Written evidence submitted by Richard Bonnar, Professor of Public Procurement Law and Practice, School of Law, University of Leeds (PB04)

The Procurement Bill

Evidence to the House of Commons Public Bill Committee on the Exclusion and Debarment Provisions of the Bill

Clauses 26 – 30, 57- 65, Schedules 6 and 7 of the Bill (and related provisions)

Exclusion and Debarment in the Procurement Bill

In this Evidence I look at the fundamentals of the proposed Exclusion and Debarment regime in the Procurement Bill and consider how workable it is, taking as my reference point Bill 218 2022-23 (as brought from the House of Lords). All reference to Clauses and Schedules are to the Bill and all references to PCR are to the Public Contracts Regulations 2015, as a proxy for the current multiple sets of Regulations, which are being reformed by the Bill.

The Evidence is divided into four Parts:

- Part One: Summary and Recommendations
- Part Two: General Observations
- Part Three: Exclusion
- Part Four: Debarment

Although this Evidence is lengthy, it is not exhaustive. All views expressed are those of the author alone.

Before looking at the provisions in more detail, it is worth explaining some fundamental vocabulary.

When we refer to "**exclusion**" we refer to the exclusion by a procuring authority in relation to a specific procurement by reference to exclusion grounds, which under the current rules are either mandatory grounds (mainly offences) or discretionary grounds (other examples of misconduct such as a grave professional misconduct). A discretionary ground means what it says on the tin: an authority does not have to exclude a supplier if it is subject to a discretionary as opposed to mandatory ground. The current exclusion regime in the PCR is being comprehensively modernised in the Bill and this is broadly welcome.

"**Debarment**" refers to the systemic exclusion for a specified period of time of a supplier from all UK public procurements (excluding of course Scotland). Because this is a system-wide decision it can only be taken centrally. The Bill states that the decision will be taken by a "Minister of the Crown", which I assume for this paper will be the Minister for the Cabinet Office acting on advice of the Procurement Review Unit. Debarment is a novelty for the UK, though it is a feature most notably of US government contracting law.

Whilst this dichotomy is simple conceptually, the two regimes must run side by side and connect, which causes some complexities and inconsistencies as I will explain later.

Part One: Summary and Main Points for Consideration by the Committee

Note: Parts Two, Three and Four contain more detailed reasoning and further, more minor drafting points.

1. The Bill retains the current EU distinction between mandatory and discretionary exclusion grounds, which runs like a stick of rock through the whole of the new rule book, using new terminology of excluded and excludable suppliers. The Committee should consider whether there is a case for all grounds being mandatory (subject to "self-cleaning", see below). This would considerably simplify the approach, arguably remove legal risk and uncertainty and align the rulebook with public expectations (that bad acts lead to exclusion as a matter of course, unless there is remorse and/or rectification). See *Evidence Part Two, paragraph 3*.

2. If the distinction between excluded and excludable suppliers is maintained there are a number of gaps in coverage for excludable suppliers (i.e. direct awards and awards under frameworks) where there does not seem to be any power to exclude at all. It is not clear whether this is intentional and this could be usefully explored. See *Evidence Part Three, paragraph 3*.

3. There is a fundamental difference between the action of exclusion and the action of debarment even though the grounds leading to the two actions are the same. The Committee should consider whether the Bill would benefit from this distinction being drawn out – at the moment the definitions of excluded and excludable supplier also includes suppliers which are debarred. It might be better to refer throughout to *"excluded suppliers*" and "*debarred suppliers*".

4. Central to any exclusion or debarment regime is the opportunity for the supplier to bring evidence to show that it has taken steps to address the concerns which gave rise to the exclusion ground – called "self-cleaning" in current EU parlance. The Bill allows for such an approach but the Committee should consider whether the proposed provisions adequately allow the authority to assess the reputational or delivery risk to the public sector. See *Evidence Part Two, paragraph* 4.

5. The issue of the responsibility of global contractors for the acts of their overseas affiliates is highly topical. The Committee should consider whether the Bill goes far enough in this regard, as it does not extend to the acts of "sister affiliates" of organisations bidding for work in the UK. The Committee could also seek to understand how Government will equip itself and procuring authorities with the knowledge to exercise these new powers and how it will work with contractors to create a light touch but proactive compliance regime. See *Evidence Part Three, paragraph 2(c).*

6. The Government has said that debarment will be reserved for the "*most serious*" cases – yet the Bill is silent on what the bar is for debarment, above and beyond the existence of grounds and the likelihood of these reoccurring. The Committee should consider what the test for debarment is and whether this should be written into the Bill or elsewhere. See *Evidence Part Four, paragraph 1.*

7. Debarment is potentially a death knell for any government contractor, yet the duration of debarment is open-ended and vague*:" the debarment will run until the date on which the Minister expects the ground to cease to apply".* The Committee should consider whether

tighter guidelines can be given or whether there cannot simply be a fixed duration (e.g. 3 years as in the US) with the right for the supplier to bring this to an end early if it can demonstrate that it has "fixed the problem". See *Evidence Part Four, paragraph 3*.

