OpenUK's response to the UK Government's Green Paper: Transforming public procurement

10th March 2021

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

Yes, however we would like to see consultation on draft guidance on the meaning of value for money and how this is calculated, as the usual measures of 'value' (e.g., total cost of ownership) are not necessarily appropriate to open technologies.

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?

We think this could be helpful, especially if authorities will be able to design their own procurement processes under the proposed competitive flexible procedure. We believe it is important to be clear that we're talking about intervention in the capability of the authority, rather than intervention in a particular deal. It would be counterproductive (in terms of running an effective and efficient process) for the unit to step in and try and improve a deal part way through.

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?

We believe the panel should include experts in the sectors in which procurements are being made, and particularly in digital technologies and open source. We believe the panel should work with the Cabinet Office Standards Advisory Board and future advisory groups to sustain the UK's world-leading position in public procurement of digital technologies.

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

Yes.

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

No response.

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

Yes, with the following comments.

(1) We'd suggest including template contractual documentation for different procurement types within the detailed guidance for contracting authorities to support the competitive flexible procedure.

(2) Wherever the open procedure (or other procedure utilising a template contract) is used, the authority needs to ensure that the contractual terms used are fully technology-agnostic and are appropriate for any suitable solution whether based on proprietary or open technology (open source software, open hardware, and open data), or a combination of the two. This should not preclude the authority from specifying that an open source solution is mandated as part of the tender process, as is currently permitted by law.

(3) We have appended to this response our proposals as to how the authorities could modify certain of the existing framework terms better to enable them to take full advantage of open technologies.

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

No, unless there is a much tighter and clearer definition of 'crisis' with effective checks and balances built into the process. We have concerns around the proposals as they undermine the purposes for which public procurement regulation exists. Whilst we accept that there may be a requirement for exceptions, the exercise of any such exception needs to remain subject to scrutiny as a necessary check and balance in line with the constitutional principles of the UK. We believe that much tighter controls are required around any ability to circumvent transparency or other safeguards to the rule of law.

In particular, we have concerns regarding urgent procurement to 'protect public morals'. This could be used to justify the implementation of technology for censorship purposes, and only making this public after the event. The lack of a requirement for notice undermines the legal principle of transparency.

Here follows a quote from the recommendations of the Council of Bars & Law Societies of Europe on the protection of fundamental rights in the context of 'national security' in 2019, which we believe are equally relevant to the definition of 'crisis':

> *"It is a prime duty of the State to protect its citizens, and no-one can doubt the need of the state to take exceptional measures in the interests of national security, but, unless there is a clear and precise understanding of what is, and is not, comprehended in the term 'national security' there is a clear threat to the democratic order. Therefore, it is important critically to analyse arguments invoking national security as a justification for measures which limit citizens' fundamental rights.*
>
> *A universally accepted definition of national security does not exist. Both at international and national level the term is not adequately specified. As a result, this makes it difficult for courts effectively to review infringements of fundamental rights which are based on the claimed justification of national security, and, even amongst those states where the domestic law does give some extent of definitional clarity, there*

may be radically different outcomes in different jurisdictions. The lack of a universally accepted definition of national security means that actions justified on the claimed basis of national security cannot be effectively reviewed in courts to ensure that they comply with a strict test of what is necessary and proportionate."

Fundamentally, a key element of constitutionality is effective judicial supervision and the ability to intervene to protect fundamental rights and freedoms enshrined in international and English law.

We believe any request to declare a crisis of any kind ought to be published immediately upon (or prior to) reference to the Minister of the Cabinet Office except where to do so would be likely to endanger the life or health of people, in which case it should be published as soon as it is safe to do so. Any such declaration ought to be subject to independent scrutiny, even where wider publication is not immediately appropriate, and, ultimately, judicial supervision.

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

The UK Government recognises the benefits of using open technologies and has a policy of 'open first' in the Technology Code of Practice and elsewhere. Whilst many of the UK's policy documents would benefit from update to be suitable for the platform economy, we believe the underlying principle of open first still represents best practice and reflects approaches taken around the world. We believe that in technology procurements, if a decision is taken not to use open technologies then this ought to be justified by the authority.

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?

Although the paper does not deal with the question of framework agreements with large enterprises ('enterprise agreements'), we have seen issues with these in practice. On the face of it, enterprise agreements can provide cost savings for the bidding organisation, allowing predictive costs on a best estimate of requirements. However they can sometimes reduce competition and innovation by limiting consideration solely to services contemplated under the enterprise agreement, with little heed to new capabilities or alternative options outside the enterprise agreement.

