



GMB TRADE UNION

RESPONSE TO

UK GOVERNMENT GREEN PAPER “TRANSFORMING PUBLIC PROCUREMENT”

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Introduction

GMB is UK's third largest trade union, with over 600,000 members across a wide range of sectors across manufacturing, commercial and public services. Public procurement policy and legislation affects the cross-section of our membership, and GMB therefore welcomes the opportunity of responding to this Green Paper consultation on "Transforming Public Procurement".

GMB notes that the Cabinet Office engaged with over 500 stakeholders and organisations through many hundreds of hours of discussions and consultations and workshops in producing the Green Paper. However, the fact that GMB and the wider trade union movement was not approached for input in to this important exercise shows an unacceptable lack of representative views gathered in this process.

We understand Government also established a Procurement Transformation Advisory Panel, where again there was no trade union involvement.

Given that our members make goods, provide services and works that supply public authorities at every level, we believe we have an important voice to be heard in the reform of public procurement.

GMB believes that the most effective model of delivering public services is direct (in-house) provision. Within the context of current contracting frameworks, it is important for the consultation process to recognise the legitimate right of contracting authorities to decide how they wish to deliver public services and provision, and give recognition to the legitimacy and benefits of in-house provision and the right to organise and deliver quality public services free from mandatory marketisation and outsourcing by removing public, health and social services from the scope of trade agreements.

Where contracting authorities decide to go out to contract, GMB urges Government to use the reform of public contracting regulations to ensure public money, taxpayers' money, delivers positive and progressive benefits for people across communities, including:

- generating good secure jobs, skills development, training and apprenticeships
- promoting collective agreements and access for trade unions, to develop fair pay, safe workplaces and good working conditions
- developing local, regional and national supply capacity across key products and services
- ensuring ethical supply chains, and strengthening control and liabilities on employment standards in sub-contracting chains
- addressing inequality in communities and society, and promoting community wealth building and well-being to level up on sustainable economic development
- promoting equality and equal treatment across all strands
- advancing environmental protection and addressing climate change
- promoting the highest levels of food standards and safety across all health, social, education and wider public service functions and establish the principle of the right to food.
- protecting and promoting devolved competence and local and regional powers on public spending.

Response to Questions

Below are our responses to the questions posed in the consultation paper according to the numbering as they appear in the Green Paper. We have restricted our response to questions deemed relevant to GMB and our members.

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

GMB is disappointed by the lack of clarity of the proposals. It is unclear where related acts and provisions, such as the Social Value Act, and Construction Playbook mentioned, sit within the new legal principles. There is no clear definition of “public good”, nor of the status and coverage of the planned *National Procurement Policy Statement* (NPPS). It is not possible to make an informed judgment on the proposed legal principles without more detailed information on related key proposals such as the NPPS. GMB believes that a robust and progressive review and extension of the scope and flexibility of the Social Value Act is needed to address growing social and economic inequalities that can effectively be addressed through more socially focused public contracting.

Together with European and International trade unions, GMB has long campaigned for UK, EU and WTO public contracting regulations to abandon lowest price contracting in favour of developing in-house capacity as far as possible, and applying robust and progressive social, employment and environmental selection criteria when outsourcing. Radical progress is needed in this area to address economic and social inequalities and address environmental and climate challenges. Yet the Government was swift to become a rule taker in this area through its hasty signature of the GPA, which has overtly liberalising objectives and has minimal provisions in this area.

GMB is concerned about the lack of detail and clarity in the paper on the obligations contracting authorities will need to comply with under international agreements, including the GPA, and indeed the procurement chapters of trade agreements it has concluded or is in the process of negotiating. There has been little or no Parliamentary or wider public scrutiny of our assension to the GPA and trade deals, and the existing and potential impact of this for many contracting authorities in relation to their priority objectives in public contracting. There is a concern that the Government is seeking to centralise and control priority setting so that it can trade away freedoms of public authorities to conduct public procurement to maximum community benefit where local and regional priorities might differ from national government priorities.

