the flexible approach and how this may vary between contracting authorities when buying the same type of provision and how this may cause confusion and ambiguity within the supply market.

There are concerns that public-public procurement including the Hamburg and Teckal exemptions are not addressed, and we seek assurances that non-commercial joint working will be addressed and if possible, expanded in order that the Teckal exemptions will remain.

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

Yes – however, further clarity is required regarding the grounds of crisis and how this is declared or differs at a local level rather than a UK wide approach.

The limited procedure appears to be a replicate for VEAT which would only potentially avoid the standstill period in times of crisis. This approach is unclear regarding the principles of permission that is required to be sought to use the procedure. This approach will be restrictive for local authorities who are already assessment the most advantageous tender however budget is a key requirement.

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

Yes, greater investment is required within the approach to upskilling contracting authorities in ensuring sophisticated market engagement is undertaken with the wider private sector. There is a requirement to ensure clear specification are prepared and to raise awareness and address the impact of poorly defined specifications.

Commissioner and procurement practitioners will need clear specification writing, training and awareness along with suitable evaluation criteria to avoid future challenges and maximise the flexibility within the competitive flexible procedure.

There also needs to be a robust approach to upskilling contracting authorities in the devision of suitable evaluation criteria to avoid future challenges especially where it may be challenging to evaluate based on potential subjective areas.

Clarification is required regarding the new flexible procedure and the criteria to select bidders before issuing tenders. There is a risk that 30 days may be deemed excessive to express interest given the criticism of the lengthiness of the process and that it is 25 days to submit a tender response.

Under the current PCRs, innovation can be considered and applied under the LTR scope of procurement activity. This can lead to a flexible procurement solution being established which may comprise of a mix of DPS and Framework aspects. For example, Primary Care arrangements for GPs and Pharmacies where pre-qualification requirements are required for service user choice thereafter. If the proposals for the new flexible procedure to be considered for LTR activity, could there be more flexibility in the commercial tools, i.e. DPS+ and Open/Close Frameworks be considered to reflect the supply market and call-off aspects?

**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?**

Case law is currently limited in understanding procurement challenges encountered by contracting authorities, this prevents the opportunity for legal and procurement representatives to build an understanding of potential risks and challenges associated with innovative procurements.

There should be consideration of alternative and innovate routes for awarding contracts concerning adult care homes and children's homes, and other contracts related to personal and social services for individuals assessed as requiring services under the National Assistance Act 1948, the NHS and Community Care Act 1990, the Children Act 1989, the Care Act 2015 or under any other relevant legislation. etc. Some of these contracts (care home for example) reflect the life choices of an individual, and are very much location dependent, with a significant element of patient (family) choice, but are awarded by Councils, not NHS, as previously awarded via the Light Touch Regime.

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

The use of artificial intelligence is required within a single e-Procurement platform that maps multiple sources of data collating meaningful intelligence regarding the supply market, supplier performance and external constraints i.e. financial, external reviews CQC/OFSTED.

NEPO and its 12 member authorities are in the process of building an end to end procurement system with our development partner Accenture, this system will be used to capture open contracting data standards and foster innovative procurement activities with the use of artificial intelligence (AI) and robotic process automation (RPA).

**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?**

Pilot cases are often requested by commissioners; however, it is difficult to progress and constraints

are presented regarding compliance with the regulation without either stop/starting or publishing an open tendering opportunity. Consideration is requested regarding the investigation of opportunities allowing contracting authorities to initially open EOI for specific projects which can evolve to realise innovation opportunities engaging with a wider private sector market.

There are often difficulties encountered in the writing a service specification detailing a concept that is not deemed to be an 'off the shelf solution'. There need to be considerations regarding how bidders can evidence their ability to work with contracting authorities when a mature market cannot be demonstrated.

Further emphasis is requested, that offers greater support and assistance to UK businesses in successfully winning contracting opportunities where there is a capability within the UK to deliver.

**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, due to the nature of services procured within social care, health, education and other services and value of services this could mean a lot more work to undertake procurement activity e.g. closed quotes to local suppliers, unless an increased threshold can be applied for LTR categories as increased advertising for open tender procedures which are currently competed by e.g. closed quote process with local providers. It is also questioned how this can be included within the GPA thresholds?

