



**dated 10th March 2021**

**Response to the publication of the Green Paper published by the Cabinet Office, entitled "Transforming Public Procurement"**

by the South East Consortium for itself and on behalf of its members

## **Response to the publication of "Transforming Public Procurement"**

### **1 Introduction**

- 1.1 The Green Paper on the post-Brexit reform of public procurement law has been issued by the Cabinet Office for consultation, inviting views on the proposed reforms, in terms of general feedback and responses to specific key questions.
- 1.2 South East Consortium has engaged with its members via a consultation event, where feedback was requested from stakeholders on all aspects of the Green Paper.
- 1.3 This document sets out the response of South East Consortium on behalf of itself and its members. This response does not address every question posed in the Green Paper, but focusses on the key issues raised in the consultation event.

### **2 South East Consortium**

- 2.1 South East Consortium (SEC) is a central purchasing body, operating as a not for profit organisation providing services relating to public procurement. We were specifically created to support the housing sector, established in 2005 and retain our heritage by being a Membership organisation owned by 39 Housing Associations and Local Authorities. Our Members across London and the South East own approximately 400,000 homes between them.
- 2.2 We run a significant amount of procurement activity per year and in this financial year would have run approximately 125 procurements totalling £140,000,000 of public sector spend.
- 2.3 As such, we felt it suitable for us to respond to the consultation in respect of the local authority and housing market and also the proposals around Chapter 5: Using the best purchasing commercial tools.
- 2.4 We ran a briefing on the 15th January 2021, specifically around the proposals of the Green Paper and its impact on the sector we serve. The session was joined by 45 procurement professionals from our member organisations and our response has been structured in consultation with them.

### **3 Our Members**

Our members are local authorities and housing associations including:

|                               |  |
|-------------------------------|--|
| Arhag Housing Association     | Gravesend Churches Housing Association |
| Ashford Borough Council       | Gravesham Borough Council              |
| Barnsbury Housing Association | Hastoe Housing Association             |
| Basildon Borough Council      | Hexagon Housing Association            |
| Dover District Council        | Home Group                             |
| Eastbourne Homes              | Inquilab Housing Association           |

|  |  |
|--|--|
| Keniston Housing Association           | Radcliffe Housing Society                |
| Lewes District Council                 | Raven Housing Trust                      |
| Lewisham Homes                         | Sapphire Independent Homes               |
| Local Space                            | Silva Homes                              |
| London Borough of Enfield              | Sutton Housing Partnership               |
| London Borough of Hackney              | Thurrock Council                         |
| London Borough of Hammersmith & Fulham | Town & Country Housing                   |
| London Borough of Islington            | Walterton & Elgin Community Homes (WECH) |
| London Borough of Southwark            | Waltham Forest Housing Association       |
| Moat Homes                             | Wandle Housing Association               |
| Optivo                                 | Wealden District Council                 |
| Origin Housing                         | West Kent Housing Association            |
| Phoenix Community Housing              | YMCA                                     |
| Providence Row Housing Association     |  |

#### 4 **Our Frameworks**

4.1 We are currently procuring the following framework agreements:

4.1.1 Asbestos Removals Framework;

4.1.2 New Build Development; and

4.1.3 Zero Carbon Framework.

4.2 Our existing framework agreements are set out in the table below:

|                                    |                             |                     |
|------------------------------------|-----------------------------|---------------------|
| Access Control Systems             | OJEU Ref: 2019/S 202-492055 | Expires: 16/03/2024 |
| Estate Cleaning Services           | OJEU Ref: 2019/S 092-222753 | Expires: 23/12/2023 |
| Asbestos Removals                  | OJEU Ref: 2017/S 122 247184 | Expires: 15/10/2021 |
| Fire Remedial Works                | OJEU Ref: 2017S 228 474512  | Expires: 19/02/2022 |
| Heating And Compliancy Management  | OJEU Ref: 2019S 115-282443  | Expires: 9/12/2023  |
| Internal & External Building Works | OJEU Ref: 2019/S 078-184728 | Expires: 22/10/2023 |