8. Debarment does not mean debarment in some instances and this should be considered by the Committee. Where a supplier is debarred on discretionary grounds (e.g. grave professional misconduct, environmental misconduct), and because the legislator has chosen to retain the distinction between excluded and excludable suppliers, it is not automatically debarred from future government contracts. In theory at least this is a matter of discretion. This seems a contradiction in terms, contrary to what the public might expect and may lead to inconsistent application of the rules. Note that debarment does not stop new business being awarded to a supplier under an existing contract or indeed bring any existing contract to an end. The Committee should consider extending debarment to new business under existing contracts (probably with a public interest override as elsewhere in the rule book) though general termination of extant contracts on grounds of debarment would be fraught with legal and delivery risk. See *Evidence Part Four, paragraph 4*.

Part Two: General Observations

1. The objectives of the new Exclusion and Debarment regime

The overarching purpose of the Procurement Bill is to streamline and simplify the current complex framework[1], "*delivering the best commercial outcomes with the least burden on our businesses and the public sector*"[2].

In this context, the revised exclusion and new debarment regime is, in the words of the Government, intended to *"ensure that the public sector has access to the right suppliers"*[3], to enable the public sector better to tackle unacceptable behaviour such as fraud and "to *raise the bar on standards expected of suppliers*".[4]

It is hard to argue with any of this. The question, considered further below, is whether these ambitions have been translated into reality.

2. Comprehensive vs Streamlined

On the face of it the new exclusion and debarment regime does not amount to a streamlining or simplification of the current regime.

Whilst the current regime can be found in Regulation 57 PCR, those who seek to understand the new regime (admittedly now including the new debarment regime) must now look to Clauses 26 -30, Clauses 57- 65 and Schedules 6 and 7 of the Bill, together with other embedded provisions (e.g. in Clause 41 (Direct Awards) and Sections 45 and 46 (Frameworks). This is also not the full picture: in common with the rest of the Bill, there will be further related secondary legislation[5].

As with the rest of the Bill, key definitions can be found both in the Clauses and the Schedules, for example a supplier's tender can be excluded by reference to itself, its **associated persons** (as defined in Clause 26(4)) and its **connected persons** (as defined in Schedule 6). Importantly Schedules 6 and 7 (labelled Mandatory and Discretionary Exclusion grounds) contain not just the grounds but other important provisions such as derogations from the triggers.

There are two problems with this approach. The first is one of "navigation", ie it is quite hard to work out the total effect of the provisions, as they are not neatly in one place: this is arguably manageable[6], although it flies in the face of making the rule book simplified and user-friendly.

The second, perhaps bigger, problem is that the Bill applies different exclusion and debarment rules to:

- different actors (for example, suppliers, associated persons, connected persons, sub-contractors);

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[1] See paragraph 3, Executive Summary, Green Paper, Transforming Public Procurement, December 2020 ("Green Paper")

[2] See Ministerial Foreword, Green Paper

[3] See paragraph 10, Executive Summary, Green Paper

[4] See paragraph 10, Executive Summary, Green Paper

[5] For example, the appeals procedures against debarment will be set out in subsequent Regulations, see Clause 64(2)

[6] At least for lawyers, though that is hardly the point

- different types of procurement (for example, competitive tendering vs frameworks vs dynamic systems vs direct award); and
- different exclusion grounds (for example, time-barring rules).

In some cases, subtle policy decisions have been taken, no doubt for good reason [7]. But, the result is that the "golden thread" sometimes gets lost.

Why does this matter? It matters because it creates risk arises for suppliers of inadvertent non-compliance and for authorities of inconsistent application, with consequent legal and commercial risk. ***The Committee should consider whether there is a case for greater simplification of the regime (this would start to happen if some of the other suggestions made in this Evidence are followed through****).*

3. Mandatory vs discretionary exclusion

As mentioned, the current Regulation 57 PCR regime makes a fundamental distinction between mandatory and discretionary exclusion. Where a mandatory ground arises, an authority **must** exclude a supplier from the procurement; where a discretionary ground arises, an authority **may** exclude a supplier from a procurement. In either case, under the current rules the supplier gets an opportunity to show it has "self-cleaned"- in other words to show that it is a "reliable supplier" despite the existence of the relevant ground.

The (apparent) logic of the current rules is that mandatory exclusion is reserved largely for criminal offences (although breach of tax rules, which may not be criminal, is an additional mandatory ground) whilst discretionary exclusion is reserved for breach of other obligations, behaviours and conduct (for example, grave professional misconduct).

This distinction is retained in the Bill, albeit with new terminology: a supplier which is subject to a mandatory exclusion ground is potentially an excluded supplier whilst one subject to a discretionary exclusion ground is potentially an excludable supplier.