The Government notes the proposed NPPS is consistent with international practice, but there is a worrying ambiguity created in the document about the geographical coverage of the legal principles being proposed. Will the NPPS only apply to central government procurement or sub-central level? Over-frequent and misplaced reference to the UK ignores the established powers of the devolved administrations in public procurement. The cursory reference in point 14 Application that *the Green Paper would apply in respect of contracting authorities undertaking wholly or mainly reserved functions* is unclear and undermined in the proposals.

GMB has concerns that these proposals are being developed with a view to centralising public contracting controls, when we believe that levelling up to address regional economic and social inequalities requires the reverse approach of more devolved, local and regional powers in developing sustainable economic recovery post COVID and ongoing development to the direct benefit of local and regional communities.

Q2. Do you agree there should be a new unit to oversee public procurement with new powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities?

The pandemic has underlined the need for GMB's long standing demand for more openness, integrity and transparency in the award of public contracts, and for in-house options to be the preferred provider for services and works wherever possible.

On past performance, GMB is not convinced that a unit based in Cabinet Office at the hub of central government is the level to hold this responsibility, and we would not support this extension of powers. We note that the NAO, in a report published in November 2020,¹ highlighted scandalous and large-scale mishandling of public money in emergency contracting during the early stages of the pandemic with over £18 billion worth of contracts for supplies, services and works.

Even allowing for the extraordinary circumstances of the pandemic, the NAO's review of a sample of contracts found clear evidence of:

- Insufficient documentation on key decisions
- Failure to properly assess perceived and actual conflicts of interest
- Retrospectively awarded contracts
- Contract notices not being published in a timely manner

The NAO concluded that the Government had 'diminished public transparency' and fallen short of the 'standards that the public sector will always need to apply if it is to maintain public trust.' Further examples of inappropriate procurement have since come to light.²

On 18th February 2021 the High Court found that the Secretary of State for Health & Social Care, Matt Hancock had acted unlawfully in not publishing billions of pounds of public contracts for PPE.³ The seriousness of this judgment is hard to underestimate.

Furthermore, billions of pounds of public money involved in these contracts was squandered on ineffective and poor quality supply of PPE and other products and equipment which proved unfit for purpose, and delayed adequate PPE reaching the front line of health and social care, putting our members at fatal risk.⁴ This is disgracefully an enduring problem.

The issue of departmental capture by profiteering lobbying interests was highlighted again during the Free School Meals food parcels fiasco, when the main contracted provider was eventually forced to apologise after families shared images on social media of packages that were far below their funded value and did not meet basic nutritional standards. Schools with in-house catering capacity would have provided a more effective service and better value for money, as would direct payments. More generally, GMB is aware of a number of examples of outsourced catering which (at no fault of front-line staff) does not meet the standards set out in the National Food Strategy. If provision was in-house by default then the accrued

¹ <https://www.nao.org.uk/report/government-procurement-during-the-covid-19-pandemic/>

² The Metro, Department of Health did £90,000,000 deal with firm listed in Chinese hotel room, <https://metro.co.uk/2021/03/08/hancocks-department-did-90m-ppe-deal-with-firm-listed-at-hotel-room-14210310/>

³ <https://www.judiciary.uk/wp-content/uploads/2021/02/GLP-v-DHSC-190221.pdf>; Guardian, Matt Hancock acted unlawfully by failing to publish Covid contracts, 19 February 2021 <https://www.theguardian.com/society/2021/feb/19/matt-hancock-acted-unlawfully-failing-publish-covid-contracts-high-court>

⁴ FT, UK government spent £156m on single contract for ineffective PPE, 06 August 2021 <https://www.ft.com/content/93036435-45df-4883-b5d3-86ab96ca20e8>; BBC News, One million high-grade NHS masks withdrawn over safety concerns, 23 February 2021 <https://www.bbc.co.uk/news/health-56167916>

savings could go a long way towards funding GMB's long standing policy objective of universal free school meals for all pupils.