|                             |                             |                     |
|-----------------------------|-----------------------------|---------------------|
| Lifts                       | OJEU Ref: 2019/S 201-488928 | Expires: 16/03/2024 |
| Pest Control                | OJEU Ref: 2017/S 187 383143 | Expires: 01/01/2022 |
| Consultancy Services        |                             | Expires 05/02/2025  |
| Asbestos Inspections        | OJEU Ref: 2020/S 098-236154 | Expires: 17/08/2024 |
| Fire Consultancy            | OJEU Ref: 2017S 246 514943  | Expires: 02/04/2022 |
| Heating Consultants         | OJEU Ref: 2018/S 073 162304 | Expires: 18/07/2022 |
| Legal Services              | OJEU Ref: 2018/S 007 011521 | Expires: 29/05/2022 |
| Electronic Payment Services | OJEU Ref: 2018/S 226-517436 | Expires: 09/02/2023 |
| Waking Watch Services       | OJEU Ref: 2020/S 119 290700 | Expires: 10/12/2024 |

## 5 Saving provisions and general information

- 5.1 The views set out in this paper are those of South East Consortium, a central purchasing body which specialises in public procurement and practices procurement in a transactional context on a daily basis.
- 5.2 Please note that we have limited our response to the Green Paper insofar as they relate to procurement in the housing sector and to those that we can usefully and insightfully comment upon. We would be delighted to have the opportunity to discuss these further with the Cabinet Office, should this be of benefit.
- 5.3 For ease of reference, we have divided this Response into two Parts:
- 5.3.1 **Part 1** – general comments and our comments on legal issues, practice and policy not included in the Green Paper.
- 5.3.2 **Part 2** – Answers to a number of the specific questions raised in the Green Paper.

## Part 1

### General Comments

#### 1 **Emphasis of the Green Paper**

- 1.1 We fully commend and endorse the principles and objectives set out in the Green Paper. However, all of our members (and SEC as a central purchasing body) are sub-central government contracting authorities. As such, it is felt that a significant amount of the Green Paper does not fall directly within our experience and practice of procurement law and is, instead, aimed at central government departments and written with them in mind.
- 1.2 As an example of this, the proposals for a Procurement Oversight Unit (Chapter 1) sit easily when considering central government procurement. In contrast, some of the proposals (eg. intervention powers where the Unit could impose spending controls over housing associations and local authorities) provoked significant criticism from our membership.
- 1.3 There is a risk that if the Green Paper is developed too far in this direction, sub-central government authorities such as housing associations, local government and bodies governed by public law, become "second-class citizens" as regards the fitness-for-purpose of the new post-Brexit procurement rules. The proclaimed modernisation and simplification of the new public procurement rules will only benefit our members organisations if the new rules are supportive of, and drafted in cognisance of, sub-central (as well as central) government procurement practice and the potential barriers and difficulties that need to be overcome.
- 1.4 We are also concerned that the new National Procurement Policy Statement has not been published and whether this is central-government focussed in its aims and objectives. It is unfortunate that the Green Paper requests feedback on the appropriateness of the new principles of procurement but has not published (what we anticipate to be) the key instrument to be used by Government to set out their strategic priorities.
- 1.5 We understand that there was limited engagement with the housing sector ahead of the publication of the Green Paper and we would very much welcome the opportunity to discuss our response with the Cabinet Office ahead of the publication of primary legislation.

#### 2 **Format of the new rules**

- 2.1 We also understand that there may well be a shift away from "hard law" to more "soft law" instruments. This is a key area of risk for both our members and our framework suppliers.
- 2.2 The need for certainty - in terms of policy, process and practice - is key. The transition from the procurement rules being largely contained within statute/statutory instruments to guidance or similar as well may be misunderstood by some procurement officers as somehow making compliance with it optional.
- 2.3 Further, it seems at odds to aim for simplification of the rules but end up spreading the remaining rules across primary legislation, secondary legislation, a National Procurement Policy Statement, statutory guidance (presumably), PPNs as well as case-law. We query

whether, word for word, we will end up with any less verbiage than is currently represented by the 350+ regulations currently governing public procurement?

