

Transforming Public Procurement

Response from the Competition and Markets
Authority

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Summary

1. This paper sets out the Competition and Markets Authority's (CMA's) response to the UK Government's Transforming Public Procurement Green Paper.
2. The Green Paper seeks to simplify public procurement, secure value for money for the taxpayer and provide opportunities for innovative firms to succeed. The CMA believes that competition is critical to achieving this aim. When firms compete vigorously for a contract, they must innovate, by developing new and better goods, works or services that meet the demands of their customers, and offer better value for money, to be the most attractive bid.
3. In some markets the public sector is likely to be by far the largest buyer and public procurers can use this position to help encourage more competitive markets, leading to fewer situations of over-reliance on one or two suppliers, and improving value for money. However, this depends on good procurement design and successful market management practice. Poor procurement design can restrict competition and inadvertently increase the likelihood of bid-rigging, by making collusion between competitors easier.
4. The Green Paper outlines a number of proposed changes to the public procurement regime. The CMA's response details ways in which these changes can harness the benefits of healthy, competitive markets – including a proposal that 'effective competition' should be included as a legal principle of public procurement, to drive better value for money and reduce the risk of illegal bid-rigging cartels.
5. The CMA would be happy to discuss any of the material in this paper.

Consultation Response

1. Introduction – the role of the CMA

- 1.1 This paper sets out the Competition and Markets Authority's (CMA's) response to the UK Government's Transforming Public Procurement Green Paper (the Green Paper) that was published on 15 December 2020.
- 1.2 The CMA is an independent non-Ministerial government department and is the UK's lead competition and consumer authority. Its mission is to make markets work well in the interests of consumers, businesses and the economy.
- 1.3 The CMA recognises the increasing importance of public procurement spending for the UK economy and agrees that by improving public procurement, the Government can not only save taxpayers' money but drive social, environmental and economic benefits across every region of the country. In responding to this consultation, the CMA aims to contribute to the Government's objective of creating "a regulatory framework that delivers the best commercial outcomes with the least burden on our businesses and the public sector" (page 5).
- 1.4 Public procurement is economically very significant, representing around a third of all public expenditure, and covers a large range of markets for goods, works and services. In some markets the public sector is likely to be by far the largest buyer and thus in a position to affect the conditions of competition through its purchasing behaviour¹. Public procurers can help encourage more competitive markets, thereby improving value for money and reducing the risk of illegal cartel activity. However, this depends on good procurement design and successful market management.
- 1.5 Our work is of relevance to public procurement in a number of ways. In particular:
 - We advise public procurers and policymakers on how to design procurement processes in a way that promotes competition and healthy markets. For example, when the Cabinet Office first introduced the Outsourcing Playbook, the CMA helped to write the accompanying Market Management Guidance Note. This describes the steps public procurers can take to understand the markets they source from, recognise their influence on these markets, and design commercial

¹ Our predecessor body the Office of Fair Trading looked at the impact of public procurement on competition in its report: 'Assessing the impact of public sector procurement on competition' (September 2004)

strategies and contracts that promote healthy markets over the short, medium and long term;

- We support public procurers in spotting and deterring anti-competitive behaviour such as bid-rigging. For example, the CMA was one of the first competition authorities to develop a digital bid-rigging screening tool in 2017²; and
- We take action against anti-competitive conduct, such as abuses of market dominance by large suppliers (including those who supply essential goods to the public sector³) and collusion⁴ (including bid-rigging⁵). We provide guidance⁶ and encourage businesses to comply with competition law.

1.6 As part of its Strategic Steer⁷ from the Government, the CMA has been asked to “make recommendations on regulatory, policy or legislative matters, and their implications for competition and consumers at either national or local level”. Accordingly, this response contains recommendations intended to ensure that reforms to the procurement regime, and changes to procurement practice that may flow from them, harness the benefits of healthy, competitive markets to the benefit of taxpayers and public service users.

² <https://www.gov.uk/government/news/cma-launches-digital-tool-to-fight-bid-rigging>

After encountering some initial difficulties when applying the screening tool, we are planning further work on its effectiveness, including working with other agencies.

³ This can include securing commitments from suppliers to charge affordable prices. For example, we recently secured a [five-year commitment for affordable supply of a key bipolar drug to the NHS](#).

⁴ For example, in 2019 the CMA [fined 5 companies in the construction \(office fit-out\) sector a total of £7 million, and secured the disqualification of 6 company directors](#), for colluding to reduce competition for contracts including a public sector project.