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

Wherever it is possible to do so safely and lawfully, datasets should be made openly available on licence terms recognised by the Open Source Initiative. Further, the use of open technologies in projects could benefit from the use of multi-use lists. Risk assessments on the use of open source software could be uniformly captured and centrally moderated (using a multi-use list or similar), and data made available across departments to enable more efficient and decision-making on the appropriate use of open source software within projects. Data shared across departments could include information on: (i) licence terms; (ii)

commercial models (including access to patching and upgrades); (iii) origins/creators; and (iv) security considerations.

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?

For many organisations within the platform economy there is a dependence upon third party software, but we are aware of issues around lock-in/out within the service layer of cloud products. We would encourage the government to require the large cloud providers to enable access to their platforms via APIs and to their tooling etc. on fair, reasonable, and non-discriminatory terms, to better enable competition and innovation within the space.

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?

If the competitive flexible procedure achieves its aims, then the Light Touch Regime would become redundant.

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

We welcome a move to MAT and recognition of the diversity of 'value' creation in the digital economy, and particularly the ability to consider the social value of openness as part of the quality assessment. We view this as fundamental to the valuation and the impact of open technologies, being open source software, open hardware, and open data. These open technologies are the engine powering the digital economy and are a source of revenue generation in forward-looking and appropriate commercialisation of citizen data in a digitally sovereign whilst world-facing environment.

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?

Without having seen the proposed exceptions we are unable to form a clear view, however we believe it would be inappropriate to have wide discretion to look at matters not directly related to the subject matter of the contract. Our sense is that the government will want to be perceived as following good compliance practices, such as placing requirements on the vendor to manage its supply chain appropriately and conduct its business in accordance with good industry practice, including being a good corporate citizen (for example, when it comes to sustainability). However, we do not believe that statutory exceptions are necessarily the most appropriate way of achieving this.

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, subject to the guidance being clear as to the scope of broader impacts which may be taken into account. Any additional factors to be taken into account should be made known to all potential bidders in a timely manner as part of the tender 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?

Openness is an important aspect of the principle of transparency and, in that spirit, we should generally support any measures that advance transparent procurement. Accordingly, we agree that self-cleaning fraud against the UK's financial interests and non-disclosure of beneficial ownership should fall within the mandatory exclusion grounds.

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

Our recommendation is that all players are treated even-handedly and equally, and any discretion would need to be exercised with care so as not to discriminate.

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)?

We refer to our answer to question 16 above in relation to the importance of transparency.

Q20. Do you agree that further consideration should be given to including DPAs as a ground for discretionary exclusion?

We refer to our answer to question 16 above in relation to the importance of transparency.

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

We refer to our answer to question 16 above in relation to the importance of transparency.

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

Yes, on the basis that this aids transparency.

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

No response.

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

Yes, on the basis that this aids transparency.

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

We welcome increased flexibility and responsiveness in fast moving markets and increased opportunities for participation.

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

We welcome increased flexibility and responsiveness in fast moving markets and increased opportunities for participation.

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

The default should be transparency.

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

Yes.

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

No response.

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

Yes, with reservations. With reference to paragraph 197 of the paper, we don't see any virtue in an arbitrary limitation on the length of pleadings to save on “expensive barristers”. The inherent complexity of any given case will dictate the length of the pleadings. A case (especially if to be decided only on written pleadings) requires to be pleaded properly. It is for the client to decide whom he wishes to draft the pleadings. There is no evidence that pleading skills differ between expensive barristers and cheap barristers, but it is certainly the case that inexpertly pleaded cases are often lengthy yet fail properly to focus on the pertinent issues. Discouraging the use of expert pleaders is likely to exacerbate rather than solve the perceived problems and unnecessarily high costs are subject to taxation.

The paper focuses on reforms in England, however a similar review ought to be conducted for Scotland and Northern Ireland.

Q31. Do you believe that a process of independent contracting authority review would be a useful addition to the review system?

Yes.

Q32. 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?

We note that the paper acknowledges the excellence of the Technology and Construction Court, but notes the need to streamline procedures to give speedier outcomes. We agree that it is worth considering a tribunal-based procedure if court procedure reforms do not deliver.

Q33. Do you agree with the proposal that pre-contractual remedies should have stated primacy over post-contractual damages?

Public sector contracts typically include a whole raft of pre-contractual remedies which in reality are never exercised and are typically inappropriate. This makes public procurement more costly as vendors must find other ways to mitigate or offset their risk, which is inevitably priced into the contract. Whilst good governance and supplier management during the life of the contract can lead to a better outcome for both authority and supplier, we disagree that primacy should be given to any particular set of contractual remedies. We further believe the remedies available should be reviewed to ensure they are required to address the parties' genuine concerns.

