

# Transforming public procurement

**TUC response to green paper  
consultation, March 2021**



# Introduction

The TUC represents the 5.3m members of 55 trade unions in all sectors of the UK economy.

We welcome this consultation on proposed changes to procurement regulation. We have long argued for a more strategic and intelligent approach to public procurement that leverages the purchasing power of the public sector in support of employment standards, jobs, skills and economic development.

We note that the Green Paper claims that these proposals have been informed by prior consultation with 500 stakeholders and the Procurement Transformation Advisory Panel. Given the TUC's commitment to procurement reform and significant prior engagement with the Cabinet Office, HM Treasury and Crown Commercial Service in this policy area, it is disappointed that trade unions were not part of this process from the outset.

Evidence shows that outsourcing has a detrimental impact on pay, terms and conditions of the outsourced workforce. Analysis by the New Economics Foundation and Landman Economics for the TUC found that across six key metrics, including hours, pay, job tenure and qualifications, workers in the public sector had better standards than those performing the same jobs in the private or voluntary sector.

Reports have shown that outsourcing companies used by the government have worse gender pay gaps than the civil service. Of the 27 "strategic suppliers" paid tens of millions of pounds by the government each year, 18 have wider disparities than in civil servants' earnings.

Attempts have been made previously to change the culture of public procurement, from a lowest price model to one that is more strategic in scope and focused on social value but with varying degrees of success – we have yet to achieve a transformation in the way public procurement is undertaken across all contracting authorities. For example, as research by Social Enterprise UK demonstrates, uptake of the Social Value Act has been patchy and inconsistent. They found that only 24 per cent of local authorities have a social value policy, about a third of all councils routinely consider social value in their procurement and commissioning and that where councils score social value when scrutinising tenders, the score is typically between 5 and 10 per cent of the overall points awarded.

It is also crucial that we use this process to restore public confidence in the credibility, probity and efficacy of the procurement process, given the track record of poor procurement practice undertaken by the government during the coronavirus pandemic as highlighted by the National Audit Office, Public Accounts Committee and High Court rulings.

We hope that the government uses this opportunity to undertake an ambitious change in the way that public procurement is regulated but also puts in the resources to ensure that contracting authorities have the capacity to deliver the step change we need.

## Responses to questions

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

The TUC has long argued for leveraging public procurement to support strategic priorities and to achieve social and environmental value beyond the primary benefit of the specific contract. The TUC has recently called for leveraging public sector procurement and spending in regions to help in the economic recovery

We welcome the inclusion of public good, defined to mean “the delivery of strategic national priorities including economic, social, ethical, environmental and public safety.” We believe that there is opportunity to go further and include strategic local and regional priorities alongside national.

However, the realisation of this in practice will depend on three things:

- (i) how it will be mandated within the legislation – will this principle be a compulsory obligation on contracting authorities to adhere to
- (ii) how it will be prescribed through the National Public Procurement Statement (NPPS) and through specific guidance on social value provided by the Cabinet Office and
- (iii) how capacity will be built within contracting authorities to deliver it.

To date, initiatives such as the Outsourcing playbook and Construction playbook and the Social Value Act have not had the impact we would like to see on procurement policies with variable and patchy uptake and implementation.

The newly developed Cabinet Office unit, with its broadened membership as we set out, should have a responsibility for ensuring that the NPPS and any subsequent guidance promotes this principle of public good in a way that encapsulates broadly defined social and environmental criteria, including employment standards, and enables local flexibility.

There should be wider consultation on the guidance issued by Cabinet Office and National Public Procurement Statement, and future changes to it, as these are central to how public procurement will work and will only be known after this consultation closes.

Ultimately, TUC support for the legal principles is dependent on how effective they will be in incorporating and promoting employment standards through ‘good work’ criteria throughout supply chains. It should be a strategic priority for government.

In its response to the Taylor Review, the Government accepted “the overarching ambition that all work in the UK economy should be fair and decent with realistic scope of development and fulfilment” and that “the case that good work can lead to greater performance and therefore increased productivity is strong”.

The government therefore committed to "take the necessary steps to achieve this" with the vision of "good work and greater earning power for all". The response outlines five key principles which the Government believes underpins the quality of work:

- Overall worker satisfaction
- Good pay
- Participation and progression
- Wellbeing, safety and security
- Voice and autonomy

The creation of good work across the UK economy is a strategic objective of the UK government set out in:

- the Good Work Plan
- UN Sustainable Development Goal 8 on decent work
- the G20 statement on good work.

Given this strategic objective, we think that procurement should include criteria aimed at the key objectives of the Good Work Plan, including fair pay; participation and progression; wellbeing, safety and security; and voice and autonomy.

