Written Evidence submitted to the House of Commons Public Bill Committee on the Procurement Bill 2022-23

Submitted 16 January 23

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Intro

00. This submission is based on the current version of the Procurement Bill[2] being debated in the House of Commons. While there is a lot that could be said about the Bill overall,[3] bearing in mind the limited set of amendments introduced in the House of Lords, the likelihood of a wholesale revision or even its withdrawal seem far-fetched. Having said that, the main risks put forward regarding the Green Paper, namely that flexibility and simplification are orthogonal objectives, less (primary) regulation does not amount simplification and that overall, these ideas will lead to a net-negative change in comparison with the outgoing regime remain present. As such, this submission focus on five key shortcomings the Bill has in its current form: i) its treatment of definitions; ii) the price of flexibility; iii) how transparency is treated; iv) direct award and v) below-threshold procurement.

1. Definitions

01. The Bill in its current form adopts a confusing legislative technique regarding definitions. Some are to be found first in section 1, namely the concepts of procurement and covered procurement which are applicable throughout the Bill. From then on we can find definitions in sections 2 to 9, 19 to 22, 34, 35, 40, 44, 45, 49, 53, 57, 73, 74, 88, 89, 107, 108, 110, 111, 119 and Schedules 1, 2, 6, 7. In addition, multiple sections cross-refer to others simply for the purposes of identifying the correct definition for a concept.

02. The situation is so complex that section 120 is simply an index of all definitions contained in the Bill. However, the inclusion of an index at that moment is not logic from a systemic perspective. This is because the index compiles both the definitions that come before it as well as those after. A good index is to be provided either at the beginning or the end of a text, not inserted midway as an afterthought. Even then, the list on section 120 is not complete as it is missing for example the definition of conflict of interest from section

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[2] That is the Procurement Bill as brought from the House of Lords on 14 December 2022 (Bill 218) and as of January 2023.

[3] As Albert Sanchez-Graells did in 'Initial Comments on the UK's Procurement Bill: a lukewarm assessment'

80, termination from section 79 or sensitive commercial information from section 92.

03. The better legislative technique, ie the one which would help users the most in terms of finding the information they need about concepts, is simply to include all definitions in a single place within the Bill. The obvious choice is the beginning, since we already have two definitions included in ss 1 which could simply be renamed 'definitions' and include all definitions. This would allow for the elimination of section 120, all definition related cross-references and the sub-sections where such definitions are to be found now. This approach would significantly improve the readability of the Bill thus helping end users in the day-to-day application of the rules. Furthermore, it would be identical to how definitions are handled in the outgoing Public Contracts Regulations 2015 (reg. 2) and frankly there is no logical reason for the change.

2. The price of flexibility

04. As with the Green Paper,[4] the Bill purports to increase the flexibility and simplifying the procurement legal regime in England, Wales, and Northern Ireland.[5] It does so while conflating both concepts. These are orthogonal objectives to one another, meaning pursuing one is done at the cost of the other.

05. The reduction to three procurement 'procedures' does provide flexibility to contracting authorities, particularly bearing in mind the competitive flexible procedure and direct award are not procedures at all but simply wrappers for each contracting authority to decide what to do in every single contract they are to tender which will not follow the open procedure. But the flexibility afforded due to the lack of standardised procedures does not come free.

06. Taking away the standardisation from the existing procedures increases the cognitive load and perceived risk for procurement officers. These now instead of taking one decision (choice of procedure) must take instead an undefined number of decisions to scope out exactly how they will award the contract. Every single of these decisions is an opportunity for mistakes and risks.

07. Despite all protestations that the Bill will make life easier for suppliers (ie, the 'simplifying' angle), this lack of standardisation means that for every contract a supplier may be faced with completely different set of rules and associated expectations. Once more this is the opposite of simplification and represents instead a significant increase in the risks and barriers associated with participation.

08. In addition, the current Bill lacks significant regulatory elements which are to be scoped out later via statutory instruments or complemented by guidance. In time, this

[4] As argued in my response to the Green Paper available here and Albert Sanchez-Graells in 'The UK's Green Paper on Post-Brexit Public Procurement Reform: Transformation or Overcomplication?' (2021) 16(1) EPPPPLR 4-18.

[5] As argued in the Bill's explanatory notes at [4] and [15], available here. Hereinafter 'Explanatory Notes'.

avoidance of taking all the difficult regulatory decisions today will lead to an increase of the overall amount of regulatory material that contracting authorities and suppliers will have to comply with. Once more, this entails more complexity and not simplification, especially as a multitude of hard or soft legal sources increases the risk of inconsistency and lack of regulatory clarity. This is specially the risk with guidance.

09. As it stands, the current iteration of the Bill is net negative in terms of simplifying the regulatory landscape applicable to public procurement in England, Wales and Northern Ireland.

3. Transparency issues

10. Another of the purported objectives of the Bill is to increase transparency in public procurement, even though most of the obvious rules for pursuing such objective appear to be relegated to secondary legislation. Furthermore, the current version of the Bill appears to row back from the admittedly lofty ambitions of the Green Paper in this regard.

11. References to transparency or the notices that would entail it are to be found throughout the Bill in sections 15, 17, 21, 39, 40, 44, 47(3), 50, 55. Some of them refer to prior notices and the risks and consequences for their breach are well established. The recurring issues with ex-post notices remain unabated.

