

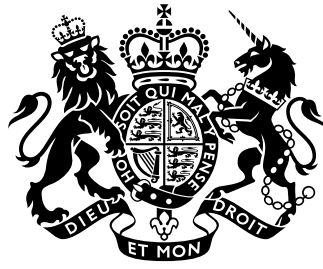


Cabinet Office

Transforming Public Procurement

Part 2 Consultation on draft regulations to
implement the Procurement Bill

July 2023



Transforming Public Procurement

Part 2 Consultation on draft regulations to implement the Procurement Bill

Presented to Parliament by the
Parliamentary Secretary at the Cabinet Office
by Command of His Majesty

July 2023



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Transforming Public Procurement

Introduction

This is the second part of the consultation on the draft secondary legislation to implement the Procurement Bill. This is a technical consultation, and this second part refers predominantly to the transparency notices which allow contracting authorities to progress procurement processes through the procurement lifecycle in an open, transparent and informative manner.

These notices are as follows:

- Pipeline Notice
- Planned Procurement Notice
- Preliminary Market Engagement Notice
- Tender Notice
- Utilities Dynamic Market/Dynamic Market Notice, including Qualifying Utilities Dynamic Market Notice
- Transparency Notice
- Procurement Termination Notice
- Contract Award Notice
- Contract Details Notice
- Payments Compliance Notice
- Contract Performance Notice
- Contract Change Notice
- Contract Termination Notice

The order in which the notices appear in this consultation document broadly follows the order in which they will be used/required as a procurement progresses from initiation to award and beyond.

In addition, this consultation covers the organisations covered by the term 'defence authority' used in the Bill and a number of other matters that feature in the draft Statutory Instrument (SI) which relate to transparency. These other matters are:

- Central Digital Platform
- Central Digital Platform: Supplier Information (which will enable suppliers to submit core information once only)
- Identifiers (the unique identifiers for organisations, procedures and notices that the digital platform requires to operate effectively)
- Assessment Summary

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The consultation also seeks views on the proposed use of a power in the Bill which would exempt private utilities from the requirement to publish a preliminary market engagement notice.

This consultation document sets out the context and policy intent for each of these notices and information requirements. It does not go into detail e.g. about the information that must be entered for each notice. This is contained in the draft SI itself which must be read in conjunction with this document in order to be able to respond to the questions set out below.

Finally the consultation explains the approach for transitioning to the new regime and how this will be managed for procurements that have already commenced or were awarded under existing regulations. The consultation seeks views on the proposed approach to transitional arrangements for procurements already underway at the time that the new regime enters into force and this approach is set out in this document. We are not seeking views on the detailed drafting for transitional provisions and this is therefore not contained within the draft SI, although it will be included within the final SI to be laid in Parliament.

Although we do not propose to consult on drafting for consequential amendments stemming from the Bill, the consultation sets out the position on other legislation that will need to be amended in order for the full provisions of the Bill to take effect (for example a number of amendments will be needed so that references to the Public Contracts Regulations in other legislation refer instead to the new Procurement Act).

These regulations will apply to all reserved procurement in the UK, and procurement by transferred Northern Ireland authorities. We have worked closely with the Devolved Authorities in developing and drafting the provisions in the Bill and the draft SI. In the Autumn, the UK Government will follow the formal process to seek consent from the relevant NI Department to make Regulations on their behalf. The draft SI will be updated as appropriate before being made. The Welsh Government intends to consult and legislate separately in respect of regulations for devolved Welsh procurement.

The consultation opens on 17th July and runs until 25th August.

Background to the legislation

One in every three pounds of public money, some £300 billion a year, is spent on public procurement. By improving the way public procurement is regulated, the Government can save the taxpayer money and drive benefits across every region of the country.

Following the UK's exit from the EU, we now have an opportunity to develop and implement a new procurement regime. The new regime helps deliver the Prime Minister's promise to grow the economy by creating a simpler and more transparent system that will deliver better value for money, reducing costs for business and the public sector.

Under the new regime, everyone will have access to public procurement data. Citizens will be able to scrutinise spending decisions. Suppliers will be able to identify new opportunities to bid and collaborate sooner in the process, and this will improve competition because suppliers will find it easier to plan and gear up. Contracting authorities will be able to analyse the market and benchmark their performance against others, for example on their spend with small and medium-sized enterprises (SMEs).

How to respond

We invite you to respond to the questions in this consultation by 25th August 2023. Where possible, please respond by completing the survey at the following link: <https://www.smartsurvey.co.uk/s/IPTKU4/>. Where this is not possible, you may alternatively respond by email to procurement.reform@cabinetoffice.gov.uk.

This consultation seeks feedback on the draft secondary legislation that will sit under the Procurement Act. The consultation is split into two parts with the first part of the process focusing on subjects which require specific detail in secondary legislation. That part of the consultation was released on 19 June and closes on 28 July and can be accessed at <https://www.smartsurvey.co.uk/s/TPPSI1/>. This second part predominantly relates to the transparency provisions and notices that will be used by contracting authorities to fulfil their legal requirements under the Bill. It also includes information on the proposed approach to transitional arrangements for procurements already underway at the time that the new regime enters into force and the position on other legislation that will need to be amended in order for the full provisions of the Bill to take effect.

