ICE submission to the Cabinet Office Green Paper: Transforming public procurement

February 2021

Introduction

The Institution of Civil Engineers (ICE) is pleased to respond to the Green Paper: Transforming public procurement. We regard this as a highly significant consultation on legislation that has the potential to make a step-change in the UK's public procurement of works, goods, and services.

ICE recognises the fundamental difference between, on the one hand, complex procurements for one-off capital contracts (for example, major infrastructure works and the one-off services contracts that support them, such as the supply and maintenance of rolling stock); and, on the other, routine or recurring supply and services contracts. ICE has particular expertise in the former procurements, which we refer to in our response as major capital procurements; these are the main focus of the submission.

In particular, ICE has rich experience in convening and providing multidisciplinary teams to provide independent assurance of major capital procurements. ICE already provides, or has provided, Independent Assurance Panels to support clients such as HS2, Highways England, Crossrail, Transport for London, and the Houses of Parliament in the delivery of their major capital projects and programmes.

The members of ICE's Procurement Advisory Group who developed this response include:

- **Steve Hudson** FICE, Group Commercial Director with Sir Robert McAlpine, and formerly: Commercial Director for HS2; Senior Commercial Adviser to HM Treasury.
- **David Orr** CBE, FREng, FICE, Strategic Adviser on Major Infrastructure, and formerly: President of the Institution of Civil Engineers; Chair of the Independent Assurance Panels for HS2, Highways England and Crossrail 2; Non-Executive Director at the Houses of Parliament; Senior Civil Servant.
- **Martin Rowark** FICE, Partner at Gardiner and Theobald, and formerly: Director of Commercial for TfL; Procurement Director for Crossrail.
- **Steve Rowsell** FICE, Director of Rowsell Wright Ltd providing specialist procurement services to major infrastructure clients including HS2, Network Rail, Highways England and the Houses of Parliament, and formerly: President of the Chartered Institution of Highways and Transportation; Procurement Director of the Highways Agency.
- **Gary Wright** MICE, Director of Rowsell Wright Ltd providing specialist procurement services to major infrastructure clients including HS2, Network Rail, Highways England and the Houses of Parliament, Chair of the ICE's Procurement Advisory Group and formerly: National Business Improvement Director for Birse Civils Ltd; National Supply Chain Manager for Highways Agency.

We hope this response will be helpful, and ICE will be pleased to provide any further assistance concerning the development of the new legislation.

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Chapter 1 - Procurement that better meets the UK's needs	
1.	**Do you agree with the proposed legal principles of public procurement?** ICE is content with the proposed six principles. We recognise that the UK's new regulatory framework is required to be founded on the principles and rules set out in the WTO Government Procurement Agreement (GPA). This incorporates the overarching principles of non-discrimination, transparency and impartiality (fair treatment), which must be embedded in the UK's new regulatory framework. The three other new principles in the proposals are public good, value for money and integrity. We also support the inclusion of these principles. Compared with the current Regulations, we consider that the change from 'equal treatment' to 'fair treatment' is an improvement because of the challenges presented in ensuring true equality. The current Regulations also contain the principle of proportionality. We consider that this has little meaningful impact on the development of procurement procedures and we are content that it is not included in the new regulatory framework. ICE has three detailed comments on the proposals: 1. Whilst we support the six proposed principles, we would not want these to become fertile ground for procurement challenges, for example by the courts considering how contracting authorities may have balanced any conflicts or competing priorities between the principles. We would be concerned if there was pressure to add any further additional principles. 2. The value for money principle is defined in paragraph 27 as the optimal whole life blend of economy, efficiency, and effectiveness. The 'optimal blend' is difficult to define and, in any event, contracting authorities are not funded on a whole life cost basis. In relation to construction projects, it is very difficult to define the life of a project. Normally construction clients can only seek to deliver the best value solution for a specified 'design life' within budget affordability constraints. It would be unhelpful for a best whole life requirement to result in legal challenges on the basis that a procurement process did not achieve it. We suggest that 'optimal whole life blend' is replaced with 'best whole life solution' as assessed over a period defined by the contracting authority and which can be delivered within its available budget. 3. Paragraph 31 states that 'the role of procurement… is to select suppliers… that offer best **social** value for money'. However, the use of the qualification 'social' is inappropriate as social value will not be the only factor in assessing the best value, which will be evaluated on the basis of the overall evaluation criteria (see comments in (2) above).

