

**Written evidence submitted by the Open Contracting
Partnership to the House of Commons Public Bill
Committee for the Procurement Bill [HL] 218 2022-23
(as brought from the House of Lords, 14 December
2022) (PB06)**

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1. Introduction

1.1 The Open Contracting Partnership

The Open Contracting Partnership is a US-based public charity working internationally to open up and transform public procurement in over 30 countries. Further details about our work can be found at www.open-contracting.org.

We receive funding from the UK Government to support procurement transformation in developing countries but have used our own, unrestricted resources (ie. not from the UK Government) to put together this submission of evidence.

1.2 Delivering on the ambition in the Green Paper

We have high ambitions for the UK's Procurement reforms. They are a once-in-a-generation opportunity to reform the UK's public procurement market.

Procurement is the government's single biggest item of spending at £300bn a year and central to providing services to citizens, to economic inclusion, and to unlocking innovation.

We were enthused to see ambitious proposals for reform in the UK Green Paper on Transforming Procurement and in the response to the consultation response.

We submitted a detailed response to the Paper in February 2021.¹ We hope the Committee will accept it as part of our evidence as it contains many recommendations and suggestions that would make the Bill and UK procurement better and stronger based on our global experience of best practices and what works to drive transformational change around the world.

We were surprised to find important elements in the Green Paper vision missing from the first draft of the Bill. Working with the UK Anti-Corruption Coalition, we published an analysis of 10 key points that we thought should be strengthened in the legislation.² We appreciate the good work done in the House of Lords to improve the Bill further but we still think some key elements need strengthening. We have highlighted our key recommendations in Section 2 of this submission.

We provide some general comments on the Bill in Section 3 and a Clause-by-Clause commentary in Section 4.

¹A copy can be accessed at: https://docs.google.com/document/d/1vLwPaamB95AeqK76YXdM_OPQgXddDtuzGEBG9bQ0PpA/edit.

²See: UK's draft procurement bill missing transformational vision: here is our 10-point plan to fix it! <https://www.open-contracting.org/2022/05/19/draft-procurement-bill-missing-transformational-vision-here-is-our-10-point-plan-to-fix-it/>

2. Key recommendations to strengthen the Bill

2.1 Adopt clear principles for public procurement across all actors, not just for Ministers to consider in the National Policy Statement

The [Government's response to the Green Paper consultations dated December 2021](#) reported that the majority of the 500 respondents supported legal principles for procurement and that the Government intended "to introduce the proposed principles of public procurement into legislation as described"³. However, this is not reflected in the Bill.

Almost every other piece of procurement legislation in the world, including [well-established UN model laws](#)⁴, starts with clear principles for their procurement legislation on what it is trying to achieve and under which every other part of the legislation and secondary implementing regulations should be judged. Given the large amount of secondary legislation that will implement the Bill in the UK, we think that this is very important.

The lack of Principles and the use of a weaker set of Objectives was a subject of considerable criticism in the House of Lords. The government's response was to point to a national policy statement that would be informed by a set of Principles. Under Clause 13 "national procurement policy statement" the Minister is to issue a national statement to:

*"(a) carry out such consultation as the Minister considers appropriate,
(b) give due regard to the following principles—
(i) promoting the public good, by having regard to the delivery of strategic national priorities including economic, social, environmental and public safety priorities,
(ii) value for money, by having regard to the optimal whole-life blend of economy, efficiency and effectiveness that achieves the intended outcome of the business case,
(iii) transparency, by acting openly to underpin accountability for public money, anti-corruption and the effectiveness of procurements,
(iv) integrity, by providing good management, preventing misconduct, and exercising control in order to prevent fraud and corruption,
(v) fair treatment of suppliers, by ensuring that decision-making is impartial and without conflict of interest, and (vi) non-discrimination, by ensuring that decision-making is not discriminatory,"*

The obligations for Contracting Authorities are much weaker and under Clause 12 "Covered procurement: objectives":

*"(1) In carrying out a covered procurement, a contracting authority must have regard to the importance of—
(a) delivering value for money;
(b) maximising public benefit;*

³Cabinet Office.2021. Consultation outcome Transforming Public Procurement - Government response to consultation. <https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement/outcome/transforming-public-procurement-government-response-to-consultation>

⁴See UNCITRAL Model Law on Procurement at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/guide-enactment-model-law-public-procurement-e.pdf>

- (c) sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions;*
- (d) acting, and being seen to act, with integrity".*

We think that a clear set of Principles should be established for all UK actors.