The nature of this consultation is detailed and technical. Except for where explicitly requested, views are not sought on the policy intent itself which has already been subject to consultation and has been established by the Bill, but on whether the policy intent has been reflected in the drafting of the regulations.

Respondents will be asked to state to what extent they agree or disagree with the question posed under each section. There are 25 questions of this nature and respondents also have the opportunity to explain the reasoning for their answer. You are not required to answer a question if it does not relate to your area or interest or expertise. Comments should be limited to whether the stated policy intent has been translated into the draft SI and on whether the drafting causes any inconsistencies, gaps or overlaps with provisions elsewhere in the draft SI or the Bill. The exceptions to this are the section on Transitional Provisions and supplementary questions on the preliminary market engagement notice, qualifying utilities dynamic market notice and contract award notice where the questions relate to the policy intent or approach set out in this consultation.

For information on how the Cabinet Office will use and manage your data, please see the Cabinet Office's privacy notice for consultations [here](#)¹.

¹ <https://www.gov.uk/government/publications/privacy-notice-for-cabinet-office-consultations>

Next steps

Following analysis of responses to both parts of the consultation, the final version of the secondary legislation will be laid in Parliament, combining the provisions contained within the two consultations into one single instrument. Before laying the SI we will determine whether its provisions warrant a review and update of the impact assessment on the new regime undertaken when the Bill was drafted and introduced.

The Government has committed to providing a minimum of 6 months' advance notice of go-live of the new regime and we expect that the laying of the secondary legislation would be the earliest point that this notice would be given.

Therefore, subject to the outcomes of this consultation, we expect that the new regime will go live during Autumn 2024.

Subjects for Consultation and Associated Questions

Pipeline Notice

The purpose of the pipeline notice is to provide the market with advance notice of anticipated public contract opportunities with an estimated value of more than £2 million which a contracting authority proposes to enter into in the forthcoming 18 months. This gives suppliers the opportunity to track potential opportunities, enabling them to determine if they wish to bid. This will be of particular benefit to SMEs and voluntary, community and social enterprises (VCSEs) by providing them with time to plan for future work, ensuring a competitive and vibrant market. The draft SI outlines the information which is required in a pipeline notice.

The notice must be published within 56 days of the first day of the relevant financial year and will include such details as the nature of what is to be procured, when it is expected to be advertised, and when it is thought that the delivery will commence.

While the pipeline notice is intended to provide suppliers with an indication of contracting authorities' plans, it is important to note that contracting authorities are not held to the information in the notice which could change over time and is intended to be updated to improve fidelity.

Private utilities are not required to publish a pipeline notice and the Northern Ireland Executive has taken a decision to derogate from this requirement for their transferred and devolved authorities.

QUESTION 1: To what extent do you agree or disagree that the pipeline notice, as described in the draft SI, will usefully provide advance notice to suppliers of forthcoming contracting opportunities?

QUESTION 2: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Planned Procurement Notice

The planned procurement notice is designed to give as much advance information to the market as possible to enable potentially interested suppliers to determine if the upcoming procurement is something that they wish to bid for, and to have the maximum time for preparation. Publication of this notice may take place at any time before publication of the tender notice. If publication of this notice occurs at least 40 days (and no longer than one year) before publication of the tender notice then the notice is a 'qualifying' planned procurement notice and the contracting authority may, if they choose to, benefit from a reduced tendering period (minimum ten days).

All contracting authorities (including utilities) are able to publish a planned procurement notice in relation to any type of procurement for a public contract covered by the Procurement Bill.

The planned procurement notice was not described as a separate notice in the Green Paper consultation, as it was integrated in the planning and pipeline notice. Following stakeholder engagement the Government decided to split out this notice in order to underline its specific purpose to furnish the market with advance information to the market and provide the opportunity to reduce tendering timelines.

QUESTION 3: To what extent do you agree or disagree that the contents of the notice described in the draft SI provide the information needed by suppliers to determine their interest in the upcoming procurement that is the subject of the notice?

QUESTION 4: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Preliminary Market Engagement Notice

We want to encourage more contracting authorities to conduct preliminary market engagement. Whilst this is not mandatory, the information gathered during this stage can be invaluable for the contracting authority as they clarify their requirements, assess the market's capacity and develop their procurement strategy.

Clause 17 of the Bill makes provision for contracting authorities to publish a preliminary market engagement notice when this engagement will be or has been conducted.

The notice can be used to invite suppliers to participate in preliminary market engagement and/or notify the market this engagement has taken place.

Publication of the preliminary market engagement notice should take place prior to publishing a tender notice. If engagement has been conducted but a preliminary market engagement notice has not been published, the reasons for not publishing it must be captured in the tender notice.

