



UNSTACKING THE DECK: BALANCING THE PUBLIC PROCUREMENT ODDS

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FOREWORD

Procurement is an essential lever through which to support small business growth and innovation – and therefore to enhance the productivity and the wider competitiveness of the economy.

Much good work has been done in recent years to make public contracts more accessible to smaller businesses. The Lord Young reforms in 2015 have made significant progress in the quest to remove some of the barriers preventing small businesses from winning Government contracts. These included the removal of burdensome pre-qualification questionnaires, better publicity of contracts through mandatory use of Contracts Finder, and a crackdown on late payments throughout the public sector supply chain.

However, much more still needs to be done to ensure that small businesses can capitalise on opportunities offered by public procurement to scale up and learn. We want to harness the power of public procurement to support the growth and scaling of small businesses.

Public procurement also has an important role to play in supporting innovation. If utilised effectively, it can stimulate innovation through helping companies get off the ground. It can provide the first sales of technology or services, and help innovative products and services become competitive by driving down prices.¹ FSB has been supportive of the Small Business Research Initiative and the Industrial Strategy Challenge Fund and we look forward to continued engagement with Government to ensure both these initiatives are delivered in the most small business friendly way as possible. Indeed, some of our members are recipients of the SBRI including, for example, a firm called Highland Biosciences, that specialise in developing and commercialising technology to find innovative solutions to issues in healthcare, aerospace and life sciences.

There may also be opportunities to further improve procurement practices after the UK has left the EU. Recent FSB research has shown that for businesses operating in supply chains, public procurement rules are regarded as a top regulatory barrier. Of these businesses, 64 per cent stated that it had led to reduced profitability and 49 per cent stated it had reduced productivity and innovation.² Clearly, any move to reduce these barriers would be welcomed by small businesses and would directly benefit the UK economy.

The above points are important strategic issues in relation to public procurement which FSB will continue to focus on. However, this report has primarily focussed on local and central government procurement in England. We believe these are two areas of the public sector where the biggest potential exists for increasing small businesses participation as suppliers. These are also the areas where our members told us in the greatest numbers that they wanted to see improvements made for small businesses to work with Government.

This report sets out five recommendations for Policymakers in central and local Government to make the step change needed to enhance the productivity of the UK economy.



Tim Colman, FSB Procurement Chair

¹ See, The Innovation Policy Platform, Public Procurement for Innovation, 2013 <https://www.innovationpolicyplatform.org/content/public-procurement-innovation>

² FSB report, Regulation Returned, July 2017, <https://www.fsb.org.uk/docs/default-source/fsb-org-uk/fsb-regulation-returned-report.pdf?sfvrsn=0>

THE UK PUBLIC PROCUREMENT LANDSCAPE

Each year the UK public sector spends over £200 billion³ on procuring goods and services from third parties, but far too little of this is with small firms. Over the last 12 months, it is estimated that small businesses won just 19 per cent of directly awarded public sector contracts by value.⁴

There have been improvements over recent years, such as the Government target of increasing procurement spend with small businesses to 33 per cent by 2020. FSB wholeheartedly welcomed this clear commitment and views it as essential that this target remains applicable to all the UK's 5.5 million smaller businesses.

Nevertheless, FSB believes there is scope for further reforms to Government procurement practices to help meet this target.

By not taking further actions, the public sector is missing out. Smaller businesses account for 60 per cent of all private sector employment in the UK, and 47 per cent of turnover.⁵ There is a wealth of talent among small businesses that the public sector largely misses out on when it procures goods and services.

When small firms aren't used effectively by Government, it is the economy as a whole which suffers. This is because small businesses are overwhelmingly the route by which people enter work from unemployment⁶ and because, as is widely recognised, small businesses are the challengers to incumbents and critical agents in the 'gale of creative destruction'. Small businesses also create greater competition for public contracts, leading to better value for money and efficiencies for contracting authorities.

The most recent data shows that, far from improving, progress is actually being reversed. The Government's recent longitudinal small business survey found that just 23 per cent of small businesses had worked for the public sector over the last twelve months - down two percentage points from 2014.⁷ For microbusinesses, this statistic was even lower at just 21 per cent. It also showed that the number of small businesses which expressed an interest in competing for a public sector contract in the last year, had also fallen. Both of these statistics should be worrying for the Government and further signify that more needs to be done if it is to have a realistic chance of hitting its own target.