### 3 **Guidance**

- 3.1 An assumption that runs through the Green Paper is the need to upskill and train procurement officers in order to ensure that the flexibility and commerciality enabled by the new rules is seized upon. We also note that the Cabinet Office intends to provide written guidance on a number of terms and practices included in the new procurement rules. We welcome this approach. It should be noted, however, that there is considerable difference between someone receiving training and upskilling as a result of such training.
- 3.2 We are concerned that the guidance should be clear and concise to avoid confusion or misinterpretation/misapplication by contracting authorities across the UK, but not so brief that it does not represent a useful guide to clients/contractors alike and cannot be applied practically and consistently by contracting authorities. Further, we would recommend that any examples or guidance adopted by the Cabinet Office recognise the wide range of stake-holders that will read and use such guidance, and that it is cast in terms and provides examples that also lie outside central government practices and procurement approach.
- 3.3 Further, we would recommend that such guidance is published via separate/topic-specific guidance papers, similar to the guidance that was issued following the 2006 Regulations. Feedback from clients and contacts on the training guidance for the 2014 Directives was that, whilst comprehensive, it covered too much, in not enough detail and was too central-government focussed. If these comments could be addressed in any new guidance, such guidance would be well received by the wider procurement community.

### 4 **Omissions**

- 4.1 There are a number of procurement tools and provisions in the current Public Contracts Regulations 2015 that are not mentioned in the Green Paper (eg Regulation 12 and the "Teckal" and shared services exemptions). We have presumed that this is because they will remain as currently drafted and be transferred across in their entirety to the new procurement regime. Nevertheless, there are some elements of the current regime that would be good to address in the new procurement rules moving forward, including:
- (a) Abnormally Low Tenders;
  - (b) Below threshold contracts;
  - (c) Selection Questionnaires for Below Threshold Contracts (Regulation 111);
  - (d) Leaseholder consultation;
  - (e) Coverage;
  - (f) Development Agreements; and
  - (g) Social Value.

5 **Difficulties concerning interface between public procurement and leaseholder consultation rules**

We would propose a revision to the leaseholder consultation rules so as to cover framework agreements. Currently the leaseholder consultation requirements do not marry up with frameworks very well and cause a lot of confusion across the sector. When a framework is to be used, nominations must be sought when requested by leaseholders, but contracting authorities cannot add the nominated contractor to the framework so this conflicts with the procurement rules. We would suggest a process is included for call-off from frameworks that simplifies what is required, and allows a flexible approach to be able to add nominated contractors to the framework agreement, or alternatively to remove this requirement for nominations when using a framework agreement.

6 **Below threshold rules set out in PPN 11/20**

If the direction of travel provided by PPN 11/20 is about directing customers to a specific route to procure to engineer social value outcomes relative to the value of the project, we do not consider that this is a useful tool as it does not help many contracting authorities who still use a framework route for procurement for expediency, even though project values do not necessitate this.

However, by limiting or reserving the procurement to a specific geographical area or group of SMEs or VCSEs, this may help those contracting authorities who are looking for a more "buy local" strategy and / or continued use of an existing local SME for things such as small repairs etc.

Additionally, it has been noted that the proposals under PPN 11/20 are somewhat unworkable for some contracting authorities as they refer to individual counties. Whilst many contracting authorities work in a local area, this can often cross county boundaries (or Borough boundaries in London) – where the boundary is literally one side of the street to another. This could stifle the opportunities to make use of the provisions under PPN 11/20. Members would welcome an interim stage, perhaps which looks at the counties in which a service is being delivered, rather than the locality of the contracting authority.

## Part 2

### Response to specific questions

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

Members have noted that the Green Paper appears to be heavily focused on central government, and there are a substantial number of proposals which do not seem relevant to bodies outside of central government. It is noted that a "one size fits all" approach would be inappropriate for the future regime, and members would like to see a proposal that is better designed to fit the whole public sector structure (reflecting, for example, the range and level of public funding for different sectors).

We also note that the principle of proportionality seems to be missing from the Green Paper. Members consider proportionality to be a key component of the procurement regime and would welcome further guidance and confirmation that this remains an underlying principle of public procurement.

In general, it is considered that the absence of proportionality and the inclusion of the proposed transparency principles will result in huge costs for housing associations and local authorities (for example, the OCDS will entail a lot of additional resource which will be a burden for housing associations and local authorities to manage). Additionally, this will make it uncomfortable for those sub-central authorities to upload feedback sheets during the procurement process.