Good work also features as a strategic priority in sub-national government, for example through the Mayor of London's Good Work Standard, the Greater Manchester Combined Authority's Good Employment Charter and Liverpool City Region's Fair Employment Charter – as well as local authority level initiatives.

There is a notable absence of mentions of equality or protected characteristics. The Public Sector Quality Duty principles should be adhered to by contracting authorities and those with whom they contract.

***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?***

Reviewing the value for money and efficacy of public procurement is ripe for reform. In a [TUC-commissioned report](#), Tizard and Walker argue that audit of public procurement is problematic and fragmented, particularly since the demise of the Audit Commission in local government, with different audit regimes across sectors and dominance by the big four private audit companies. While the National Audit Office undertakes useful reports, its reach is not systematic and its recommendations not always followed through on either by PAC or government.

The report calls for new powers of audit across the public sector for the NAO along with the establishment of a new statutory body with a "specific mandate to assess the efficiency,

effectiveness and equity of outsourcing, procurement and contract performance across the public sector”.

The unit should also take responsibility for measuring progress against the principles, driving continuous improvement and sharing best practice from contracting authorities in the UK and globally.

Our proposed membership would allow for not only seeking improvement in capability but measuring this and continuing to improve it into the future to meet existing and emerging national and global priorities e.g. in a just transition to climate change or tackling unemployment.

Such a unit, subject to its membership, should also have a responsibility for aiding transparency in contracting drawing on new data transparency proposals and heightened audit powers for the NAO to focus on key themes, e.g. relationships between political leaders and decision makers in contracting authorities and suppliers.

***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?***

The panel should be constituted in a way that enables it to cover all the legal principles set out, including the public good. As such, its membership should be drawn from a broad range of partner organisations, including those with a stake and interests in the public good elements.

This should include:

- experts on social value procurement,
- global initiatives on ethical sourcing and supply chains,
- civil society organisations and those representing local communities/service users
- trade unions that represent the workforce impacted by outsourcing
- suppliers (SME's, larger organisations and voluntary and community sector)
- local government, health and representatives of other contracting authorities

The panel should foster collaborative and partnership approaches to improving procurement practice and how it can be developed to meet changing national and global priorities.

It should be mandated to produce reports, whose recommendations must inform and shape the work of the Cabinet Office and Crown Commercial Service. There must be a mechanism to feed in views and voice concerns.

A diverse membership of the unit would overcome the power imbalance in procurement and social value, in those who it is done to or on behalf of are not always included in the decision making process.

If the unit is to have 'oversight' and to drive improvements that deliver better value – economic, social, environmental or otherwise – then a diverse membership is required.

There must be transparency on recruitment to the panel and how it operates, with participation subject to the Nolan principles. Such a panel and how it operates must manage and address both real and perceived conflict of interests of panel members.

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

The benefits of moving to one framework have not been clearly spelt out. Questions remain about how this will interact with the Social Value Act, particularly given that guidance and the NPPS might offer more or less than the Act. We agree with consolidation and simplification of regulations on the condition that

- (i) sector specific exemptions are permissible and
- (ii) that the current regulations retain or improve upon existing social value measures set out in the PCR 2015, including compliance with 56(2) and 57(8)(a) and relevant obligations transcribed from Annex X of the EU Public Procurement Directive 2014.

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

Single source contracting should be maintained in relation to defence and security sectors in order to nurture UK supply chains in the interest of national security and resilience.

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

The proposed changes must not risk over-simplifying the procedures, losing important protections and safeguards around transparency and social value in the process.

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

It is unclear why this change would be required, given existing provision for use of limited procurement in cases of “extreme urgency due to unforeseeable events” and it is not entirely clear from the paper where the current ambiguity exists.

Given the track record of government procurement during the pandemic in terms of quality, due process and value for money, this proposal causes some concern. This is particularly so, given the proposal that contracts let under this limited procedure “would be excluded from the risk of automatic suspension preventing contract award” – although still subject to post-contract remedies.

A more sustainable, open and resilient approach would be to build and utilise public sector capacity to deliver at times of crisis. More effective ‘make or buy’ decisions in a time of crisis may lead to better utilisation of in-house services. The Test and Trace system as one

example, has highlighted the concerns with contracting in a crisis, where local authorities have tended to out-perform the contracted out service provision.

Beyond equipping the public sector to deal with crisis, preparations for the next 'crisis' could include the establishment of an approved supplier list of providers that could be contracted with, through some form of dynamic purchasing, in the event of such situations. This would have the benefit of open, fair and transparent selection and award but also would support an active industrial strategy seeking to build supply chains, particularly within the UK. While this list may contain generic as well as specialist providers, the utilisation of manufacturers in the provision of PPE and ventilators in the Covid-19 crisis demonstrates the flexibility that can be applied by generic providers in situations of this kind.