The issue of improving the process of public sector procurement will also be increasingly important in the coming years as the Industrial Strategy crystallises. The significant amount of infrastructure spend committed to in recent spending announcements means that not only will the day-to-day operations of the Government need to be delivered, but that the delivery of critical Government-initiated projects such as HS2, the Road Investment Strategy and Heathrow will also dramatically increase procurement opportunities. It is essential that Government ensures these opportunities are genuinely opened up to small businesses. A key part of this will be moving away from Framework Agreements and harnessing the power of digital through, for example, expanding the use of Dynamic Purchasing Systems.

Over the past two months, FSB has looked to understand why more small businesses aren't looking to enter into Government contracts and supply directly to the public sector.

By conducting interviews and canvassing views from our membership, we have heard a range of concerns. These include a lack of awareness of the opportunities available, difficulties in being accepted onto Government frameworks, a lack of feedback on unsuccessful tenders and multiple problems with accreditations and accreditations agencies.

3 House of Commons, Public procurement briefing paper, 2015 <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06029>

4 SMEs won 19% of directly awarded public sector contracts by value. For Local Authorities this figure stood at 20% and for Housing Associations just 11. These figures were mined by Tussell from officially published procurement notices. http://tussell.com/wp-content/uploads/2017/07/Tussell_Index_of_UK_Public_Procurement_Activity-April_2017.pdf

5 House of Commons, Business statistics briefing paper, 2016 <http://researchbriefings.files.parliament.uk/documents/SN06152/SN06152.pdf>

6 See, S Thompson, Small Firms, Giant Leaps, small businesses and the path to full employment, IPPR, 2014

7 See BEIS Longitudinal Small Business Survey: Year two, SME employees, cross reference report, 2016

RECOMMENDATIONS

Our findings have resulted in the following five recommendations which we ask Government and the public sector as a whole to implement urgently:

1. Require local authorities to publish all contracts over £10,000 on Contracts Finder, as central Government is required to.
2. Give the Mystery Shopper Service (MSS) powers to enforce its findings, and to more effectively name and shame poor performers.
3. The Government must publish a thorough Action Plan detailing how it will better enforce the law requiring detailed feedback from local authorities to unsuccessful tenderers.
4. Local authorities should recognise comparable accreditations to reduce existing barriers of entry to small firms seeking public procurement contracts.
5. Replace framework agreements with Dynamic Purchasing Systems (DPS), where possible, so small businesses are not locked out from lists of potential suppliers to local authorities.

We believe if these recommendations are implemented, some of the most serious barriers inhibiting small businesses from supplying to Government would be removed, allowing for further economic benefits to be felt, along with improvements to public service delivery.

IMPROVING CONTRACTS FINDER

Contracts Finder is a digital platform aimed at helping small and medium sized businesses win more business with Government. First introduced in 2011, it acts as a one stop shop that allows suppliers to find live contract opportunities, contract awards and contract documents across the whole of the public sector.

As the single online portal for all public sector procurement awards, the original aim of Contracts Finder was to reduce complexity and make it easier for small businesses to find relevant procurement opportunities.

As a result of the Public Contracts Regulations of 2015, it is now mandatory for central public sector bodies to publish all contracts worth over £10,000 on the platform, and worth over £25,000 for Sub Central Contracting Authorities and NHS Trusts. Once a contract has been awarded, contracting authorities must also publish the details of the winning supplier, the contract value and state whether the winning organisation is a small business.

FSB welcomed these changes. We believe the more opportunities that are advertised in the public domain, the greater the chances are that small businesses will participate in the competition. We also welcomed the increased transparency that came with advertising all public sector opportunities in one place. As a result, Contracts Finder has fast become a vital tool for any small business looking to identify supplier opportunities, in what is otherwise a complex market.

However, we believe that local government can and should go further. FSB would like to see all contracts worth over £10,000 published on Contracts Finder so as to bring local authority practice in line with central Government. This could be achieved through Guidance issued by Ministers. Further, since these new obligations were imposed, many contracting authorities have found ways to exempt themselves from the Contracts Finder guidelines. This has meant that far fewer tendering opportunities are actually being publicised than the Government originally intended and indeed, should be, according to Public Contracts Regulations.