OCP recommendation: In line with various amendments tabled in the House of Lords and now in the House of Commons, we strongly believe that contracting authorities should have to give due regard to the principles in Clause 13. These should be elevated to apply to all actors in Clause 12 so that they apply to all covered procurement and not just to the Minister in drafting the national policy statement.

One way that this could be done is as per [Baroness Hayman of Ullock's and others' proposed amendments to the Bill](#) (Amendment 33 MARSHALLED LIST OF AMENDMENTS TO BE MOVED ON REPORT 24 November 2022) and other amendments to restate the Principles from the Green Paper in Clause 12 of the Bill. Specifically, add to Clause 12:

"Procurement principles

(1) In carrying out a procurement, a contracting authority must pursue the following principles—(a) promoting the public good, by having regard to the delivery of strategic national priorities including economic, social, environmental and public safety priorities, (b) value for money, by having regard to the optimal whole-life blend of economy, efficiency and effectiveness that achieves the intended outcome of the business case,(c) transparency, by acting openly to underpin accountability for public money, anti-corruption and the effectiveness of procurements, d)integrity, by providing good management, preventing misconduct, and control in order to prevent fraud and corruption, (e) fair treatment of suppliers, by ensuring that decision-making is impartial and without conflict of interest, and (f) non-discrimination, by ensuring that decision-making is not discriminatory.

(2) If a contracting authority considers that it is unable to act in accordance with any of these principles in a particular case, it must—

(a) take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage, and (b) publish a report within 90 days setting out the principles with which it could not act in accordance and its reasons."

2.2 Creating a single digital, open data register for all UK procurement information

As the [Green Paper on Transforming Procurement](#) said (in para. 163): a "lack of standardisation, transparency and interoperability is preventing the UK from harnessing the opportunities that open, common and shared data could bring... The experience of other nations (e.g. Ukraine and South Korea) is that driving forward with a clear digital procurement strategy focused on transparency results in greater participation and increased value for money driven by competition." We agree!

In the Paper, the response to the consultations and in a subsequent paper on its transparency ambitions,⁵ the Government committed to introduce end-to-end commercial transparency as well as best practices in transparency and data sharing such as the Open Contracting Data Standard,⁶ and to bring in better digital tools to improve efficiency (such as a single supplier portal operating on the "tell us once " principle, so that authorities are not overburdened by resubmitting the same information many times).

In the Lord's Amendments, we were pleased to see in Article 93 (on "Notices, documents and information: regulations and online system") that:

"(1) 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. (2) Regulations under subsection (1) may for example— (a) require a notice or document to contain specified information; (b) require publication on a specified online system.

...

(4) A Minister of the Crown must make arrangements to establish and operate an online system for the purpose of publishing notices, documents and other information under this Act.

(5) An online system established or operated under subsection (4) must— (a) make notices, documents and other information published under this Act available free of charge, and (b) be accessible to people with disabilities."

The details about the online system will be left to the implementing regulations. Nonetheless, we think that the language in the Bill could be tightened to emphasise that all information mentioned in the Bill must be published in the online system. This will create a single source of truth about UK contracts, which is badly needed.

Such a single register will also improve transparency and accessibility of key information for citizens and businesses. It should also substantially reduce the publication burden on authorities, where notices are filed in multiple, siloed systems.

Although the details of the notices will be left to the implementing regulations, it will be very important that they are carefully designed to capture key information on the health and competitiveness of the UK procurement market, rather than just the details of a specific procurement. For example, the contract award notice should record the number of bidders for a contract, their identity and if they are an SME. These items are important to understanding purchasing patterns and which buyers might need help to foster more competition, especially as there is strong evidence that single bid contracts are much more expensive for buyers.⁷ It will also make counting awards to small businesses much easier.

⁵Cabinet Office. 30 June 2022. Transforming Public Procurement - our transparency ambition.