2.	**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 proposal is for a new unit, supported by an independent panel of experts, to oversee public procurement and to intervene if necessary, to improve the commercial capability of contracting authorities. We are content for the role of the new unit to provide oversight and strategic leadership of public procurement, providing guidance, observing trends and sharing lessons to be learned. However, we would be very concerned if it is proposed that the new unit could intervene in specific procurements, for several reasons: ▪ the task of this new unit would be enormous with thousands of contracting authorities (if the role includes local authorities); ▪ intervention in a specific procurement would most likely introduce delay; ▪ it would undermine the responsibility and accountability of the Accounting Officer; and ▪ the new unit would share responsibility for the outcome of the procurement and could be enjoined in any legal challenge. We support the proposal for a new unit and independent panel but consider that they must operate at a strategic level to maintain an overview of the new procurement regulatory framework. In relation to major civil engineering related procurements, ICE already provides (or has provided) independent review panel arrangements to support clients such as HS2, Highways England, Crossrail, HS2, TfL and Houses of Parliament in the delivery of their procurement procedures. Expanding arrangements of this nature would be a better option than creating a new central panel with a remit covering a very wide range of procurements.
3.	**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?** As set out in our response to Question 2, public sector procurement requirements are very wide-ranging and would require an equally wide range of experts to support the different requirements. We consider that a single central panel is unlikely to be feasible and that it would be better to build on the idea of independent expert panels appointed by a contracting authority. The new overseeing unit could mandate the use of independent panels and provide guidance to contracting authorities on how to select panel members, including the use of the IPA and professional bodies such as ICE. ICE has strong experience of this as it provides (or has provided) independent review and assurance panels to support major procurements by HS2, Highways England, Crossrail, TfL and Houses of Parliament. We consider that such panels should only have an advisory role, but panel reports could be made available to the new Cabinet Office unit and the National Audit Office. Any powers of intervention by the new unit to demand changes to improve commercial capability should only be a last resort. Departmental Accounting Officers must remain responsible for delivering best value with their allocated funds. There could be a requirement for contracting authorities to produce an annual report on the general findings of independent reviews and setting out proposed actions to improve any significant issues identified in the independent reports.

Chapter 2 - A simpler regulatory framework	
4.	**Do you agree with consolidating the current regulations into a single, uniform framework?** The Institution considers this to be a good idea. It would remove oddities such as utilities technically not being allowed to access government frameworks set up under the Public Contracts Regulations despite them being procured using very similar competitive procedures.
5.	**Are there any sector-specific features of the UCR, CCR or DSPCR that you believe should be retained?** We recognise that there are new proposals for frameworks elsewhere in the Green Paper, but we consider that the new single, uniform regulations for frameworks should allow the current greater flexibility in the UCR to be retained.

Chapter 3 - Using the right procurement procedures	
6.	**Do you agree with the proposed changes to the procurement procedures?** We note the good intentions in para 56 of the Green Paper to 'abandon complicated and stifling rules of procurement procedures and unleash the potential of public procurement…' While we support the proposal to abandon complicated and stifling rules, we observe that the main reason public procurement is process-driven and can be protracted is the strong desire of contracting authorities to avoid a legal challenge to the procurement, which will usually have a significant adverse impact (whether or not that challenge is ultimately successful). Avoiding a legal challenge involves strict adherence to rules and processes and requires strong, but time-consuming internal and external review and assurance. Accordingly, we believe that streamlining of rules and processes must be accompanied by the measures to address the issue of legal challenges, as we have suggested in our response to Chapter 7. ICE supports the approach of the proposed competitive flexible procedure. We consider however, that the use of the word 'flexible' in its title may give the wrong impression and could lead to inappropriate or imprecise procedures. We recognise that flexibility is helpful in developing solutions tailored to deliver specific requirements, but to avoid challenges it is also vital that procurement procedures are precisely defined and compliant in their application. Whilst recognising the value of negotiation, it is important to ensure it is undertaken in a way that upholds the six key principles, particularly Fair Treatment and Non-Discrimination. This can be especially challenging in situations where bidders are involved in helping the contracting authority to shape the scope or develop the specification of the procurement. Some potential risks of the new competitive, flexible procedure are set out in paragraph 69, which in part relate to increased flexibility. We agree that the overall benefits of the proposed new approach would outweigh the potential risks, but we would prefer an alternative title for the procedure, such as the **versatile** competitive procedure. We strongly support the proposal in paragraph 70, that good practice case studies would be published to share experience and lessons learnt. This should be established as early as possible to help encourage contracting authorities to move away from well-established existing procedures.
7.	**Do you agree with the proposal to include crisis as a new ground on which limited tendering can be used?** Yes, although we are concerned that the governance involved in making a submission to the Minister of the Cabinet Office (para 80) could cause delays in what would be a crisis situation.
8.	**Are there areas where our proposed reforms could go further to foster more effective innovation in procurement?** The proposals set out in the document are a substantial change to the current procedures, and it will take procurement professionals and practitioners some time to adapt to them and develop new appropriate procedures. It may be unwise to go much further with the changes at this stage, and it would be best to allow an implementation and review period before making further changes. One aspect that should be considered further is the current reluctance to pay bidders for participating in procurements that involve developing innovative ideas or solutions. A policy is required to allow contracting authorities to invest in tender procedures to achieve best outcomes and support research and the development of innovation as part of the tender process.