The Bill is arguably too cautious and should take the opportunity to sweep away this distinction for a number of reasons:

- there is a widespread assumption in public discourse about the Bill that a supplier to which a discretionary exclusion ground such as poor contract performance applies will as a matter of course be excluded – but in fact the authority has a discretion.

- The discretion is potentially of limited assistance to an authority. If there is a proven discretionary ground and an authority considers that the circumstances are likely to occur again, how likely is it that an authority will (or can safely) exercise a discretion to proceed with an excludable supplier?

- The twin approach perpetuates an apparent distinction between poor corporate behaviour/acts or omissions which merits exclusion as a matter of course and corporate behaviour, acts or omissions which do not merit automatic exclusion. For example, environmental misconduct is a discretionary ground not mandatory ground. Is this because it is less grave/put the authority at less risk or is more subjective?

[7] For example, the differential time periods applying to different exclusion grounds, see further below

- Quite a lot of the complexity of the exclusion and debarment regime derives from the recurring distinction between excluded and excludable suppliers, a distinction which follows through into the debarment regime in a way that produces some odd results, as is explained later.

4. "Self –cleaning" and authority risk - what is the reason for Exclusion/ Debarment?

Under the current PCR regime, a supplier may provide evidence to demonstrate its reliability despite the existence of an exclusion ground[8] under the well-known "self-cleaning provisions". In the US regime the test is whether the contractor can still be considered a responsible contractor[9], something which is considered against a risk-based assessment of the reputational and delivery risk posed to the public sector.

In both cases the point is that there is a linkage between the exclusion ground and the risk to the contracting authority/public sector, which answers the "why" question, i.e. why is a supplier being excluded from a procurement (or now the government procurement marketplace in the case of a debarment)? The answer is not just because the supplier has done a bad thing but because it now poses an unacceptable risk to a public sector buyer. Note that neither exclusion nor debarment are there to punish suppliers.

The Bill adopts a new formula and approach in this regard. The second part of the test for an excluded or excludable supplier is whether "*the circumstances giving rise to the application of the exclusion ground are likely to occur again".* Clause 58 then provides that "*a contracting authority may have regard to the following matters:*

(a) evidence that the supplier, associated person or connected person has taken the circumstances seriously, for example by paying compensation;

(b) steps that the supplier, associated person or connected person has taken to prevent the circumstances occurring again, for example by changing staff or management, or putting procedures and training in place;

(c) commitments that such steps will be taken, or to provide information or access to allow verification or monitoring of such steps;

(d) the time that has elapsed since the circumstances last occurred;

(e) any other evidence, explanation or factor that the authority considers appropriate."

But arguably assessing whether the circumstances are likely to occur again is only part of the test.

According to the OED a circumstance is *"the conditions and facts that are connected with and affect a situation, an event, or an action".* But the question is not whether the facts are likely to arise again: of necessity they will not. The issue is whether the supplier has addressed the underlying issues so as to satisfy the authority that there is an acceptable level of risk to it despite the occurrence of the exclusion ground. In short, the problem with the test as re- formulated, and by omission of the current reference to reliability (or a new formulation) is that there is no explicit reference to the likely impact of the re-occurrence

[8] See Reg 57(13)

[9] See https://blogs.dlapiper.com/uk-government-blog/2022/05/debarment-from-uk-government-contracts-back-to-the-future/

of the circumstance on the authority. A better approach might be to allow the authority to assess the evidence referred to in Clause 58 to determine whether the supplier will pose to the authority an unacceptable level of reputational or delivery risk.

This point raises itself again, in the area of debarment, in an even more acute fashion, as is explained in Part Four. ***The Committee should consider whether the test for "self-cleaning" should be strengthened.***

Part Three: Exclusion

1. Exclusion grounds

Mandatory exclusion grounds. There are two sets of new mandatory exclusion grounds. The first, in Part 1 of Schedule 6, lists offences (under the headings: corporate manslaughter/homicide, terrorism, theft, fraud, bribery, labour market, slavery, human trafficking, organised crime, tax offences, cartel offences and ancillary offences). The second in Part 2 of Schedule 6 lists misconducts in relation to tax, competition law infringements and failure to comply with a Section 60 investigation (debarment). Aside from the obvious distinction between offences and other misconduct still meriting mandatory exclusion this allows differential treatment of extra-territorial behaviours, see below.

The changes from the current mandatory exclusion grounds are extensive, addressing known gaps in the current PCR regime such as fraud against financial interest, and tidying up the current unsatisfactory treatment of tax offences and evasion.

There is an additional Part 3 of Schedule 6 with Definitions and an extensive list of excluded matters (from the exclusion grounds), which clarify which events can be taken into account (before the coming into force of the Act) in determining the application of exclusion grounds.

