The answers to your questions from our recent Customer Procurement reform Surgery

1. Is the content of the legislation finalised now?

The final *final* version has not been agreed yet but we should be confident that the vast majority of the text is finalised and there is not much left to debate.

Once the Bill receives royal assent, then it will become an Act of Parliament and will become fixed.

If you're curious as to what is outstanding, there is currently a back and forth going on between the House of Lords on Commons on a singular point regarding an exclusion ground in relation to organ harvesting, so an extremely specific area not relevant to most points of discussion when looking at the bill.

In terms of timescales, after the commons rejected a House of Lords proposed amendment, it looks to be scheduled for debate by the Lords on the 24th which will have passed by the time this is published. It doesn't feel to me that we are long off achieving Royal Assent now – maybe before the end of October, certainly by the end of the year although some commentaries have suggested as late as March next year but there's nothing to substantiate such claims given how close it is to completion.

Its worth bearing in mind also that there is secondary legislation that is currently being drafted too - these are currently known as the procurement transparency regulations, and the procurement act miscellaneous provisions regulations and they will put a bit more meat on the bones of the core Act, covering things like what specific information you need to put into your notices, what light touch services there are, some new definitions, how the regulations will work with Scotland, so on, so forth. They are a little dry to read in full so are best read mixed in with the procurement act but I recommend checking them out if you didn't have chance to engage with the consultation process that the cabinet office ran a few months back as they do fill in a lot of the blank spaces in the bill- but take them with a pinch of salt, as they are still in draft I believe.

2. **Do we have a firm date when these will be applied?**

No, no firm date but the Cabinet Office have repeatedly referenced the beginning of October as the date the rules will apply from. So long as things proceed as they are, there's no real reason to doubt this won't be correct. The Cabinet Office have always promised at least 6 months to implement necessary changes and that would give us that amount of time, plus more to put changes in place.

Some have raised questions about the implementation not being long enough, but my personal view is that the content of the bill is all but certain. The feel from the cabinet office is that this is in their own words, an evolution not a revolution, meaning we should all be building on from processes, procedures and template that already exist- we're not reinventing the wheel meaning every contracting authority should be somewhere along the journey already to being prepared and should (if it chooses to) start to look at its processes and templates now, and not wait for formal training to be offered by the Cabinet Office.

3. Will the procurement reform make it easier for local authorities to source local and sustainable food?

The subjectivity of the question means that the answer is unsatisfyingly grey. If we're assuming we're talking about over threshold procurements, so one that is subject to the Procurement Act, we know that food itself does not receive any special treatment as a product at the moment.

That means a Contracting Authority wanting to source such a contract is still going to have to follow all the usual procedural rules for running a tender, including public notices and a formal tender process in line with the objectives set out in Part 2, Paragraph 12 and the strategic priorities set out in the National Procurement Policy Statement as updated from time to time.

The answer then on the face of it is possibly not any easier or worse, but similar. However, we're failing to take account of the new competitive tendering procedures at paragraph 20 which includes the new, competitive flexible procedure which is currently a bit of an unknown as to how such a procurement process could be conducted.

Is it possible that the flexible procedure invites the opportunity to do something more unique to procure this type of requirement? First to invite suppliers to show general capabilities, then within a second stage to show how the supplier could source locally and support sustainability, and then with those elements locked in, a more traditional quality price assessment to achieve the desired goal and maybe a separate step to negotiate contractual terms? Obviously that scenario is probably oversimplified, but I do hope the new flexible competitive procedures will see us leave some of the common, recognised routes to markets to really tailor an approach to get what we actually need, and not whatever the competition spits out at the end.

On a more general note- bear in mind there's nothing in the bill that expressly allows for competition to be locally focussed – at the end of the day, the rules exist to ensure that fair and open competition can thrive. I'd note that one of the repeated claims of the government in introducing this change is an oft repeated statement, that the new rules represent a realisation of the benefits of Brexit.

Whether it does represent a realisation of the benefits of Brexit is a whole other question but some would interpret that as permission to buy local or buy British but we should remember that the UK has entered into a number of trade agreements including membership of the WTO that means for over threshold procurements, suppliers from other countries should be offered the opportunity to have a crack at publicly funded contracts, including the EU members we recently said goodbye to. That wouldn't expressly prevent us from sourcing locally though, but in setting such a requirement, if an international provider covered by our trade agreements is able to source and sell local to you, they could not always be automatically dismissed from a potential opportunity because of where they are based

A final point to keep in mind is that reserved contracts for some community based bodies like VCSE's also remain a part of the new rules and if such suppliers are providing food or food services to local communities, it will remain possible to reserve contracts for such suppliers too.