However, members have also explained that the simplified approach is welcomed, as is the explicit inclusion of "Value for Money".

#### **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 Green Paper is not entirely clear as to the manner of the interventions that the unit would be empowered to make, and there is a lack of clarity as to how the unit would achieve its objectives. Will, for example, the unit be empowered to "step in" and manage a procurement process in the aim of improving commercial capability? Members are keen that any new unit does not introduce additional burdens through extra reporting functions, and that it does not give rise to excessive audit and review.

Additionally, members have also spoken in support of the unit taking on a support/educational role to facilitate best procurement practice, as opposed to a sanctions-focused unit. Although members also noted that contracting authorities should be encouraged to take responsibility themselves for improving their commercial capability without external intervention.

#### **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?**

Members have raised queries as to the constitution of such a unit (for example, would the unit be comprised of academics / lawyers / practitioners) as the current proposals remain fairly vague. Some members have expressed support for input from appropriately qualified

and experienced lawyers (for example), but consider it important to ensure that experienced and knowledgeable practitioners are included as members of the unit.

Members have suggested that the unit is drawn from a variety of sectors (including the public, private and voluntary sectors) and includes experts representing various professions, including procurement, legal, finance, ICT, customer service, strategy and communications.

Members have suggested that the unit should also draw on representatives from a range of backgrounds, including the business community, social care, health, education, utilities, defence, regulatory services and housing (amongst others). They should not solely be drawn from central government departments.

It is suggested that a series of risks and impacts could be developed for each type of complex procurement, and members of the appropriate area can then ask questions and raise concerns once a risk or impact score reaches a predefined threshold. At that point, the unit could initiate investigations and any necessary interventions.

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

In principle yes, although this is dependent on the specific requirements for sub-central authorities being grouped together so that it is readily identifiable which parts of the regime do and do not apply to sub-central authorities.

Members feel that, at present, there is insufficient detail as to why this is a good idea. Certain sub-central authorities find that the Concession Contracts Regulations 2016 apply so infrequently that to all intents and purposes they are irrelevant (with all of their above threshold procurements falling within the remit of the Public Contracts Regulations 2015). There is some concern that, as a result of the different natures of various sectors, a single consolidated set of regulations would necessarily require several exclusions and/or provisions which would not apply to many contracting authorities, resulting in a comprehensive set of rules that are even more difficult to navigate. If this approach is to be adopted, members have noted that the rules would need to very clearly set out which rules apply to the various categories of contract.

It is also felt that the Green Paper has missed a critical point regarding the interaction of much of the applicable legislation which can make it complicated and contradictory for practitioners. Additionally, there is a lacuna in respect of certain areas which do not work well together (for example, the impact of the procurement rules associated with section 20 under the Landlord and Tenant Act 1985, TUPE or Patient Choice); all of these areas can have a significant impact for the practical element of undertaking a procurement.

Further, the proposals of moving to a more soft-law focus and the introduction of a National Procurement Policy Statement will mean that the relevant remaining rules are spread across a wider range of formats, making them difficult to navigate. The combination of the current regulations into one uniform framework will only be of practical benefit to a few contracting authorities and bidders (eg those acting in the defence sector), whereas the proliferation of rules and the changing of their format will affect all contracting authorities and bidders and needs to be taken into account when Guidance is issued.

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

Members have noted that it would be beneficial to see the wider use of the qualified list from the UCR (and that this could be a more pragmatic approach as opposed to the intended DPS+).

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

Yes, in general we agree with the approach. More detailed guidance will be required to understand what some of the requirements are. For example, reference is made in the Green Paper to the Construction Playbook which in turn references that financial checks are to be undertaken; the guidance says that if the financial checks are anything other than "low risk" then additional evidence should be obtained although it is not clear what such additional evidence entails. We also consider that it would be helpful for further guidance as to the definition of "off the shelf competition".

The three procurement procedures which are proposed are the open procedure (which will not change), the competitive flexible procedure, and the limited tendering procedure (which is akin to direct award). The competitive flexible procedure follows the GPA's two-stage process in the selective tendering procedure.