Discretionary Exclusion grounds. Turning to Schedule 7, the discretionary grounds extend to labour market infringements, environmental misconduct, insolvency/ bankruptcy, potential competition infringements, professional misconduct, breach of contract and poor performance, acting improperly in procurement and national security. There is also a list of excluded matters and definitions, but this time not in a separate part[10]. Many of the discretionary exclusion grounds will be familiar to current users of Regulation 57. However, the revised and extended treatment of contract/poor performance has been extensively trailed and will be considered further below.

2. Exclusion grounds – geography, "actors" and time

In an attempt to be thorough and address gaps in the current framework, the legislator has created a complex compliance regime. This will increase cost and risk for (1) suppliers, particularly those which are part of international groups and bidding as part of consortia and for (2) authorities and the Cabinet Office which are faced with some complex judgments in places. ***The Committee should seek to understand how the oversight, compliance and data requirements of these provisions will be translated into practice.***

(a) **Geography**

In relation to Schedule 6 Part 1 offences an offence outside the UK would be an offence under Part 1 if it would otherwise be an offence had the conduct been carried out in the UK. In relation to Part 2 conducts[11], a penalty or decision outside the UK will generally qualify under Part 2 if it would have amounted to a mandatory exclusion ground had that conduct occurred in the UK.

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[10] ***The Committee should consider whether the draftsman should adopt consistent drafting approaches to Schedules 6 and 7.***

[11] Other than counter-action of a tax advantage , to which paragraph 41(b) Schedule 6 applies

The approach in Schedule 7 (discretionary grounds) is different from a drafting point of view. Here the extra-territoriality is dealt with in the body of the Schedule itself with different approaches depending on the subject matter. For example, the environmental misconduct discretionary exclusion ground is said to apply if the supplier is convicted of an offence in or outside of the UK and the conduct caused significant harm etc[12]. A slightly different approach is adopted with regard to potential competition infringements where the ground applies to breach of a Chapter I prohibition in the UK or any substantially similar prohibition outside the UK. On occasions the approach is more subjective, for example the poor contract performance grounds apply to a contract[13] entered into by "any authority *outside the United Kingdom that the [decision maker] considers to be equivalent*" to a contracting authority or public authority.

In all cases it is interesting to note that the conduct may occur in the rest of the world and is not limited to treaty state jurisdictions. This demonstrates a broad "polity of nations" perspective which is positive, but there will be some subtle judgments to be made and justified – given the challenge risk to decisions taken.

(b) **Actors**

The Bill contains an extensive regime addressing the crucial issue of what could be called co-liability of suppliers. In other words when considering the application of exclusion grounds how far up and around the corporate chain and the supply chain should an authority go?

The answer, in broad terms, is that a supplier will be "liable for" an associated person, a sub-contractor and a connected person.

An **associated person** is a **person** that the supplier is relying on in order to satisfy the tender's conditions of participation – but does not include a guarantor[14]. This could include other group members or affiliates with relevant experience and will extend to any consortium members. There is no materiality test and the Committee should consider whether it might make sense to include one.

Similar provisions apply to **sub-contractors of all or part of the contract**[15].

In each of these two cases there is an opportunity to "swap out" the offending consortium member or proposed sub-contractor and of course the associated persons and sub-contractors are specific to the bid in question.

There seems to be a drafting gap with regard to the treatment of "**associated persons**". Whereas Clause 28 contains a specific obligation to treat a supplier as an excluded or excludable supplier where it is intending to subcontract to an excluded/excludable supplier[16] there merely seems to be assumption in Clause 26(3) that a tender can be disregarded by virtue of an associated person – but without an express obligation to disregard the tender/ exclude the supplier similar

[12] See

[13] Paragraph 12(6) Schedule 7

[14] Section 26(4)

[15] Section 28

[16] Section 28(3) and (4)

to that in Clauses 28(3) and (4). ***The Committee should consider whether such an obligation could be included.***

(c) **Connected person**

The exclusion grounds apply to any connected person of the supplier, whether it is involved in relation to the tender or not. This is a critical definition and can be found in paragraph 44 of Schedule 6. At a very high level, a connected person is someone who has control or influence over the supplier, someone who is a parent company of the supplier or a subsidiary of the supplier. But this does not appear to extend to a company under **common control** with the supplier. This is an important distinction which needs to be explored.

Let's take a hypothetical example. Atlas Cloud Services UK Limited and Atlas Cloud Services SA are both owned by Atlas Cloud Services plc. Atlas Cloud SA is convicted of an environmental offence falling within paragraph 4 of Schedule 7. There will be no exclusion ground relating to Atlas Cloud Services UK Limited unless SA is a direct subsidiary or parent of Limited. If they are "sister companies" SA is not a connected person of Limited.

Given the furore surrounding Bain and Co it's worth considering whether this is correct. It is arguably fair not to tar an associate company with the bad deeds of another associate company over which it has no control. However this ignores the nature of global corporate and professional services organisations: in a scenario such as the hypothetical one there would be potential reputational or even delivery risk to the government, but with no recourse. ***The Committee should consider how far (and why) it would like liability to extend within corporate or professional services groups.***

(d) **Time**

Now to the most complicated part of the provisions.