<https://www.gov.uk/government/publications/transforming-public-procurement-our-transparency-ambition/transforming-public-procurement-our-transparency-ambition>

⁶The Open Contracting Data Standard is a non-proprietary, machine readable, open data standard for ordering and sharing information across the entire cycle of public procurement used by over 50 countries, cities and regions worldwide including by the UK Cabinet Office. See <https://www.open-contracting.org/data-standard/>

⁷See, for example, summary of the academic research on this topic in Europe at: <https://www.open-contracting.org/2017/12/06/greater-transparency-calls-tenders-save-europe-billions>

Finally, we note that global best practice innovations to digitise the whole flow of business around procurement - such as Ukraine's award winning ProZorro system - drew positive comments in both the Commons and the Lords. Harriett Baldwin (West Worcestershire) (Con) stated:⁸

"I draw the Minister's attention to the situation in Ukraine—no, not the one that occupies the headlines, but a little-noticed development in 2016 that was very much supported at the time by the UK, along with Transparency International: the development of its procurement system, known as ProZorro. It is quite a remarkable platform. It is open source and shows every opportunity that exists in Ukraine to bid on contracts. It is completely open to citizens and civil society to look at all of the data on what is being tendered for and at what price companies are successful in bidding for those contracts. It is an extraordinary example of how public procurement can be transformed by openness and technology. If he has not done so already, I urge him to ask his officials if they could give him the opportunity to look through the ProZorro system used in Ukraine. It has done an enormous amount to reduce the cost of procurement over the years and to increase transparency for citizens."

To which Alex Burghart, The Parliamentary Secretary of the Cabinet Office responded: ⁹

"A number of hon. Members on both sides of the House have referred to the excellent work that has been done on the ProZorro service in Ukraine. I am pleased to be able to let the House know that Ukraine was on our advisory panel and has actually informed our work, and our single digital platform takes a lot from what Ukraine has done with ProZorro. The platform will enable everyone to have better access to public procurement data. Citizens will be able to scrutinise spending decisions, suppliers will be able to identify new opportunities to bid and collaborate, and buyers will be able to analyse the market and benchmark their performance against others on spending with SMEs, for example—better transparency; better for taxpayers."

The UK may eventually want to go beyond improving the transparency and notices around procurement to building a smart, digitised platform to help authorities transact and procure directly. The savings and impact from ProZorro in Ukraine, for example, are compelling and we estimate for a US\$5-6m outlay, that there have been aggregate savings of US\$5bn, a surge in competition, and thousands of new companies are now in the government's supply chain. Indeed, over 80% of contracts by volume through ProZorro go to SMEs.

The investment in ProZorro, which provides a sophisticated digital e-procurement system for all Contracting Authorities and a notification system, is much less than that spent currently on the existing Contracts Finder and Find a Tender Services and the planned £4 million budget

⁸Harriett Baldwin (West Worcestershire) Procurement Bill [Lords] Hansard 9 January 2023 House of Commons
[https://hansard.parliament.uk/commons/2023-01-09/debates/2936011F-A818-40FC-941B-D53E05672870/ProcurementBill\(Lords\)#contribution-3F8BD043-1D44-4512-848B-9E0272A83C49](https://hansard.parliament.uk/commons/2023-01-09/debates/2936011F-A818-40FC-941B-D53E05672870/ProcurementBill(Lords)#contribution-3F8BD043-1D44-4512-848B-9E0272A83C49)

⁹Alex Burghart The Parliamentary Secretary, Cabinet Office Procurement Bill [Lords] Hansard 9 January 2023 House of Commons
[https://hansard.parliament.uk/commons/2023-01-09/debates/2936011F-A818-40FC-941B-D53E05672870/ProcurementBill\(Lords\)#contribution-C7CEF982-C48E-459F-98B3-9419770C6BC3](https://hansard.parliament.uk/commons/2023-01-09/debates/2936011F-A818-40FC-941B-D53E05672870/ProcurementBill(Lords)#contribution-C7CEF982-C48E-459F-98B3-9419770C6BC3)

for the development of the new online system¹⁰. The UK investment cost excludes the millions of pounds spent by Contracting Authorities on contracts to use e-procurement systems. To that end, we think the Bill should make an explicit provision to adopt such transactional electronic Government Procurement (eGP) innovations at the future date in a new clause.

OCP Recommendation: Where the Bill refers to an obligation for a Contracting Authority or Minister to publish information or reports, it should explicitly state that publication must be on the online system including for payment information, key performance indicators, reports of investigations under Clause 61 “Investigations under section 60: reports”, the debarment list etc, for awards under framework agreements etc.

As the Government has made a long term commitment to publish open data related to public procurement, the Bill could refer to the publication of open data in Clause 93 Notices, documents and information: regulations and online system sections (4) and (5).