⁵ Where this occurs, our work can secure compensation. For example, in 2019 we secured [£8 million in damages to the NHS](#) as part of a wider package to resolve competition concerns over the supply of a vital medicine.

⁶ <https://www.gov.uk/government/publications/how-your-business-can-achieve-compliance-with-competition-law>

⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818214/cma-strategic-steer.pdf

2. Relationship between competition and procurement

- 2.1 The rationale for procuring goods, works and services – rather than having government provide them “in house” – is that market mechanisms and private sector experience can reduce costs, raise quality and spur innovation, to the benefit of taxpayers and public service users. However, these benefits depend on procurement processes being designed in a way that promotes competition between bidders; and on the markets that supply government being competitive and well-functioning.⁸ Recent experience (for example, the failure of Carillion) has highlighted that – where these features are absent – there can be risks for taxpayers and public service users. This is especially the case where government is procuring essential public services; where there are market weaknesses such as a limited number of suppliers or barriers to switching suppliers; where the design and implementation of contracts restricts competition; and where market conditions or the design of the procurement process make collusion between suppliers easier to sustain.
- 2.2 Healthy, competitive procurement markets can help mitigate these risks. In simple terms, procurement markets are competitive and healthy when buyers are clear about their requirements and can select and switch to suppliers that offer the best value for money, and when there is an adequate number of suppliers that are actively competing to offer what buyers want. When these conditions are present, suppliers must make attractive bids in order to win contracts, and those that win contracts must work hard to deliver value for money, or risk buyers taking their business elsewhere. This results in better value for money for government and taxpayers.
- 2.3 A key risk in public procurement – and one that the Green Paper does not directly address – is bid-rigging: that is, illegal secret agreements between bidders for a contract about who will win and at what price. Bid rigging denies the customer – in this case the Government, and ultimately the taxpayer – a fair price. It can also exclude potentially more efficient competitors from the bidding process and reduce suppliers’ incentives to improve quality or innovate. A limited supply base can increase the likelihood of bid rigging, and so promoting healthy, competitive markets can help to address this risk. There are also steps that procurement professionals can take (discussed below) to mitigate the risk of bid-rigging and identify it when it occurs.

⁸ Evidence suggests that each additional bidder for a public contract can lower the cost of that contract by 2.5%. Angeles L and Milne RG, ‘Competitive provision of public services: cost savings over successive rounds of tendering’, *Applied Economic Letters*, 2016, vol. 23, no. 9, pp. 627–32; Milne RG and Wright RE, ‘Competition and costs: evidence from competitive tendering in the Scottish National Health Service’, *Scottish Journal of Political Economy*, 2004, vol. 51, no. 1, pp. 1–23.

2.4 Through the proposals set out in the Green Paper, the Government is seeking to reduce bureaucracy and give greater flexibility to commercial teams in designing procurement processes. As these are taken forward, it will be important to ensure that there remain strong incentives and capability to carry out public procurement in a way that harnesses the benefits of competition, promotes healthy markets, and mitigates the risk of bid-rigging.

Promoting healthy, competitive markets through procurement design

2.5 Procurement rules and processes can directly or indirectly influence both the number of credible bidders for a public contract, and the extent to which potential bidders compete on a level playing field. They can also increase the likelihood of bid-rigging by making collusion between competitors easier. At a general level, there are a number of common ways in which this can occur. These are set out below. The CMA recommends that, where possible, the reforms to the procurement regime, and any changes to procurement practice that flow from them, take these into account:

- (a) *Placing too much emphasis on short term cost* in contract specification, or in assessing bids, can lead to reduced competition in the long run. Where bidders anticipate this outcome, they might be incentivised to reduce the price to a 'loss-leading' level when a new contract is first put out to tender in an attempt to 'lock up' a market. The incentive to do so is strongest in markets with strong incumbency benefits⁹ where securing an initial contract might lead to ineffective competition and high profits for the incumbent firm in future.
- (b) *Raising the cost of participation in public procurement beyond the level necessary* can prevent inexperienced, or smaller firms from bidding for public contracts. In many cases, costs might be unavoidable, and a reflection of the complexity of the public sector's requirements. However, procurers should be mindful of procurement design factors that can raise participation costs and seek to minimise these. For example, requiring large amounts of information or form-filling from participants can make it difficult and costly for smaller and less experienced firms to participate in public procurement. Likewise, communication and publication of contract opportunities can have a relatively higher impact on participation costs for smaller firms where this requires routine monitoring of publications. Larger firms that are regularly active in public procurement might have more

⁹ For example, incumbency benefit might be high for a product or service that exhibits network effects, such as telecommunications.

dedicated resource for monitoring public procurement opportunities, or be more able to combine monitoring activities in more than one market.