The Bill contains provisions which "time bar" certain events when considering the existence of exclusion grounds: in other words " historic" events at a certain point are not deemed to expose the public sector to risk. As a principle this makes sense, reducing the burden for suppliers and authorities alike and addressing certain gaps in the current rule book .

The new rules are to be found in Part 3 of Schedule 6 and paragraph 16 of Schedule 7, which identify events (not circumstances) which a decision-maker[17] must ignore.

Time barring and mandatory exclusion grounds

For mandatory exclusion grounds it is stated that the [authority] must ignore any event that occurred before the five-year period ending with the date on which the determination is made by the authority (note the clock ticks backward from the authority's determination)[18].

[17] ***The Committee could explore why the terminology has now switched to events not circumstances, as elsewhere in the Bill***

[18] Paragraph 43, Schedule 6

However, there are then some exceptions and further transitional rules (which broadly seek to avoid suppliers being excluded by the Bill, once enacted, for events that would not have resulted in exclusion before then).

Thus, for some grounds such as terrorism[19] the 5 year time bar is set aside altogether and events before and after the coming into force of the Bill can be considered.

For some grounds, in addition to and as well as the 5 year time bar, all events prior to the Bill coming into force must be ignored[20], presumably because these grounds are new grounds for exclusion.

For other grounds[21], in addition to and as well as the 5 year time bar, events that occurred before the three-year period ending with the coming into force of the Bill are to be ignored.

Time barring and mandatory exclusion grounds

For discretionary exclusion grounds a subtly different approach is taken[22].

Here there is a 5 year time bar as for mandatory grounds, but there is also the introduction of an awareness factor and the concept of what a "*reasonably well-informed decision-maker*" would have been aware of. The general rule[23] is therefore that the authority must ignore any event that (a) it was aware of before the five-year period ending with the date on which the determination is made, or (b) a reasonably well-informed [decision-maker] in their position would have been aware of before that period. The latter phrase builds on a well-known piece of terminology in procurement law litigation and of itself may well lead to more litigation. ***It is not clear why an awareness factor is being brought into play and this could usefully be considered by the Committee.***

Again, there are a number of seeming transitional provisions but it is not so clear how these are intended to apply.

For example, for professional misconduct and breach of contract the Bill provides that a decision maker must also ignore any event it was aware of (or should have been aware of as above) in the 3 year period prior to the determination. The word" *also*" implies as for the mandatory grounds that these are transitional rules in addition to the standard 5 year time bar. But, logically, a 3 year time bar and a 5 year time bar are mutually exclusive. **The Committee should usefully seek to understand the intent here.**

As is also the case for the mandatory grounds, there are some grounds in relation to which pre -Act events must be ignored altogether[24], presumably because they are new. ***The Committee should note that these include national security, meaning that national security - related events affecting a supplier prior to the***

[19] See paragraph 43(2), Schedule 6 for further examples

[20] E.g. corporate manslaughter or homicide, paragraph 43 (3), Schedule 6

[21] E.g. blackmail, paragraph 43(4), Schedule 6

[22] See paragraph 16, Schedule 7

[23] Paragraph 16, Schedule 7

24 Paragraph 16(4), Schedule 7

Bill coming into force must be ignored[25]. The Committee could consider whether this ground is not better treated in a similar way to terrorist and other offences, which as explained above, do not attract any time bar.

One can see the logic of the choices made, including a desire not to retrospectively penalise suppliers for pre- Procurement Act events or circumstances which would not have had any consequence under the PCR. However, as is evident hopefully from this briefest of summaries this provides a significant due diligence challenge for suppliers and appraisal challenge for authorities. ***Perhaps the Committee could consider explore with the Bill team the reasons for and consequences of the choices that have been made.***

3. What will a supplier be excluded from?

The answer to this question is not straightforward.

The exclusion rules which apply to the award of public contracts[26] (including frameworks and concession contracts) are set out in Chapter 2 in the case of competitive awards and in Chapter 3 in the case of direct awards. How the rules apply depends on the procedure adopted.

Competitive flexible procedures. According to Clause 27, an excluded supplier must be excluded from a two-stage competitive flexible procedure whilst an excludable supplier may be excluded from a CFP; in either case the exclusion must take case in the first stage, as one would expect. This seems fine.

Other competitive awards. It's pretty obvious what is intended here but ***a review by the Committee of headings, overlaps and cross-references*** might help with the overall understanding as the current drafting seems a little muddled in places (at least to this reader).

For example, according to Clause 26 ("**Excluding suppliers from a competitive award**") a tender which is assessed under Clause 19[27] must be disregarded if it is from an excluded supplier and may be disregarded if it is from an excludable supplier. This seems an incorrect/misleading heading: since Competitive Awards[28] covers the whole of Chapter 2 including CFPs (which are already dealt with in Clause 27 as referred to above) and the award of contracts by reference to dynamic markets (the exclusion rules for which can be found in Clause 36). To make it even more confusing, Clause 19 is entitled "**Award of public contracts following a competitive tendering procedure":** which is defined in Clause 20 as being either the open procedure or a competitive flexible procedure.