The Green Paper gives no indication that the Government is owning this gross mishandling of public money or has learnt from the critical review of its behaviour.

We are concerned that – even if the proposed unit was initially balanced in its representation – it would be all too easy for the body to become remote and technocratic, or for it to be staffed on an ideological basis under the direction of Ministers. This could lead to a dramatic increase in outsourcing, low pay, and risk of the delivery of public services. Instead, we would prefer a social partnership approach based on the pioneering work of the Welsh Government, with equitable representation for Government, trade unions and employers.

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?

GMB does not support a central Government unit, and notes that the Government's suggested pool of experts from which to draw an "independent" panel in point 46 does not include trade unions. We therefore have little faith in its integrity, and we have concerns about a non-accountable panel having the powers of sanctions in contracting procedures.

The Green Paper specifically refers to the collapse of Carillion, which devastated the lives of many of our members across a wide range of services and works. GMB had long warned politicians and Government at all levels of our concerns, and we were summarily ignored. Had GMB's warnings been heeded, action could have been taken earlier to mitigate the damaging effects of the Carillion collapse.

Should the Government proceed with its intention to establish such a unit, it is essential that there is an appropriate level of sector-specific representation. Policy recommendations that are based on generalised experience may not be appropriate to some sectors such as defence, where there are a number of special factors that include: a limited number of potential UK suppliers; a need to preserve sovereign manufacturing capabilities; and extensive use of single source procurement. The sector representatives should have expertise in their respective areas and they should be full members of the unit.

Trade Unions should have a role in influencing exclusions in any debarment list or register if this proposal is formalised.

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

The Government's reasoning on the justification for this consolidation seems confused. The paper claims that the objective is to reduce complexity, but it admits that the consolidation process will *be a major and complex exercise and will not by itself achieve our ambition to speed up and simplify the rules*. GMB is concerned this suggests a change for change's sake approach with no clear benefits identified.

Consolidation of regulations should not risk sectoral-specific features of contracting as covered in detail in our response to Q5.

GMB would like to see further clarification of how other existing free-standing legislation applying to contract award procedures such as the Social Value Act, which the Government does not propose to include in the new regulations, will interact with any new framework. It is also unclear how the consolidated regulations would interact with and support existing (but

underutilised) provisions in the HM Treasury Green Book, such as the right of contracting authorities to include tax and National Insurance contributions paid in the UK into their calculations of social value.

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

GMB is the lead shipbuilding union in the Confederation of Shipbuilding and Engineering Unions. We are the largest union in the defence shipbuilding sector.

It is a source of concern that the Single Source Contracts Regulations are only mentioned once and in passing in the consultation. The reality is that use of the DSPCR has remained muted in critical areas of expenditure (including spending with critical suppliers), despite concerted attempts to extend use of the DSPCR. There are long-standing and recurring concerns that competitive processes have been pursued when the Single Source Regulations may be a more appropriate approach (dating back at least as far as the RAND Corporation's recommendation to Government in 2005 that the UK should '[re]consider the feasibility of competition in light of the [UK's] industrial base constraints.' Most recently, the MoD was forced to cancel and restart the £1.5 billion Fleet Solid Support procurement exercise which had initially been planned on the basis of international competition.

GMB believes that the defence exemptions from general international procurement obligations have served the UK well, and that it is essential that inappropriate pressures to pursue competitive tendering do not lead to a further loss in baseline sovereign defence manufacturing capabilities. We call on the Cabinet Office to clarify the role of the Single Source Regulations under this proposed consolidated framework, and to confirm that – should it proceed with current plans – the central procurement unit will have an appropriate level of sector-specific expertise.

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

It would appear that the main incentive for the suggested changes to the procurement procedures is to extend competitive tendering procedures in line with the overtly liberalising objectives of the GPA. GMB believes that increasing domestic capacity and provision through public contracting will be key to post-COVID economic recovery across the UK, with in-house provision being the preferred option wherever possible.