To date, local authorities have been some of the worst offenders when it comes to avoiding Contracts Finder. For councils, where they have a standing order stating that advertising is not required for contracts with a value below a certain amount, this takes precedence over the government guidance. This means that, for example, if a contracting authority is dealing with a procurement worth £40,000 and its standing orders state that contracts with a value below £50,000 need not be advertised, the opportunity does not have to be published on the Contract Finder website. These thresholds are more often than not well above those set by the Government guidance. With many local authorities having a threshold of £100,000 for formal tenders, this places all their Contracts Finder adverts well outside the reach of small businesses.

In addition to these exemptions, not all public bodies currently use Contracts Finder. For example, the MoD and some NHS bodies use completely separate online procurement systems, which adds complexity for small businesses wanting to supply across departments. In addition, many Housing Associations simply don't realise public sector procurement rules apply to them. As such, this behaviour is blocking many procurement opportunities from being advertised to small businesses.

Recommendation:

FSB would like to see the Government enforce mandatory use of Contracts Finder for all public sector contracts above £10,000, without exclusions. This should be accompanied by a letter of direction from the Secretary of State to local authorities reiterating their obligations under the Public Contracts Regulations. We would also like Government departments who don't currently use Contracts Finder to move across to this platform where possible.

“As a micro business owner, Contracts Finder is a critical tool for us to be able to identify, qualify and respond to suitable tendering opportunities in a timely manner. Over 2017 we have seen a gradual improvement in the number of buyers posting opportunities on contracts finder, however we are aware that still not all opportunities are still posted – with some public sector bodies still not signed up to the platform. Going forward, I would hope to see all public sector organisations signed up to contracts finder and required to post opportunities, and that buyers are better educated, on how this impacts the dynamics of the tendering process and appointment of appropriate suppliers.”

Caroline, FSB Member Staffordshire

GIVING MYSTERY SHOPPER TEETH

The public procurement Mystery Shopper Service (MSS) first launched in 2011, with the aim of providing a structured mechanism for suppliers to raise concerns about public procurement practice and processes.

The service provides a single point of contact that allows suppliers to anonymously escalate issues about problems in Government supply chains to the Cabinet Office. The aim is to provide a clear, structured and direct route for suppliers to raise concerns about public procurement practices when attempts at resolving issues with a contracting authority, or a first tier supplier have failed. These failures can then help the Cabinet Office identify contracting authorities who have been guilty of bad practices, and work with them to ensure similar problems don't occur again in future. In theory, it should be a service that helps to strengthen compliance and better publicise some of the common pitfalls in procurement practice.

FSB has been supportive of the MSS programme. Small businesses have often been the worst affected by public bodies not adhering to procurement legislation, and we believe MSS provides an invaluable service for suppliers to anonymously report this bad practice.

However, FSB members and our field staff have reported a number of barriers to this service being as effective as would be desirable. In particular, they have voiced concerns that the service isn't taken seriously by local authorities who often ignore guidance because of the lack of powers held by Mystery Shopper to enforce their decisions. We have heard many examples of local authority procurement departments paying no attention whatsoever to MSS guidance, as they know that all MSS recommendations are non-binding.

Under the Small Business, Enterprise and Employment Act of 2015, things have improved slightly as the Government now has the power to investigate the way an authority's procurement process have been conducted. However, because this does not apply to central government departments, their arms-length bodies and non-departmental public bodies, it still leaves a great deal of public procurement unchecked.

FSB believes that if local authorities and other public sector bodies were compelled to follow the advices of the MSS - and if MSS better named and shamed those worst offending councils - then local authority procurement practice would be dramatically improve.

Recommendation:

FSB would like the Mystery Shopper Service to be given powers to enforce their decisions and for the Government to more effectively name and shame those worst performing public sector bodies who are repeatedly reported for bad practice.

"We were informed by a local authority that two of our tender submissions had not been received via their third party on-line tendering portal, even though we had proof of submission. When we appealed – without success - to the Local Authority we said that we intended to raise the issue with Mystery Shopper. Their response was that we could go ahead, as they had no intention of taking any notice of the Mystery Shopper service as they had no power and therefore could not be taken seriously."

Danny, FSB Member, Wessex.

FEEDBACK IS KING

Local authorities in the United Kingdom are subject to the UK Public Procurement Regulations, which implement relevant European Directives. Under these directives all unsuccessful tenderers, whether above or below EU contract value thresholds, have a legal right to receive detailed feedback on why they have not been successful in bidding for a public contract.