Q34. 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.

Yes.

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

No. The purpose of damages is to give fair and appropriate compensation to persons who have suffered damage as a result of wrongful acts committed by defendants. In procurement exercises, the defendant will be a public authority. We see no logical or moral justification to deprive a person suffering damage of full compensation for its losses in order (it appears) to shield public authorities from the full consequences of their wrongful actions. The excuse that it will discourage "speculative claims" is a fig-leaf. A claim is either justified or not justified, whether or not it is also "speculative". A "speculative" claim which is not justified will be lost and the claimant will be penalised in costs. A "speculative "claim" which is justified will be won and the claimant will obtain its remedy. A policy of discouraging "speculative" claims will necessarily discourage genuine claimants, thus exacerbating the tendency to protect public authorities from the full consequences of their wrongful actions.

Q36. How should bid costs be fairly assessed for the purposes of calculating damages?

No response.

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

Yes, subject to our answer to question 7 above.

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

Whilst the proposals will give increased transparency, we believe there may still be value in providing individual debrief letters as this will give losing bidders sufficient clarity. If bidders are left to draw their own conclusions, then this may give rise to unwarranted challenges.

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?**

Yes.

Q40. Do you agree with the proposed changes to amending contracts?

Yes, subject to our answer to question 7 above.

Q41. Do you agree that contract amendment notices (other than certain exemptions) must be published?

Yes.

Q42. 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?

No response.

Appendix:

OPENUK's

PUBLIC PROCUREMENT REVIEW

"LEVELLING THE PLAYING FIELD"

Introduction to this Report

OpenUK's Legal & Policy Group, is a world-leading group of UK-based experts in open source software, open hardware, and open data, together referred to as Open Technology. This Report was prepared by the OpenUK Future Leaders Group under the direction and mentorship of OpenUK's Legal & Policy Group Chair, Chris Eastham, and members Amanda Brock, Andrew Katz, Iain G. Mitchell QC, and Sami Atabani.

The Future Leaders Group is co-chaired by Robert Grannells, an Associate at Fieldfisher LLP, and Katy Gibson, an Associate at Bristows LLP, and brings together a mixture of lawyers (including both in-house counsel and private practice lawyers) and non-lawyers who work in the fields of technology, intellectual property, outsourcing, procurement, data, coding, and innovation (amongst other areas) and who are interested in everything 'open' (software, hardware, and data). This report would not exist without the hard work and contribution of Robert and Katy, together with Future Leaders Michael Thonger, Max Harris, and Magdalena Rzaca.

OpenUK is the industry body and advocacy group for Open Technology in the UK. More information on our work is available at https://openuk.uk/committees/legal-and-policy-group/. The Future Leaders Group was set up to create learning and collaboration around Open Technology for young legal and policy professionals.

The European Commission recognised OpenUK as the UK's actor on open source software in its OSOR country intelligence report:

https://joinup.ec.europa.eu/sites/default/files/inline-files/OSS%20Country%20Intelligence%20Report_UK.pdfand fact sheet,

https://joinup.ec.europa.eu/sites/default/files/inline-files/OSS%20Country%20Intelligence%20Factsheet_UK_0.pdf

These documents provide a convenient overview of UK Public Sector law and policy in relation to open source software. The 2010 policies were ground-breaking and world leading when published, but would benefit from a refresh to consider the platform economy and digital and data sovereignty practices.

The Future Leaders Groups undertook this review of UK Government public procurement terms and procedures to identify how they could become more 'open to Open', which includes both fully open solutions and combined open/proprietary solutions. Having prepared this paper during the course of 2020, a year which has seen increased focus and motivation for sharing and open collaboration in the face of a global pandemic through the likes of test and trace apps, and, in anticipation of the UK Government's *"Green Paper: Transforming Public Procurement"*, this report provides a timely look at how UK public bodies procure.

It suggests a fresh approach considering how Open Technologies may be procured alongside proprietary solutions to realise maximum benefits and by identifying potential problems at an early stage of the procurement process.

This Report provides an overview of some areas we believe could be improved across public procurement terms and procedures for sourcing Open Technology and sets out our recommendations. It recognises that a principal focus for public bodies has been to procure the most economically advantageous[1] solution—irrespective of underlying technology infrastructure—that addresses the procuring body's requirements, and that facilitates their operations running as smoothly as possible, whilst complying with the applicable policies and rules. With the aim of offering alternatives as to how public bodies could approach their contract terms and processes to 'level the playing field' between proprietary solutions and open solutions and so facilitating the best possible results on a balanced scorecard, without seeking to tip the scales in favour of any particular solution, technology, or type of vendor.