4. Interested in views and thinking in respect of the Dynamic Market

I am guessing that the question is in terms of its application under the new regulations. On a recently attended conference, a speaker described the changes to DPS's as a major change but I've been describing the impact on dynamic marketplaces as nothing more than a facelift in principle, so its important to point out there is more than one view on the subject.

What we all can agree on is that they will continue to be permitted under the new regulations, they will be at minimum a two stage process under the flexible competitive procedure, first to assess capability and suitability and then to assess qualitative elements in a separate stage (or maybe stages), they will not be a contract in an unto themselves – they are considered part of an extended tender process and I think to some extent with dynamic marketplaces other than a name change, its business as usual.

If you dig a little deeper, there are some considerations though. Contracting Authorities now know that we are able to charge a fee as a fixed percentage based on the award of a contract through a dynamic marketplace- that has been in question for a long time under the PCR due to uncertain drafting and is a positive step forward in creating certainty regarding their operation.

We also know they need to be set up by contracting authorities to be considered as valid for contract awards under the procurement bill, that's sets a scope as to who can establish them initially although this represents a continuation of current practices.

DPS's were always restricted to off the shelf products which technically set a limit to what they could be used for although I'm not aware this was ever tested in court and so "off the shelf" is suitably ambiguous beyond not being a product or service that is especially created or tailored which would likely prevent a DPS being a suitable solution for most works projects. With this barrier removed under the new rules, Dynamic Marketplaces can be set up for anything which could with the dawning of AI becoming more common in the workplace see the public sector flooded with new, potential solutions in coming years, with initial tender responses being assessed via binary decision making, cutting down on admin requirements, possibly to the detriment of supply chains and the value of all Dynamic Marketplaces as a result but that will remain to be seen.

Another question also comes to mind. Will the introduction of the competitive flexible procedure result in marketplaces with multiple steps to reach an end procurement? Possibly and if so, that would represent a more radical step away from what we know Dynamic Marketplaces to be but to what end a Contracting Authority might do this is uncertain. Possibly with the removal of the off the shelf scope, there will be justifiable need for more complex, multi stage market places in the future.

There is also a question about the treatment of suppliers who join the marketplace whilst a competition is live- should they be invited to compete or not on a live competition? I think the way the rules are written leaves that open to interpretation possibly.

Our natural approach under existing regulations has been to allow all suppliers who were admitted to a DPS before a further comp was issued to compete for the opportunity. Suppliers who join after the competition were published are not automatically invited to join that competition because they would have less time to submit a bid, making the competition immediately unfair and put pressure on the authority to extend time, repeatedly. However, under the new bill the process is written to allow contracting authorities to exclude or disregard bids from suppliers who are not part of a particular dynamic marketplace, but technically, bids can only be excluded after they are received, so do we interpret that as a contracting authority not being able to disregard a bid from a marketplace members simply because they joined the marketplace after a competition was published?

Admittedly, there is some flexibility there in how to apply the rules as there is also no longer a requirement to consider applications to join a Marketplace within a fixed period of time anymore, and instead consider applications to join within a reasonable period, which might mean it is reasonable only to consider such application after the completion of a further competition should that competition be drawing to a close.

However, the point being Dynamic Marketplaces to me, seem a lot less certain in terms of their operation under the new bill which will no doubt require some guidance and possible moderation as time goes on but in the meantime will see contracting authorities use them in a similar pattern and fashion to now to avoid unknown risks associated with that uncertainty.

5. With the competitive flexible procedure can you award a contract through a single stage procurement process?

I don't know the answer to this question because of a potential contradiction in the bill. However, after YPO hosted the QA event for these questions, there was overwhelming support to suggest that it needed to be at least two stages. We left the event certain of that conclusion but attending another event the next day, the audience on that occasion including some procurement lawyers reached the exact opposite conclusion and stated that it could be one stage and so for me, the answer remains uncertain.

The definition of a competitive flexible procedure is "*such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the public Contract*" so not setting any minimum or maximum number of stages at all.

Based on this rather open interpretation of what a competitive flexible procedure might be, one of my criticisms of the bill initially was that it was impossible to see why the rules would retain the open procedure if I could run the equivalent of an open procedure, a single stage process through the competitive flexible procedure. It just served no obvious purpose and I thought maybe it was being retained for security – a process we are all familiar with to ease us into the new regime maybe, but the drafting of the bill suggests that a flexible procedure may be only intended for a procurement with 2 or more stages, which would mean the open procedure absolutely still has a purpose remaining within the bill.