Although the decision not to publish is solely at the discretion of the contracting authority, this decision must be taken in the context of their obligations in clauses 12 (covered procurement: objectives) and 16 (preliminary market engagement) of the Bill.

Private Utilities

The Government wants to take this opportunity to use the power in the Bill at clause 120 to amend Bill provisions for private utilities with respect to the preliminary market engagement notice in line with our aim of minimising burdens on these private businesses. Therefore we have included a draft amendment to dis-apply the preliminary market engagement notice requirements in clause 17 for private utilities. Private utilities will be encouraged to use the notice, but where they choose not to do so, we would not expect them to explain this.

The UK Government is consulting on this proposed amendment on behalf of reserved private utilities and transferred Northern Ireland authorities.

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QUESTION 5: To what extent do you agree or disagree that the notice as set out in the draft SI delivers the policy intention of encouraging the use of preliminary market engagement in an open and transparent way?

QUESTION 6: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

QUESTION 7: To what extent do you agree or disagree that private utilities should be exempted from the preliminary market engagement notice requirements in clause 17 of the Bill?

QUESTION 8: If you wish to explain why you do not agree that private utilities should be provided with this exemption please do so.

Tender Notice

The Bill requires contracting authorities to publish a tender notice in order to advertise and commence a competitive tendering procedure. This is to ensure that suppliers and citizens have visibility of what the contracting authority is going to market to procure. For suppliers this allows them to determine if they wish to take part in the procurement for citizens it allows them to see the process by which contracts are being tendered and for which goods and services.

A tender notice will act as an invitation to submit a tender for the contract under the open procedure and could act as an invitation to tender or an invitation for suppliers to submit a request to participate under the competitive flexible procedure. In either case it must be published on the central digital platform (see page 20). The Bill requires contracting authorities to provide any associated tender documentation in conjunction with the tender notice and in accordance with the rules that govern its use. The tender notice is not applicable in the case of direct award, where the transparency notice plays a similar role.

Whilst the Bill gives contracting authorities significant freedom to choose a procedure that will best deliver their requirement, they must set out the process to be followed at the outset. Whilst there is some limited scope to modify these, contracting authorities must follow the processes set out in their tender notices and failure to do so will leave them at risk of challenge.

These requirements apply to frameworks in the same way that they apply to any procurement procedure, with the addition of some framework-specific requirements including:

- identification of all contracting authorities that may award contracts under the framework during its term;
- identification of the nature, scope and overall maximum estimated value of the works, services or supplies that may be awarded under the framework;
- stipulation of whether the framework is an open framework or a closed framework;

- clarification whether contracting authorities intend to appoint a maximum number of suppliers to the framework and, if so, what this maximum number is or, alternatively, to give a range.

Tender notices are also required in respect of certain high-value below-threshold contracts, where the contracting authority is making the opportunity publicly available: the draft SI makes provision for the requirements which attach to these.

QUESTION 9: To what extent do you agree or disagree that the tender notice as set out in the draft SI enables a contracting authority to effectively advertise and commence a competitive procedure?

QUESTION 10: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Utilities Dynamic Market and Dynamic Market Notice

The Procurement Bill replaces dynamic purchasing and qualification systems with a single new commercial purchasing tool called a Dynamic Market (DM). DMs can be used and established by contracting authorities, including utilities; and utilities can also establish and use a Utilities Dynamic Market (UDM) for the purpose of the award of utility contracts. DMs and UDMs are generally very similar with slight differences such as the basis of charging fees.

A dynamic market notice is required to be published at various times relating to the establishment of a DM or UDM, its operation and, except in the case of a UDM established by a private utility only, when it ceases to operate (a notice is not required when a UDM set up by a private utility ceases to operate). This notice does not outline the requirements for public contracts awarded by reference to a DM or UDM.

The policy intention is for DMs and UDMs to be more flexible than frameworks, with no restrictions on their duration, and with new suppliers able to be admitted throughout their life.

Qualifying Utilities Dynamic Market Notice

A UDM is established for the purpose of the awarding of utility contracts by utilities. A UDM can be established either by reference to a DM notice or a Qualifying Utilities Dynamic Market (QUDM) notice.

The purpose of a QUDM notice, like the DM notice, is to notify suppliers of the intention to establish a UDM, as well as to provide details in regards to its establishment, modification and termination. A QUDM notice differs from a DM notice, in that it must provide as much of the information which would be required in a tender notice for the award of a contract by reference to the UDM in question as is available at the time the QUDM notice is published.

Additionally, the QUDM notice (rather than a DM notice) indicates that when a procurement is commenced by reference to the resultant UDM in future, only members of the UDM will be notified of any future opportunities to bid for a public contract (and a tender notice will not be published). Instead, the information that is ordinarily provided in a tender notice is required to be provided directly to the members of the UDM (as well as suppliers that have

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applied for membership of the market (or part of the market) but have yet to be accepted or rejected). In this circumstance, the tender notice which is to be provided is required to include further details relevant to the specific procurement in question and must include any details that are ordinarily required for a tender notice that have not already been provided in the QUDM notice.