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

A broadly drawn panel of experts with a broad remit could build networks within the UK and globally to draw on and develop good practice while providing the networks to share that good practice and build capacity to deliver new innovation.

An example might be the work undertaken by the National Social Value Taskforce TOMS framework.

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

Existing provision within the Most Economically Advantageous Tender (MEAT) criteria set out in the EU Directive, enabled a social value approach to procurement, provision that was growing but still under-used.

Rebranding this as Most Advantageous Tender would be helpful if accompanied by a National Public Procurement Statement and Cabinet Office guidance that captured a broad range of metrics. This should look to include, but not limited to:

- Creation of decent jobs in local communities
- Fair pay, including adherence to national and collective agreements, real living wage etc
- Good employment standards, including trade union recognition and access
- Health, safety and wellbeing
- Equality, including improving on pay gaps and in recruitment
- Assist in a just transition and net zero ambitions
- Education and skills development of workers, including training and apprenticeships

It should also allow for the inclusion of what was advantageous to local communities, giving some latitude to local politicians and leaders to seek wider improvements and deliver social value.

In removing 'economically', attempts to shift away from it being a cost-based decision only should see that any guidance clearly states that decisions must be broader than price and be explicit in including the metrics set out above.

It would also need to ensure capacity was developed across contracting authorities to deliver on this.

However the ability to benefit from this change will be governed by the NPPS and the Cabinet Office guidance that follows, which may be too prescriptive. The Government should consult widely, including with trade unions, on guidance that is used to support the move to MAT.

***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?***

Outsourcing has often led to downward pressure on wages, pensions and employment standards. Evidence varies but work that the TUC commissioned in 2015 shows that for a range of public service occupations, standards of pay, job security, job tenure and hours were worse in the private sector compared to the public sector.

We know that there are business benefits attached to the promotion of good work as well. Good work policies and employment standards have a direct bearing on the subject matter of the contract.

For example, we know from surveys that turnover of care staff is a crucial issue since continuity and familiarity are key concerns for people in receipt of home care services. And we know councils have reported improved turnover since adopting policies as part of Unison's Ethical Care Charter – see evidence from LB Southwark and LB Islington.

It is essential for all contracting authorities understand that the potential provider's workforce will be provided with the kind of skills, remuneration and reward, engagement and representation and well-being and safety that will boost quality and productivity. This would seem applicable to any contract in question.

The use of "specific exceptions set by the Government" causes concern, as does how "subject matter of the contract" will be defined. We believe the subject matter of the contract should be broad enough to include good work standards for those working on the contract or producing the goods and services that are procured including the criteria listed in question 13.

A more expansive approach to the setting of public good principles in the NPPS and Cabinet Office guidance would mean that a greater range of social and environmental



criteria could be included within scope of the subject matter of the contract, social value would become core without being seen as an add-on subject to Cabinet Office approval.

There should be a more permissive and enabling approach that achieves a balance between localism and flexibility with consistency by setting broadly defined parameters but enables contracting authorities more scope to identify social value priorities and criteria for themselves.

The Government should consult on its planned list of 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?***

We support this proposal as (i) leveraging procurement in support of strategic priorities means value will accrue beyond the immediate contracting authority, e.g. across sectors and enterprises in the local economy and (ii) there may be benefits or savings that impact on other public bodies, e.g. environmental or safety criteria within a local authority contract may lead to benefits for the local health and social care system.

This value should be captured, as far as possible, and used within evaluation.

***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. There is a question about who is involved in such fraud that would see them excluded whether this is directors, decision makers or beneficial owners? Who it is we are judging and holding to account needs to be clearer, so as to ensure such exclusions work well.

The principle of who within an organisation, or what part of an organisation, should be held accountable applies to all grounds for exclusion and should be set out more clearly.

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

The current discretionary exclusion set out in 57(8)(a) in Public Contracts Regulations 2015 should be made mandatory.

Furthermore, we believe that elements of tax policy and practice should be included within exclusion grounds, including companies not domiciled in UK for tax purposes and/or not paying UK tax. Those seeking to tender should have to declare their tax policy publicly/to the contracting authority.

There should be wider consultation on planned mandatory and discretionary exclusion grounds.

**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

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

Yes, but the scope for this and how it works in practice should be consulted on widely. Responsibility for this list, where it lies and who will make decisions on it are important if there is to be confidence in its purpose and its application.