The evidence to support that view can be seen in the retention of the open procedure itself, but more convincingly, cl.27(1) of the bill says of excluding suppliers from a competitive flexible procedure, that

"Before permitting a supplier to participate in a competitive flexible procedure, a contracting authority must determine whether the supplier is—
(a) an excluded supplier, or
(b) an excludable supplier."

Realistically, in order for a contracting authority to do that, it would first need to have a stage to undertake that assessment and then a second stage to invite the supplier to participate in the procedure, similar to the beginning of the current restricted process – so, we can infer more than one stage minimum, at least two. That seems pretty clear to me, and seems to make sense and that explains why retain the open procedure too.

However, that's by no means certain. Could a supplier not compete in such a procedure after an initial assessment all within a single submission? Also, when we move back to paragraph 21, talking about tender notices for competitive flexible procedures it says that for competitive flexible procedures, a tender notice must be published for amongst other things, inviting suppliers to submit their first, or only, tender as part of the procedure….thus inferring in the publication of the notice, its possible to invite a tenderer to offer only a single response for assessment as part of the procedure- so possibly a single stage process. There's similar wording for modifications at paragraph 31 too.

Interpretations aside, my feel is to interpret a single stage process as being an open procedure and a stage with more than one stage as being competitive flexible but I don't think that is by any means certain by the draft- it would also raise questions for us about how we apply that procedure to frameworks and whether, to benefit from the longer framework terms being offered under the competitive procedure, we would need to run a more complicated process.

Whatever your own interpretation, it goes to show just how critical the words of the draft are for those of us seeking to apply them and how tricky a mammoth task such as the procurement regulations can be- I am hoping to put the query to the Cabinet Office directly to provide some much needed guidance to settle my mind on the subject.

6. How will frameworks change under the new rules?

Frameworks will still be permitted under the new regime. A framework that is set up under the open procurement procedure (NOT an open framework!) is going to look extremely similar to how they look now. They will have a 4 years max timeframe, mechanisms built in to determine how contract awards are to be made including terms and conditions as standard. It will also be possible to award a framework to a single or multiple suppliers through this route.

The new route to market under the competitive flexible procedure though will open frameworks up to some new potential opportunities to run longer length solutions through "open frameworks" which are to be a series of frameworks to ultimately expire after 8 years and which must provide for the re-procurement of the first framework after a maximum of 3 years.

It effectively will allow a framework provider to run a more simplified process for years 4 to 8, allowing existing supply chains to re-submit their existing offers, to be compared against new entrants and ultimately it should mean a more streamlined, process that balances a reduction in admin when it comes to creating frameworks but ensuring competition can still exist within a reasonable timeframe of the framework being let.

Its worth bearing in mind though that I don't think direct awards will be automatically permitted under the open framework scheme which may well influence how effective they are as a procurement tool for others seeking to use them. Its also noteworthy that an open tender with only one bidder cannot exceed a 4 year length but that would also infer direct awards are possible in some circumstances on an open framework, possibly also where one of the conditions set out in Schedule 5 apply too.

7. What is YPO doing to prepare for the changes?

Externally, were taking part in presentations, webinars, QA's like this and being involved in forums where the changes are being discussed generally and that's proving extremely useful for understanding what our stakeholders and counterparts are thinking and doing.

Bearing in mind YPO is itself a contracting authority and a supplier to public sector customers, we've created a training needs matrix, of our staff looking at the stakeholders that need to understand the rule changes and we've identified 4 levels of individuals from those that need to be aware of what is happening down to those that need a fundamental understanding. Through that matrix we intend to make the most of the training opportunities that are being offered by the cabinet office through the government commercial college, with each identified level being required to complete different elements of the available training.

We are also creating a training programme internally for our buyers which we will issue before next October to tailor our buying teams understanding of the reform to YPO's own operating procedures.

We're also already updating and preparing changes to our templates and core contract terms to incorporate the otherwise implied terms, all to be launched next October but drafting now to give our key stakeholders sight of the templates in advance and also possibly providing the opportunity to benchmark against our peers too if the opportunity arises.

We're getting involved still wherever we can on any chance to engage with the Cabinet Office to understand how we should interpret some of the more difficult parts of the bill. Largely so far, that's been through the super user groups which have been useful to get a market temperature and receive updates but are a little light on technical detail.

We've also engaged with our e-tendering provider too, to make sure they are ready for the change to make sure the tool we use remains fit for purpose.