In terms of whether this will be simple to implement, the government will need to figure out what the second stage looks like, how it fits with their standing orders and how it is appropriate for the relevant contracts.

In practice, members consider it likely that contracting authorities will end up running procurements in the same way that they currently do. It is considered likely that without a "green-light" to do something revolutionary, contracting authorities will lean on what they already know; clear and detailed guidance will be needed as to the flexibilities permitted under the proposed procedures, as without such guidance it is likely that the post-Brexit procurement system will look similar/be operated in a similar way to what we currently have.

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

Members have suggested that it could be a useful tool to link procurement outcomes to the impact on local, regional and national GDP.

Additionally, members have suggested that the government could seek to establish procurement innovation bodies that focus on exploring the commercial benefits of new ideas, as often innovators form ideas without anywhere to take their idea, or with little knowledge of how to promote and market the idea, or how to gain funding etc.

**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?**

Members have noted that the proposed new competitive flexible procedure affords the same flexibility as the Light Touch Regime, but have indicated that it would be beneficial to retain higher thresholds for these types of services to retain flexibility of approach in their procurement and a distinction between the two types of services.

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

Members consider that further clarity around the definition of the most advantageous tender would be helpful. In general, members are of the opinion that contract awards should still be made on a transparent basis and by reference to the predetermined award criteria.

**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?**

In general, we agree with this proposal, but further clarity on the proposed framework is required. Members have noted that it should be a decision for individual contracting authorities to determine which, if any, broader impacts it wishes to consider. They are generally nervous about award criteria being hijacked to reflect a political imperative of the relevant government of the time and that they should not be obliged - at a sub-central level - to award their contracts on the basis of national imperatives in the event that a more regional or local objective needs to be secured for the benefit of their end-users/in order to maximise value for money.

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

Certain members have suggested that tax evasion should be included as a mandatory exclusion ground rather than a discretionary exclusion ground. Additionally, members have identified behaviours such as environmental offences and collusion which they consider should be expanded upon within the exclusion grounds.

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

Yes, in general we agree. However, further guidance and information would be welcomed as to the operation of the list. For example, would this be managed by central government for checks on the main Selection Questionnaire rather than contracting authorities? We are also concerned that the issues to record past performance will be onerous and prone to change which could make monitoring past performance hard to convert into a sensible "flag" on the system.

Members have also noted that this might prove difficult to manage in practice (as it would be necessary to check the list at regular intervals and not just at the outset of the procurement). Members have also queried whether there would be an access charge for the list, or whether it is intended to be freely accessible by all contracting authorities?

Additionally, whilst a centrally managed debarment list could be helpful in day-to-day life, it is the experience of some members that suppliers are rarely excluded for their past poor performance (even where the contractor has significantly failed on previous procurements).

It would be helpful for further clarity on the proposals, for example, whether the centrally managed debarment list is going to reflect selection procedures under the new regime (and hold the relevant information). Consideration also needs to be given to the status of non-national bidders and SMEs in such a list: will they be held to a similar level of

information and what if a supplier seeks to bid for a contract and is not registered on the central debarment list – presumably there will need to be an obligation of equivalence/information requirement to show that they would not be subject to debarment?

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

Yes, in general we agree with the proposals. However, we would propose that this is managed by central government for checks on the standard Selection Questionnaire rather than requiring individual contracting authorities to manage such a system (as this would create an unmanageable burden for many smaller sub-central authorities).

There is also concern that a single centralised platform may prove to be overly complex for simple requirements, whilst potentially not being robust enough for more complex procurements. Additionally, members have noted that previous supplier registration systems haven't always proved effective in practice, and we would query how the proposed system would be different.

Members have also noted that this approach may also lead to an increased use of "Pass/Fail" questions as part of a competitive flexible procedure, which in turn may lead to suppliers having to provide lots of information at an early stage in a procurement process.

Further clarity would also be welcomed as to how this system will be funded.

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

Our understanding of the Green Paper's proposals is that this is very similar to the existing DPS regime, except under the proposals contracting authorities could hold a list of suppliers and, using the new competitive flexible procedure, they could use a process similar to the old restricted procedure to then short-list suppliers on the DPS+ (using a selection process) before tendering to that shortlist. If that is correct, then we are in broad agreement with the proposed changes.