The Bill should also contain a new Clause that would allow for future digital tools and innovations including supporting a national eGP system. This could be framed as:

“Procurement Transaction System

(1) An appropriate authority may by regulations make provision requiring procurement transactions to be carried out in a particular way, including through a specified online system.

(2) Regulations under subsection (1) may require a contracting authority to—

(a) carry out procurement transactions in a particular way, or

(b) take steps to ensure that suppliers participating in a procurement carry out procurement transactions in a particular way.

(3) keep records related to any transaction or communication between the authority and a supplier for the purposes of, or in connection with, a covered procurement in a specified online system.

(4) In this section, ‘procurement transactions’ means transactions carried out under, or for a purpose relating to, this Act.”

2.3 Revise threshold for contract publication downwards

While we warmly welcome the extension of transparency notices to the full procurement cycle, there are provisions in the Bill and how it was altered in the Lords that reduce the current level of transparency in UK procurement and weaken the proposals in the Green Paper response. In particular:

- 1) A significant increase in the thresholds to require Contract Authorities to publish copies of contract documents of more than £5 million (Clause 53 Contract details notices and publication of contracts). The current policy¹¹ for central government authorities and other Executive Agencies is to publish contract documents worth above £10,000, although adherence to this requirement is patchy.

¹⁰Contract Notice for The Provision of Contracts Finder and Finder a Tender Services. 28 March 2022. <https://www.digitalmarketplace.service.gov.uk/digital-outcomes-and-specialists/opportunities/17101>

¹¹PPN 01/23: Requirements to publish on Contracts Finder Cabinet Office. 18 January 2023. <https://www.gov.uk/government/publications/ppn-0921-requirements-to-publish-on-contracts-finder>

- 2) There is no specific requirement to publish a contract award notice for a contract awarded under a framework agreement.
- 3) The lack of a principle for Contracting Authorities to take account of transparency (see item 2.1 above on Principles).

The recent publicity and court cases concerning the transparency of the procurement of PPE during the COVID pandemic emphasises how important transparency provisions are to maintaining public trust and to preventing bad practices and waste.

In the original version of the Bill, the government required contracting authorities to only publish key transparency data (key performance indicators, publication of contracts, and contract change notices) for contracts worth over £2 million.

Following the changes in the House of Lords, this threshold was increased to £5 million. Using data from Find A Tender and Contracts Finder, it would appear that had this change been applied in 2022, approximately 1,000 contracts worth £4 billion would not have been published.¹² We think that this is a significant backwards step. [In Hansard, Baroness Neville-Rolfe](#) is recorded as saying (on 30 Nov reading of the Bill in the Lords): "Where does the figure [£5 million] come from? I do not know exactly; that is the honest answer. I was offered options of £50 million, £10 million and £5 million. I chose £5 million because that is quoted in the *Sourcing Playbook*, which seemed a reasonable point."

The rationale behind the change is to reduce the burden of these requirements on contracting authorities by focussing on larger contracts but we think the threshold is now too high and disproportionate.

Publication of contacts generally encourages competition and deters complicated, opaque contracting procedures - when the government of Slovakia mandated the publication of all contracts from 2012, competition in terms of bid per contract doubled.⁵

Whilst pointing out these gaps, we also appreciate some provisions in the Bill, where the standstill period for awarding contracts only begins once a contract notice is published, which is an important safeguard against non-compliance by authorities.

OCP Recommendation: The thresholds for publication should be reduced back to £2m from those set out in the Amended Bill, particularly for the publication of contract documents. There should be a specific requirement to publish contract award notices for those awarded under frameworks which should indicate if the contract was after a competition or was a direct award.

The principles of transparency etc should be applied to contracting authorities (see Recommendation 2.1).

¹²Analysis by UK Anti-Corruption Coalition 2023. Second Reading Briefing - Procurement Bill.
<https://www.ukanticorruptioncoalition.org/work/56a3bjwdeon1xk6tt5sxxil674ap66>

2.4 Extension of debarment & exclusion regime to include evidence of financial & economic crimes

Currently, contracting authorities are only able to consider exclusion and debarment of actors against whom there has been a conviction of financial crimes, or where there is grave professional misconduct. There should be a ground for discretionary exclusion where there is credible evidence or knowledge of financial and economic offences.