Consideration must be given to Local Authorities regarding the awarding contracts concerning adult care homes, education settings and children's homes, and other contracts related to personal social services for individuals assessed as requiring services under the National Assistance Act 1948, the NHS and Community Care Act 1990, the Children Act 1989, the Care Act 2015 or under any other relevant legislation. etc. Social Care related contracting accounts for a substantial amount of Local Authorities overall budgets (care home for example) and are for the life of the individual, and very much location dependent, with a significant element of patient (family) choice, these are awarded by Local Authorities and not NHS, currently via the Light Touch Regime.

There are also concerns regarding ICT Procurement in the flexible procedure providing a realistic route to market for this area of spend.

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

No, not necessarily, there are concerns regarding the revision of MAT from MEAT which could imply an inaccurate message and a contradiction where value for money is an attributing principle and budget constraints must be considered by contracting authorities. In this instance the financial aspect must be taken into consideration to safeguard financial constraints.

**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, as a need to be material considerations. However further guidance is required regarding the proposed amendments to the exceptions in order to fully understand what criteria have been requested in identifying any conflicts with local requirements.

**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?**

No, it should remain the responsibility of the contracting authority in determining the process undertaken to regulate the evaluation outcome.

Further clarity is required regarding the objective of this proposal and how this can assist a contracting authority, for example, wider social benefits of public interest and how this would be governed.

**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, this area needs to be strengthened, however, there needs to be clear guidance regarding the conditions of exclusion regarding beneficiary ownership to ensure ground for exclusion is fairly applied.

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

Yes, tax evasion and breaches of the Data Protection, and Modern Slavery Act should be included in the exclusion grounds.

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 – this ground should cover all forms of professional misconduct, such as malpractice within in social care settings.

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

Yes. Clear guidance is required to determine when the grounds for exclusion may apply, for example in the instance a Director who may hold ultimate control of a company's interests may be questioned. This exclusion presents an opportunity to instil transparency ensuring that contracting authorities fully understand any potential conflicts.

**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. There is an opportunity to ensure both mandatory and discretionary grounds are brought up to date, fit or purpose from a public interest perspective.

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

Yes, however, clear guidance is instrumental in determining the circumstances.

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

Yes, however, there needs to be clear management, protection and transparency and clarity of how this can be determined. There is a requirement to manage risks of misrepresentation of a contractor for context e.g. a poorly written KPI which is ultimately breached may not reflect poor performance. Clarity is also required regarding how this can be considered by contracting authorities and how this list can also be mandated for all contracting authorities to refer to?

There needs to be a clear understanding of the principles of this list and how this would work in terms of pinpointing to a local/national branch of an organisation.

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

Yes, however, the contracting authority should govern how this would be measured. Further clarity regarding the proposed measurement at a local level is required.

There are concerns regarding how this consideration can be objectively applied whilst minimising any risk of discriminatory challenges being posed to a contracting authority. For example, the contracting authority may pose a differing view to another who has deemed past performance as unsatisfactory.

There is a requirement for clear evidence and to still approach and manage with caution.

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

Whilst a simplified process that is administered through a global registration system is welcomed, it is essential that the detrimental impact of removing the technical section is fully considered and where possible mitigated.

It is recognised that this approach would assist suppliers in the time requirements to participate within public sector contracting opportunities however there may be a contradiction between contracting authorities requirements.

Paragraph 131 references further criteria that can be applied to further reduce the number of bidders, further clarification is required regarding the detail and the points of assessment.

**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. The limits on the information that can be requested offer assurance to the contracting authority in the decision to exclude and/or disqualify a bidder. By removing limits on the information that can be requested, transparency is critical in disclosing relevant criteria setting out at what point can the contracting authority stop and exclude and/or disqualify a bidder.

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

Yes, however further clarity is required regarding the principles associated with the DPS+ procedure including clarity around timescales to evaluation entry applications and carry out call off's from the DPS+ model.

It was questioned what values could be attributed to the DPS+ procedure in comparison to establishing an open Framework Agreement in which new suppliers could join at fixed intervals.

The absence of the option to direct award is also perceived as a potential barrier to applying the DPS+, especially when re-procuring any contracts that were previously procured via the Light Touch Regime.

Charging fees or levy as detailed within paragraph 156 require additional clarity, there should be an emphasis on value for money, public sector-led DPS+ and Framework Agreements being established by contracting authorities determined by public sector needs and requirements and not in association for private sector organisations exploiting suppliers and contracting authorities whilst making profits that are not invested back into the public sector.