The Government response to the Green Paper consultation proposed that the new regime would maintain the effect of qualification systems as a separate tool for utilities under similar terms to the Utilities Contracts Regulations to maintain how utilities currently operate. The disapplication of the tender notice for contracts awarded by reference to a UDM established using a QUDM notice, is how that effect has been implemented in the new regime.

QUESTION 11: To what extent do you agree or disagree that the DM notice as set out in the draft SI permits a contracting authority to effectively create a dynamic market (including a utilities dynamic marketplace) for the future award of public contracts?

QUESTION 12: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

QUESTION 13: To what extent do you agree or disagree that the QUDM notice as set out in the draft SI permits a contracting authority to effectively create a utilities dynamic marketplace that maintains the effect of a qualification system under the existing rules?

QUESTION 14: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Transparency Notice

The Bill stipulates that a contracting authority must publish a transparency notice before awarding a contract under direct award provisions. The function of the transparency notice is to inform stakeholders that a contracting authority intends to direct award a contract and ensure that there is transparency relating to this decision. It provides an opportunity for interested parties to scrutinise whether grounds for direct award are being applied correctly.

This notice is similar in its purpose to the 'voluntary ex-ante transparency (VEAT) notice' under the EU regime. However, where the VEAT is published voluntarily and triggers a standstill period just before a contract is entered into, the transparency notice is mandated (except for direct award: user choice contracts) and should be published earlier in the procurement process. It is used in conjunction with the contract award notice, which is required prior to the contracting authority entering into the contract and will (in most cases) start the standstill period.

There is no set time period between the publication of the transparency notice and the award of the contract, however, we intend to set out in guidance the benefits of publishing the transparency notice as early as possible.

QUESTION 15: To what extent do you agree or disagree that the transparency notice as set out in the draft SI will provide visibility of upcoming procurements to be awarded using the direct award procedure?

QUESTION 16: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Procurement Termination Notice

The procurement termination notice informs the market that a contracting authority has decided not to proceed with a procurement. It is only necessary to publish this notice if a tender notice or transparency notice had been published for the procurement.

Each time a tender or transparency notice is published to initiate a procurement, it creates a data record of the lifetime of that procurement and any resulting contract. Failing to confirm a procurement has been terminated will result in suppliers not being aware of a cancellation and permanently incomplete data records and inaccurate records on the central digital platform (with the number of ongoing procurements incorrectly including terminated procurements), which is unhelpful for anyone monitoring and using this data. A procurement termination notice is required to ensure that the data record and the full story of the procurement is concluded.

A procurement termination notice is a new concept included within the regulations to provide detailed information to the market and suppliers so they understand the intentions of the contracting authority have changed, reducing bid costs for suppliers and providing increased market certainty. It applies to all procurements except those initiated by private utilities.

QUESTION 17: To what extent do you agree or disagree that the contents of the termination notice, as set out in the draft SI, provide greater transparency about procurement processes that have not resulted in a contract?

QUESTION 18: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Assessment Summary

The assessment summary has the same function as what is currently known as the standstill letter (often referred to as the debrief letter). The Bill requires that an assessment summary must be provided to any supplier that submitted an assessed tender in relation to a competitive procurement under clause 19 of the Bill. For clarity, this means that an assessment summary is not mandated when awarding a call-off contract under a framework, as the call-off is awarded in accordance with the procedure set out in the framework itself (not under clause 19), although its provision is to be encouraged.

The draft SI details what needs to be included in the assessment summary document. In short, an assessment summary will provide a supplier that submitted an assessed tender (defined in clause 50 of the Bill) with the scores their tender was awarded as a result of the

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final assessment process at the end of the procurement procedure which determines the Most Advantageous Tender and an explanation, making reference to the bid content, as to why particular scores were given against each criterion.

Each supplier that submitted an assessed tender will privately receive the assessment summary pertaining to their bid and, if they are unsuccessful, they will also receive a copy of the winning supplier's assessment summary. That copy will be redacted, in accordance with clause 94 of the Bill, to protect any sensitive information.

The provision of this information will give the supplier an understanding of why their bid was successful or unsuccessful.

Assessment summaries must be provided at the same time to all suppliers that submitted an assessed tender, and before the contract award notice (which commences the standstill period) can be published.

As well as ensuring suppliers continue to receive an explanation as to why they did or did not win the contract, the draft SI aims to drive more consistency across assessment summaries regardless of which contracting authority has provided the information, by clearly indicating what needs to be addressed and reducing the potential for differing interpretations.

It also aims to reduce the time it takes to create the summaries (compared to the time taken to draft standstill letters) by removing the obligation to make direct comparisons between the successful and an unsuccessful bid in order to indicate the relative advantages between them. Instead, the advantages will be evident from reading the successful supplier's assessment summary alongside the unsuccessful supplier's summary. This gives contracting authorities the opportunity to use information already generated during the assessment process and enables summaries to be drafted once only, rather than revising information for each unsuccessful supplier.