9.	**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 consider that there is a range of factors which inhibit innovative ideas being brought forward as part of competitive procurement, including: ▪ Contracting authorities failing to establish long-term and constructive relationships with key suppliers. ▪ The desire of companies to retain IPR ownership to preserve competitive advantage. ▪ Companies unwilling to suggest innovative ideas if there is a risk that they may be shared with others. ▪ How to demonstrate in the procurement process that proposed innovation will work. ▪ Contracting authorities needing to justify expenditure on, or being criticised for, innovation which fails. ▪ Contracting authorities failing to seek innovative solutions at the right point in the procurement process and project delivery approach. ▪ Protracted governance procedures around innovation decisions. ▪ Existing standards and timescales in revising them. ▪ The difficulty contracting authorities have in knowing how to deal with unsolicited innovative proposals, but which would require competition in order to implement them.
10.	**How can government more effectively utilise and share data (where appropriate) to foster more effective innovation in procurement?** We assume that this question relates to paragraph 91, which refers to more creative ways to use and share data. We consider that the most relevant data to support improved procurement are cost and performance data. It would appear to be common sense for government departments, including ALBs, to work more collaboratively and to share data. The communication of cost data is often restricted on the basis of commercial confidentiality, but the Government ought to be able to share information on key unit rates, etc. across its departments (and at the very least within the same department and its ALBs) to support benchmarking and the delivery of better value to the taxpayer. In relation to performance data, the Cabinet Office or a new unit could have a role in using data to identify best practice and for lessons learnt to be shared across government and contracting authorities.

11.	**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?** ICE fully supports early and regular market engagement. We consider that market engagement provides important opportunities to raise the profile of clients and their work programmes. The engagement should involve a two-way exchange of information and should be used to help raise the appetite of the market for the work. The Cabinet Office should also publish examples of good practice market engagement procedures and techniques. In major capital procurements, we have seen considerable improvements in good market engagement. But there is still a reluctance among some contracting authorities to engage with the market as it may be seen as undermining fair competitive procedures and giving an advantage to companies involved in the engagement. This can, of course, be managed by being open and transparent. It may help if new guidelines were published to pre-procurement market engagement whilst ensuring that a level playing field is maintained in the market. More enlightened contracting authorities have implemented successful and beneficial market engagement processes related to the contracting authorities' specific requirements. As part of our role in the assurance of major programmes, ICE has found, however, that contracting authorities generally act in isolation without effectively considering wider client programmes and market capacity. The result is that suppliers respond positively in terms of capacity to deliver individual project or programmes without knowing their potential involvement in the requirements of other contracting authorities. Consideration should be given to putting in place market engagement for wider government programmes for specific sectors, such as construction. This would help to identify capability and capacity across the whole programme.
12.	**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?** Yes, although consideration could be given to maintaining the existing higher thresholds in these areas.

Chapter 4 - Awarding the right contract to the right supplier	
13.	**Do you agree that the award of a contract should be based on the "most advantageous tender" rather than "most economically advantageous tender"?** Yes. Most major capital procurements in the UK already use a combination of price and quality (in other words, value) to evaluate tenders. We agree that 'most advantageous tender' is a better description of this process and adds clarity.
14.	**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?** Yes. We agree that award criteria should continue to be linked to the subject matter of the contract, with some specific exceptions set by the Government. However, any exceptions must be proportionate, and not outweigh the main thrust and subject matter of the contract. One area that might be considered as an exception for major capital contracts is the proportion of UK jobs or apprenticeships that will be created if the tender is awarded. This aim would not be to exclude foreign tenderers, but to increase the proportion of UK jobs/skills created or sustained by the contract, to further national economic development. In passing, we would wish to support the current provisions which distinguish between: ▪ selection or pre-qualification criteria, which consider the capabilities and experience of the applicant and its fitness to supply; and ▪ tender award criteria, which are designed to evaluate the specific offers to determine the most advantageous.

15.	**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?** ICE has concerns about this proposal. We are mindful this provision was introduced into the EU Regulations following a court case brought on the basis that a contract award had been made to a tender that did not represent the most economically advantageous tender when considered in wider terms than the contracting authority had envisaged. Introducing 'from the point of view of the contracting authority' eliminated that potential challenge route, and it is important that the new regulations should not reintroduce that risk. It is also important to differentiate between setting the evaluation criteria and the actual process of evaluation. ICE has no objection to a contracting authority being allowed to include other evaluation criteria to take account of the wider impacts of a tender, such as on other contracting authorities and broader impacts on society, subject to the proportionality point set out in our response to question 14. However, it must remain the case – and be clearly stated – that once the evaluation criteria are determined by the contracting authority, the evaluation must be made solely on the basis of the contracting authority's view of how applications or tenders meet those criteria. It is, of course, vital that once selection and evaluation criteria are determined, they are made clear to applicants and tenderers, so they know what is expected of their bid.
16.	**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.
17.	**Are there any other behaviours that should be added as exclusion grounds, for example tax evasion as a discretionary exclusion?** One aspect that may merit consideration would be a supplier's persistent failure to pay its supply chain in accordance with the Prompt Payment Code.
18.	**Do you agree that suppliers should be excluded where the person/entity convicted is a beneficial owner, by amending regulation 57(2)?** Yes, provided there are safeguards in the event of multiple beneficial owners where only one has been convicted.
19.	**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)?** We have no objection to this proposal.
20.	**Do you agree that further consideration should be given to including DPAs as a ground for discretionary exclusion?** We have no comment on this proposal.