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

Yes, there is the agreement with the Open and Closed Framework proposal however further clarity is required to understand the full expectations.

It is questioned whether there would be any time restrictions mandated regarding call off's from the Framework Agreement. For example, could the maximum duration exceed the total Framework Agreement?

Clarification is also required in terms of the opening timetable for the Framework, and whether any restrictions will be imposed as to when the Framework can be re-opened i.e. could the guidance be stated as the Framework will open after the third year at intervals determined by the contracting authority?

There are concerns regarding the additional resources that will be required by contracting authorities to oversee this process and the subsequent risk of legal challenges from disgruntled suppliers.

Open frameworks, whilst welcomed, are anticipated to put an additional administrative burden on procurement teams so there is a need to manage expectations of the market.

There may be occasions encountered when a single provider framework could be considered more realistically for a longer term 'closed' framework – could this be considered? If not, this may result in a work around where a framework is a ranked provider framework to enable an open framework to be utilised.

As referenced within question 26, charging fees or levy as detailed within paragraph 156 require additional clarity, there should be an emphasis on public sector DPS+ and Framework Agreements being established by contracting authorities and not in association with private sector organisations exploiting suppliers and contracting authorities whilst making profits.

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

Yes, as required within the current regulation's, transparency should be demonstrated throughout the entire procurement process. There are concerns regarding additional resource and time implications required to comply with these standards by Authorities. There are serious concerns regarding the intention to publish Regulation 84 reports before the awarding of a contract and the additional risks associated with Authorities.

There are also concerns regarding Data Protection issues in how this approach may prevent organisations from applying for public sector contracting opportunities, due to the disclosure of opportunities they have participated within and their overall performance.

This will be extremely resource-intensive for procurement teams, therefore, needs to be intuitive technology used so less onerous – it is questioned, how will the Open Contracting Data Standard aid this?

There are certain elements of transparency that may cause issues with other legislation e.g. DPA and invite frivolous challenges from suppliers.

It is questioned in what benefit will there be in revealing of bidder identity will achieve as could cause unrest in the supply market and prevent supplier participation.

Clarity is required to address how will devolved procurement practices in contracting authorities be expected to comply with all the transparency requirements?

There are concerns regarding legal firms intentionally or maliciously scanning procurement outcomes to identify potential flaws or challenges.

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

Yes, NEPO member authorities are in the latter stages of building an end to end procurement system with development partners Accenture and AWS. The system will include a regional and central datastore, cleansing and rationalising all internally held procurement data.

The system will utilise built-in RPA to pull externally available data to enrich the internal data and supplement analytics dashboards.

The system will also include a code standardisation tool capable of standardising common and emerging procurement code classes (proclass/eclass/CPV and so on).

The purpose and use of a Register of complaints and a Register of legal challenges are questionable. Clarity is required regarding what is the value in making this information publicly available. However, contracting authorities are not averse to making data publicly available.

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

Yes, providing the central platform is developed entirely with a user focus and can be integrated with existing procurement systems. NEPO Member Authorities will have the capability to capture all procurement, commercial and supplier-related data through the regional developed system (outlined in question 28). Therefore, the only current perceived value for the region with an additional central platform would be in data comparison with other regions and sectors – of which we shall already have good and progressive capture capability through the RPA data pull and enriching.

NEPO member authorities are actively moving away from system fragmentation, broken data chains and operational waste. We would want to ensure that any mandated central digital platform was a) scalable, b) did not create data flow barriers and/or c) disruption to the regional data and technology ambitions.

**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, but there are concerns expressed as to the unintended consequences of a faster, cheaper route as this would be a significant change to the current process.

A faster pace would be beneficial to prevent the lengthy delays encountered and the consequent negative impacts on services and users. However, there are concerns that the potential increase in the volume of procurement challenges would present a problem in terms of resource implications and vexatious challengers.

It would be beneficial for clarity to be shared regarding how the proposed reform would work in conjunction with the proposed unit.

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

No. It is questioned as to whether contracting authorities could call upon the unit for an independent review.

Most contracting authorities would immediately undertake a review in the face of a challenge it would therefore be preferable for an independent review to be undertaken, possibly from a neighbouring authority, based on queries/concerns raised by the challenging bidder.