Again, the scope for development and extension of Social Value contracting provision is not clear under this proposed procedure, which is a major concern to GMB.

The Government continues to make big play of the opportunities offered to UK suppliers and service providers for global public contracts through membership of GPA and other trade agreements it is negotiating. It is silent about the increased scope for reciprocal international competition, which has a much heavier footprint on the UK public contracting landscape.

Government commitments to excluding NHS and wider public services in international trade have not materialised and we see no clear carve out.

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

As mentioned in answer to question 2, GMB has major concerns about an integrity deficit at the heart of Government in relation to emergency contracting, as revealed by the NAO report and High Court Judgment. Cronyism, mishandling and inadequate documentation of limited tendering running to billions of pounds during the pandemic makes us wary of the motivation

of the Government in seeking to extend this contracting procedure to include a new circumstance relating to crisis. With trust so badly damaged in terms of openness and transparency, GMB would not recommend extending the scope for such nepotism and cronyism.

Furthermore, GMB is unclear what the Government means by “where measures are required to protect public morals, order or safety” which clearly has its roots in international agreements and needs further clarification.

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?

We believe that the scope of this question is unduly limited by its restriction to barriers to ‘innovative solutions or ideas.’ There are systemic problems with public procurement that have not been addressed in the consultation that nevertheless lead to inadequate public services and higher costs in the long run for taxpayers.

One prominent problem is the failure of procuring authorities to integrate Public Sector Equality Duty principles into tendering processes. Indeed, we note that the Equality Act and protected characteristics are not referenced in the consultation. A failure to meaningfully consider equality impacts can have devastating consequences: one example is the driving out of specialist BME women’s crisis organisations by generalist providers during the pandemic, who cannot provide a comparable service, on narrow cost grounds.

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

Data on public sector contracting is remote, fragmented, and partial. Even the main public procurement outlets such as Contracts Finder and Find a Tender do not systematise their data for ready public consumption. The growth of alternative sectoral, local or Departmental contracting portals has further reduced oversight. There are even cases of routine secondary publication on contracting being discontinued (NHS Digital reporting of the proportion of facilities management workers who were outsourced was removed after 2015/16). It is also often not disclosed when a major contract has been subject to significant changes of scope or extensions.

The Trade Unions have previously argued that a public sector contracting ‘Domesday Book’ would significantly increase oversight and accountability, and lead to more efficient spending decisions. While such an approach would have considerable advantages for tracking central government procurement, the same approach could be extended to other public bodies. These publications should be readily machine readable and be available in time-series forms (in contrast to public sector spending data, which is typically only published in large monthly data files that are difficult to aggregate in bulk).

There are particular transparency shortfalls on public sector subcontracting. Unless there is a specific contractual provision in place, the identities of subcontractors on major projects are not routinely published. This creates an accountability gap and prevents external scrutiny of potential risks to the delivery of major projects. GMB believes that when contracts are publicly funded then subcontractors’ identities should be published by requirement where the subcontracts are above a certain value.

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?

GMB would like to see any reform of public contracting regulations extending the scope for consideration and implementation of Social Value delivery across the entire procurement process, and these principles bedded into the pre-procurement process. We want to see social value specifically including adherence to collective agreements and access for trade unions to organise being built into criteria to define the procurement process to help stimulate better pay and conditions in public contracting and encourage a levelling up of economies across contracting authorities, and tackling inequalities.

Q12. In light of the new competitive flexible procedure, do you agree that the Light Touch Regime for social, health, education and other services should be removed?

Removal of the Light Touch regime for health, social education, and other services and the lowering of the thresholds of procurement of these services, puts them at further risk of marketisation under the CFP and in relation to international procurement markets under GPA and other trade agreements mentioned above.