12. Ex-post transparency notices are routinely not complied with and nothing in the Bill is designed to change the lack of compliance, ie there are no consequences for the non-compliance. As such they will remain law in the books but sadly not in action.

13. The problem could be obviated if Part 9 recognised explicit grounds for the wider public to syndicate the compliance of the rules by contracting authorities. However, the duty to comply with the rules is only owed to suppliers as per section 97(2). In consequence, the likelihood of enforcement of procurement rules will remain intimately aligned with the interests of aggrieved suppliers and not a general public interest of upholding the law. This was a key limitation with the existing enforcement system, and it seems to remain unchanged.

14. In other instances, for example when looking at the KPIs in section 52, an apparently pro-transparency rule of making such information publicly available is then eviscerated by leaving discretion to the contracting authority for the actual decision to comply. It should be added that if a contracting authority feels unable to create meaningful KPIs for a large contract then perhaps there is something fundamentally wrong with the procurement function at that contracting authority.

15. Then there's the general exemption of section 92(2) for publishing sensitive commercial information. The current drafting includes trade secrets as well as information that 'would be likely to prejudice the commercial interests of any person if it were published or otherwise disclosed.' In effect, all transparency-related information that is to be published must meet this very broad definition of sensitive commercial information. It is

noteworthy that the definition is neither limited to an actual prejudice nor to the interests of a supplier but instead it is extended to 'any person'. In consequence, this will kill off any idea of an improvement to transparency arising from the new legal regime.

16. Finally, Part 10 introduces a new Procurement Oversight function which is welcome and reasonably aligned with suggestions made about the Green Paper. However, there is no obligation to publish any investigation results or even a simple 'public by default' option to make any conclusions or recommendations available. Section 104(4) simply provides the appropriate authority with the possibility of publishing the recommendation report from section 105 but no clear default option in that regard. In consequence this function will lack the gravitas that arises from the certainty of the findings being published and the dissuasive effect any potential report could have in the behaviour of contracting authorities.

4. Direct award

17. Chapter 3 of the Bill introduces the concept of direct award as a means for award contracts with limited or no competition. This is not a concept exclusive to the UK since it exists in other jurisdictions such as Portugal and Spain.[6] In those jurisdictions, direct award has been associated with poor procurement practice as well as corruption.[7] For the most part it is what under the PCR 2015 the negotiated procedure without prior notice amounted to and as we have seen with the COVID-19 PPE contracts such types of awards are ripe for fraud and abuse.

18. Once more the poor legislative technique employed makes the interpretation of the scope of these provisions difficult to ascertain. For example, section 41(6) cross-refers to Schedule 5 as the place where the justifications for direct award are to be found, only to be followed in section 42 with what amounts to a specific justification for its use, that is the creation of specific regulations establishing new grounds for the use of direct award.

19. The current draft of section 42 opens the door for expansion of the grounds for direct awards by means of secondary legislation. While the potential expansion itself is very concerning for the reasons mentioned in para 17, leaving it in the hands of secondary or delegated legislation to be defined on a case-by-case basis compounds the problem. In this regard it would have been preferable for section 42 once more to take the difficult decisions and decide now what amounts to situations necessary to protect human, animal or plant life or health or protect public order or safety.

20. Overall it is easy to predict the impact of this move: more contracts are to be awarded directly and as such there will be more opportunities for fraud and abuse to occur.

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[6] In Belgium and Italy the direct award of concession ended up being considered as a breach to transparency. See, *Case C-221/12 - Belgacom NV v Interkommunale voor Teledistributie van het Gewest Antwerpen, Inter-Media, West-Vlaamse Energie-en Teledistributiemaatschappij* and *Provinciale Brabantse Energiemaatschappij CVBA* and *Case C-388/12 Comune di Ancona v Regione Marche*.

[7] Regarding Portugal see, Pedro Telles, 'Direct Award and Prior Consultation: everything needs to change, so everything can stay the same', e-publica, Vol 4-2, November 2017.

If those are detectable and actionable, it is a different a matter since by default the lack of transparency for these contract opportunities and actual published contract information limits the scope for syndication of these practices.

5. Enforceability of below-threshold rules

21. Part 6 introduces specific rules for below-threshold contracts that are to be considered as covered procurements. There we can find a procedure to award such contracts (section 84), a duty to consider small and medium-sized enterprises (section 85), notices (section 86) and implied terms (section 87). Taken together - and at face value - they are a welcome development over the existing regime. However, as with so many other areas of the Bill the devil is in the details.

22. The proverbial devil in relation to below-threshold contracts is to be found not in Part 6 but instead in section 97(1). Here the duties included in Part 6 are explicitly excluded from being enforceable in civil proceedings, either reducing them to a best-efforts type of clause or at most to potentially being syndicated via judicial review.

23. The same can be said about section 97(5) which provides for the same treatment for the requirement to have regard to barriers facing SMEs and the procurement policy statements. Either they are important enough to be included in primary law and as such, enforceable, or not. If the answer is the latter, then they should not be included at all. As things stand, they amount to a 'smokescreen' of appearances which do not correspond to reality. The Explanatory Notes of the Bill states the SME-related duty as a key component of the Bill,[8] while at the same time suggesting perhaps judicial review might be available for breaches.[9]

[8] Explanatory Notes at [25].
[9] Explanatory Notes at [581].