21.	**Do you agree with the proposal for a centrally managed debarment list?** We have some concerns about this proposal: ▪ There would have to be effective and timely processes to determine fairly any challenges to the inclusion of a supplier on the debarment list. ▪ There would need to be clarity on whether or not a supplier with a pending challenge could be included in a procurement. ▪ There would need to be prompt and effective consideration by the central list managers of any self-cleaning measures undertaken by the supplier. ▪ Procurements can have a life of many months (as they progress through pre-qualification and tender stages) and there would need to be clarity on the definitive point in that process at which the debarment list would be applied. It would seem appropriate that this should be the date for the return of pre-qualification applications or tenders. It would be particularly difficult to reinstate a supplier whose debarment was lifted after that point, as the procurement process will have moved on and it would be disruptive and potentially unfair to other tenderers to consider, retrospectively, such applications/tenders. ▪ It will be extremely difficult for the debarment list to include non-UK companies, and so contracting authorities will still have to ask these questions in any event. A more workable alternative to a centrally managed debarment list would be the availability of centralised data, on which contracting authorities could determine mandatory or discretionary exclusion, rather than relying on self-reporting by applicants/tenderers as happens at present.

22.	**Do you agree with the proposal to make past performance easier to consider?** We have significant concerns about the proposal to allow contracting authorities to exclude applicants or tenderers on the basis of poor performance on previous public contracts. ▪ This is a particularly significant issue. If a contractor is deemed to have performed poorly on a public contract, it could be catastrophic and may result in being denied all future public procurements. ▪ It would be important to place the poor performance in context. For example, it would be unfair to exclude a supplier on the basis of poor performance on one contract if there is a track record of good performance on others. For example, companies can operate across a range of sectors and may perform well in some sectors and not in others. ▪ Clarity would be needed on whether the performance of another company within the same corporate group should be taken into account. ▪ Poor supplier performance can result from poor client performance. ▪ For this to be workable and fair, there would have to be a clear definition of what constitutes poor past performance. It must be based on objective KPIs defined in the contract and not on subjective opinion. This is particularly relevant where the poor performance was under a contract to a different contracting authority to the one being procured. ▪ There would need to be a time limit on the period for which past poor performance could be considered, and a system for self-cleaning. ▪ Past poor performance should only be considered if the contract was of broadly similar scope and extent to the one being procured. A better way to consider past performance would be to require pre-qualification applicants to provide evidence of past performance (based on objective KPIs) on equivalent contracts. Processes would be needed to require the contracting authorities for the previous contracts to validate the evidence provided.
23.	**Do you agree with the proposal to carry out a simplified selection stage through the supplier registration system?** We are content that a supplier registration system can be used for some of the basic information required for the selection stage, but on the clear understanding that contracting authorities may continue to define other selection criteria relating to applicants' experience, capacity and capability to undertake the contract. There may be some merit in considering a common system of holding common data on a supplier's financial standing. However, it would be difficult to make a common evaluation of its financial capacity as this would depend on the type and scale of the contract – for example, a supplies contract would be very different to a major capital procurement.
24.	**Do you agree that the limits on information that can be requested to verify supplier self-assessments in regulation 60, should be removed?** Yes.

Chapter 5 - Using the best commercial purchasing tools	
25.	**Do you agree with the proposed new DPS+?** We generally agree with the proposal, but believe there are some detailed issues to address: ▪ We agree that applications should be allowed at any time (as with the current DPS), but the proposal to evaluate supplier applications as they are received could create resource problems for contracting authorities. The period for approval is not critical if there are no planned procurements off the DPS, and a more generous evaluation period should be available subject to this condition. ▪ Provision should be made for suppliers to be removed from the list due to poor performance on contracts awarded from the DPS, or repeated failure to participate in procurements off the DPS. They could reapply when they have addressed performance issues. ▪ The proposal not to limit the number of suppliers on the DPS can create difficulties with high numbers of tenderers qualifying for competitions and requiring substantial evaluation resources. At the moment this risk can be managed by splitting DPS arrangements into sub-categories which become separate DPSs, for example on a geographical basis. However, this can mean suppliers applying for multiple DPSs. It may be better to allow contracting authorities to apply specified criteria to reduce the number of tenderers for competitions.
26.	**Do you agree with the proposals for the Open and Closed Frameworks?** We agree with the principle of having Open and Closed Frameworks but have concerns about their detailed operation: ▪ While we recognise the possible concern about shutting out the market from Closed Frameworks for a number of years, we believe that, for capital contracts, the four-year maximum duration is too short. For such contracts, frameworks with a duration of up to eight years have the benefit of developing long-term relationships which allow invested knowledge to be retained and to achieve added value through continuous improvement. In the construction sector, typical durations of projects mean that a four-year maximum duration of the framework severely limits the number of contracts that can be awarded to a supplier and constrains the ability to develop long-term relationships. ▪ Further consideration is needed for the proposal that, if a contracting authority wishes to have a framework with a duration of longer than four years, the framework must be opened at least once after the third year for new entrants to join. Requiring existing suppliers to decide whether or not to submit an updated bid as part of the mid-framework refresh (as envisaged by para 153 of the Green Paper) is unsatisfactory. Framework suppliers who are performing well and delivering good value for money may decide not to tender and could be undercut by low unsustainable prices submitted by new tenderers who would not as good value for money. If an existing good performing supplier does decide to submit a refreshed tender, it may result in the commercial dynamics changing and performance suffering as a result. Accordingly, we recommend that, for capital procurements, a closed framework should have a life of up to eight years, as currently provided for in the Utilities Contracts Regulations, in order to strengthen working relationships and encourage innovation in these longer-term projects. We accept that, for supplies contracts and possibly services as well, a four-year maximum duration is appropriate.