The draft SI does not require the contracting authority to provide any additional feedback that may help suppliers improve future tenders, but guidance will continue to encourage this, where it is feasible.

This is in line with what was described in the Government response to consultation, but rather than the information being released to suppliers once the contract award notice is published, it must be provided before the contract award notice is published. Both the unsuccessful suppliers' assessment summaries and that of the successful supplier will be provided privately (i.e. they will not be published on the central digital platform).

QUESTION 19: To what extent do you agree or disagree that the contents of the assessment summary (along with the provision of the successful supplier's assessment summary) will provide adequate information to suppliers so that they can reasonably understand why they did or did not win the contract while reducing the time it takes for contracting authorities to provide this information?

QUESTION 20: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Contract Award Notice

The contract award notice notifies the market of the outcome of a procurement process and alerts the market to the fact that a contract is about to be entered into. In the majority of cases, it starts a standstill period which allows a window for challenges to the award decision before the contract is signed. This notice can also inform the market if a contracting authority decides to not proceed with one or more lots in a procurement process after the closure of the tendering period.

It is not permissible to enter into a contract awarded following a competitive tender procedure without having first published the contract award notice and issuing the assessment summaries in relation to tenders included in the final assessment. The contract award notice will require contracting authorities to confirm the date on which the assessment summaries were provided.

The requirement to publish a contract award notice is the same for frameworks as it is for any other contract and is required for the set up of both open and closed frameworks. However, there are certain contracts outlined in the Bill for which the contracting authority is not required to publish a contract award notice. These are:

- direct award: user choice contracts;
- call-off contracts awarded under defence and security frameworks; and
- (regulated) below threshold contracts

Private Utilities

A contract award notice is required for call-off contracts awarded through any other framework. Although not yet captured in the draft SI, we intend to make provision, in line with our international obligations, to cover contract award notices published by private utilities. As part of this, we will require a reduced version of the contract award notice for contracts awarded under a framework for private utilities. This intent will be reflected in the final version of the SI, subject to views received in this consultation.

QUESTION 21: To what extent do you agree or disagree that the contract award notice as set out in the draft SI will be a suitable vehicle for alerting the market to the contracting authority's intent to enter into a public contract and triggering the standstill period?

QUESTION 22: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

QUESTION 23: To what extent do you agree or disagree that it is appropriate for private utilities to publish a reduced version of the contract award notice for contracts awarded under a framework?

QUESTION 24: If you wish to explain why you disagree with this approach please do so.

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Contract Details Notice

This notice serves to tell interested parties that the contract has been entered into. It must therefore always follow the contract award notice and any associated standstill period. Contract details notices are also required in relation to certain high-value below-threshold contracts, although no standstill period attaches to those contracts.

The purpose of the notice is to inform suppliers and the public that the contracting authority has entered into a contract as the result of procurement procedure. In accordance with the Bill (clause 53) this must be published within 30 days of the contract being signed (120 days if the contract is a light touch contract). The Bill also requires the publication of contracts with a value over £5m within 90 days (180 days if the contract is a light touch contract). This threshold has changed from the £2m threshold proposed in the Green Paper. For notifiable regulated below threshold contracts they must be published within a reasonable time.

The contract details notice is also where the contracting authority should, where relevant, record information on at least three Key Performance Indicators (KPIs) for each contract in accordance with clause 52(1) of the Bill.

This notice is also required upon the establishment of a framework. This will tell interested parties which suppliers are on the framework and in most cases (when published), what the core terms and conditions of both the overarching framework agreement and any subsequent call-off contracts are. Additionally, framework 'call-offs' will publish this notice to inform interested parties that the call off contract has commenced.

The requirement does not apply to contracts awarded by private utilities or to direct award: user choice contracts. Additionally, the Welsh Government and Northern Ireland Executive have taken a decision to derogate from the requirement to publish contracts for their devolved and transferred authorities.

QUESTION 25: To what extent do you agree or disagree that the contents of the contract details notice, as set out in the draft SI, will give the required level of transparency of the existence and substance of government contracts?

QUESTION 26: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Payments Compliance Notice

The Government is strengthening payment legislation to ensure that the public sector is held to account for its own performance. We are aligning how the public sector reports on its payment performance with the private sector and both will report against the same set of metrics. The Bill requires contracting authorities to publish specified information every six months, detailing how quickly they have paid their suppliers.

By creating a central repository of government payment information, we aim to increase transparency of public sector payment performance, and make external scrutiny of that performance easier.

The payments compliance notice is intended to replace and strengthen regulation 113(7) of the Public Contracts Regulations 2015. The goal is to move the public sector publishing requirements on payment performance closer to those in the private sector, creating more direct comparability.

This notice does not apply to private utilities or contracts awarded by schools, nor does it apply to concession contracts. The Northern Ireland Executive has taken a decision to derogate from this requirement for their transferred authorities.

