

# Enhancing transparency in public service contracts

Recommendations for a new default

# Foreword

Contracted services are central to public service delivery in the UK. Private and voluntary sector organisations are now very large suppliers of taxpayer funded programmes – for example in health, care of older people, employment, and probation. In addition, almost all public sector organisations outsource aspects of their IT, facilities management and other support functions.

Both in-house and outsourced services have enjoyed their share of successes and failures. More recently however, high-profile problems with specific outsourcing arrangements appear to have undermined public confidence in outsourced service provision as well as the government's ability to manage these contracts.

One reason for this low confidence is that there is little public information on how well these contracts are performing. From the data that is currently available to the public, it is difficult to tell whether media stories about specific contracts fairly represent the performance of suppliers, let alone the effectiveness of outsourced provision as a whole. The current opacity of contracting arrangements also makes it difficult for potential suppliers to spot opportunities to step in and offer a better service at lower cost to taxpayers.

When we started the work summarised in this document, many organisations had already demonstrated the need to address this unsatisfactory state of affairs. The Confederation of British Industry (CBI), the National Audit Office (NAO), the Information Commissioner's Office (ICO) and the Public Accounts Committee had all made various commitments to increased transparency of outsourced services, as had various government departments and politicians.

Much attention was being paid to ensuring that freedom of information requests could be applied to outsourced services so the Institute focused on another area – using contractual arrangements to encourage regular publication of information about performance to the public. And while it was clear there was broad agreement for something like this in principle, there was a need to translate this agreement into action.

To move forward, we convened a taskforce comprising of representatives from government, industry, the voluntary sector (NCVO) and independent organisations such as ICO, NAO and Open Data Institute (ODI). The aim of this taskforce was to devise a set of detailed and legally robust obligations that everyone – government, private providers, and the voluntary sector alike – could sign up to and adopt.

The taskforce agreed that these new transparency provisions would focus on the issues that mattered most to the public – the fees paid to government suppliers, their performance and details of major subcontracting arrangements. The hard part was defining the scope, working through the detail and translating this aspiration into a set of workable provisions.

I am immensely grateful to all those who have helped make sure that the provisions outlined in this document were sufficiently specific to be meaningful, while also being broad enough to allow them to be used as a starting point for a range of contracts. While this publication represents significant progress, it is still just the beginning. The Institute – like many of those involved in the process – will continue to support government efforts to increase transparency in this area and to monitor how widely these provisions for transparency are adopted.



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This publication was authored by Chris Wajzer, Tom Gash and Sir Ian Magee from the Institute for Government. The transparency provisions were drafted by Andrew Dyson from DLA Piper.

## Acknowledgements

This work would not have been possible without the help and assistance of many people. We are grateful to our taskforce for providing constructive challenge throughout, helping us to define our approach and providing specialist input into the provision drafting process. The taskforce group comprised representatives from the following organizations: Crown Commercial Service; Cabinet Office Transparency Team; Ministry of Justice; Department for Work and Pensions; National Audit Office; Information Commissioner's Office; Open Data Institute; NCVO; G4S UK & Ireland; Atos; HP; Mitie; and DLA Piper.

The CBI was a key source of advice and guidance for the duration of the project and their assistance was fundamental to this work. Particular thanks must also go to Andrew Dyson of DLA Piper who assisted the taskforce with independent legal guidance and input on the drafting of the transparency provisions presented in this report.

Finally, many people also generously gave their time when scoping this project. These include Ian Makgill, Kate Blatchford, Debbie Ryan, Alan Cave, Matthew Trimming, Andrew Parkins, Kerry Hallard, Derek Parlour, Mike Zealley and Richard Johnson. Many thanks are due for your insight and help turning this work into a tangible project.

# Contents

Introduction .....	1
Approach.....	2
Recommended Transparency Provisions.....	3
Next Steps .....	6

## Introduction

### Transparency is vital to enhancing public confidence and trust in UK public service markets.

The contribution of public services to the UK's economic and social prosperity is greatly enhanced when public service providers – whether public, private or voluntary – are open about how the services they provide are performing. For outsourced services, transparency has the potential to enhance public confidence and trust by helping taxpayers to see how their money is being spent and give them the power to hold government and service providers to account for performance.

The Government has committed to strengthening transparency of outsourced public service provision and has already opened up some information to the public as part of its drive to be the most open and transparent government in the world. In his first few weeks in office, the Prime Minister committed to publishing details of all contracts over £10,000 on *Contracts Finder*. Francis Maude, Minister for the Cabinet Office, has championed a range of transparency and open government initiatives over the course of this parliament including contract transparency. The *2013-2015 UK National Action Plan* for the Open Government Partnership pledged to build on existing transparency in government contracting to “look at ways to enhance the scope, breadth and usability of published contractual data”. Justice Minister, Simon Hughes, has pledged to extend the scope of the Freedom of Information Act to provide greater transparency for outsourced public services. Similarly, Labour has called for freedom of information legislation to cover private companies providing public services.