**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 possibility to resolve procurement claims as quickly as possible would be welcomed. However, there is a need to consider the risks of increasing the level of procurement challenges, the additional resource implications and associated costs.

Further clarification is required regarding the definition of low-value claims and existing tribunals as the tribunal should have specialist knowledge of procurement processes and applicable legislation.

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

Yes, as this protects the public purse and the majority of challenging bidders are interested in halting the procurement process with a view to the tender process being re-run.

**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.**

Yes, a procurement-specific test is welcomed however, it is unknown how the changes impact in comparison to the current testing.

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

Yes, in principle, however, the legal fees could still be significant in value. It is questioned what is the rationale for applying the cap to be based upon legal costs?

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

We would propose that there should be a universal and concise assessment mechanism for bid costs to be assessed.

**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, this will be based upon the exceptional circumstances associated with the crisis.

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

Yes, in principle however additional information is required on the level of detail which is needed as 'Winning bidder information' under the Award Notice. Further clarity is required regarding the proposed change to debrief letters to fully understand the impact for contracting authorities.

The removal of the requirement to set out the relative advantages of the winning bid is hugely welcome but the replacement of a formal letter with the much more burdensome process set out in Chapter 6 will be costly and time-consuming. Bidders, especially SME's, find some form of feedback essential in order to help them with future bids. Removal of the debrief letters may lead to a lack of 'finality' for bidders who will still approach councils for feedback.

Further clarity is also required to determine transparency requirements regarding any abandoned procurement exercises, the level of detail required and whether this would also need to be published within the public domain.

**Q39. Do you agree that:**

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

There is already legislation in existence that offers an escalation route, there are however potential concerns regarding any supplier who does challenge and the longer-term impact and how this may interfere with relationships in the longer term.

It is also noted that the supply chains within central government are different to local government, will this be reflected?

What would the extent of the contracting authority in this situation?

- **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 – contracting authorities should monitor payment performance routinely within contract management responsibilities. Where issues are identified, the contracting authority should work with suppliers to improve payment performance. There needs to be a consideration regarding the resource implication required to do this, especially where staffing teams have significantly reduced over the past 10 years.

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

Yes, continuity is key to establish a level playing field and shared based on a standardised approach.

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

Yes. The proposed publishing requirements of transparency and implementing the standstill period causes concerns for authorities. This is of particular concern for works notices when changes may only reflect confirmation of requirements rather than a genuine contract amendment.

We would like to see more freedom to amend contracts where a substantially different delivery

mechanism is identified in mid-contract. There are substantial economic, environmental and social costs of contracting authorities encountering live poor contract performance which are challenging to exit due to the associated costs being prohibitive. Contracting Authorities do not have perfect foresight, contracts cannot anticipate every eventuality, and society, economics and technology change rapidly. COVID19 has identified in many cases contracts could be performed very differently – for example substituting digital for face-to-face services.

Clarity is required to confirm that this approach is adapted for all contracts? It is felt that there is a strong requirement of proportionality consideration as the 10% may be onerous. There are concerns, a consequence of this proposal could create an industry in itself to maintain and publish.

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

As per NEPO's response to question 40. There needs to be a consideration of how scope and proportionality can be adequately captured.

**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?**

Yes, based upon the basis that the procurement challenges, this should be considered based upon its own merits.

**Further comments**

- The Public Services (Social Value) Act 2012 to also be considered for incorporation within the extent of the regulations and linked to the threshold values to ensure social values is well embedded into the procurement process.
- The rationale applied to consider national policy considerations is recognised however there needs to be consideration replicated at a national level for all service areas in local government and conflicting requirements.
- Legal Challenges and timescales –current regulations stipulate timescales regarding challenges raised. Clarification is required regarding timescales and any proposed amendments. Paragraph 201 references the proposed system, are there designated timescales regarding challenges raised?
- Paragraph 165 references the proposed legislating to embed transparency by default throughout the commercial lifecycle from planning through procurement, contract award and performance. Contracting authorities would be required to disclose procurement and contract data as soon as practically possible and significantly increase transparency in the public procurement regime. Contracting authorities would be required to declare in their tender documents when information would be disclosed and justify what, if any, information is to be treated as commercially sensitive. Suppliers would be able to bid with a better understanding of the expected transparency requirements and the timetable for when data should be released. Clarification is required as to whether this will include evaluation data.