The principal differences between the new regime and the old, are the switch to six monthly reporting rather than annual, the requirement to measure from the point an invoice is received, rather than the point it is validated, the additional requirements to provide average payment days and the number of invoices received but not paid in the period, the requirement for sign off by a finance director, and the removal of the requirement to publish late payment liability interest.

QUESTION 27: To what extent do you agree or disagree that the payments compliance notice provides the transparency necessary to hold the public sector to account for its performance in paying suppliers on time?

QUESTION 28: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Contract Performance Notice

The contract performance notice fulfils two functions: recording both the performance of the supplier against the published KPIs and information relating to any serious breach of contract. It is not a requirement for both KPI performance and a serious breach of contract to be published on one notice; this information can be published over multiple contract performance notices.

Before entering into a public contract with an estimated value of more than £5 million, a contracting authority will usually be required to set at least three KPIs in respect of the contract in the contract details notice and in the contract performance notice; the supplier's performance is measured and monitored using these KPIs. There will also be a separate requirement to publish KPIs, but not necessarily before the contract is entered into. However, a contracting authority may decide that KPIs are not relevant to a contract if it considers that the supplier's performance cannot be appropriately assessed through such indicators – in this case there is no obligation to set and publish KPIs.

KPIs are not required to be published in any case for certain types of contract. These are:

- frameworks;
- utilities contracts awarded by private utilities;
- concession contracts;
- light touch contracts.

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The requirement to publish information relating to a serious breach of contract does not apply to private utilities or in relation to light touch contracts.

The publication of KPIs and breach of contract/failure to perform information provides transparency to both contracting authorities and the public on supplier performance. This therefore provides contracting authorities with an objective source of information as to which suppliers are subject to the discretionary exclusion grounds for breach of contract and poor performance, and will allow them to better exercise their discretion in respect of this ground as a result.

The response to the Green Paper described our intention to publish a contract performance register. We still intend to make this register available online. It will be released after the new regime and the central digital platform are established, and will be populated using the information provided by the published notices.

QUESTION 29: To what extent do you agree or disagree that the Contract Performance notice will provide adequate information about a supplier's performance on a contract?

QUESTION 30: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

QUESTION 31: To what extent do you agree or disagree that the Contract Performance notice will provide adequate information relating to a serious breach of contract by a supplier?

QUESTION 32: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Contract Change Notice

The Procurement Bill sets out that before modifying a public contract or a 'convertible contract' (as described in clause 74), a contracting authority must publish a contract change notice (CCN).

The intention behind CCNs and (if the modification makes changes to, or results in, a contract valued over £5 million the subsequent publication of the modification (as required by clause 77)), is to make the important decisions taken during the lifetime of larger contracts more transparent and open to scrutiny by interested parties. Modifications that may occur during the life of the contract can affect the value, duration, requirements and other elements of the contract.

In the current regime, there is little information available during the implementation phase of contract management. This notice and the publication of modifications seeks to address this in the future.

A CCN can cover multiple contracts that all stem from the same procurement process. This could happen, for example, if a contract is divided into lots with multiple awards, but they all still result from the same tender notice.

A CCN is not required for modifications to certain types of contracts, as follows:

- defence and security contracts;
- light touch contracts;
- contracts awarded by a private utility.

The Northern Ireland Executive has taken a decision to derogate from both the requirement to publish CCNs and the requirement to publish the modifications/modified contracts for their transferred and devolved authorities. The Welsh Government has derogated from the latter requirement only.

Originally the Green Paper stated that publication of a CCN would commence a mandatory standstill period. We listened to concerns from stakeholders that this could impact on contract delivery and consequently will not mandate that contracting authorities should enter standstill following publication of a CCN. Instead, clause 76 of the Procurement Bill makes provision for a voluntary standstill period.

QUESTION 33: To what extent do you agree or disagree that the contents of the contract change notice will provide greater transparency of the proper management of government contracts?

QUESTION 34: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Contract Termination Notice

The function of the contract termination notice is to inform stakeholders that a contract has been terminated and to ensure that the data record is kept up to date. Currently it is unclear whether contracts have actually terminated or been extended.

The use of the contract termination notice will allow more scrutiny by placing a 'flag' for interested parties highlighting the end of the contract and allow for greater analysis of the value for money of the whole contract. It will also provide probity for decisions made during the lifetime of a contract and ensure that there is greater clarity over contract changes that might have been made, such as, for example, extensions to the contract duration.

The contract termination notice will also function to fulfil the requirement in clause 71 'Assessment of contract performance' that authorities must publish certain information when a supplier has breached a public contract and that breach results in termination of the contract. This is intended to ensure there is a public record of which suppliers are subject to the discretionary exclusion ground relating to breach of contract, both for transparency purposes but also to make it easier for authorities to apply the ground. The notice must be published before the end of the period of 30 days beginning with the day on which a public contract is terminated. The requirement to publish a contract termination notice does not apply to private utilities or in relation to a direct award: user choice contract.

