

Green Paper: Transforming public procurement – WithYou response

March 2021

We Are With You (With You) is a charity that offers free, confidential support and treatment to people in England and Scotland who have issues with drugs, alcohol or mental health. We give people support in a way that's right for them, either face to face in their local service, community or online. We are one of the largest providers of treatment and support services, currently working in over 80 locations across the UK with over 1500 staff and 800 volunteers, helping more than 100,000 people a year.

Questions

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

With You supports the principles within the Green Paper Transforming Public Procurement, to improve and simplify current procurement processes. If designed and implemented correctly, procurement can contribute to improving service provision for people needing support and treatment for drugs, alcohol and their mental health.

Over 90% of our income is received through public procurement exercises and we believe that the strategic focus of the Green Paper reforms should be based on the following:

- Greater focus on quality of tender within the public procurement process, ensuring a more level playing field.
- Reduce the focus on input, activity or even output KPI's and instead focus on the outcomes wanted and desired impact of commissioned services on the individual and wider society.
- Services should be enabled to spend their time on making a difference to the public rather than being consumed by reporting multiple KPIs that are

not outcome focused.

- Focus on encouraging innovation and reimagining services within the procurement process which may also mean encouraging new providers.

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?

Introducing the power for a new public procurement unit to intervene could help contracting authorities feel confident in changing, rejecting or challenging incumbent providers where necessary.

Providing support on how to set outcome or impact based tenders and supporting the process of more consistent tender documentation would also be a helpful role for a new public procurement unit.

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

We welcome the consolidation of the new 3 levels of procedures into a single, uniform framework. This will create a clearer, and more simple process to follow.

Currently, there are too many rules and regulations that make the bidding process overly and unnecessarily complex. A lack of clarity around what procedure bidders need to follow undermines the ability of bidders to plan effectively and know how much resource to allocate to certain tendering opportunities. A single, uniform framework will provide more clarity for those bidding for contracts in knowing what process will need to be followed and why that process is to be followed. It will also make the process for lodging challenges against decisions easier.

The differing time-scales used in different bidding processes, which can vary substantially, also make the tendering process more complex. Greater clarity around the length of tendering processes is welcome and will help those bidding for contracts to be able to plan for future tender activity more efficiently, and ensure the best use of bidder resources.

However, there are areas missing under this new framework. We think there are risks in not having NHS regulations follow the same single, uniform framework. To ensure the purpose of these reforms are achieved, the NHS regulations used for procurement should follow those outlined in this Green Paper, or at least mirror

public procurement regulations. NHS commissioning employing completely different processes undermines why these processes are being simplified, and can create additional challenges for providers.

We believe that local authority commissioning, rather than the NHS, is the best system to understand the wide and diverse priorities for local drug and alcohol services and treatment systems. In our experience, a strong place-based strategy and culture of collaboration between different types of providers can best support treatment and recovery. Local authorities can also broker partnerships and support integrated commissioning models, for example to support joint working between charities and the NHS, and are the best model for encouraging innovation.

Lastly, we broadly welcome the negotiation principles included in the Green Paper, especially for those larger tenders which will contribute to the building of better working relationships with commissioners. However, the negotiation process needs to be used selectively and our recommendation would be for it to be proportional to its use relative to contract value and complexity of the contract. Otherwise, this process could end up substantially lengthening bidding processes, and this would result in disproportionate resources being needed by all to complete the procurement exercise. Where a lengthy negotiation stage is undertaken, we believe that consideration needs to be given to providing a development fund to providers (as seen in other central government projects).

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

We agree that 'crisis' is a ground in which limited tendering could be used. However selected providers must still be able to demonstrate that selection of provider is based on past acceptable performance/provision of similar goods/services using the proposed performance transparency measures outlined below. It is important this is only used for a limited amount of time during the specific 'crisis' period. Greater transparency for when crisis measures are introduced must accompany any implementation of these measures ensuring these limited measures do not become business as usual.

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

The regulations could go further in providing flexibility to encourage more innovation in procurement. Currently commissioners invite bidders to tender for

a pilot project to deliver a new service or approach. These are often on a short term contract i.e. 12 months. Following this exercise the pilot is then put back out to the marketplace as a new procurement exercise. There should be flexibility within pilots/ development projects to allow for formalised contracts to be issued – where the pilot project has already been through a tender exercise prior to award. This would encourage more providers to be part of innovative solutions rather than seeing them as higher risk, or procurement intensive.

We also believe that with greater collaboration and increased partnership being required within the sector, long term change and measuring of impact can be restricted where contracts are only for short time-scales. As a result, providers may be more reluctant to take on this approach where contract KPI's and provider performance are publicly available without an understanding of the complex system and interdependencies that the service operates in.