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

GMB would wish to see a broadening of the scope and range of evaluation criteria to include stand alone criteria for social, employment, and environmental considerations to be taken into account in the evaluation of bids. Social considerations under current quality assessment are too narrow and restrictive to bring progressive changes through procurement.

Changing the evaluation acronym from MEAT to MAT will not in itself deliver the cultural changes in contracting necessary to deliver this. More concerted action is required to encourage the movement from lowest price contracting, and having clear and legitimate criteria relating to social and employment considerations will help remove the risk averse nervousness of many contracting teams, and encourage quality and value led public contracting to the benefit of communities.

It seems the enthusiasm for adopting MAT is more closely tied to UK meeting international requirements than acting in the interests of domestic public interest. It seems the Government sold the idea of taking back control in leaving the EU only to relinquish it to international bodies instead.

GMB would wish to see Government consulting widely on any guidance accompanying the proposed move to MAT to ensure that it makes full use of the opportunity of reform of procurement regulations to ensure progressive and social value led contracting. This could be accompanied by ‘ready reckoner’ models or worked examples of how contracting authorities could make use of progressive but underutilised provisions in the HM Treasury for the calculation of Social Value.

Q14. Do you agree with retaining the basic requirement that award criteria must be linked to the subject matter of the contract but amending it to allow specific exceptions set by the Government?

No. For too long the requirement for contract award criteria to be linked to the subject matter of the contract has acted as a straight-jacket stifling public contracting from delivering real community benefits. This requirement, combined with award being most advantageous to

the contracting authority drawn in a narrow context has prevented billions of pounds of public money achieving benefits for the public good, and stimulating community wealth building.

Specific exceptions set by Government will not give the flexibility required, and the two-point list of exceptions given in the paper shows a lack of ambition in this area. A list of exceptions should be defined by wider consensus, and should include the employment, pay, health & safety, equality, skills, training and apprenticeship record of bidders.

The Government has to move away from the excuse of requirements being a barrier to small businesses in procurement, and instead see the requirements as a way of encouraging small businesses to adopt better practices.

Q15. Do you agree with the proposal for removing the requirement for evaluation to be made solely from the point of view of the contracting authority, but only within a clear framework?

Yes. The narrow interpretation of evaluation being advantageous *to the contracting authority* often perversely results in a contract being awarded that offers less direct benefit to communities and the tax-payer in terms of jobs, economy and social and environmental considerations that would, in turn, directly/indirectly benefit the authority in related or other ways. A broader assessment of advantage, value and benefit needs to be built into the evaluation process.

GMB would expect inclusive consultation involving trade unions on any framework and guidance setting out wider criteria that can be taken into account in this process.

Q16. Do you agree that, subject to self-cleaning fraud against the UK's financial interests and non-disclosure of beneficial ownership should fall within the mandatory exclusion grounds?

Yes, but GMB has concerns about trust in self-cleaning processes, and therefore calls for the bar to be set at the highest level, and mandatory exclusion to be the default position.

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

GMB believes that breaches of employment, human rights (including those enshrined in the Modern Slavery Act and the Equality Act), labour standards, and tax evasion and avoidance should be mandatory grounds for exclusion.

Q18. Do you agree that suppliers should be excluded where the person/entity convicted is a beneficial owner, by amending regulation 57(2)?

Yes.

Q19. Do you agree that non-payment of taxes in regulation 57(3) should be combined into the mandatory exclusions at regulation 57(1) and the discretionary exclusions at regulation 57(8)?

Yes, but the weight should be on mandatory exclusion for any evasion or avoidance of taxes.

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

GMB has concerns about the level of centralised control on the debarment list and its operation. There should be a representative forum of wider interests making decisions relating to this list, with full scope for all levels of contracting authorities, trade unions and

other interests to make recommendations/cases regarding debarment. The debarment list must be in tandem with a broader list of grounds for mandatory exclusions including breaches of employment, human rights and labour standards.