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QUESTION 35: To what extent do you agree or disagree that the contents of the contract termination notice, as set out in the draft SI, will give greater clarity and transparency about which government contracts are still in force?

QUESTION 36: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Central Digital Platform

Under the new procurement regime, the Cabinet Office is developing a digital platform for the publication public procurement notices and documentation. By creating this central digital platform, relevant procurement notices and information will be held in one place, generating clarity for suppliers and fairer and open competition as well as meeting related requirements in international trade agreements and providing the opportunity for meaningful analysis of public procurement data at an aggregated level.

The digital platform will enable notices and documents to be accessible by electronic means, free of charge and through a single point of access. The draft SI provides information about the operation of the platform and sets out requirements for contracting authorities' interaction with it. Where contracting authorities are required to publish notices and/or documents, this will be done through the digital platform. Publication is successful when the notice is publicly viewable on the system or the contracting authority receives confirmation from the Cabinet Office that the notice or document has been successfully submitted to the platform.

The new digital platform will be capable of being used to publish information relating to below threshold procurements (including where this information is required by the Bill (clause 87) and where the contracting authority has elected to publish notices) as well as all other procurements subject to the new regime (covered procurements).

In the event of the digital platform not being available for publication to take place, the contracting authority can publish on an alternative platform; conditions for such a platform are further detailed in the draft SI. Subsequently, once the central digital platform is available again for publication, the contracting authority must ensure that the notice is then also published on the central platform.

QUESTION 37: To what extent do you agree or disagree that the SI drafting provides clarity about the operation of the central digital platform?

QUESTION 38: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

QUESTION 39: To what extent do you agree or disagree that the workaround procedure provides a viable alternative in the event of a failure in the central digital platform?

QUESTION 40: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Central Digital Platform: Supplier Information

Before a supplier participates in a covered procurement, the draft SI requires contracting authorities ensure suppliers are registered on the platform and confirm they have submitted their core supplier information (as set out in the draft SI) to the platform. Where a contracting authority requires any of this core supplier information it must in the first instance obtain it from the platform unless the supplier provides updated or corrected information (after the tendering period) otherwise than via the platform. This was referred to in the Green Paper and the subsequent Government response as the ‘Supplier Registration System’.

The purpose of capturing supplier information in the central digital platform is to reduce the time taken by suppliers to access public procurement opportunities by ensuring that common data can be submitted more efficiently and effectively. This is of real benefit to all businesses, but especially SMEs.

In line with a ‘tell us once’ approach, this will enable suppliers to bid for public sector opportunities without having to duplicate core information with each bid they submit. Suppliers will be responsible for ensuring that the information they authorise to be submitted from the central digital platform to the procurement team as part of their tender is current and correct at the end of the tendering period. If a supplier’s information changes during the course of a procurement they can withdraw and then resubmit their bid until the tendering period ends. Suppliers will also have the ability to update their information outside of any formal tendering process.

The central digital platform will create a package of information which the contracting authority receives as the tendering period closes. This means that they will have some of the information needed when it comes to publishing later notices. It will assist them in undertaking due diligence and determining if the supplier is excluded or excludable.

QUESTION 41: To what extent do you agree or disagree that the information required by the draft SI to be obtained via the central digital platform will save duplication and re-submission time by suppliers bidding for multiple government contracts?

QUESTION 42: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

QUESTION 43: To what extent do you agree or disagree that use of the Central Digital Platform: Supplier Information should be mandatory during the tendering period and that, until the end of the tendering period, contracting authorities may only use the registered core supplier information submitted to the platform?

QUESTION 44: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Unique Identifiers

In order to ensure that published data is correctly attributed to specific parties and processes, all contracting authorities, suppliers and procurement procedures (and their individual notices) will have a unique identifier on the central platform. Contracting authorities will be

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required to include these unique identifiers in all procurements when publishing notices and other information (including payment data) to the central digital platform. This supports the publication and use of data on the platform.

A unique identifier for all information published by all contracting authorities in relation to the contracting authority, the supplier and the procurement prevents duplication of records on the central digital platform and will link together all records associated with each procurement (and each supplier and contracting authority), facilitating tracking and analysis.

Where a supplier already has an unique identifier from an official register, such as Companies House, for example, it can utilise the same identifier for the central platform. Or where an identifier does not already exist for the supplier elsewhere, the platform can create one.

The draft SI defines the different types of identifiers to be used and sets out how these are generated, provided and used.

QUESTION 45: To what extent do you agree or disagree that the provisions on unique identifiers will enable tracking of procurement data?

QUESTION 46: If you wish to explain why you do not agree that the draft SI reflects or delivers the policy intent described above, please do so.

Transitional Provisions

The Bill contains a power (clause 124) to make transitional, transitory or saving provision for the commencement of the Act. Regulations will establish the transitional arrangements for procurements already underway at the time that the new regime enters into force. The intent is that the new procurement regime will cause as little disruption as possible for contracts already awarded under the present regulations or procurements that have started but not yet been awarded when the new regime comes into effect.