Q9. Are there specific issues you have faced when interacting with contracting authorities that have not been raised here and which inhibit the potential for innovative solutions or ideas?

A significant issue With You has faced is contracting authorities reducing the budget envelope for services they put out for tender. The competition to deliver the service at reduced cost leads to a race to the bottom. Where providers are encouraged to do more for less, within a reduced budget envelope, the quality of service that is delivered will decline and does not present value for money. Therefore, it is essential that contracting authorities ensure the budget envelope is appropriate and sufficient to deliver all aspects of the services they have out to tender. The proposed budgets must be relevant to local needs and have been tested at a pre-procurement level to ensure they are at the right level.

Lastly, where contracting authorities put tenders out for re-commissioning, there can often be a lack of detail and clarity provided in the procurement process, which undermines the bids quality and chance of success. Typical information that can be withheld by the existing contract holder citing commercial sensitivity could include details about TUPE, outcome/service performance data, and required KPI's. This can mean those bidding for these re-commissioned contracts take a more risk averse approach to the tender than they would if there was more information available. They risk bids being over-budget – reducing the potential for innovation, or under budget – making it more challenging to achieve the deliverables promised in the tender. Therefore

commissioning authorities can do more to challenge incumbent providers where vital information to running the service is withheld.

Where the benefit of contractual outcomes are shared (eg across public health, crime/policing, NHS); there needs to be clear agreement on who is funding the outcomes and service. Often where these conversations include the bidding organisation it can be prohibitive. The regulations should ensure that all commitments for jointly funding services are 100% agreed by all parties.

Sometimes the commissioning of pilots and short-term contracts are motivated by surplus budgets within commissioning organisations rather than the commissioning organisation having a clear need/evidence based and rationale.

Co-design and negotiation processes can be lengthy with no guarantee of contract, at a cost to the provider – a commitment and investment needs to be made to the bidding organisation to support the development of the services and reflect the collaboration.

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

See answer to question 9.

Q11. What further measures relating to pre-procurement processes should the Government consider to enable public procurement to be used as a tool to drive innovation in the UK?

While the Green Paper is broad in scope, it fails to address significant upstream issues such as the decision-making process around who decides which services will be put out to tender, and how those broader priorities are decided. These upstream decisions can have a significant impact on innovation.

For example, for people with multiple and complex needs, the most innovative and successful commissioned services are those that incorporate and integrate various services into one. Ensuring these services are able to be integrated needs to happen at a pre-procurement level. However current procurement practices mean that services for this demographic often remain siloed, commissioned separately, and to different time-frames. To encourage the commissioning of more integrated services, flexibility needs to be provided to allow older contracts for services to be aligned so procurement time-frames can be matched and so they can be joined together and commissioned as one.

Lastly, as has been mentioned previously, there is a need to test the appropriateness of budgets at the pre-procurement level to ensure there is an adequate envelope within which services can be delivered, and that they are delivered at an appropriate level. Research and development are both vital to get a true understanding of user/population needs and system requirements and to test new solutions.

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

We welcome the principle that contracts should be awarded to the ‘most advantageous tender’, rather than the ‘most economically advantageous’, and KPI’s must focus on being impact and outcome based. Ensuring tendering processes become more outcome and impact focused is vital to encouraging innovation and the meeting of service users needs. Outcome-based commissioning models and funding that supports innovation in service development can also give commissioners more scope to find and invest in new approaches. This can make commissioners facilitators in meeting service user needs rather than customers themselves.

Awarding contracts based on the ‘most advantageous tender’ requires there being a level playing field, and larger providers should not receive a commercial advantage due size, and economies of scale. Commissioners have a role to ensure they are not afraid to turn down big providers, ensure large providers do not use direct lobbying to win the favour of commissioners, and make sure there is not an overly punitive challenge process.

Furthermore, by simplifying the bidding process, administrative costs of developing tenders will be reduced and help ensure that the process does not favour larger providers. There also needs to be minimum standards set for training and pay so contract costs cannot be reduced on the back of poorer treatment of staff, and through higher caseloads.

However, it is important to ensure that providers are suitably held to account for the ‘advantages’ that they are including in their tenders. Including certain ‘advantages’ into tenders cannot just be for the purpose of winning bids. There needs to be clear KPI’s included into a contract award to ensure accountability and transparency around what is being proposed is actually being delivered sufficiently.