For many small businesses, this feedback is a vital part of the learning curve, and helps them to submit better contract bids in the future. It also helps them to understand what changes may need to be made to the business, in order to make them 'contract ready' and overcome identified weaknesses.

However, we know from our members that the quality of this feedback varies immensely. From some purchasing authorities, tenderers receive full and comprehensive feedback. This includes information on which aspects of their bid were strongest and which were weakest, along with good practical advice on improving and developing for the future. However, from some authorities, so little feedback is given as to be useless, while others refuse altogether and give no feedback at all.

Poor quality - or a failure to provide feedback - can also reinforce the common belief that public sector procurement is still purely based on lowest cost, or buying from friends, rather than value for money. This is especially the case for those small businesses who have taken days, if not weeks, to complete a tender application, only to receive nothing meaningful in return.

Giving detailed and comprehensive feedback promotes integrity and confidence in the public procurement process. If businesses are able to learn from errors made in a tender application, this will be beneficial both to that business and to those public sector bodies whom they subsequently bid for work with. This would help spread best practice amongst the small business community as a whole, and develop best practice across supply chains. This would also help achieve the key government objective of standardisation throughout procurement practices.

Good feedback can also drive improvements in the contracting authorities own tender processes, because it helps public purchasers to identify areas where suppliers need to make their own future tenders fit-for-purpose.

Recommendation:

FSB would like to see the Government crackdown on purchasing authorities to ensure that all unsuccessful suppliers receive useful and timely feedback in regards to their tender applications. The Government must set out a detailed action plan showing how they will better enforce the existing law requiring detailed feedback.

Ensuring useful feedback is provided as part of a tender application would be an easy way to make sure small firms are better equipped for future procurement opportunities and will undoubtedly help the government hit their targets.

“As the owner of a small business that specialises in support, advice and training, I’ve bid for many public sector contracts over recent years. Whilst each department differs in their requirements and processes, one common thread throughout, is the often non-existent feedback received, on the back of unsuccessful bids. To prepare myself and my businesses for future tenders, this feedback is invaluable – and the minimum I’d expect after spending days and weeks filling out an application. I’d like to see the Government crackdown on this practice and ensure that all small businesses receive the feedback they are entitled to, when bidding for public sector contracts.”

Albert, FSB Member, London

STREAMLINING ACCREDITATION

Over recent years, gaining industry accreditations has become a prerequisite when bidding for public sector contracts. Most purchasing authorities now regard this as an essential element of procurement, as it gives them assurances that potential suppliers are suitable to tender for contract opportunities, in terms of their legal, financial and technical capacity.

However, these accreditation and qualification requirements have become a substantial barrier for small businesses when applying for Government contracts. This is because the criteria for accreditations is not consistent across the public sector which can make it very difficult and costly for small businesses to know which accreditations they should obtain.

Local authorities are some of the worst offenders in this regard. Many councils now require independent accreditations as part of the procurement process, and the majority accept independent accreditations as evidence of compliance with their own procurement standards.

The problems this causes can most clearly be seen in regards to health and safety accreditations. FSB estimates that there are currently over 40 organisations offering different forms of health and safety accreditation. A small company could therefore be required to obtain a different health and safety accreditation for each public tender they complete. This adds a significant cost to each tender and an extra barrier when bidding for public contracts.

In many cases there is no significant difference between the different accreditations offered, meaning the process essentially becomes a money-making exercise for the accreditation bodies. In fact this situation has become so serious that often the accreditation is based purely on the ability of the supplier to pay for the accreditation rather than their actual capabilities.

In some local authorities there has been progress on this issue with the recognition of accreditation bodies that are Safety Schemes in Procurement (SSIP) registered. However, this is still far from being widespread and the SSIP process is self-regulated rather than being truly independent.

Recommendation:

FSB believes that procurers, in particular, should take account of the third party accreditations that a firm already has, rather than insisting that all bidders are registered with a specific accreditation body as a blanket requirement. At present, this is a disincentive for small businesses looking to bid for government contracts. Central Government must issue guidance to all local authorities directing them to recognise comparable accreditations.