Private and voluntary sector providers have welcomed these calls for increased transparency. In September 2013, the CBI published *Licence to Operate* which called on all providers to actively work with their commissioners to drive transparency. In 2014 it set out *four practical changes* to boost contract transparency for outsourced public services. Similarly, the NCVO have been pushing for greater transparency in public service contracting on behalf of voluntary providers.

As part of a suite of recommendations for improving public sector markets, the Institute for Government's *Making Public Service Markets Work* report recommended that transparency measures should be built into government contracts, obliging suppliers or contractors to publish information about contract performance.

In January 2014 the CBI, ICO and the IfG convened a roundtable to discuss options to promote greater transparency through contractual arrangements. Following this event, the CBI and the Institute for Government recommended that a set of standardised transparency provisions should be developed for government contracts.

Building on this support, the Institute for Government convened a taskforce to draft these standardised transparency provisions that would commit commissioners or service providers to publish pre-agreed information on contract performance to the public. The taskforce comprised of representatives from business, the voluntary sector and government as well as key advisory bodies including the ICO, NAO, NCVO and Open Data Institute.

This short paper summarises the work of the taskforce and presents the set of standardised transparency provisions recommended for inclusion in the Government's existing *Model Services Contract*, and, potentially, other large service contracts.

## Approach

The taskforce explored what features a set of standardised transparency provisions would need to be successful.

The outcomes of this discussion are captured in the principles set out below. These have guided the approach to the standardised transparency provisions set out in the latter section of this paper.

**Transparency provisions should encourage an active ‘push’ of information to the public.** Any reform to contract terms should enhance transparency through a proactive ‘push’ of pre-agreed information to the public, as opposed to a ‘pull’ or request for information that is typical of freedom of information requests. Transparency provisions should commit the contracting parties to publish pre-agreed information on contract performance to the public. This means that the contracting authority and supplier would agree this information before the service commenced.

**Contracting authorities and suppliers should be equally committed to transparency.** An obligation for a supplier to provide information on contract performance for public transparency should be matched with an obligation for the contracting authority to publish it. Transparency provisions should include an absolute obligation on the contracting authority to publish performance information in an open and accessible format. Where a contracting authority or supplier cannot publish pre-agreed information, it should clearly explain why.

**Reporting on contract performance should provide the public with a contextual view of performance.** Information should be presented in a format that helps members of the public interested in contract performance to understand the relevance and completeness of the information being published. The data should be complemented by a narrative description of performance to ensure that the public obtain a fair, accurate and, where possible, comparable view of contract performance. Where relevant and appropriate this should be extended to subcontractors.

**Reporting on performance should be tailored to specific services and be proportionate to the size and nature of the service being provided.** It is important that transparency obligations account for the differing scale of contracts as well the nature of service being provided. This includes what is reported as well as how often it is published. If the scale of reporting is not proportionate, the requirement may impose significant costs on contracting authorities and suppliers that could be passed on to citizen. There should also be clarity on when transparency obligations are not appropriate. In defence contracts, for example, national security considerations may restrict the type of information that can be reported.

**Suppliers should have the opportunity to verify the information before it is released.** For published information to be credible, it should be agreed in advance by the contracting authority and suppliers. To achieve this, contracting authorities and suppliers – and where they are material to the contract, subcontractors – need to be given the opportunity to verify and comment on information that is to be published. Transparency provisions should set out how and when the contracting authority is obliged to consult with suppliers. In addition, contracts should not prohibit voluntary publication of additional information by suppliers, subcontractors or government.

**Transparency requirements should be made explicit from the outset.** In practice, the requirements of the transparency clause should be made explicit at the start of pre-procurement dialogue between the contracting authority and potential providers to ensure full and mutual understanding of disclosure expectations, and to prevent unnecessary disputes arising later.

## Recommended Transparency Provisions

The provisions are intended to complement existing transparency and freedom of information clauses already in the Model Services Contract.

The following section presents the set of standardised transparency provisions that the Institute for Government recommends for inclusion in the Government's existing Model Services Contract<sup>1</sup> and, potentially, other large service contracts. The recommendations include:

- Amendments to the existing transparency provisions in the Government's Model Services Contract
- Suggestions for a new linked schedule and accompanying annex.

As a package, the provisions broadly set out the terms for deciding what information would be published as well as how, when, in what format, and by whom it should be published. They also set the terms for how and when the contracting authority is obliged to consult with the supplier on publication and vice versa.

The provisions are intended to complement existing confidentiality and freedom of information clauses already in the Model Services Contract. Public authorities will still be obliged to fulfil their obligations under the Freedom of Information Act, including publishing information in accordance with their publication schemes.

These provisions were drafted with independent legal guidance and input from legal teams representing both government departments and providers. Nonetheless, it is expected that some tailoring may be required for the provisions to be neatly integrated into the existing model services contract.

Finally, the provisions presented here reflect a broad endorsement from the taskforce and represent the best solution after having taken in the wide-range of input, advice and legitimate concerns of the taskforce members.

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<sup>1</sup> The Model Services Contract is a set of model terms and conditions for major services contracts over £10 million. They were developed by the Crown Commercial Service and Government Legal Service and are intended for use by government departments and many other public sector organizations.