Chapter 6 - Ensuring open and transparent contracting	
27.	**Do you agree that transparency should be embedded throughout the commercial lifecycle from planning through procurement, contract award, performance and completion?** Yes, provided there are safeguards to avoid the disclosure of commercially sensitive information such as: ▪ the contracting authority's procurement strategies and plans (which are developed in advance of the publication of procurement documents) as these may divulge sensitive information about the contracting authority's views, for example in relation to risk or bidder appetite; or ▪ commercially sensitive information about specific bids, such as detailed pricing information or innovative tender solutions.
28.	**Do you agree that contracting authorities should be required to implement the Open Contracting Data Standard?** Yes. However, an adequate implementation period should be allowed.
29.	**Do you agree that a central digital platform should be established for commercial data, including supplier registration information?** While we agree with this in principle, there are risks with central systems: ▪ Updating central systems does not tend to get the highest priority in government departments. ▪ It relies on well-trained resources available in contracting authorities to use the system. ▪ There needs to be an efficient process for updating records and correcting errors; it requires a strong central team to administer it. ▪ If it is difficult to use or is unreliable, it will quickly become a white elephant. ▪ Most systems appear to be at risk of hacking, and public sector competitive procurement could be undermined by a serious hack.

Chapter 7 - Fair and fast challenges to procurement decisions

30. **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.**

Introductory Comments

ICE strongly supports the principle of fair and fast challenges to procurement decisions. However, we have reservations as to the likely effectiveness of the current proposals and make suggestions and recommendations below.

We recognise the fundamental differences between, on the one hand, complex procurements for one-off capital contracts (for example major infrastructure works, and the one-off services contracts that support them such as the supply and maintenance of rolling stock); and, on the other, routine or recurring supply and services contracts. It is the former procurements that are the focus of this submission, and we shall refer to these as major capital procurements.

We note the strategic priority given to major capital projects by the Government and are conscious that such projects only proceed if there is a satisfactory business case delivering public benefit. We are extremely concerned that, under the present arrangements, procurement legal challenges can cause significant delay, not only in terms of the time to resolve the challenge itself, but in the downstream impact if re-procurement is necessary or tender prices have expired. By contrast, a challenge to a recurring supplies or services contract will have a much-reduced impact, with the incumbent supplier continuing to provide supplies and services until the challenge is resolved.

Due to the strategic significance and benefits of major capital projects, delay due to procurement challenges can mean very significant disbenefits for the public good, which must be balanced against the aspirations of aggrieved bidders.

There are various reasons why a procurement challenge by way of correspondence or proceedings may be launched including: (1) to seek to achieve a reversal of the decision; (2) to seek damages for profits that would have been made if were not for the decision; (3) to recover bid costs, which can be high for one-off capital projects; and (4) to secure recognition of the error that they consider has been made by the contracting authority.

Based on informal feedback to senior staff involved in defending legal challenges to procurement decisions, many aggrieved bidders in initiating a legal challenge simply wish to recover their high bid costs and secure recognition of the error that they consider has been made by the contracting authority. However, under the current arrangements, what starts with these relatively simple intentions becomes a juggernaut with a momentum and life of its own.

There are many losers, including:

- The public good, as a beneficial scheme can be seriously delayed whether or not the claim is eventually proven.
- An unsuccessful claimant, who will have risked significant legal costs and internal workload.
- A claimant who, even if successful, will have diverted significant management time to meet the demands of the case.
- The contractor who was awarded the contract under the original decision.

- The contracting industry generally, since such cases stifle the progress of key infrastructure projects and the pipeline of capital contracts.

The only real winners are the claimant's and the contracting authority's professional advisers who will almost certainly be paid their time-based costs.

It is for these reasons that we strongly support fair and fast handling of legal challenges to procurement decisions, particularly in relation to major capital procurements.

Question 30 Part 1: Do you believe that the proposed Court reforms will deliver the required objective of a faster, cheaper and therefore more accessible review system?

We welcome the proposals to expedite proceedings, including the fast-track system, written pleadings, disclosure, capacity, and reduced timescales. However, these measures will need to be particularly robust to avoid the drift in the progress of cases arising from legal arguments, pleadings and new information coming to light from the disclosure process.