“I was recently supporting another FSB member in his tender response for a social housing tender – which is covered by Public Sector tendering legislation. But the tender – for a very straightforward service – required confirmation of 17 accreditations on a pass/fail basis. A number of these were totally irrelevant to the nature of the contract. This was part of a 32 page so called “pre-selection questionnaire” – which was clearly a PQQ under a different name - and as such breached the EU legislation that was relevant to the tender. The only conclusion was that the procurer had one supplier in mind who happened to meet all their – sometimes bizarre – accreditations.”

Ken, FSB Member, Hampshire.

DYNAMIC PURCHASING SYSTEMS

Over recent years, framework agreements have become an established part of public sector procurement. According to a recent report from Tussell, it is estimated that the use of framework agreements have increased from less than 10 per cent of total award value in February 2015, to an average of 54 per cent over the last six months of 2016.⁸

In essence, a framework agreement is an arrangement made with providers that sets out terms and conditions for specific purchases, which can be made through the term of the agreement. Unlike a Dynamic Purchasing System (DPS), firms cannot apply to join a framework agreement throughout its life time.⁹

However, framework agreements have been favoured by purchasing authorities because they deliver value for money through lower contract management costs and because they simplify repeat procurements. This allows procurers to quickly and efficiently procure from trusted sources without the need for a full tender exercise.

Framework agreements are perceived as a major barrier when attempting to win public sector work by many small businesses. FSB believes that locking out small firms in this way reduces the ability of procurers to receive bids from small businesses that would deliver significant value for money and improve services.

This is because once a framework agreement has been established, new entrants into the market are unable to join. This can lock suppliers out of a market for a period of up to four or five years. For small businesses this has been a particular problem, as any unsuccessful bid would leave them outside of the framework for the duration of the agreement.

These restrictions imposed by framework agreements can also be harmful to purchasing authorities. By reducing competition, this can lead to increased prices and the barring of new and lower cost solutions from entering the market. This is clearly counter to government procurement aims of receiving value for money, especially for local authorities which are already facing severe budgetary constraints.

As a result, many FSB members have indicated that they therefore prefer to work with DPS, which they regard as a small business friendly alternative to frameworks. DPS is a completely electronic system which enables public sector bodies to procure work or services through an open market of potential suppliers. However, unlike framework agreements, businesses looking to supply services can apply to join at any time in the life of the DPS and are not required to submit complicated tenders to join a DPS.

DPS also allows any supplier that meets the basic selection criteria to be automatically admitted to the DPS quickly and efficiently and without being bound by published exclusion clauses.

Consequently, DPS allows for far greater flexibility for smaller businesses, which are no longer bound by tight deadlines and can benefit from a much longer practical duration before the DPS becomes obsolete. A DPS also supports small businesses (and especially those with little or no experience in bidding for public sector contracts) by allowing suppliers who may not initially be able to meet the selection criteria, to review their processes, finances and capabilities and apply for acceptance onto the DPS at a later stage – essentially giving them further opportunities to join a framework.

These benefits to both suppliers and contracting authorities explains why, across the rest of the EU, the use of DPS procurements dramatically exceeds traditional frameworks.

⁸ Tussell, Tussell's barometer of UK public sector purchasing, 2017, <http://tussell.com/blog/tussells-barometer-uk-public-sector-purchasing-february-2017/>

⁹ See, CCS, Public procurement policy guidance, 2017 <https://www.gov.uk/guidance/public-sector-procurement-policy>

Recommendation

FSB would like to see the replacement of framework agreements with DPS for the vast majority of public sector procurement. We believe this would remove a substantial barrier that currently excludes many small businesses from even having the chance to tender for a public sector contract. Government should issue guidance to require local authorities to move towards greater use of DPS.

“I have spent 25 years bidding on framework agreements and I sincerely believe that in many cases they are a major barrier for SMEs and no longer provide value in public procurement. Framework agreements consolidate the position of incumbents over many years, creating inertia and lazy purchasing. They inhibit market entry, innovation and agility. They are seen as convenient for Government departments but they often ending up costing the tax payer far more than is necessary. It is time that procurement was opened up to SMEs through the establishment of a Dynamic Purchasing System. In my opinion, a DPS system will facilitate the wider participation of SMEs in public procurement opening up numerous opportunities and growing our entrepreneurial eco-system.”

Arnab, FSB Member

METHODOLOGY

The policy recommendations in this report have been drawn up as a result of qualitative research carried out with FSB members between June and August 2017. This research consisted of a series of structured interviews as well as a focussed online forum discussion which included small business input from across the UK.

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