This was an important recommendation [from a 2020 UK review of local procurement fraud](#), which highlighted that the government should “examine the exclusions regime for public procurement to see if more could be done to allow procurers to exclude bidders from the process (with reasonable cause and without the requirement to disclose), for example when there are known concerns with law enforcement that have not yet resulted in a prosecution.”¹³

In the US debarment regime under its Federal Acquisitions Regulations, officials can act on evidence rather than wait for a conviction¹⁴ and we think that the UK Bill should allow a similar provision. Given that procurement is the biggest corruption and fraud risk area for governments, as previously noted, this provision would bring an additional layer of protection.

Since publication of the original Bill, the government has accepted a change in policy whereby the Bill will now allow for the exclusion of suppliers where there is evidence of involvement in modern slavery and genocide, so a change is not without precedent.

OCP Recommendation: Extend the debarment & exclusion regime to include evidence of financial & economic crimes. This could be done by the following provision:

“In Part 7, after Clause 1 “Labour Market Misconduct”, insert New Clause;

Financial and economic misconduct

A discretionary exclusion ground applies to a supplier if the decision-maker considers that there is sufficient evidence that the supplier or a connected person has engaged in conduct (whether in or outside the United Kingdom) constituting (or that would, if it occurred in the United Kingdom, constitute) any of the following offences —

(1) An offence under section 327, 328 or 329 of the Proceeds of Crime Act 2002 (money laundering offences).

¹³ Ministry of Housing, Communities and Local Government. June 2020. Review into the risks of fraud and corruption in local government procurement. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890748/Fraud_and_corruption_risks_in_local_government_procurement_FINAL.pdf

¹⁴ US Federal Acquisitions Regulations 2022, 9.406-1 Debarment, Suspension, and Ineligibility General Provisions. <https://www.acquisition.gov/far/subpart-9.4>

- (2) An offence under section 86, 88 or 92 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.
- (3) An offence under Schedule Three of the Anti-Terrorism, Crime and Security Act 2001 (sanctions evasion offences).
- (4) An offence under section 2, 3, 4, 6 or 7 of the Fraud Act 2006 (fraud offences).
- (5) An offence under section 993 of the Companies Act 2006 (fraudulent trading).
- (6) An offence under section 1, 2, 6 or 7 of the Bribery Act 2010 (bribery offences).
- (7) An offence under section 45 or 46 of the Criminal Finances Act 2017 (failure to prevent tax evasion).
- (8) An offence under section 72 of the Value Added Tax Act 1994 (fraudulent evasion of VAT).
- (9) An Offence under 106A of the Taxes Management Act 1970 (fraudulent evasion of income tax).
- (10) An offence under section 170 of the Customs and Excise Management Act 1979 (fraudulent evasion of duty).
- (11) Offences under section 167 or 168 of the Customs and Excise Management Act 1979, and section 20BB of the Taxes Management Act 1970 (untrue declarations).
- (12) The common law offence of cheating the public revenue.”

2.5 Raising the threshold on information redaction due to commercial confidentiality

[All the evidence is clear](#), the more information that is published around public contracting, the more competition there is in the market and the better suppliers can plan ahead.¹⁵ So, it matters for the health of the market that information is available.

OCP conducted detailed research with over 70 experts in over 20 different countries and we found very little evidence of provable harm to competition from publication of contracting information and a lot of evidence that routinely publishing contracts increased competition.¹⁶

One of the key challenges that we see globally to improving disclosure is that if the rules on redacting commercial information are not clear, then authorities become overly risk-averse and withhold more information than is strictly necessary. This was a major reason for the incredibly late publication of many of the UK's emergency Covid contracts, which hindered coordination and undermined public trust while wasting a lot of critical time during an emergency.

It is important to get this right in the UK Bill. We welcome the threshold of “overriding public interest” in having information withheld in Clause 92 “General exemptions from duties to publish or disclose information” in section 1(b). However, we note that the provision in section (2) of what constitutes "sensitive commercial information" is weaker. The discrepancy should be fixed.

¹⁵See a compelling list of examples at <https://www.open-contracting.org/impact/evidence/#competition>

¹⁶Open Contracting Partnership. 2018. Mythbusting Confidentiality in Public Contracts. <https://mythbusting.open-contracting.org/>

OCP recommendation: The "would be likely" to harm competition language in Clause 92(2)(b) should be clarified and strengthened in 92(1)(b), to say "there is overriding evidence that it would prejudice the commercial interests of any person if it were published or otherwise disclosed".

We would also suggest that the language on why an exemption is applied should be strengthened. Currently, Clause 92(3) states: "*If a contracting authority withholds information under this section, the authority must publish or notify anyone to whom the information would otherwise be provided of—*

(a) the fact that information is being withheld, and

(b) whether it is being withheld under subsection (1)(a) or (1)(b)."