- (c) *Setting unnecessarily¹⁰ narrow pre-qualification criteria that limit the number of eligible firms.* Such criteria might include requirements on past experience or firm size, or the restriction of eligibility to firms in a particular region.
- (d) *Directly limiting the number of eligible bidders,* for example as part of limited processes intended to increase the speed of procurement.
- (e) *Bundling together multiple contracts where there are no economies of scale and scope in doing so.* Bundling suits the largest, most experienced public sector suppliers, at the expense of specialists, who may be put off by inclusion of services outside their core competence. Bundling can also amplify the extent of incumbency advantage compared with letting multiple contracts. This may eventually force smaller, specialised firms out of the market, leaving government with a supply base that consists of a smaller number of vertically-integrated firms.¹¹
- (f) *Making commercially sensitive information, such as the identity and size of a winning bid, transparent to other bidders* can facilitate cartel behaviour (see paragraph 2.11 below). For example, this could occur through disclosure requirements.
- (g) *Bringing competitors together* through industry cooperation at the design or specification stage can create opportunities for competitors to collude.

2.6 A limited supply base, or a static supply base characterised by minimal entry from new competitors, can increase the likelihood of bid-rigging. Bid-rigging is when suppliers agree to limit competition in the procurement process, thereby denying the customer – in this case the Government, and ultimately the taxpayer – a fair price. Bid-rigging leaves taxpayers paying over the odds and can exclude potentially more efficient competitors from the bidding process. It may also reduce suppliers' incentives to improve quality or innovate.

¹⁰ There may be legitimate reasons for procurers to specify restrictive criteria. For example, in procuring essential public services, costs of delivery failure will be higher than in other contracts, and procurement officials may in such cases place a higher value on the experience and reputation of bidders within public markets when letting these contracts.

¹¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/657858/local-authority-waste-contracts-cma-analysis.pdf

2.7 In some markets the public sector is likely to be by far the largest buyer and thus in a position to affect the level of competition through its purchasing behaviour.¹² The Cabinet Office Market Management Guidance Note¹³ describes the steps procurers that may have a degree of buyer power can take to monitor and promote market health. In giving greater flexibility to public procurers, the reforms set out in the Green Paper increase both the opportunity for, and the importance of effective market management practices. The CMA strongly supports the promotion of the Cabinet Office Market Management Guidance Note across government and recommends that this is included within the capability-building remit of the proposed public procurement unit.

Addressing risks of collusion

2.8 Across government we need to be aware of the risk of illegal cartel activity (in particular, 'bid-rigging') in public procurement and the damage cartels can cause to the UK economy¹⁴. [OECD research](#) suggests that eliminating bid-rigging could reduce procurement prices by 20% or more. However, while the Green Paper refers to the dangers of corruption in public procurement (paragraph 25-36), it does not mention the risk or consequences of cartels.

2.9 The CMA and its predecessors have undertaken a range of work relating to competition and public procurement¹⁵. The CMA's recent work to support the public sector's ability to identify and prevent collusion in supply chains includes:

- working to incorporate awareness of the risks of illegal bid-rigging into the curriculum for commercial professionals;
- ongoing development of a toolkit of data-driven methods and screening tools, led by the CMA's Data Science Unit, that procurers can use to improve their identification of bidder collusion;
- a programme of talks to local authority procurement groups to raise awareness about the risk of cartels, how to recognise cartel 'red flags' and how to report suspicious cartel activity to the CMA; and
- publishing CMA guidance on avoiding collusion in construction and risk of bid-rigging in public procurement: [Avoiding collusion in construction: advice for](#)

¹² Office of Fair Trading report 'Assessing the impact of public sector procurement on competition' (September 2004)

¹³ Government Commercial Function (2019) [Market Management Guidance Note](#)

¹⁴ According to the OECD, 'Bid rigging, i.e. agreements between bidders to eliminate competition in the procurement process, thereby raising prices, lowering quality and/or restricting supply, is a major risk to the effectiveness and integrity of public procurement and deprives the public sector of genuine opportunities to achieve value for money. For this reason, the fight against bid rigging has become one of the enforcement priorities of competition authorities around the world' ([Fighting Bid Rigging in Public Procurement: Report on Implementing the OECD Recommendation 2016](#)).