Finally, one of the other things I've specifically been working on with our compliance team is meeting on a weekly basis to deep dive the bill ourselves. I ask my team to read parts of the bill in preparation for a meeting, once per week where we read through it line by line together, encouraging all to ask questions and raise issues.

Success of something like that is heavily dependent on the invitees but I've found that has been extremely valuable for getting direct engagement on an otherwise dry document and its led to the creation of a series of specific questions and actions based on what we've found as we've read through it, including things I had not thought of myself. It's an ongoing process for us, but once complete, we will answer those questions through further research or with some external advice if we cannot reach an adequate solution ourselves which we will then turn into a QA for our buyers which we in turn, hope they will contribute to as well.

8. What are the exceptions being provided for schools?

This is one of the questions I saw that came up a lot at the last super user event, but I don't think was answered in that forum as far as I know.

Schools and MAT's are contacting authorities for the purposes of the regulations. However, they often do not have the means or resources to deliver some of the expectations that might be required of other authorities. Therefore, much like under the current Public Contract Regulations, there are some provisions – rules that certain bodies don't have to follow, and these are quite easy to dig out of the bill with a quick search for schools, but they are primarily that schools would be exempt from:

- Implied payment terms
- Payment compliance notices
- Information about payments under public contracts
- Implied payment terms in subcontracts
- Part 6 – regulations for below threshold contracts

Note largely then, all the expectations on notices for a procurement would still apply to a school looking to award an over threshold contract which might be a challenge in some cases.

9. A lot of the detail is missing from the bill, like what to put into notices, where do we find this out?

This is correct – the bill refers to a requirement to publish things like notices at various stages of a procurement. Where there is such a requirement, it often includes a provision to the effect that the contents of the notice are as set out in paragraph 95 which itself just states that:

An appropriate authority may by regulations make provision about—
(a) the form and content of notices, documents or other information to be published or provided under this Act;
(b) how such notices or documents are, or information is, to be published, provided or revised.

But no more than that.

Those regulations as referred to currently exist in a draft form as the procurement act miscellaneous provisions regulations and more importantly for the notices, the procurement transparency regulations which were part of the cabinet offices consultation this summer. If you didn't get a chance to see or respond to those consultations, the publications are still available online but are a bit tricky to find if you don't know what to look for, but within them, it sets out the exact detail of what you would be expected to publish within a tender notice amongst other things such as a list of CPV codes, light tough regime contracts and how the new regulations will tie in with their Scottish counterparts.

Within them, there doesn't seem to be any surprises with the expectations as to what we would include in any given notice- if you're familiar with the current process, I suspect it will look very similar under the new regime.

10. Can I use the new "Planned Procurement Notice" to act as a call to competition?

Detail on the planned procurement notice is set out at cl.15 and they will replace the procurement information notice we currently use. It will work in a similar way too – so long as it is published at least 40 days (and no longer than one year) before publication of the tender notice then the notice is a 'qualifying' planned procurement notice and the contracting authority may, if they choose to, benefit from a reduced tendering period (minimum ten days).

It is important to note that the planned procurement notice is not really designed as a means of market engagement in the same way the PIN was sometimes used. For that purpose, and where a contracting authority plans to engage with a supplier market in advance of running a procurement, it will need to publish a preliminary market engagement notice separately, so effectively, the old PIN has been split into two separate notices.

11. What is the difference between most advantageous tender and most economically advantageous tender?

Good question and depending on the interpretation, potentially not much. Obviously at present, we award contracts to the tenderer that presents the most economically advantageous tender. Under the new rules, this changes, to awarding contracts to the supplier that offers the most advantageous tender instead.

The difference between the two being the word 'economic' which taken on its own usually means something along the lines of a justification in terms of financial suitability or profitability.

A question then should be, can a contracting authority therefore begin to change the way that it assesses competitions to join frameworks or contracts to remove economic assessment entirely- maybe even awarding on completely qualitative measures like sustainability or usability?

I think it's possible, particularly for frameworks that we can use this change as an opportunity to justify moving away from assessing prices at the point of setting up the framework, where there are no direct award factors, into determining which suppliers are going to offer the best quality results with a more relevant financial assessment taking place at a later stage or maybe not even at all if there is a fixed budget expectation from an end customer.

12. If a new supplier joins a dynamic marketplace whilst we are running a further competition, do we have to invite them to the competition even though its already running?