We would suggest adding something along the lines of:

"(c) a description of public interest served by withholding such information".

2.6 Improve dispute resolution provisions

A major ambition of the Green Paper was to reform the UK's costly, uncertain and protracted dispute resolution process, which is a major block on innovation and leads to excessive risk avoidance by UK authorities. Provisions to achieve this ambition are absent from the Bill. Without it, the threat of costly litigation will stifle the flexibility that the Bill seeks to introduce elsewhere including from the new competitive, flexible procedure. When combined with effective transparency and external auditing, the World Bank has found that effective complaints mechanisms have been shown to boost competition and reduce corruption in countries around the world.¹⁷

We understand that the Government's original ambition of creating a specialist fast-track tribunal has been stymied by wider issues in the justice system, so we suggest the Bill makes provision to support a mandatory alternative dispute resolution (ADR) procedure before litigation. We note that this approach is seeing increasing adoption in the UK (especially in the construction sector)¹⁸ and is becoming best practice in the EU.

An alternative approach to lessen the litigation threat overall would be to cap damages from any award to 1.5 times the bid costs.

We also believe that there should be an option of bringing a public interest challenge to a procurement decision as well as those brought by economic operators, given that this has positively contributed to trust in other jurisdictions and helped highlight concerns around the VIP Lane in the UK.

¹⁷ World Bank Policy Research Working Paper 8078. May 2017. Deterring Kickbacks and Encouraging Entry in Public Procurement Markets Evidence from Firm Surveys in 88 Developing Countries.

<https://documents1.worldbank.org/curated/en/817871496169519447/pdf/WPS8078.pdf>

¹⁸ As described in this construction law blog: <http://constructionblog.practicallaw.com/the-use-of-mediation-to-resolve-public-procurement-disputes-draft/>

OCP recommendation: Make clearer provisions in the Bill for an improved dispute resolution regime focussed on fixing procurements as opposed to litigation in the courts. One way of doing that could be to introduce a clause requiring the use of an Alternative Dispute Resolution before litigation. This could be done by adding a new section to the Bill, to be included after Clause 98 “Automatic suspension of the entry into or modification of contracts”:

“Alternative dispute resolution mechanisms

(1) A contracting authority that receives an advanced claim based on an alleged breach of any of the duties established in Clause 97 that would be enforceable in civil proceedings must engage in discussions with the claiming supplier on the suitability of alternative dispute resolution mechanisms to resolve it.

(2) Upon receipt of an advanced claim under subsection (1), the contracting authority may not enter into a public contract, or modify a public contract or a convertible contract, until such a time as the suitability of alternative dispute resolution mechanisms has been excluded, or the suitable mechanisms have run their course.

(3) Where a claim is subjected to alternative dispute resolution mechanisms, the outcome of those procedures shall be published.

(4) An appropriate authority shall by regulations make provision for alternative dispute resolution mechanisms relating to procurement carried out under this Act, identify the circumstances under which they are suitable, and establish the binding or advisory character of the outcome of those procedures.

(5) In circumstances under which alternative dispute resolution proceedings are suitable, suppliers retain a free choice to opt between such proceedings and enforcement of the Clause 89 duties in civil proceedings. For the avoidance of doubt, issuing an advanced claim does not alter the supplier's rights under this Part.

(6) In this section, "advanced claim" means a notification in writing of the intent to initiate proceedings under this Part. An advanced claim shall include sufficient information to enable the contracting authority to understand the way in which its duties under Clause 97 may have been breached.”

As mentioned, a lighter touch alternative to lessen the litigation threat overall would be to cap damages from any award to 1.5 times the bid costs.

2.7 Improve authorities implied right to terminate public contracts and claw back funds

We think the Bill should strengthen provisions to aid recovery of public money where contractors abuse the system and are in breach of their contracts and where attempts at mediation have failed. It is also important to prevent contractors from gouging authorities in times of emergency or putting in waivers or 'no comebacks' clauses that undermine basic accountability for their performance.

OCP recommendation:

1) To include a new ground (d) for termination in sub-section 2 of Clause 77 "Implied right to terminate public contracts", to the effect that:

"the supplier has breached its primary obligations in a public contract in a way that deprives the contracting authority of the intended goods, services or works, or substantially reduces their functionality or economic value".