Executive Summary

The UK's public sector is world-leading in its policies on open source software, and this and the value of open source to the UK economy can be seen in OpenUK's State of Open: The UK in 2021 report, https://openuk.uk/wp-content/uploads/2021/03/StateOfOpen-TheUKin2021-PhaseOneReport-March2021.pdf

Government guidance around technology procurement encourages public bodies to give all due consideration to 'open' solutions and approaches, at a practical level—such as the procurement process itself and drafting of applicable terms— but they are not necessarily viewed as a viable alternative to their proprietary counterparts due to historically held misperceptions (including, for example, concerns around security, efficacy, and viral effects), and public documentation is rife with dated approaches to intellectual property rights. OpenUK's State of Open Report clarifies the multi billion pound UK economy in open source software and should help to dispel this confusion.

This report considers how through minor revisions to processes and contractual terms procuring bodies can look to redress the balance in the "levelling the playing field" for open source software and facilitate yet more adoption within the public sector bringing the associated benefits of trust and transparency and allowing reuse and scaling of solutions whilst removing unnecessary vendor lock-in.

- Governments around the world are redefining open source, taking their learning from commercial confusion, and making clear that open source is clearly and accurately defined. The UK terms should take advantage of this review to apply the industry accepted definition correlating open source with the Open Source Initiative's Open Source Definition and approved licences.
- Government should also consider open data and open hardware.
- Procurement measures should move practices away from any dependency on measures that include royalty based cost analysis or total cost of ownership.
- Government understanding of the prevalence of open source software in today's platform and cloud economy will support increased adoption bringing the benefits of trust and transparency.

[1] Under s.67 of the Public Contracts Regulations 2015, with reference to Art 67 of Directive 2014/24/EU

- In a post Brexit economy, the UK is a world leader in Open Technology and as one of the biggest contributors to open source software, the UK's public centre will benefit hugely from increased utilisation of appropriate open source software.
- A greater understanding of open source practices would be beneficial from a practical perspective and in managing the supply chain around open source.
- G Cloud is the envy of the world and itself built on open source software, but its contract terms do not always best facilitate the procurement of open source software and the grant of licence and intellectual property provisions would benefit from a refresh.
- Security and ensuring it for the public sector, is critical in both open and proprietary solutions and suggested change in tact would facilitate this through the advantages of opening up the software.

Specific Terms Reviewed

The Report considers a number of public procurement terms used by public bodies in the UK, as set out below. These terms were selected for review as they were considered to be the most commonly used at the present time. Although the review was not exhaustive, the findings provide a useful steer as to how the public sector can improve its terms and processes in future.

We have commented on the following (hyperlinks included for convenience):

- ***Model IT Services (1.07):*** ***Model services contract - GOV.UK (www.gov.uk)***
- ***G-Cloud-12 Call-Off Contract:*** ***G-Cloud 12 call-off contract - GOV.UK (www.gov.uk)***
- ***The Public Sector Contract:*** ***The Public Sector Contract - GOV.UK (www.gov.uk)***
- ***NHS Procurement:***
  - ***GP IT Operating Model:*** ***gp-it-operating-model-v4-sept-2019.pdf (england.nhs.uk)***
  - ***NHS Standard Contract:*** ***NHS England » 2020/21 NHS Standard Contract***

Model IT Services (1.07)

1. Definition of open source

"Open Source" is defined in the definitions schedule to the Model IT Services Contract as follows:

> "*computer Software that is released on the internet for use by any person, such release usually being made under a recognised open source licence and stating that it is released as open source*".

We believe the purpose of this definition is to draw a distinction between proprietary software and open source software. This is helpful when addressing aspects such as limitation of liability, should the procuring body wish to draw a distinction (as suppliers will often ask for this).

We identified a few problems with this:

i) Whilst open source software is indeed often *"released on the internet"*, this is by no means a requirement for such software to be open source. Some open source software is not available online, but only via a CD-ROM or other tangible medium (although we appreciate this is becoming less common). Fundamentally however, the method by which the software is made available is irrelevant to whether or not it is open source.

ii) This definition states that open source software is *"usually"* released under a recognised open source licence, implying that sometimes it is not. However, in our view, software should not be categorised as open source unless it is released under a licence approved by the Open Source Initiative.

iii) Open source software is not necessarily released with a statement that it is "*released as open source*", and this is not a requirement for software to be open source.