## Recommended transparency provisions and example schedule

### DEFINITIONS

"**Transparency Reports**" means the information relating to the Services and performance of this Agreement which the Supplier is required to provide to the Authority in accordance with the reporting requirements in Schedule [X];

### X. TRANSPARENCY INFORMATION

X.1 The Parties agree that:

- (a) the content of the Transparency Reports, and
- (b) the content of this Agreement and any changes to this Agreement agreed from time to time (except for any information which is exempt from disclosure in accordance with the provisions of the FOIA),

(together the "**Transparency Information**") are not confidential in nature and may be published by the Authority to the general public notwithstanding any other provision of this Agreement or any other confidentiality undertaking.

X.2 Subject to clause [X.3], the Authority shall publish and maintain an up-to-date version of the Transparency Information in a format readily accessible and reusable by the general public, under an open licence.

X.3 If in the Authority's reasonable opinion, publication of any element of the Transparency Information would be contrary to the public interest, the Authority shall be entitled to exclude such information from publication. The Authority acknowledges that it would expect the public interest by default to be best served by publication of the Transparency Information in its entirety. Accordingly, the Authority acknowledges that it shall only exclude Transparency Information from publication in exceptional circumstances and agrees that where it decides to exclude information from publication on that basis, it will provide a clear statement to the general public explaining the categories of information that have been excluded from publication and reasons for withholding that information.

X.4 The Supplier shall assist and co-operate with the Authority to enable the Authority to publish the Transparency Information, in accordance with the principles set out above, including through compliance with the requirements relating to the preparation of Transparency Reports set out in Schedule [X].

X.5 Where the Authority publishes Transparency Information, it shall:

- (a) prior to publishing, consult with the Supplier on the manner and format of publication and (where relevant) to inform its decision regarding any information which it proposes to exclude from publication (but shall have the final decision in its absolute discretion); and
- (b) present information in a format that assists the general public in understanding the relevance and completeness of the information being published to ensure the public obtain a fair view on how the Agreement is being performed, having regard to the wider context of the wider commercial relationship with the Supplier of this Agreement.

## SCHEDULE X – TRANSPARENCY REPORTS

- 1.1 Within three (3) months of the Effective Date the Supplier shall provide to the Authority for its approval (such approval not to be unreasonably withheld or delayed) draft Transparency Reports consistent with the content requirements in Annex 1.
- 1.2 If the Authority rejects any proposed Transparency Report, the Supplier shall submit a revised version of the relevant report for further approval by the Authority within five (5) days of receipt of any notice of rejection, taking account of any recommendations for revision and improvement to the report provided by the Authority. This process shall be repeated until the Parties have agreed versions of each Transparency Report.
- 1.3 The Supplier shall provide accurate and up-to-date versions of each Transparency Report to the Authority at the frequency referred to in Annex 1.
- 1.4 Any Dispute in connection with the preparation and/or approval of Transparency Reports shall be resolved in accordance with the Dispute Resolution Procedure.
- 1.5 The requirements in this Schedule are in addition to any other reporting requirements in this Agreement.

### Annex 1: List of Example Transparency Reports

The following is an example of how transparency reporting requirements might be integrated into contract schedules. This list is not exhaustive. Other areas for reporting may be informed by requests for information actually received. A description of the service being supplied should be outlined here to provide context for the information being presented.

### Annex 1: List of Transparency Reports

Title of Report	Content	Format	Frequency
Headline service performance	•		
Charges	•		
Major subcontractors	•		
Technical	•		
Performance management arrangements	•		

## Next Steps

We will monitor adoption of the recommended transparency provisions and take actions to help promote uptake.

The Crown Commercial Service and the Cabinet Office have indicated an intention to adopt a version of these transparency provisions set out in this document, once they have been more widely consulted on across Whitehall departments. To assist adoption and uptake, the Institute for Government, together with relevant partners from government, business, voluntary sector and civil society, will:

- **Track adoption of the transparency provisions in new contracts** awarded by government departments after the 2015 election. We will check uptake across a selection of new Whitehall contracts for public service provision six months after the 2015 election.
- As part of encouraging uptake, we will work with the Crown Commercial Service, and willing Whitehall departments and service providers to **test the provisions as a demonstration project**. This will provide an opportunity to incorporate early feedback as well as demonstrate how publication of transparency information can work in practice.
- The transparency provisions commit contracting authorities and suppliers to agree what information to publish upfront. We will work with those departments and suppliers willing to champion the provisions to **identify a default set of transparency information that might be published in contracts**.
- **Provide advice on how best transparency information can be presented to the public**. Once adopted, the transparency provisions will oblige contracting authorities to publish the transparency information for the general public. The usefulness of this data will hinge on how it is presented and on whether it can be reused under an open data licence.
- **Continue to support simultaneous work on the Freedom of Information Act**, including recent work done by the Information Commissioner's Office. The transparency provisions are complementary to FOI obligations.
- **Support work to examine how and where transparency provisions should apply to subcontractors**. The focus of this work has been on using the contractual arrangements between prime contractors and contracting authorities. At a lower level, a number of sub-contractors are often integral to service delivery and there are important questions around what level of scrutiny they require.

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