It needs to allow individuals or organisations to recommend inclusion on such a list, including from trade unions and workers, and contracting authorities. As we have seen with the practice of blacklisting concerns were raised about companies involved continuing to receive public funding. Such a list would need to address these matters to be worthwhile.

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

We support the proposals to make past performance easier to consider, particularly through the use of performance against KPIs captured in a central, transparent registry – as opposed to current narrowly defined contract failures.

We would want the KPIs to include performance on employment standards, including recruitment, retention, remuneration, employment status and well-being of employees.

Performance should also take into account the wider company, including their financial exposure in other sectors and international markets. As we have seen with some of the large outsourcing corporations, financial performance on other contracts has created a risk. This performance should take into account their employment practices.

We would like to see a mechanism in which key stakeholders, including trade unions, can report and lodge complaints about performance of contractors.

We support measures that require public bodies to exclude suppliers where there is clear evidence of human rights violations in supply chains, or their business activities contribute to or are linked to a violation of international law and human rights, which relates to obligations in the [UN Guiding Principles on Business and Human Rights](#)

- "The responsibility to respect human rights requires that business enterprises: Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."

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

Yes

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

Yes

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

Carillion was a major supplier to the public sector, with over 450 contracts across health, education, transport, criminal justice and local authorities, bringing in £2bn, 38 per cent of its total reported revenue in 2016. We also know that the company had a complex structure comprised of over 300 subsidiary companies.

This scale and complexity is replicated across a number of large private sector outsourcing companies. Yet given the crucial role that these organisations play in the delivery of a vast range of core state functions, the lack of information on who runs what, for how long, at what cost and to what level of quality is alarmingly scarce.

According to the National Audit Office, the public sector spends more money on contracts than it spends on providing services itself. During 2014-15 it spent £242 billion (31 per cent of total government spending) on external suppliers, compared with £194 billion on staff costs.

However, this figure includes goods, services and construction. We can only estimate what proportion of this is spent on outsourced services as there is no systematic collation of data on outsourcing across the public sector.

In 2015, the TUC commissioned the New Economics Foundation to undertake research into the level of outsourcing in various government departments. Freedom of Information (FOI) requests were sent to thirteen government departments requesting details of expenditure on contractors for out-sourced public services. However, as there is no agreed definition of contracted-out services this was not expected to be especially fruitful. Only two departments, the Department for Environment, Food & Rural Affairs (DEFRA) and Foreign & Commonwealth Office (FCO) had replied to the FOI requests by the time we were able to publish our findings, both explaining that their departments do not hold information regarding expenditure on contractors for out-sourced public services, and that it would incur undue expense to collect the data.

Neither the Cabinet Office nor the Treasury have reliable or complete data on contracts let in Whitehall, no consolidated data exists for the NHS, local government or the devolved administrations. The National Audit Office itself points out that there is too little

information in the public domain to conduct an effective analysis of the performance, rewards and governance of major contractors delivering publicly funded services.

This presents an accountability deficit - citizens and elected representatives should have easy to access information on who runs which parts of our public services. But it also a barrier to intelligence on performance and quality that could be shared between public sector organisations, informing better commissioning decisions and driving innovation and joined up government.

We would therefore support the recommendation of Tizard and Walker in their report for the Smith Institute that "the government should compile a Domesday Book listing all significant contracts and create a central clearinghouse for evaluating the performance of companies across multiple contracts" – at least above a defined threshold of contract value.

We support open data and transparency across the procurement process in order to:

- (i) increase accountability
- (ii) enable better scrutiny
- (iii) allow contracting authorities to share intelligence and make better judgements and
- (iv) provide evidence on KPIs that informs better procurement decision making.

We support a central database would include the names of all suppliers of goods and services above a given threshold, cross-tabulated with specific contracts allocated.

The database should include:

- the names of the contractor
- beneficial ownership details
- major shareholders if a quoted company
- the names of partners if a consortium
- identity of Tier 1 and Tier 2 sub-contractors

Corporate data included in the database should include:

- the value and percentage of corporate turnover formed by public sector contracts
- the gender, disability and BAME pay gap
- trade union recognition
- location of corporate headquarters,
- geographical distribution of staff and proportion of turnover in the UK
- contractors' staff diversity
- company tax policy, Fair Tax Mark qualification and the estimates of UK tax paid
- remuneration policies and practice.

The database would archive and analyse:

- copies of the contract and any significant renegotiated terms
- the length
- service specification
- value and annual contractual payments
- the contract default and cancellation terms.

The database should establish a means of identifying suppliers, for example by their company or charity numbers.

Through discussion with councils, NHS trusts and government departments, the database would be able to assemble and appraise key objectives set by them in letting a contract.