That being said, members are of the opinion that further clarity and guidance is needed to fully understand the proposals. Experienced practitioners in the housing sector have already established DPSs in a flexible and creative way under the existing rules that reflect the proposals set out in the Green Paper. It seems to us that the proposals for DPS+ and framework agreements do not offer more flexibility than how the existing tools are already used (eg. there are numerous DPS already set up for construction works, indeed – Homes England are just about to replace its developer partner framework agreement with a DPS). Nevertheless, the existing DPS provisions are designed for simple procurements and as such are not entirely fit for purpose, and it would be useful for the proposals to expand on what DPS+ can be used to procure in detail and how the DPS+ system should be used to procure more complex works and services.

Additionally, it is noted that commercial providers and their frameworks do not have to comply with procurement rules, and with an increase of commercial providers supplying to the public sector, this should be monitored. In order to preserve the principles behind public procurement, we would also like to see the preservation and emphasis of the requirement that only contracting authorities are able to set up DPS and framework

agreements. This ensures that private-sector bodies (or those with private-sector shareholdings) do not profit from providing access to the public-sector market-place.

There is also some uncertainty as to whether the proposed DPS+ would allow direct awards (although we assume that this is not intended). Given the intention to allow greater flexibility within the commercial purchasing tools, it would be beneficial and afford greater flexibility to consider including this within the DPS+ proposals.

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

Some of the assumptions made in the Green Paper are incorrect, including the assumptions that the difficulties of using framework agreements and DPSs are caused by the capability and misunderstandings of the users and that the circumstances in which DPSs should be used are limited. Our collective experience is that the users know exactly how and when to use DPSs and framework agreements, but the rules do not fit current procurement requirements.

The concept for open and closed frameworks seems flawed to us. The aim of the Green Paper is to provide flexibility and aid simplicity, and we do not believe that the proposals meet this aim.

It seems to us that the concept of an open framework would in reality function as two (or more) new procurements with no benefit to either the contracting authority or bidders as to time or cost (as the refreshing of the framework after the initial three (3) years of the term would essentially require another tender exercise). We understand that utilities want to retain eight (8) year framework agreements and would suggest that this is retained. As establishing framework agreements can be resource intensive, the requirement to hold two tender processes for a flexible framework does not seem to provide the benefits that the Green Paper seeks to provide. It also seems to us that the flexible framework agreement is more likely to result in additional red tape and bureaucracy which could hinder its flexibility.

As a note of caution, however, members also noted that markets can change significantly during an eight (8) year period and it may not drive best value for money to continue with a framework for this duration (even if there is an option for a "refresh" of suppliers) as areas such as technology may have developed during that timeframe. As a final point on open frameworks, members have noted that further clarity would be welcome as to the status of further competitions which are commenced but not yet finalised at the point of a supplier "refresh" (i.e. what happens if the successful supplier under a mini-competition is no longer a framework supplier at the point the contract is to be awarded?).

With regard to closed framework agreements, we would propose a slightly longer maximum term of six (6) years. In addition, the current flexibility of allowing a framework agreement to extend beyond the initial duration in exceptional circumstances, duly justified particularly by the subject-matter of the contract should be retained.

It may also be useful to provide clear guidance on end dates for call-off contracts. Currently they can extend significantly beyond the expiry of a framework agreement and there is no limitation on the length of call-offs. This is a useful flexibility that we would like to see preserved, although guidance confirming this flexibility would also be welcomed.

We also note that some contracting authorities are concerned about using a framework in the final year of its term (on the basis that some call-off procedures take a long term, coupled with their internal requirements to enter into the contract before the framework expiry, can result in an artificial shortening of the framework's term to only three (3) years). To this end, we would welcome guidance as to the various call-off scenarios in the last year of a framework agreement, particularly in relation to call-offs commenced before but not finished until after the expiry of the framework itself.

This longer term would also promote building partnership working and also reduce costs associated with leaseholder consultation, as well as procurement costs.

Additionally, members have highlighted that in their experience framework operators are often unable to keep their tendered rates for the full four (4) year term of a framework agreement and lose the appetite to mini-compete (with the result that the same framework operators often win call-off contracts). Contracting authorities can include review and/or benchmark clauses in their framework agreements but we would welcome proposals to keep the procurement process involved throughout the lifespan of the agreement, rather than just at the beginning.