We also observe that, if the objective is to produce a more accessible system, then that will place additional pressure on the courts and tribunals tending to increase timescales.

We would also note that, even if litigation timescales can be reduced, there could still be a significant delay to the project if there was found to be a manifest error by the contracting authority, which would require re-running the procurement process.

It is for this reason that we:

- express reservations about the proposal that pre-contractual remedies should have stated primacy over post-contractual damages (see our response to question 33); and
- recommend the introduction of a 'material error' test instead of the current 'manifest error' (see below).

Question 30 Part 2: Can you identify any further changes to Court rules/processes which you believe would have a positive impact in this area?

Currently, many procurement challenges relate to allegations of a manifest error made by the contracting authority, often in relation to the evaluation of restricted list applications or tender submissions.

Manifest error was initially considered to be something equivalent to Wednesbury unreasonableness, but recent rulings (for example the 2018 Birmingham City Council Highways PFI case) defined it as 'one that is obvious or easily demonstrable without extensive investigation'.

The issue is that, if a claimant shows the contracting authority has made a manifest error, the claimant will be entitled to damages or remedies that can have a significant delay to the project, and this can apply whether or not the claimant would have been included in the restricted list or would have won the tender in the absence of the manifest error. This seems wrong and means that public funds and public benefit are put at risk even if the claimant would not have been successful in the competition anyway.

	We propose that manifest error is replaced in the regulations by a new outcome-based test, namely 'material error'. A material error would be one where, had it not been made, the claimant would, on the balance of probabilities, either: ▪ (in the case of a selection process) have qualified for inclusion in a restricted list; or ▪ (in the case of an ITT) have been awarded the contract. This seems to a much fairer basis to restore the parties to the position they would have been in had the error not been made. In addition to the above significant improvement, we believe that the following measures would support more robust procurement procedures and reduce the risk of challenges being made: ▪ Independent external assurance reviews of procurement documents prior to their publication to identify non-compliances, omissions, errors etc. ▪ Contracting Authorities to make more effective use of market engagement to help potential suppliers improve their understanding of procedures, develop improved and trusting relationships, and to identify any barriers to efficient and effective procurement procedures. ▪ For complex and high-value procurements, introduce a time period in the early part of the tender period for tenderers raise any concerns about the compliance or robustness of the procurement documents or the procedures. The Contracting Authority would have the opportunity to address and rectify any legitimate concerns within the tender period. Subsequent challenges made on the adequacy of the procedure could be precluded. ▪ Contracting Authorities to be given a duty to act with reasonable skill and care in delivering procurement procedures and be required to use suitably experienced and trained people in the execution of procurement procedures. ▪ Provision could be made for participants in procurement procedures to submit feedback to contracting authorities with the aim of supporting continuous improvement. Contracting authorities could be required to produce regular reports setting out the general findings of the feedback and any resultant improvements to procedures.

31.	**Do you believe that a process of independent contracting authority review would be a useful addition to the review system?** We assume this relates to para 199 of the Green Paper, which proposes encouraging contracting authorities to undertake a time-limited, formal internal review of complaints before they are lodged with the Court, by staff not directly involved in the procurement. We are doubtful that such an internal review will be effective, mainly because an outcome that favours the claimant may cause significant delay to the project as well as reputational damage to the authority, and the internal review team may therefore feel under (indirect) pressure to exercise fine judgements in a way that supports their employer. We feel the proposal is likely to be more effective if the review was truly, independent, undertaken by a small panel of external professionals with relevant experience. ICE has convened many such panels to provide independent expert review of procurement processes for organisations such as Crossrail, High Speed Two and Highways England. If the proposal for such reviews were to be taken forward, it would be necessary to consider whether the findings of the review would need to be disclosed to claimants.
32.	**Do you believe that we should investigate the possibility of using an existing tribunal to deal with low value claims and issues relating to ongoing competitions?** If the objective of the Green Paper is to make the process of challenging a procurement more accessible, then additional capacity will be needed to deal with more cases, even if the proposed reforms prove to be effective. There may well be a role for a tribunal to handle low value claims and issues relating to ongoing competitions, but care would be needed to establish robust procedures which can resist the natural pressure to turn such tribunals into replicas of a full-blown court process.