Dynamic markets. Clause 36 governs exclusion from dynamic markets. Here the terminology is different again – as the reference is to the rejection of an application by a supplier to join a dynamic market.

Clause 37 governs removal from a dynamic market once it has been established. Here there seems to be a further potential muddle. An authority has to remove a supplier which has (subsequently) been debarred on mandatory exclusion grounds, But, if the authority

25 Paragraph 16(4)(e), Schedule 7

26 See Section 3

27 See clause 26(1)

28 There is no definition

considers that a supplier is an excluded supplier otherwise than as a result of debarment it may[29] (but does not have to) remove that supplier from the market. In other words, an excluded supplier is not mandatorily excluded from dynamic markets. This seems to fly in the face of the definition and the schema which the Bill is trying to establish and ***the Committee should consider whether "may" should turn to a "must***".

An authority may remove a supplier which becomes an excludable supplier (this would include debarment on discretionary exclusion grounds) or which it discovers was an excludable supplier.

Direct awards. Chapter 3/ Section 41 provides that a contracting authority may award a public contract directly to a supplier that is not an excluded supplier with an override provision if the contracting authority considers that there is an overriding public interest in awarding the contract to that supplier.

There is no mention of excludable suppliers and so it is presumably permissible to award any contract directly to an excludable supplier, so long as the relevant justification can be made out under Schedule 5. ***This seems wrong and is quite puzzling and could be revisited by the Committee.***

Awards under frameworks (i.e. not of frameworks). This is governed by Chapter 4/Section 45. This provides that *"a framework may not permit the award of a public contract to an excluded supplier*" but is silent on whether a framework may or may not permit the award of a public contract to an excludable supplier. Given the very significant volume of framework awards and the continuing pressure to use frameworks, this would be another very significant loophole if this were not the case and ***so the Committee should consider whether the Bill should expressly address this topic.***

Summary: ***the treatment of excludable suppliers in relation to direct awards and framework awards could usefully be re-visited***, whilst this topic alone is a good illustration of the overall point that the rulebook is far from the streamlining promised and might benefit from simplification.

4. Exclusions and national security

The Bill introduces a new discretionary exclusion ground which applies to a supplier if a decision-maker determines that the supplier or a connected person poses a threat to the national security of the United Kingdom[30]. This is welcome and in line with the general "beefing-up" of national security provisions in the Bill and in other current legislation.

Clause 29 requires any contracting authority (other than a Minister of the Crown or a government department, the Corporate Officer of the House of Commons, or (c) the Corporate Officer of the House of Lords) to notify and seek the permission of a Minister of the Crown before excluding on the grounds of national security.

5. Exclusions and contract management

[29] Section 37(2)

[30] Schedule 6, paragraph 14

The Bill marks a significant shift by Government to regulate the management of public contracts. This is a topic in its own right but the relevant exclusion rules, by the Government's own admission, are a central part of the new approach.

So, what has changed – and what will the impact be?

The current rule is that a supplier may be excluded if it "has *shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions*[31]*.* "

This is now replaced by a number of different rules.

Rule 1 (combined)

"The supplier has breached a relevant contract and the breach was sufficiently serious or a court has ruled to that effect"[32]. Sufficiently serious means that the breach resulted in full or partial termination and/or damages and/or a settlement agreement. For these purposes a relevant contract is a contract to which (a) a contracting authority (b) another public authority, or (c) an authority outside the United Kingdom that the authority considers to be equivalent is a party.

A few comments:

(a) This is the ground most analogous to the current PCR ground.

(b) The ground does not say, as it does elsewhere, that the authority must merely consider that a sufficiently serious breach has occurred and makes clear that a Court finding is only one of the two limbs of this rule. In practice, however, in the absence of a Court finding, an excluding authority would have to have compelling evidence before it may rely on the ground.

(c) The extension to settlement agreements is likely to have some unintended consequences. Why would a supplier want to settle a dispute in relation to a public contract if the consequence were its potential exclusion (or debarment, see later)? This will potentially significantly prolong commercial disputes as a well-advised supplier will only settle a dispute if it has an assurance that it will not lead to debarment or exclusion (which is not something that will be readily available under the future system). Further, it is no secret that a supplier is rarely the sole author of performance- related issues/ disputes. Even if the authority is mainly at fault, so long as there is a breach by the supplier and this result in a settlement agreement, the breach will be sufficiently serious.