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

In general, we agree with the proposals, although there is a difference of resource between central government and sub-central authorities that will need to be taken into account in the proposals.

Additionally, members have raised concerns that the difficulties in complying outlined above could give rise to more procurement challenges (particularly where it is proposed that it will cost less for economic operators to commence procurement challenges). In reality, there is a concern that the proposals could in fact stifle the honest publication of information, and this is considered a real challenge for practitioners. On this point, we disagree with the assumption made; that bidders make spurious challenges due to the lack of information provided; it is often the presentation of the material that provides disappointed bidders with the suspicion that "something has gone on" and therefore it is not necessarily the case that the disclosure/transparency obligations will address the perceived problem.

Further, members have noted that not all contracting authorities are subject to the Freedom of Information Act 2000, and there are concerns that this places an onus on those contracting authorities to publish information that they would ordinarily not be required to provide (which in turn compounds the issues around resource and competence). For those members who are subject to the Freedom of Information Act 2000, there is a general concern that this could create an additional burden on those organisations to publish more information at the outset whilst still dealing with information requests.

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

Whilst this would help to standardise what is required, the amount of information proposed is large. This may be possible for central government, but we are concerned that sub-

central authorities may not be able to comply. In our view, if this is implemented there will be a gap between the aspiration and competence/capacity to comply.

There are also further questions as to how this will operate in practice. For example, will there be additional funding to enable both extra capacity and competence to be increased? What will the consequences be for a contracting authority who does not comply?

Members have noted that the proposals for transparency provide an opportunity for procurement as this could build supply chain relationship management across a business. This could allow contracting authorities to take a greater level of ownership for contract management.

That being said, there are concerns (as outline above) over the administrative element of such an approach, and members have flagged that the current proposals appear bureaucratic and potentially costly and therefore at odds with the overall principles underpinning the Green Paper.

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

Members have noted that the IT requirements for such an approach would in themselves require a mammoth procurement exercise, and there are queries as to whether such a system would be able to be procured in time. We anticipate that there will need to be some sort of transitional period whilst such a system is put in place, and confirmation on the expected timings for when the OCDS will be mandated would be welcomed.

That being said, members are in general supportive of the idea and consider that such a system makes commercial sense.

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

Members have raised concerns as to the feasibility of this approach, and it is considered that this could present a disproportionate burden for smaller contracting authorities (some of whom have either no or only one procurement professional within their organisation). Further clarity would be welcomed on how this is intended to operate in practice.

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

It seems that the Green Paper's proposals are focussed on a national level, and members would suggest that the Government considered this from the perspective of sub-central authorities (for example, crisis is defined on a national level, but does not include crisis situations at an organisational/local level which might have been considered a crisis in line with current thinking had they occurred more widely).

**Q39: Do you agree that businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?**

Members have flagged issues with this proposal, in that they should not be expected to act as quasi credit control departments of contractors/sub-contractors. There are issues to be

addressed in such a proposal, such as how would a contracting authority know whether a payment was simply delayed, or whether there was a valid dispute to an unpaid invoice? Additionally, we note that there is no contractual relationship between contracting authorities and sub-contractors, and it is felt that it should remain the responsibility of contractors to ensure the prompt payment of their sub-contractors.

We would suggest that there are other, more suitable, approaches that could be considered such as the use of Project Bank Accounts for significant/high value projects instead. There are already tools in place, and the public sector should be encouraged to consider their use in a proportionate way.

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

Members have queried whether the list of exemptions is appropriate as set out in the Green Paper's proposals. For example, options which are covered by Regulation 72(1)(a) (unequivocal, unambiguous review clauses) should be exempted from contract amendment notices (for example, extensions to the initial contract term, price uplifts or instruction of optional work).

**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?**

Whilst we agree with this proposal in principle, it is not a problem we see in practice and we wonder how widespread this is across the public sector? It is difficult to see how this would operate in practice. Further clarity on this proposal would be welcome, including who would decide how much that cap on profits should be.

**South East Consortium for itself and on behalf of its members**

**10<sup>th</sup> March 2021**