33.	**Do you agree with the proposal that pre-contractual remedies should have stated primacy over post-contractual damages?** We are not convinced of the need or the desirability of formally stating in the new regulations that pre-contractual remedies have preference over post-contractual damages. As set out in our response to Question 30, we recognise the fundamental differences between, on the one hand, complex procurements for major capital projects and, on the other, routine or recurring supply and services contracts. We consider that, for the latter, it may be appropriate to state a preference for pre-contractual remedies. However, for major capital procurements, we consider there would be a high risk that the encouragement of pre-contractual procedures would result in substantial delays to high priority and urgent major infrastructure projects, with adverse impact to public benefit. Our understanding is that the main consequence of stating a priority for pre-contractual remedies would be a potential reduction in the damages that a claimant may be awarded if they waited and submitted a post-contractual claim for damages. On the basis that potential costs of delays to much needed major projects arising from pre-contractual legal proceedings could substantially outweigh post-contract damages (particularly in light of the Green Paper's proposal to cap them), we do not consider that primacy should be stated in favour of pre-contractual remedies. We consider that the other measures proposed to develop fair and fast challenges to procurement decisions will, for many straightforward procurements, result in aggrieved companies following the pre-contractual procedures. For high-value major capital procurements, cases will inevitably be more complex and legal proceedings will take longer despite best efforts to speed them up. We consider that the associated risk of delays means that the current position of not stating any primacy should be maintained.
34.	**Do you agree that the test to list automatic suspensions should be reviewed? Please provide further views on how this could be amended to achieve the desired objectives.** We are not persuaded that there is a significant problem with the current provisions for lifting the automatic suspension of procurement procedures. The Green Paper identifies that in 2017 around two-thirds of hearings were found in favour of the contracting authority. The conclusion is drawn in the paper that this indicates the difficulty in showing that damages are inadequate substitute for a profit-making contract. The Green Paper does not say that it might also indicate that claimants often do not have strong cases. We consider that, for some procurements such as straightforward supply contracts, there may be merit in considering amendments to the test to be applied by the Courts. For other procurements relating, for example, to nationally important infrastructure works or services, there is no evidence to indicate that a change is required to the existing test.
35.	**Do you agree with the proposal to cap the level of damages available to aggrieved bidders?** Yes. We believe that the proposal to cap damages at 1.5 x bid costs plus legal costs represents a fair balance between restitution to a bidder who has successfully challenged a procurement and the prudent expenditure of public funds. This is particularly relevant given the point in our introductory comments in response to question 30 that, in initiating a legal challenge to a procurement decision, most aggrieved tenderers simply wish to recover their bid costs and secure recognition of the error that has been made. We believe some clarification is necessary, as follows:

	▪ It should be made clear that it is only the bid costs of the tenderer that will be reimbursed, not any secondary members of the supply chain who may have contributed to the tender. If the award did include supply chain bid costs, we feel it is unlikely the proportion of any damages award would flow down to the relevant supply chain members. ▪ Para 210 of the Green Paper proposes that damages are capped at 1.5 x bid costs. This implies that bidders will have to justify costs/losses up to that limit. Whilst bidders will obviously have to provide evidence of the bid costs themselves, we feel that justifying with precision any additional cost will be difficult and may lead to dispute. So, in practice, it may be better for the 50% uplift to be viewed as a fixed element, rather than a cap. ▪ While welcoming the proposal to cap bid costs, we believe this should go further and also cap legal fees. Given the Green Paper's emphasis on fast and fair resolution of legal challenges, we feel it would not be in the public interest for legal costs to exceed 50% of the bid costs, and we recommend reimbursement of such costs is capped at that level. This would apply whether the claimant or the contracting authority was successful in the proceedings. An alternative method would be to cap (or calculate) damages based on a proportion of the advertised contract value. However, we feel this would be impossible as the costs would vary depending on the type, scale and complexity of the project and, indeed on the procedure used (fixed price and single-stage contract would be high, two-stage design and build would be moderate, construction management would be low).
36.	**How should bid costs be fairly assessed for the purposes of calculating damages?** We believe the majority of tenderers for major capital projects will capture their bid costs in their internal accounting systems. We recommend that the regulations should require tenderers to do so in an appropriate and auditable format if they wish to benefit from the award of damages as proposed in para 210. However, they may not all do it the same way and may have different 'start and finish' points. For example, where does Business Development sit; how are fixed bid department resources charged etc. We recommend the Cabinet Office should consult with the industry and publish guidance on the allowable elements to be included in bid costs. We feel it is unlikely that tenderers for major capital projects would try to artificially load bid costs during currency of a bid, on the off-chance of recovering higher damages if they mount a successful challenge. Bid budgets are typically set and monitored by the company as an investment case – the pressure on bidders from their Board is to minimise bid costs, not expand them. For damages to be awarded based on bid costs, the claimant would have to permit an audit of the costs in its accounting systems and any associated investment case approvals. We feel this should be a relatively swift and light touch process.
37.	**Do you agree that removal of automatic suspension is appropriate in crisis and extremely urgent circumstances to encourage the use of informal competition?** Yes.