Recommendation:

We recommend revising this definition for accuracy, clarity, and consistency. This will help ensure all parties correctly understand the concept of open source software and how it relates to any solution procured under the terms.

The Open Source Initiative (OSI) provides the definition of open source software here: https://opensource.org/osd, and is the approving body for open source licences. It maintains a list of approved open source licences that have been through an approval process to provide a single accepted standard of open source. We recommend that the definition of "Open Source" should require that the software referred to is released under a licence approved by the OSI.

2. Definition of confidential information

By its nature, open source material cannot be considered confidential and there should be no restriction on putting it into the public domain. The definition of "Confidential Information" under the terms is wide enough to capture any material provided by the vendor, and issues could arise because there is no carve out for open source material. The material may need to be put into the public domain to comply with the applicable open source licences.

Similarly, any modifications to open source material (which might include, for example, improvements to GPL-licensed software) may need to be published in order to comply with the relevant licence terms. These modifications could be considered *"information derived from"* confidential information, and the obligation not to use or exploit such material is inconsistent with the principles of open source.

Recommendation:

We recommend introducing an exception to the definition of Confidential Information to cover open source material to avoid conflict with the applicable open source licences.

3. Incorporation of open source software in a proposed solution

Open source software is covered by the defined term *"Third Party Software"* and, as such, is treated in an identical manner to software which is licensed under proprietary terms.

We believe the terms intend open source software to be covered by the defined term *"Third Party COTS Software"*. However, the wording of this definition (specifically, the requirement for a non-trivial customer base) means that some open source software may instead be *"Third Party Non-COTS Software"*. These categories of Third Party Software have different regimes that apply to their incorporation into the solution, and it may therefore be unclear which regime is to apply.

Recommendation:

In order to address the inclusion of open source software or data in the solution, we believe it would be appropriate to introduce a third licensing regime at clause 17 to include open source licensing.

4. Warranty and indemnity obligations relating to the Authority publishing software as open source

Clause 20 provides that the procuring authority may, at its sole discretion, publish vendor-provided materials under an open source licence. We assume that if a public authority were to release materials on an open source basis under clause 20, it would do so under an OSI-approved licence.

We see an issue with the drafting of Clause 20.2(a), which requires a vendor to warrant that any release under clause 20 will not *"allow a third party to use the Open Source Software to in any way compromise the operation, running or security of the Specifically Written Software, the*

Project Specific IPRs or the Authority System". However, once the public authority releases source code, the use and manipulation of the code is outside the vendor's control.

We believe the intent here is that any software provided for publication as open source will not expose vulnerabilities in such a way as could enable a malicious third party to interfere with the software running within the authority's environment. However one of the advantages of opening up code is the enabling of peer review and identifying potential vulnerabilities.

Recommendation:

We recommend that this requirement is redrafted to more clearly address the specific security concern. For example, rather than a wide obligation to prevent third parties from using the software in a particular way, the requirement could instead be for the vendor to maintain the solution to take account of vulnerabilities identified and to keep the procuring entity abreast of developments. Such vulnerabilities should include those identified by the vendor, together with those by the relevant open communities.

There are a number of industry reports around security and open source which may be helpful, such as the 2020 Open Source Security and Risk Analysis report from Synopsys, Inc., available at this link: 2020 Open Source Security and Risk Analysis Report (synopsys.com).

G-Cloud 12 Terms

Under Clause 11.2 of the Call-Off Contract forming part of G-Cloud 12, the vendor *"grants the Buyer a non-exclusive, transferable, perpetual, irrevocable, royalty-free licence to use the Project Specific IPRs and any Background IPRs embedded within the Project Specific IPRs for the Buyer's ordinary business activities"*. Clause 11.3 requires the vendor to *"obtain the grant of any third-party IPRs and Background IPRs so the Buyer can enjoy full use of the Project Specific IPRs, including the Buyer's right to publish the IPR as open source*".

This contemplates that any licence for the third party IPRs will be procured by the vendor, whilst remaining silent (presumably for flexibility) as to whether these will be licensed to the vendor and sub-licensed, or licensed directly by the public body. With open source software, the latter would typically apply.

The wording is slightly problematic in that it requires any third party licence terms to permit publication as open source. Where material is obtained under an open source licence, it is likely that the public body would be permitted to publish any modifications as open source (hence complying with the letter of the clause). However it is worth noting that the open source terms on which such materials may be published may be limited to a compatible open source licence (for example in the case of copyleft licences).

Recommendation:

Amend clause 11.3 to clarify that *"obtain the grant"* may be effected either by the vendor procuring a licence grant directly to the procuring body, or via a sub-licence from the vendor.