The database could compare and contrast contracts, examining contractors and processes and promoting discussion.

The database would establish lines of communication to audit, risk, scrutiny and oversight committees to deliver updates on contracting trends and alerts about contractors, ensuring that its material was in an accessible and intelligible format to all citizens and service users.

In order to ensure the database remained fit for purpose, new protocols should be established that would ensure:

- public bodies and contractors would ensure data was kept up to date
- data should be verifiable and open to the maximum degree, with commercial confidentiality tightly defined and exceptional
- a named lead official responsible for the database and for enquiries from other public bodies
- data should be accessible via an internet portal, after agreements on
- access, security, applicability and Freedom of Information.

The data held should be used when considering past and current performance, as set out in question 22 under the proposal to consider past performance.

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

The recent experiences and reporting on contracting during the Covid-19 crisis would give us concern to see changes that reduce transparency and accountability.

As is set out in answer to question 7, the Government has other options to pursue that would make us more resilient in times of crisis. A strong and resilient public sector would

reduce the need to contract others to deliver services, and a pre-approved supplier list in contingency planning for future crisis' would avoid the waste we have seen in purchasing goods and services that were unfit for purpose or unable to deliver during Brexit transition and Covid-19.

There must be in place an open and transparent mechanism and decision making process for contracting during any crisis, that is in addition to building the capacity set out here.

**Q39. Do you agree that:**

- ***businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?***
- ***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?***
- ***private and public sector payment reporting requirements should be aligned and published in one place?***

Enabling businesses in the public sector supply chain to have direct access to contracting authorities to escalate late payments is a necessary step to counter the asymmetrical and disproportionate allocation of risk between contractors and sub-contractors in the supply chain.

But we think the proposals should go further to enable workers to seek similar remedies up the supply chain.

The use of sub-contracting tiers through public sector supply chains means that employment relationships, which on the face of it seem straightforward, often involve labour market intermediaries not directly involved in the day-to-day interactions between the worker and the organisation that directs their work.

There are grounds for better regulation of supply chains, contracting authorities do not contract out of their responsibility for maintaining decent employment standards throughout supply chains.

TUC research estimates that at least 5 million UK workers are unable to bring a claim against the organisations that they do work for, to enforce their basic workplace rights:

- 3.3 million are employed through outsourced companies;
- 615,000 are employed by franchise businesses;
- At least 1 million are employed by recruitment agencies, umbrella companies and personal service companies.

The TUC is calling for improvements in the enforcement system, which will make it impossible for organisations to shrug their shoulders and look the other way when the

people who do work for them are not receiving their core workplace rights. More collective bargaining and improvements in state led enforcement are necessary to restore accountability to the fragmented employment relationships that have developed as a result of outsourcing in the UK labour market.

This fragmentation of the labour market makes it more difficult for workers to enforce their employment rights, through

- (i) confusion over who their employer is and who has responsibility for employment rights
- (ii) restricted access to employment rights
- (iii) deteriorating terms and conditions and
- (iv) breaches of basic workplace rights.

We believe these proposals should also seek to restore accountability to the fragmented employment relationships in the labour market and make sure that organisations that rely on people to do work for them have a legal responsibility to protect their workers' core workplace rights.

This should include extending existing legislation so that organisations who use strategies to transfer their obligations to other parties, can be found liable for any breaches of core employment rights of the people who do work for them.

As an initial step, the TUC proposes that workers should be able to bring a claim for, say, unpaid wages, holiday pay and sick pay against contracting authorities.

We believe there are many reasons for this:

- Organisations should take greater responsibility for the people that do work for them
- It opens up further avenues for a worker to seek compensation
- It ensures that where a company goes insolvent, in phoenix cases or where the employer disappears, workers still have a course of action to enforce their rights
- Widened liability would make contracting authorities more diligent and careful in choosing and seeking information on their contractors and subcontractors
- Widened liability would strongly incentivise the contracting authority to risk assess and tackle potential breaches of employment standards in their supply chains
- It incentivises the creation of more secure, permanent employment, as less contracting authorities are willing to take the risk of working with contractors who might create liabilities for them.

Under existing domestic law, employers using the strategies outlined above already have legal obligations to the people who do work for them, regardless of whether they are directly employed. If they breach these rights, they will be liable for providing a remedy to these workers.

The TUC is proposing an extension to these existing laws. We would like to see contracting authority being legally accountable for labour standards in their supply chains.

Contracting authorities should ask at the early stages who contractors might use in sub-contracting, to better manage any risk from this.

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

Contract amendment notices should be published as part of the database requirements set out in answer to Q29.