This was discussed as part of another question. Under existing rules, YPO have always drawn a pretty thick line between the point a supplier joins a DPS and the point at which a further competition commences, to ensure the competitors on the further comp are afforded the same amount of time and access to the documents to avoid claims of unfairness unless instructed to do otherwise by the competition owner.

Cl. 34(5) brings this approach into question under the new rules says in relation to the assessment on new applications to join the market that there is no need to consider excluding suppliers if the contracting authority is unable to consider an application before and I quote "where there has been no invitation to submit such requests to participate, the deadline for submitting a first or only tender."

So technically, how we currently run our DPS's under the new rules will only really be permitted where a customer first has a step in the form of a request to participate. What I am not sure of, is if the process of joining the Dynamic market set up by us would count as a "request to participate" or not but it seems unlikely to me that joining the Dynamic marketplace is itself a request to participate because of cl. 36 which states that we may set conditions for participation in a dynamic marketplace which is not by its reading the same as a request to participate.

I would argue then, that if a supplier joined the dynamic marketplace, the new supplier joining may need to be invited to compete on current, open opportunities available at the point they have met the conditions for participation, so long as the customer has not had a first stage asking for requests to participate.

Also bear in mind the previous point that applications to join a marketplace must be assessed within a reasonable period. This may see some contracting authorities preventing a supplier joining the marketplace possibly during a competition period if it was not a reasonably sufficient period of time to complete the assessment, with what is reasonable being left open to some interpretation.

13. Do we still need to issue an award notice when we call off of a Dynamic Marketplace.

Cl. 39 covers specific notices required for dynamic marketplaces including when one is being proposed, after it is set up, if it is modified and when it shuts down. What it does not cover is notices for an award under a dynamic marketplace

For that, we must instead turn to Cl. 50, covering contract award notices and assessment summaries. Generally this clause provides that before awarding an in scope public contract, a notice must be published. It does not distinguish by what means the award has been achieved and such call-off do not appear to be excluded contracts from the need to publish such a notice.

Remembering also, that a dynamic marketplace is a form of competitive flexible procedure with the steps leading to award being delayed until a need is established, I believe it is therefore clear that if you are awarding a contract through a dynamic marketplace, you will need to issue an award notice. The same looks to be true for the award of contracts through frameworks too.

14. What happens if our supplier becomes debarred after we have awarded them a contract?

The debarment list will be a list of suppliers maintained by the government that public bodies will not be allowed to award contracts to.

Under a YPO framework, we will be including specific provisions to allow customers to terminate immediately if the supplier becomes debarred and I'd recommend your own preferred contracts have similar provisions in place to ensure that this is not an issue too.

However, even if you've not done this you needn't worry too much. Part 4 of the regulations creates contract terms that will be implied into your contract whether you or your suppliers agree to them which includes a right to terminate a contract under paragraph 78 for certain grounds including where your supplier becomes debarred.

In addition, if you assess a supplier and determine them to be an excluded supplier as you run your procurement, remember there is also a duty on you within 30 days to give notice of that exclusion to an appropriate authority (for now, being a minister for the crown) who may also assess if that supplier should be debarred.

What is unclear is what would happen if you exclude a supplier for being debarred and then following an assessment, the minister for the crown disagrees with your initial assessment or an appeal is successful against a debarment. It is unclear in such an instant whether the initial assessment would be re-open for scrutiny as a misapplication of the act or not and whether your subsequent award could be challenged.

15. Can we still use frameworks and DPS under the new rules?

Yes there are specific provisions included to allow frameworks and Dynamic Marketplaces to continue under the new regime. To be compliant, the chosen tool appears to need to be established by a contracting authority, and its just worth bearing that in mind when vetting your chosen solution for whether it is appropriate for your needs and also whether you are permitted to use it too.

16. Can we change or vary a contract after we've awarded it?

Modification of terms is currently provided for under regulation 72 of the PCR and I've always found it to be a relatively straight forward process to apply with some clear instructions as to when it can or cant be used and this is a continuing trend under the new bill in cl. 74 which gives some clear instructions for when a public contract might be modified.

Basically, this shall be if it is a "permitted modification" not substantial or is below threshold with substantial and below threshold being explained in more detail within the provision.

Schedule 8 sets out the permitted contract modifications and I don't want to run through them all but they include where the modification was provided for in advance within the procurement, for urgency and the protection of life, where there are unforeseeable circumstances, materialisation of a known risk, where there is a requirement for additional services, goods or works, for corporate

restructures and defence contracts with each of the permitted purposes setting out the limits of their application.

Overall then, yes you can modify contracts after award for specific purposes and the bill clearly sets those out in good detail.