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

Yes. However, GMB believes that there should be a structure for wider assessment and views of contract performance to be considered in the evaluation document. Central to this would be the ability for trade unions to report and lodge complaint as part of the evaluation process in relation to failings in adherence to workers' rights, collective agreements and conditions and Health & Safety performance on contracts and at all levels of subcontracting. We would consider these significant deficiencies not minor requirements. The evaluation process must have sufficient teeth to enable exclusion of suppliers were these deficiencies are reported.

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

No. Again, the scope to improve the quality and choice of suppliers is being dictated to by limiting restrictions and requirements of the GPA to open up the contracting process as far as selection stage without important assessment of professional and technical ability.

Q24. Do you agree that the limits on information that can be requested to verify supplier self-assessments in regulation 60, should be removed?

GMB would require more information on Government proposals to clarify what wider range of information contracting authorities could use before answering this question.

Q25. Do you agree with the proposed new DPS+?

Again, these procedures are being heavily dictated by GPA requirements rather than domestic contracting benefit. GMB has concerns about the proposals for commercial tools to be recorded onto a central register, with award notices on a central platform. Again, this centralisation seems to be preying on the powers and independence of local and regional contracting authorities, unless the paper only envisages this for central government procurement, which is not made clear in the text.

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

GMB is concerned that provisions for reserved contracts for supported employment workplaces for the integration of disabled and disadvantaged workers is given no reference in the Green Paper. We ask Government to confirm that this Regulation 20 of the 2015 PCR and related texts transposing Article 20 of the EU Procurement Directive will be included in any reform of UK regulations. Several reserved contracts were let as frameworks by government and other contracting authorities, so it is important to understand its place in the new proposals.

Terms for removing suppliers from the framework and any DPS provisions should include breaches of employment rights, collective agreements, equality and H&S protections to be grounds for exclusion.

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

Yes. However, GMB believes the approach proposed by Government in this Green Paper is again over centralising. Given the Government's poor record of transparency in contracting, we are unconvinced of the benefits of the system set out in the consultation.

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

See response to Q27.

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

See response to Q27.

Q35. Do you agree with the proposal to cap the level of damages available to aggrieved bidders?

There should be no cap for damages to bidders who have been unsuccessful as a result of corruption or cronyism in the contracting process, which will help to act as a check on the behaviour of government and other contracting authorities pursuing these illegal practices.

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

No. The Government's own record of cronyism and mishandling of emergency contracts during the pandemic outlined in our response to Q2, is a compelling basis for keeping this option where it is clear that public money is not being used effectively and to resolve the emergency at hand.

GMB believes that a better approach for ensuring speedy provision in crisis and urgent circumstances is for Government and contracting authorities to create qualified supplier registers for a wide range of services and supplies that may be required in a variety of emergency/crisis situations, building in high levels of local/accessible capacity, which would be a more transparent and efficient way to ensure quality and adequate specification and provision of goods and services quickly without flaying about in the market place or awarding contracts to friends who have no expertise in the product or service.

The debate on the NAO report in Westminster Hall on 9th December 2020 reveals MPs lining up with cases of producers in their constituencies who contacted government departments with their ability to supply PPE and related products who were summarily ignored.⁵

Q38. Do you agree that debrief letters need no longer be mandated in the context of the proposed transparency requirements in the new regime?

There is no guarantee that the transparency requirements will be effective, and, to ensure due process, additional provision for debrief information should be considered.

Q39. Do you agree that: • businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays? • there should be a specific right for public bodies to look at the payment performance of any supplier in a public sector contract supply chain? • private and public sector payment reporting requirements should be aligned and published in one place?

⁵ <https://hansard.parliament.uk/commons/2020-12-09/debates/fe48462e-e0e7-4715-b4fa-e229acd07976/WestminsterHall>

GMB believes a bigger problem in supply- and subcontracting chains is non-compliance with employment rights, payment of collectively bargained rates and labour standards, and it would be refreshing to see more concern being shown to these issues in contracting, on which the Government is silent in this paper.