Rule 2[33]

Failure to perform a relevant contract to the authority's satisfaction after being given a proper opportunity to improve performance (and failing to do so). Unlike Rule 1, there is no "materiality" threshold and so any delay or performance failure triggering service credits will arguably constitute an exclusion ground - even though the excluding authority will most

[31] Regulation 57 (8) (g) PCR
32 A summary of the rule for simplicity : see Schedule 7, paragraphs 12(1) and 12(2)
[33] Paragraph 12(3)

likely still have to demonstrate that there has been a performance failure, i.e. it cannot simply assert a performance failure. Again, the rule may get in the way of the cut and thrust of management of contracts.

Rule 3[34]

Publication of a notice under Section 70(5) in relation to a sufficiently serious breach or unremedied performance failure. This ties back to the transparency provisions in Clause 70(5) which require an authority to publish a notice in the event of any of the circumstances described in Rules 1 or 2 arising. Therefore, this rule seems more like a another bite of the cherry rather than an additional ground as such.

Both Rules 1 and 2 apply to contracts to which a contracting authority, another public authority or "an *authority outside the United Kingdom that the decision maker considers to be equivalent".* As noted earlier, this is another example of the peculiar application of extra-territorial rules in some places. Rule 3 will only apply to UK contracting authorities.

Areas for consideration by the Committee. The question here is whether the Bill strikes a good balance between (1) ensuring that poorly performing contractors are not allowed to receive government contracts and (2) protecting contractors from arbitrary behaviour by contracting authorities. In discussions about "raising the bar" the latter factor is important too, as good quality contractors will be put off if they feel there is a risk of unfair treatment by contracting authorities.

As already explained the reference to "settlement agreement" is potentially unhelpful. On balance, Rule 2 seems broadly correct though there would be an argument for introducing "materiality" and clarifying that the failure to rectify must be due to the supplier not the authority (or a third party).

6. Exclusion: improper conduct and conflict of interest

Not all the mandatory exclusion grounds are in Schedule 6 (confusingly).

There is an additional deemed mandatory exclusion ground in Clause 31. This applies if an authority determines that a supplier has acted improperly in relation to a procurement, that the supplier has been put at an unfair advantage as a result and that the unfair advantage, cannot be avoided other than by excluding the supplier. In this case it must treat the supplier as an excluded supplier in relation to the award of that contract.

There is a further deemed exclusion ground in Clause 81. This applies if a supplier is placed at an unfair advantage due to a conflict of interest and the advantage cannot be avoided or the supplier will not take requested steps to mitigate the advantage. In this case, the authority must treat the supplier as if it were an excluded supplier.

In both cases, the ground relates to behaviour with regards to a procurement itself.

The significance of the exclusion grounds not appearing in Schedule 6 is that it does not lead to notification under the debarment provisions: in other words, improper procurement behaviour or an irremediable conflict of interest in relation to one procurement does not seem, in the eyes of the policy - maker to be "systemic" enough, to give rise to debarment as a whole. Given that improper behaviour can extend to accessing

[34] Paragraph 12(4)

confidential information or unduly influencing decision-making, it is not obvious why it is an “exclusion-lite” ground, and there is an argument for simply including it in Schedule 6. ***This could be considered by the Committee.***

Part Four: Debarment

1. Debarment – relationship with exclusion and grounds

Although exclusion and debarment have quite different consequences, they are inextricably linked in at least three ways:

1. One of the grounds for being an excluded or excludable supplier is that the supplier is on a debarment list. [35]

2. Once an authority has excluded a supplier, it must notify an "appropriate authority" , which may then commence a debarment investigation[36].

3. The grounds for exclusion and debarment are the same. [37]

Before moving on to consider the process with regard to debarment ***the Committee should consider this fundamental point***: on the face of the Bill there is no "higher" bar for debarment than there is for exclusion.

Thus, Clause 60 explains that the appropriate authority will conduct an investigation into whether the supplier is an excluded supplier or excludable supplier by virtue of the relevant exclusion grounds. Following the investigation, a report will be prepared by a Minister of the Crown[38] which[39] must, in particular, set out—

"(a) whether the Minister is satisfied that the supplier is, by virtue of the application of a relevant exclusion ground, an excluded or excludable supplier and, if so, in respect of each applicable exclusion ground

(i) whether it is a mandatory exclusion ground or a discretionary exclusion ground, and
(ii) the date on which the Minister expects the ground to cease to apply; and

(b) whether the Minister has entered, or decided to maintain the entry for, the supplier's name on the debarment list. "

The Cabinet Office has stated, in correspondence with the House of Lords that *"the debarment list is intended to focus on the most serious cases of supplier misconduct, where suppliers may pose a significant risk to contracting authorities or the public"* [40]. However, the Bill is silent on how the Minister will arrive at a decision as to what is a most serious case and that is not in fact what the Bill says. In fact, the Minister will simply be applying the same test in relation to debarment as any authority does in relation to exclusion and then has to give his/her reasons for entering the organisation on the debarment list.

Clause 61 clearly envisages that a Minister may conclude that a supplier is an excluded or excludable supplier but nonetheless that it should not be entered on the debarment list. But there is no guidance in the Bill as to the factors a Minister is supposed to take into account in arriving at such a conclusion.