The fundamental principle is that procurements that ‘start’ after the effective date of the new legislation must be conducted by reference to the new regime only, whilst those that have been conducted, or have started, under the Public Contracts Regulations (PCR) 2015, the Utilities Contracts Regulations (UCR) 2016, the Concession Contracts Regulations (CCR) 2016 and the Defence and Security Public Contracts Regulations (DSPCR) 2011 (the ‘old regime’) should continue to rely on those regulations. In practical terms, ‘starting’ a competitive procurement under the old regime could mean:

- submitting a notice for the purpose of inviting tenders, requests to be selected to tender or to negotiate, or requests to participate in relation to a contract or framework agreement;
- publishing an advertisement seeking offers or expressions of interest in relation to such a contract or framework agreement;
- contacting a person in order to seek an offer or expression of interest in relation to such a contract or framework agreement;
- contacting a person in order to respond to an unsolicited offer or expression of interest in relation to such a contract or framework agreement;

- entering into such a contract or concluding such a framework agreement.

For non-competitive contracts it is more difficult to determine whether a procurement has 'started' under the old regime because there is no mandatory noticing. We have listened to feedback received after transition to the PCR and intend to make the position clearer for contracting authorities. Any non-competitive procurement entered into later than 3 months after implementation date will be subject to the rules of the new regime, unless a Voluntary Ex-Ante Transparency Notice (VEAT) has already been published for the procurement.

Procurements that have been started under the old regime will continue to the end of the contracting lifecycle for that process; that is to say the procurement and resulting contract continue to operate under the old regime until:

- the termination of the contract that is awarded as the result of a process under the old regime, or,
- the decision is reached that no award is to be made; or
- for a framework, the termination of the last call off contract to finish as a result of an award made within the life of that framework; or
- for Dynamic Purchasing Systems (DPS), the termination of the last contract awarded by reference to the DPS within its lifetime, or
- for a Qualification System (QS), the end of the last contract awarded by reference to the QS within its lifetime or where it has an unlimited duration, the end of the last contract by reference to the QS before its termination.

Therefore, frameworks, DPS and QS set up under the relevant old procurement regimes will remain compliant routes to market, assuming that they were set up lawfully, i.e. it will be permissible to award contracts through these commercial tools set up under the old regime until they expire, are replaced, or cease to exist.

The register of commercial tools will be a single reference point that contains information on all frameworks and dynamic markets to support contracting authorities' decision-making on the route to market for a particular procurement. It will only record frameworks or dynamic markets set up under the new regime.

To support an orderly transition some additional principles have been set that take into consideration the differences between old and new regimes, for example:

- If a contracting authority has commenced or completed pre-market engagement under the old regime, but had not advertised prior to the new regime coming into force, they will not need to rewind the process and start the engagement over again with a pre-market engagement notice. Instead, it will be able to explain the position on pre-market engagement in its tender notice.
- If a contracting authority has published a Prior Information Notice without inviting expressions of interest or taking other steps outlined above which constitute the start of a procurement, then the contract will be let under the new regime.

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- Under the new regime, a payment compliance notice should be published within 30 days of the end of each six month period. However, it is expected that the digital capability to publish payment compliance notices will not be available until later in 2024, therefore there will be an exception of the period immediately following the coming into force of the new regime.
- It is also likely that the contract performance notice also will not be available until later in 2024 and therefore any relevant reporting will be delayed.

Please note that further guidance will be provided that will fully explain all transitional arrangements.

QUESTION 47: To what extent do you agree or disagree with the approach to transitional arrangements set out in this consultation?

QUESTION 48: If you wish to explain why you do not agree with the approach described above, please do so.

Consequential Amendments

The Procurement Bill (clause 123) allows an appropriate authority to make regulations that amend other legislation as a consequence of provisions of the Bill. This is necessary to ensure that other legislation that contains references to public procurement are updated for consistency with the Procurement Act. For example, the power will be used to remove references in other legislation to the Public Contracts Regulations 2015 which will be repealed by the Procurement Act, and replace them with references to relevant parts of that Act instead.

Amendments will need to be made to numerous pieces of legislation, for example the Equality Act 2010, the Public Services (Social Value) Act 2012 and the Health and Social Care Act 2012. Although these updates will be made by SI we are not providing a draft for consultation as the provisions are purely technical in nature, and we are still working with government departments to finalise.

Defence Authority

The draft SI lists those contracting authorities which are specified as defence authorities for the purposes of clause 7 of the Procurement Bill and to which certain clauses in the Bill on defence and security contracts apply. These are contracting authorities which the Minister for the Cabinet Office considers exercise their functions wholly or mainly for defence or national security purposes.

QUESTION 49: To what extent do you agree or disagree that the list of defence authorities in the draft SI accurately captures the organisations that should be included within the definition?

QUESTION 50: If you wish to explain why you do not agree with the list, please do so.