The amendments should exclude open source materials from the obligation to *"obtain the grant"*, and instead require the vendor to identify the relevant open source components and licences to the procuring body so that it can itself review and accept the open source licences.

The Public Sector Contract

1. Intellectual property licences and ownership

As the Public Sector Contract terms are currently written, there are two categories of intellectual property rights: "Existing IPR" and "New IPR". The definitions don't currently support the potential complexities of third party licensing, or the use of open source software, in a solution.

"Existing IPR" is defined as *"any and all IPRs that are owned by or licensed to either Party and which are or have been developed independently of the Contract (whether prior to the Start Date or otherwise)"*, and there are references to the *"Supplier's Existing IPRs"*, which presumably covers IPRs either: (i) owned by the vendor; or (ii) licensed to the vendor by a third party. If a solution incorporates open source software obtained from a third party source, this would be caught by the definition.

As discussed in the context of the Model IT Services and G-Cloud 12 terms above, in the context of rapidly evolving and improving technology environment, it may be too simple to view the rights in solutions by reference to "Existing IPR" and "New IPR" (as defined) as these do not acknowledge that a solution may contain third party IP (including open technology). Sophisticated solutions will often be made available to a procuring entity on the basis of a number of different licences (that should work coherently together), which may or may not be granted directly by the vendor.

The licence terms at clause 9 are drafted such that the vendor grants the procuring entity a perpetual licence to use, change, and sub-license the vendor's Existing IPR. If a solution incorporates open source components then this licence is inappropriate as it may be that the vendor: (i) can only sub-license on the basis of an identical open source licence as to that under which it obtained the relevant component; or (ii) the licence is not granted by the vendor directly to the procuring entity—for example components covered by the GNU GPL are automatically licensed by the original author.

If modifications have been made to an open source component by the vendor (and those modifications need to be licensed directly), we believe the contract should be flexible enough to allow licensing on open source terms. Depending on the type of open source licence under which the open source component was obtained originally by the vendor, any choice which the vendor may have as to the licence which it can grant may be limited by the original open source licence.

In addition, the references to ownership of IPRs (for example at clauses 9.1 & 9.2) are problematic. In respect of Existing IPRs, some of these will be licensed to, rather than owned by, the relevant party. In relation to New IPRs, the definition is wide enough to catch modifications to Existing IPR, which may be incompatible with some open source licences.

Recommendation:

We recommend a distinction be drawn between the different bases on which materials and services are provided (including third party software and open source software), and then terms are set out which are appropriate to each. The contract terms should be drafted in such a way as to allow flexibility of third party and open source licence terms.

In respect of third party and open source materials where different licence terms apply, the procuring entity should put in place mechanisms to: (i) risk assess the inclusion of any such materials; (ii) ensure it is aware of and is able to comply with applicable licence terms; and (iii) ensure such compliance.

If the procuring entity is not required to license the materials itself (such as in certain cloud-delivery models), it should instead take steps to satisfy itself of the vendor's compliance. For example, requiring the vendor to be OpenChain (ISO/IEC 5230/2020) conformant to demonstrate it follows a rigorous governance process for the use of open source software.

2. Liability

The level at which liability caps are set can be a critical issue for small vendors (which may include open source projects) that could offer a valuable solution for a particular problem, and can preclude them from entering competitive processes which otherwise could be worth pursuing.

Recommendation:

Whilst we do not recommend that terms are changed so as to disadvantage a procuring entity, we have found that in some cases there are alternative approaches to dealing with risk rather than pushing it onto the vendor under the contract. In some cases, the prospective vendor may not have sufficient covenant strength to make contractual allocation of risk a viable option for the procuring entity in any case. As the use of open source software may greatly reduce the price of development of a solution, this may make resources available to make alternative provision for such risks.

NHS Procurement (including GP IT operating model & NHS Standard Terms)

Securing Excellence in Primary Care (GP) Digital Services: The Primary Care GP Digital Services Operating Model 2019-21.

Vendors providing any form of solution requiring the input and support of others may be discouraged from participating in a tender to supply GPs under the Securing Excellence in Primary Care (GP) Digital Services: The Primary Care GP Digital Services Operating Model 2019-21. It would be better for all solutions, regardless of their operating models and how they are delivered, to be considered fairly to encourage competitive and innovative solutions. This is especially true at a time when demand for workable and effective health technology solutions is ever increasing.