38.	**Do you agree that debrief letters need no longer be mandated in the context of the proposed transparency requirements in the new regime?** We fully support transparency, but we are concerned that this proposal could have perverse and undesirable consequences. We consider that it could undermine relationships between contracting authorities and suppliers. Ultimately it could result in more challenges. Our experience is that tenderers welcome the opportunity for meaningful de-briefs. Specific feedback to tenderers is essential to remove suspicion and provide clarity of why the bid was unsuccessful. Feedback aids understanding which means a challenge is less likely (unless the procurement decision was flawed), and it helps the tenderer to improve future bids. It is only a few years since it was standard practice to hold debrief meetings with unsuccessful tenderers to explain the reasons for contract award decisions. The tenderers who had committed considerable effort, resource, and money to the production of their tenders were pleased to have the opportunity to hear directly from the client and to have the opportunity to express their disappointment. In our experience, debrief meetings – provided they were run by experienced senior managers – helped to maintain relationships with companies and reduce the risk of procurement challenges. In recent years, debrief meetings have reduced considerably and been replaced by impersonal feedback letters to the detriment of supplier relationship management. The removal of mandatory debrief letters could potentially further undermine relationships and result in an increase in complaints and/or challenges. We are not convinced that the market would welcome the proposed fully transparent approach which would allow all companies to see how everyone else had performed. The risk to companies is that they may, for whatever reason, not do well on a particular tender and be at the bottom of the rankings which may impact on its reputation. The proposal is to replace debrief letters by the publication of a rather generic or high-level report on the procedure and outcome of the procurement; this may be complex and would require very careful preparation. The benefit of individual debrief letters is that they allow explanations to be tailored to individual participants and for any issues relating to a particular tenderer to be addressed in a more open and targeted way. Individual letters can focus on the key aspects of the contract award decision relevant to the specific tender. The reliance on the Green Paper's proposed procurement reports is that they would include summary information and would carry the risk that aspects of them may be open to different interpretations by different participants. Any misinterpretation could result in challenges arising, and the greater level of detail within the reports could provide more opportunity for unsuccessful tenderers to find or perceive flaws on which to base challenges.

Chapter 8 - Effective contract management	
39.	**Do you agree that:** ▪ **businesses in public sector supply chains should have direct access to contracting authorities to escalate payment delays?** ICE fully supports fair and prompt payment principles throughout the supply chain. Small businesses can play a vital role in the delivery of very important projects and programmes. The failure of key small companies due to cash flow problems can have a very detrimental impact on the delivery on time of government investment programmes. We support the proposal to legislate to provide clear access for any business to take up payment delays in the supply chain directly with the contracting authority. This will help to keep clients better informed of payment problems and to make investigations as appropriate. We recognise that there can be genuine disputes in relation to entitlement to payment which mean that it can be appropriate for a main contractor to withhold payment or part payment, but there are too many examples of payments not being on time where there is no good reason to delay payment. The proposed new legislation should help to reduce payments which are delayed without appropriate reasons. ▪ **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?** Yes, for the reason set out in the first part of our response, ICE supports public contracting authorities having full transparency of payment performance throughout the supply chain. We also consider that contracting authorities should be entitled to account of previous poor prompt payment performance in taking decisions on future contract opportunities. ▪ **private and public sector payment reporting requirements should be aligned and published in one place?** Whilst we are in favour of robust performance data being published in a single place, this is conditional on data collection processes being efficient, and that performance data is reliable and assessed on a consistent basis. There is a risk that the administrative processes involved may result in some organisations not submitting full records which could result in a distortion of overall performance. There is also the risk of errors in submitted data, so there would need to be provision for published data to be challenged. It is also possible that a supplier's payment performance could be affected by a client's procedures or performance, and so the interpretation of results will require some caution.

40.	**Do you agree with the proposed changes to amending contracts?** ICE is concerned about the consequences of the proposed changes on construction-related contracts. It is important to distinguish between fundamental changes to the scope and/or extent of the contract, and, on the other hand, variations and compensation events that become necessary to complete the contract. Civil engineering projects are exposed to a wide range of risks, such as unexpected ground conditions, bad weather, and unknown utility assets. There can typically be large numbers of changes or variations made to the original specification during the course of the contract. Civil engineering contracts incorporate provisions for instructing and dealing with the commercial consequences of changes. We consider that variations arising from normal civil engineering risks should not be treated as contract amendments for the purpose of the proposed contract amendment provisions in the new Regulations. The risk of changes is understood and accepted by all contractors working in the construction sector, and the process for making such amendments is already set out in the contract. Individually, not many changes would exceed the proposed 15% limit for works contracts, but this level can commonly be reached in relation to the aggregation of changes. If this situation were to require a contract amendment notice which resulted in a challenge, the potential consequences would be very difficult to manage. Halting construction of a project whilst legal challenges were resolved could result in high additional costs and create safety problems. The situation could be even more difficult if a successful challenge were to lead to the need for a new procurement to complete the construction of the project. Replacing a contractor during the construction period would result in many complex contractual issues and likely to result in considerable extra costs. We believe this proposal is unworkable for Works contracts.
41.	**Do you agree that contract amendment notices (other than certain exemptions) must be published?** No, we do not agree that contract amendment notices should be required in relation to construction contracts for the reasons set out above.
42.	**Do you agree that contract extensions which are entered into because an incumbent supplier has challenged a new contract award, should be subject to a cap on profits?** We can see that this would be appropriate for supplies or services contracts, as the items being provided under the contract are usually fairly straightforward. We consider that, depending on the form of contract and its commercial provisions, it is unlikely that the proposed approach would be appropriate on construction projects. The proposal is that an appropriate rate of profit would be determined based on a government standard rate and the profit payable during the contract extension would be calculated using that rate for the duration of the extension. It could be difficult to establish the actual profit, and we are concerned that this proposal could lead to costly disputes and legal proceedings.