¹⁵ See for example: OFT 2014 Market Study into the supply of ICT to the public sector; OFT 2004 report into public sector procurement; OFT 2010 report into competitive neutrality; OFT 2011 report into public sector commissioning; PwC 2011 research to accompany the OFT's 2011 report.

2.10 Some characteristics of public procurement can increase its susceptibility to the risk of collusion over other procurement types, for example:

- Public projects often involve repeated purchases over a long timescale, which can help members of a bid-rigging cartel to allocate contracts among themselves and identify opportunities to punish any firm who ‘cheats’ the agreement;
- Public procurement can be subject to strict regulation, which increases procedural predictability and creates learning opportunities for colluding firms;
- Inflexible regulation may limit the ability of procurers to react strategically to market developments; and
- Public procurement involves a very high volume of contracts – making it difficult to monitor and rectify all issues – even when authorities are vigilant and well-resourced.

2.11 Public procurement might also be more susceptible to collusion because of transparency and disclosure requirements. Transparency can play a vital role in effective public procurement. It can help demonstrate value for money and prevent perceptions of favouritism, which maintains trust in the procurement process and encourages competitors to contest the market. However, there is a trade-off – too much transparency may make collusion between bidders easier to sustain. For example, a member of a cartel might be tempted to lower the price of their bid below the level agreed with others, in order to win a public contract. However, through disclosure of the identity and size of the winning bid, firms participating in a cartel could observe when other firms are charging prices below the agreed level, making the threat of retaliation towards the ‘cheating firm’ more credible.

2.12 The risk from cartels could be reduced by, for example, ensuring that procurement professionals are appropriately trained to spot cartels and bring them rapidly to the attention of the CMA.

¹⁶ See also OECD [Fighting bid rigging in public procurement - OECD](#); [OECD Recommendation on Fighting Bid Rigging 2012.pdf \(oecd.org\)](#) and [Fighting Bid Rigging in Public Procurement: Report on Implementing the OECD Recommendation 2016](#)

- 2.13 The Green Paper outlines some suggestions to allow procurement processes to foster greater innovation in response to public tenders, including use of ‘innovation labs’ (para 91). Innovation is a feature of healthy, well-functioning markets. In seeking to bring innovative suppliers and relevant bodies together to develop ideas, and encourage sharing of information, the CMA would advise policymakers to be aware of the risks presented by information exchange – namely that competitors may exchange sensitive information that facilitates collusion, and keep information exchange between potential competitors to a well-defined scope.

3. Views on proposals in the Green Paper

In response to questions listed in the consultation document

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

- 3.1 The Green Paper proposes the following principles of public procurement should be included in new legislation (paragraph 27):

- Public good - procurement should support the delivery of strategic national priorities including economic, social, ethical, environmental and public safety.
- Value for money - procurement should enable the optimal whole-life blend of economy, efficiency and effectiveness that achieves the intended outcome of the business case.
- Transparency - openness that underpins accountability for public money, anticorruption, and the effectiveness of procurements.
- Integrity - good management, prevention of misconduct, and control in order to prevent fraud and corruption.
- Fair treatment of suppliers - decision-making by contracting authorities should be impartial and without conflict of interest.
- Non-discrimination - decision-making by contracting authorities should not be discriminatory.

- 3.2 The CMA agrees with the principles outlined; however, we note the collusion risks associated with transparency. Transparency can play a vital role in effective public procurement by dispelling perceptions of favouritism and maintaining trust in the procurement process – which in turn encourages

competitors to contest the market. However, higher levels of transparency can also make collusion between bidders easier to sustain (see paragraph 2.11 above). The CMA considers it essential that public procurement officials are aware of the link between collusion and transparency and report any suspicious activity by suppliers to the CMA.

3.3 The CMA proposes that, in addition to the proposed legal principles outlined in the Green Paper, the new regulatory framework for public procurement should include a further principle of ‘effective competition’:

- Effective competition - procurement should promote healthy, competitive markets, which in turn drive better value for money and reduce the risk of illegal bid-rigging cartels.

3.4 Healthy, competitive procurement markets can help mitigate public procurement risks – a wider supply base reduces reliance on one or two large firms that are ‘too big to fail’ and makes bid-rigging harder to sustain – and drive better value for money for taxpayers. It is therefore vital to make explicit this principle to procurement officials, who will be responsible for market management, procurement design and spotting signs of illegal bid-rigging.