Under the commissioning framework for GPs, practices may procure digital services directly. The operating model indicates that in such cases the practice remains *"responsible, as contract holder, for the maintenance of that service which will include ensuring it remains supported by the supplier/developer"*. It also suggests that *"the security of systems and applications which are unsupported or unmaintained cannot be assured"*, and states that *"software, browsers and operating systems not supported or maintained by the supplier must not be used on NHS managed infrastructure"*. This wording has the effect of precluding the use of a great deal of open source software, which in many cases is in fact more stable and secure than proprietary software.

Some highly effective, innovative, and entirely workable solutions may require support (or additional support) by a different provider to the principal contractor, or by the procuring entity itself. These would be excluded by the wording above, meaning some excellent solutions may not be fairly considered by GP practices seeking digital services. Note that this could also apply to proprietary solutions within a multi-vendor environment, as much as open source solutions.

Further, due to reliance on a single vendor, the procuring body may find itself facing one or more unwanted and potentially costly scenarios. For example:

i) The procuring public entity may be effectively locked-in to the selected vendor, with a single supplier providing the whole package of services. This could mean remaining within a disadvantageous contractual arrangement for an extended duration, including if the solution no longer meets the procuring entity's operational requirements.

ii) The costs of migrating away from the selected vendor may be significantly increased, as the entire solution would need to be replaced. Cost may escalate further if it proves operationally difficult to exit from the outgoing solution and transition arrangements are required.

iii) Technology that may have been developed for and transferred to the entity as part of the solution may be wasted, as it may not be compatible with any replacement solution (and it may be impossible for an incoming vendor to interface with it due to necessary IPRs forming part of the outgoing vendor's proprietary technology.

iv) The solution becomes more vulnerable to issues affecting the vendor. If there is no ability to source key components or services elsewhere, the procuring body has few options if the vendor suffers financial difficulty, system failures, or business interruption. Taking this further, if the vendor were to become insolvent the procuring body may be left with an unsupported solution and no ability to recover the costs of maintaining or replacing the solution.

v) The procuring body becomes beholden to the single vendor's update schedules, deprecation timetables, and additional unanticipated scope-creep. These can lead to unresolved issues with the solution, and additional costs for the provision of additional upgrades and services.

As the procuring body will seek to mitigate some of the risks above—to the extent possible—this has the effect of disadvantaging smaller providers who would simply be excluded from the procurement process, even though their contribution to the overall solution could ultimately result in it being the best one for the GP practice.

Recommendation:

Amend the commissioning framework such that software and operating systems do not necessarily have to be maintained by a single supplier, or by the prime contractor. Allow for alternative means of ensuring technology is supported. The framework could still include requirements for the prime contractor to remain contractually responsible for its selection and management of third party technology or services.

NHS General Conditions

1. Third party intellectual property

Under the NHS General Conditions, there does not appear to be a clause that contemplates a service provider licensing in third party intellectual property. This also presents a problem for IP subject to open source licence terms. Sophisticated solutions will almost always include some third party components, and therefore these provisions are based on a false premise that the entirety of the solution will be created by the vendor from scratch.

The terms state: *"The Provider grants the Commissioners a fully paid-up, non-exclusive, perpetual licence to use the Provider Deliverables for the purposes of the exercise of their statutory and contractual functions and obtaining the full benefit of the Services under this Contract"*.

"Provider Deliverables" are defined as "*all documents, products and materials developed by the Provider or its agents, subcontractors, consultants and employees in relation to the Services in any form and required to be submitted to any Commissioner under this Contract, including data, reports, policies, plans and specifications"*.

This may be appropriate where the Provider Deliverables are created entirely from scratch, but doesn't take into consideration a situation where they contain third party materials (including open source software), or existing IPR of the vendor. See also our comments above in relation to 'Existing IPRs' and 'New IPRs' in the Public Sector Contract. The non-exclusive perpetual licence set out may not necessarily be incompatible with all open source terms, however the NHS may need to comply with additional licence requirements for a particular solution (such as attribution obligations).

The wording is highly likely to be incompatible with licence terms for proprietary third party materials which the vendor may need to incorporate into the Provider Deliverables. For example, in some solutions the NHS may need the vendor to sub-license third party materials to it, or may need to procure a direct licence from the applicable third party.

Recommendation:

Amend the terms to allow vendors to include third party material within the solution, subject to appropriate controls. These controls could include requirements that the service provider is open and transparent about any and all licence terms applicable to its solution, including those subject to an open source licence. We also recommend putting in place appropriate processes such that the NHS is aware of what material is being included, and is familiar and able to comply with any relevant licence requirements.

Our recommendations in connection with intellectual property licensing under the Public Sector Contract also apply.

2. Best practice

There is an obligation on the vendor to cooperate with the commissioning NHS body to understand and adopt "Best Practice", and especially so that such practices can be shared with other NHS bodies.