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

We agree in principle with the proposal for a centrally managed debarment list which can provide greater scrutiny of providers. However this should fall under the remit of the new unit mentioned in question 2, so there is a degree of independence and option to challenge any potential errors in the debarment list.

Greater clarity will need to be included in the event of debarment. For example, does this include all services in one area? Or those services delivered by that provider, and not other types of services they provide? Or will it refer to all services delivered by the organisation? How long debarment would last and could a provider be reinstated early?

The definition provided for national debarment is not specific enough. It does not allow for specific contractual differences; for example, the severity or instances which would constitute debarment and how this differs across sectors.

Debarment may penalise providers future growth and retention for three years (longer than some contract terms), which may be sufficient to cause companies or VSCE to fold, making public contracts less viable as an income stream and reducing competition to providers with higher risk tolerances.

We believe that debarment for minor breaches that are consistently failed could lead to perverse incentives within organisations and lead to behaviour that becomes undetected within the debarment framework – and outside of the aims of the legislation. For example, persistent br could automatically resolve all employee disputes to stay under a threshold.

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

While assessing past performance is essential, it is important to consider how this can affect providers of new services and encourage providers to be innovative. Often KPIs for a new service are a starting point for evaluating a service's success, and these KPIs may not always be achieved in the same way as a long standing service which will have been in operation for a long time, and have well established KPIs appropriate for that service. As such, when assessing past performance in consideration of a tender, there needs to be some recognition that contract KPIs can change, as other KPIs may become more appropriate measures of success and performance. This providing of this context should be compulsory.

We also believe that with greater collaboration being required within the sector, and increased partnership working, long term change and measurements of impact are restricted where contracts are for short timescales. Providers may be more reluctant to take on this approach where contract KPI's and provider performance are publicly available without an understanding of the complex system and interdependencies that the service operates in.

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

We welcome the proposal to carry out a simplified selection stage through a supplier registration system. This would reduce the administrative burden required and would stop bidders having to repeat the same information in every tender process.

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

We agree that transparency should be embedded throughout the contracting lifecycle. Commissioners could encourage greater learning and sharing between providers with funding for cross-cutting research and development projects, the learning from which could become part of national guidelines. Currently, providers have a disincentive to share insights and findings from their research as this may provide competitive advantage in a tender process.

We welcome increased transparency in terms of objectives, rationale and feedback on contract award. We welcome dialogue to help shape solutions and opportunities for innovation and collaboration.

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

Greater transparency requirements placed on private enterprises in tendering processes would create a more level playing field among those competing for contracts. As a charity, our supplier registration information is already publicly available through the Charity Commission. This level of transparency is not reciprocated when competing against private companies who are subject to fewer transparency requirements. This has a significant impact in giving private companies significant commercial advantage over third sector organisations.

However, there are a few risks posed by these proposals. For example, certain

types of services with more favourable and easily achievable KPIs can be cherry-picked over those services which may be addressing a more challenging demographic. For example, the KPIs for a service provider who is working with people with multiple and complex needs, or in areas of high-deprivation, will often have KPIs that are harder to achieve than those compared to a service provider that is addressing a more easily engaged demographic. This could create a significant divide in the marketplace.

Price and commercial performance is generally held as commercially sensitive information by suppliers – having a function to compare these measures is likely to incentivise gaming without the context of local differences in wide ecosystems and infrastructure.

Greater clarity on who will verify the data on a central digital platform that is provided as part of contract management and KPIs will also have to be provided alongside this proposal.

We currently have in place a range of KPI's that reflect contract performance and service governance– our contractual requirements are reported via NDTMS whereas our service governance (sickness levels, staff training etc.) are more a measure of the health of our services. We believe that the contract performance measures should be published only, as the health of our organisation and services reflects the advantages of us as a provider and would have a negative consequence on the suggested changes from MEAT to MAT at tender evaluation.

Q30. Do you believe that the proposed Court reforms will deliver the required objective of a faster, cheaper and therefore more accessible review system? If you can identify any further changes to Court rules/processes which you believe would have a positive impact in this area, please set them out here.

We think the fast-track system will make it quicker and cheaper to challenge decisions and will be more focused on resolution at the pre-contract stage, which is to be welcomed.

The Green Paper could also include additional proposals on effective sanctions towards commissioners for poor procurement processes. However, as proposed in the Green Paper, we do not think capping the damages that can be awarded for breaches of the procurement rules to legal fees and 1.5x bid costs would be effective sanctions. This wouldn't act as a deterrent against poor procurement practice. In addition to the damages payable to the bidding provider, we believe

an additional fine should be issued to the commissioning authority. This fine should be based on a % of the contract value or be a sliding scale of costs, proportional to the contract value.