2) To include a further specification of sub-section 10 of Clause 77 for this specific ground, so that the subsection now reads:

"But any term purporting to restrict or override the implied term is without effect. In particular, no term can limit the ability of the contracting authority to claw back up to the full value of the contract in case of termination under subsection (2)(d). No term can limit the ability of the contracting authority to claim damages beyond the value of the original contract in such a case."

2.8 A duty to identify conflicts of interest proactively

The new conflicts of interest provisions in Section 5 of the Bill are a step forward, imposing positive obligations on authorities to identify conflicts, and giving them a "duty to mitigate" them, including by conducting a conflict assessment. The provisions also ensure that conflicts can pertain to ministers, not just officials taking procurement decisions. This is especially important given issues with the illegal use of a VIP Lane to award contracts during Covid.

However, these new provisions do not go as far as the [Boardman Review](#) recommendations that:

- suppliers should also be required to make conflict of interest declarations themselves;
- a centralised register of conflicts should be kept which authorities can consult; and
- sanctions for non-compliance
- when there are direct awards with no competition, additional disclosure on conflicts and more senior level sign-off should be required.

OCP recommendation: We recommend that the Boardman recommendations are implemented in full.

One amendment to the Bill that would help with this would be to amend:

Clause 80 "**Conflicts of interest: duty to identify**" (1) to state that "reasonable steps" "include but are not limited to:

*"(a) Requiring that suppliers submit a conflict of interest declaration; or
(b) Requiring that suppliers submit written confirmation of compliance with the Suppliers Code of Conduct applicable at the time, or any future guidance that replaces it."*

We also note the MARSHALLED LIST OF AMENDMENTS TO BE MOVED ON REPORT 24 November 2022 LORD FOX LORD SCRIVEN Amendment 113 to amend the list of "*person who influences*" in Clause 80(3) and (4) to "*includes, but is not limited to—*

- (a) civil servants;
(b) any other public sector employees or officials;
(c) NHS staff;
(d) government contractors and their employees;
(e) consultants;
(f) special advisers;
(g) political appointees;*

"reasonable steps" include, but are not limited to—

(a) requiring that suppliers submit a conflict of interest declaration,

or

(b) requiring that suppliers submit written confirmation of compliance with the Supplier Code of Conduct issued by the Government Commercial Function applicable at the time, or any future guidance that replaces it."

3. General comments on Bill 218 2022-23, dated 14 December 2022

3.1 Heavy reliance on secondary legislation and on ministerial discretion

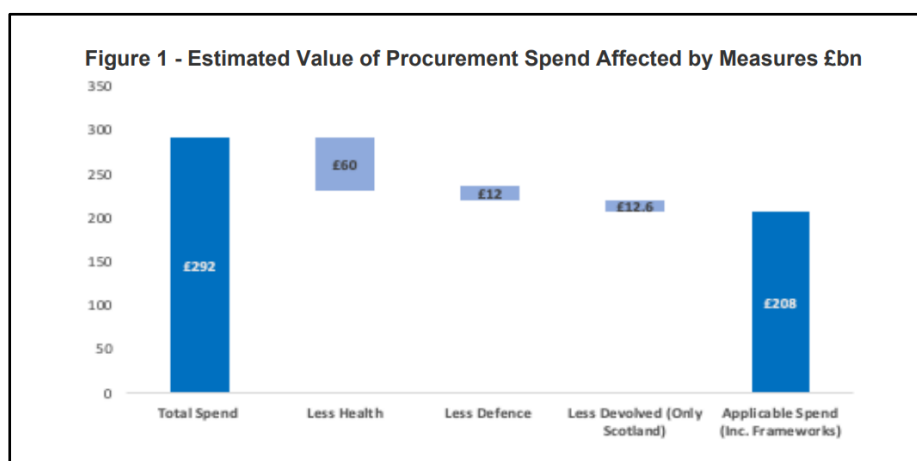
Statutory instruments can be a flexible and responsive way to optimise and improve the procurement regime, as opposed to primary legislation, but the list of items covered by this approach is surprising, as is the flexibility of Ministerial powers to disallow parts of the Bill.