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?

3.5 The Green Paper proposes to establish a new unit, supported by an independent panel of experts, to oversee public procurement with powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities. The new unit would have responsibility for (paragraph 45):

- Monitoring - to assess and address systemic gaps in commercial capability and understanding, especially as the new rules are adopted. An increased level of monitoring will be necessary initially as the reforms bed in and contracting authorities engage with the new flexibilities.
- Intervention - powers to issue improvement notices with recommendations to drive up standards in individual contracting authorities. Where these recommendations were not adopted, the unit could have recourse to further action such as spending controls.

3.6 The CMA supports the introduction of a new unit and the responsibilities outlined.

- 3.7 One of the roles of the new unit will be to improve the commercial capability of contracting authorities, especially as the new rules are adopted (paragraphs 43 and 44). There will be a significant need for training on the proposed new approach to public procurement. The CMA recommends that training should include material on how to identify and report to the CMA any cartel behaviour in public procurement.
- 3.8 The CMA also recommends the inclusion of training on market analysis, and how government's procurement decisions affect the health of markets. This would allow contracting authorities to identify markets at risk of weak competition (such as those with few competitors, high entry barriers and high switching costs) and avoid public procurement decisions that exacerbate the risk. This training could focus on the application of the existing market management guidance within the Outsourcing Playbook. It would complement the Green Paper's suggestion that the new unit will provide greater information about purchasing and supply markets and behaviour (paragraph 44).
- 3.9 The proposed new unit will manage a complaints system about 'systemic issues' (paragraph 44) and can carry out investigations, make recommendations and may operate a disbarment register. It will be important for the new unit to be familiar with interaction between public procurement rules and competition law, including the leniency regime^A and to refer suspected cartel activity to the CMA.

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?

- 3.10 The CMA considers that it would be beneficial for the proposed panel to include:
- a member with competition law experience, to sit alongside other members of the legal profession. This would enable the panel to identify procurement issues arising from cartel behaviour and involve the CMA; and
 - an economist, with expertise in competition and market analysis. This would enable the panel to identify procurement issues arising from poor market health and make recommendations on remedial action.

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

- 3.11 The Green Paper proposes to replace the current requirement for contracting authorities to assess bids on the principle of most economically advantageous tender (MEAT), with a requirement for bids to be assessed on the principle of most advantageous tender (MAT). According to the Green Paper (paragraph 99) MEAT is identified “on the basis of price or cost, using a cost-effectiveness approach”, whereas MAT would provide a broader view of value for money (paragraph 101).
- 3.12 The CMA supports the adoption of assessment according to MAT, rather than MEAT. Too much focus on short-term cost in assessment risks the omission of other important considerations in the overall value for money provided by a bid. One such consideration might be a bid’s strategic value in contributing to better market health, for example by supporting new entrants or challenger firms that can expand long-term market supply, but there are others. Government may also wish to contribute to public objectives through procurement by prioritising social and environmental value alongside economic indicators. The CMA considers that competition need not be a barrier to environmental and social considerations - and in many cases can contribute to the delivery of social and environmental objectives. The CMA’s Annual Plan¹⁷ outlines a vision for our functions that prioritises sustainability and protection of vulnerable consumers.
- 3.13 However, competition will occasionally need be ‘traded-off’ against other objectives. Procurement exercises that prioritise other factors above competition may mean taxpayers end up paying more than in an outcome determined purely by competition. It is important that public procurers are conscious of these trade-offs where they occur. The CMA recommends that public procurers are well-informed by evidence in deciding how these trade-offs should be balanced, and clearly explain the rationale for these decisions.

Q.22 Do you agree with the proposal to make past performance easier to consider?

- 3.14 The Green Paper proposes to widen the range of circumstances in which poor performance can be taken into account, and provide an evidence base to contracting authorities on the past performance of bidders in public contracts. The Green Paper suggests that one measure of past performance could be persistent failure in relation to KPIs (paragraph 125).

¹⁷ <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2020-to-2021>

3.15 The CMA supports this proposal. Sharing experiences between contracting authorities would improve the information available to public procurers on suppliers and increase the 'buyer power' incentive for suppliers to deliver on their promises. Accurate information on past performance in public contracts would also offer public procurers a less restrictive indicator of 'quality' or 'firm reputation' than narrow pre-qualification criteria such as experience or firm size.