"Best Practice" is defined as *"any methodologies, pathway designs and processes relating to the Services developed by the Provider or any Sub-Contractor (whether singly or jointly with any Commissioner or other provider) for the purposes of delivering the Services and which are capable of wider use in the delivery of healthcare services for the purposes of the NHS, but not including inventions that are capable of patent protection and for which patent protection is being sought or has been obtained, registered designs, or copyright in software".*

The vendor is expected to grant the procuring NHS entity a perpetual, non-exclusive licence to use the IP in the Best Practice. However the vendor, whether providing a proprietary or open solution, may not be in a position to grant such a licence because the Best Practice in question (such as associated documentation) may need to be licensed from a third party. For example, the use of OpenChain (ISO/IEC 5230:2020) is arguably best practice in the case of open source software management, but the standard itself is licensed under ISO's licence agreement, as with other ISO standards. Other Best Practice documentation may be made available via open licences (e.g., a Creative Commons licence) and therefore may apply to a supplier's solution but would not have been developed by the supplier itself.

Recommendation:

In addition to the vendor making the procuring entity aware (prior to contracting) of any applicable third party licence terms for the solution, the service provider should be transparent about the licence terms (and any third party originators) of any relevant documentation (including all best practice, whether industry standard or otherwise) to assist the procuring entity (and other NHS bodies) in its use of the technology (such as its compliance with all applicable licences) to adopt "Best Practice". Both open and proprietary solutions may have third party additional documentation that would be applicable in this regard and so the terms could acknowledge this requirement for additional flexibility.

Conclusions

Our recommendations can be summarised as follows:

1. Risk profile management

Consider the actual risks posed by the specific use case for the solution being procured, and how these can be addressed. In some cases a contractual allocation of risk is the best solution, and in others alternative risk management approaches may be more suitable. Consider whether a small trial can provide a test-bed for surfacing issues and testing resolutions, without unduly exposing either party to unknown or unquantified risks. This may lead to a wider deployment once the parties are satisfied that risks have been suitably addressed.

The stability and security of open source software comes in no small part from the work of the community around the particular open source component, and one advantage of open source

development is that potential vulnerabilities are more easily spotted and reported due to the wider group of reviewers. Consider including obligations on the vendor to remain abreast of developments and keep the component up to date, with supporting obligations to inform the procuring entity if risks are identified so that any further mitigating steps can be taken.

Among other advantages, the use of open source software may reduce the cost of the development of a solution, and this may result in greater value for money for the taxpayer. However, where third party solutions or software are incorporated into the services provided, it may not be possible for a vendor to give the same assurances with respect to the IP in third party components as it can do with its own developed software. We believe vendors should still be able to give suitable assurances to protect the procuring body. However, to account for the nature of open source software, these assurances about third party components may need to be worded slightly differently to any assurances given in relation to the vendor's own developed software.

2. Work with what is already available

Adopt pre-existing definitions and methods to make contractual terms more suitable to open technologies—e.g., the OSI's definition of open source and OSI-approved licences, and OpenChain (ISO/IEC 5230:2020) standards. This expands the options available to public bodies and simplifies the procurement process by referring to externally-recognised elements, and will help to level the playing field by removing ambiguity (which currently disadvantages and disincentivises the use of open technologies).

3. Collaborate and understand each other at an early stage

Work with vendors to explain what problems need solving, and the solution required to solve them, so that due diligence becomes a collaborative exercise with all parties discovering how they can together develop and implement the most suitable proprietary, open source, or hybrid solutions. Procuring entities can ask questions of their potential vendors, who should be able comprehensively to respond with information about the components incorporated within their proposed solution. Discuss this at an early stage to ensure all parties understand the issues, which is especially pertinent when evaluating competing solutions.

4. What does the applicable license mean for the solution?

Revise the terms to recognise that open source components are licensed on the basis of standard open source licences. Work with the vendor to determine whether components, and the terms on which they are obtained, are suitable for the solution and how it will be deployed. Require the vendor to prepare a detailed specification including information about all third party (including open source) components within the solution. The specification should be clear as to which licence applies to each third party component. In turn, the vendor should be required to explain what this means for the solution both during the term of the agreement and post-termination.

5. Preventing lock-in

Avoid situations where the vendor is the only provider able to deliver and/or support a particular solution or component, and consider opportunities to reduce reliance on a single vendor. This might include using open technologies and standards, and encouraging collaboration between service providers. This will not only enable public bodies to obtain the most economically advantageous solution, but could also increase competition with wider benefit to the market, the tax-payer, and the public.