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[35] See above

[36] See below

[37] See below for NI and Wales

[38] Ie not the appropriate authority, see further below

[39] See Clause 61(4)

[40] Lord True to Baroness Neville-Rolfe, 4 August 2022

Since the jump, from a consequences point of view, from individual exclusion to systemic debarment is very great indeed, this is a gap which could be addressed by the Committee. In his correspondence Lord True refers to the assessment being based on risk. This is most helpful and should, as explained in relation to exclusion, become part of the Bill or related guidance.

2. Process leading to debarment

There are three stages to debarment: (1) investigation (2) report (including determination) and (3) entry on the debarment list.

In the case of England, there is a two tier approach, with debarment investigations being conducted by an "appropriate authority" (in England a Minister of the Crown) either on notice from procuring authorities which decide to exclude suppliers or on its own cognisance. Once a debarment investigation is conducted, a Minister of the Crown must then prepare and publish a debarment Report (including a positive or negative determination). If the determination is positive the Minister will then enter the supplier onto the debarment list under Clause 62.

Since the Bill covers Wales and NI, and since debarment would apply across the UK (other than Scotland), there is a three-tier approach across these devolved nations. The Bill provides that an investigation will be conducted by a relevant appropriate authority, allowing investigations to be conducted by Welsh Ministers (in the case of a referral from a Welsh contracting authority or an autonomous decision by Welsh Ministers) and Northern Irish Departments (in the case of Northern Irish contracting authorities or an autonomous decision by Northern Irish Departments). However, once an investigation in Wales or NI is completed, it may be referred to a Minister of the Crown who alone will make a report and come to a debarment decision after considering the investigation from Wales or NI.

Clause 60 contains due process provisions (notice to supplier) and obligations on the excluding authority and supplier to cooperate/provide information.

There are no time periods set for the investigation. ***The Committee could usefully consider whether the Bill would benefit from specific timelines***, as is standard in other regulatory or quasi-regulatory investigations and indeed generally the case across the Bill.

Once the debarment report is prepared, it must be provided to the supplier. It would be standard in situations such as this for the report to be provided to the counterparty in draft for comment, as part of general fair process obligations and this should be considered here.

However, the Minister may decide[41] to redact the report/ not to publish it/ not to give a copy to the supplier or disclose the report only to such persons as it considers appropriate if they consider it (a) necessary to safeguard national security or (b) prevent publication of sensitive commercial information where there is an overriding public interest in it being withheld.

The Committee should consider whether there is an argument for unbundling national security and sensitive commercial information. Whilst wide powers are arguably more

[41] Clause 61(6)

justifiable in the case of national security, the only relevant power in the case of sensitive commercial information is arguably that of redaction.

3. Duration of debarment

Debarment will last from the entry of the supplier onto the list until the date when the Minister expects the relevant ground to cease to apply[42].

The duration of debarment is critically important and this provision should be revisited by the Committee. As it currently stands the wording is arguably not even consistent with the way the exclusion/ debarment provisions operate. Thus, the question is not whether the relevant ground has ceased to apply but whether the circumstances giving rise to the exclusion ground are likely to occur again.

But, going back to the first point made in this Part, if debarment is reserved for the most serious cases which pose "systemic risk", then surely the debarment should come to an end when the Minister believes the risk will have been fully mitigated or disappeared. Alternatively, there could be a fixed period of debarment (the Consultation Response had suggested five years[43], three is standard in the US) with an opportunity to bring it to an end if the supplier successfully exercises its proposed right to apply for removal if there has been an intervening material change and/or the application is supported with significant information not previously considered.

The Minister must keep the list under review and has the power to amend or remove an entry – which would presumably allow the Minister to extend an expiry date if they were not satisfied that the ground had in fact ceased to apply. [44] The Minister has an obligation to remove a supplier once it has ceased to be an excluded or excludable supplier.

4. Consequences of debarment

To recap, a supplier which is entered on a debarment list as a result of a mandatory exclusion ground is an excluded supplier as a matter of course.

Conversely, a supplier entered on a debarment list as a result of a discretionary exclusion ground is still only an excludable supplier and so not automatically debarred. Furthermore, it is not debarred from framework awards and/or direct awards. As already stated, this could be re-visited.

5. Appeal processes

There is an express right to appeal a debarment decision and entry on the debarment list but the procedure will be set out in secondary legislation, which is yet to emerge.

The magnitude and therefore high challenge risk of a debarment decision is well understood. However, it is not clear why there is a specific appeals procedure as any breach of a duty under the Act (other than Part 6, Below Threshold contracts) will in any event be enforceable in proceedings. This also raises the prospect that an exclusion decision will be contested under one set of rules whilst a debarment decision will be contested under

[42] Clause 62 (4)(b) (ii)

[43] See para 170 Response

[44] Query whether this should be made explicit

another. ***The Committee could seek to understand what is intended here and the reasons for it.***

18 January 2023