We note that the rise of "[Skeleton Bills](#)"¹⁹ and the overreliance on secondary legislation has already drawn direct criticism from the [House of Lords Secondary Legislation Scrutiny Committee](#) and in the Delegated Powers and Regulatory Reform Committee 3rd Report of Session 2022–23 Procurement Bill [HL]²⁰. Given that so much of the Bill will be dependent on the implementing regime, it is regrettable that draft secondary legislation has not been published alongside the Bill. There would be great value in seeing the notices and ensuring that they publish information related to understanding the overall fairness and competitiveness of the markets, such as the number of bids for a tender, versus just details of a specific procurement (see Recommendation 2.2).

The Impact Assessment identifies "a key uncertainty [which] is around the extent of behavioural change, and the adoption of new procedures by contracting authorities" and a key risk "that the benefits are not realised due to a "reversion to the norm" effect". The lack of clarity about how the many operational provisions of the Bill significantly increases the uncertainty about how contracting authorities and suppliers will respond to reforms and whether the hoped-for value for money benefits will ever be delivered.

3.2 Coverage of the Bill

According to the Government's Impact Assessment,²¹ the Bill only covers £208 billion of the £300 billion annual procurement spend and excludes £60 billion of health spending and £12 billion of defence spending.



Source: Cabinet Office Impact Assessment

¹⁹Skeleton Bills and Delegated Powers In Focus 21 /12/2021. <https://lordslibrary.parliament.uk/skeleton-bills-and-delegated-powers/>

²⁰House of Lords Delegated Powers and Regulatory Reform Committee. HL Paper 15 3rd Report of Session 2022–23. 14 June 2022. Procurement Bill [HL] <https://committees.parliament.uk/publications/22609/documents/166331/default/>

²¹Cabinet Office Impact Assessment 21/04/2022. <https://bills.parliament.uk/publications/46429/documents/1767>

OCP recommendation: We do not think huge areas of public spending by the NHS and MoD should be exempt from the Act (particularly the requirement to publish contract award notices) without very clear public interest provisions and parliamentary scrutiny to check the proposed regime will meet the objectives and principles of the new legislation even better.

4. Clause-by-Clause commentary

PART 1 KEY DEFINITIONS

Clause 2 Contracting authorities

OCP comment: We welcome the amendment of this Clause in the latest version of the Bill which now includes the NHS so that it is fully in the scope of the Bill's procurement regime and we hope that this will appear in the subsequent Act.

Clause 12 Covered procurement: objectives

OCP recommendation: We suggest that a clear set of principles for public procurement are introduced here and applied to contracting authorities and covered procurement. See details in Recommendation 2.1.

Clause 13 The national procurement policy statement

OCP recommendation: We welcome the inclusion of explicit principles but as mentioned above, we would like them to be included in Clause 12 as per our Recommendation 2.1.

PART 3 AWARD OF PUBLIC CONTRACTS AND PROCEDURES

CHAPTER 1 PRELIMINARY STEPS

Clause 15 Planned procurement notices

OCP comment: The Bill lays out a series of notices and processes that structures how procurement will be conducted. We are supportive of providing a clear process and clear notices accompanying them which is core to delivering the 'end-to-end transparency of the commercial cycle for government contracts' laid out in the Green Paper.

It is a shame therefore that some of the notices that are important to improving competition and helping SMEs identify opportunities - the pre-procurement and market engagement notices are only made optional. Under 15(1), the Bill states "Before publishing a tender notice, a contracting authority may publish a planned procurement notice" and whilst sections 16 and 17 lay out some sensible rules on how to talk to the marketplace in a fair, non-discriminatory way, they are also optional.

We also note that utilities are excluded from the commitment for the big spenders in government spending more than £100m or more a year to publish pipeline notices under Clause 91 Pipeline notices. A clearer link from Pipeline to Planned to Pre-Market Engagement would be better too.

Clause 41 Direct award in special cases

We recommend the revisions from the MARSHALLED LIST OF AMENDMENTS TO BE MOVED ON REPORT 24 November 2022 LORD SCRIVEN BARONESS BRINTON BARONESS BENNETT OF MANOR CASTLE Amendment 72 Page 26, line 22, says at end insert—

"(3A) Provision under subsection (1) must not confer any preferential treatment on suppliers connected to or recommended by members of the House of Commons or members of the House of Lords."

OCP recommendation: This is a helpful amendment and we would like the Bill to include it. It seems a key safeguard to restore public trust given huge public concern over the VIP Lane to award Covid contracts, many of which failed to deliver.

CHAPTER 4 AWARD UNDER FRAMEWORKS

Clause 45 Frameworks

Frameworks arrangements account for large amounts of public spending e.g. four recently awarded by Crown Commercial Services amount to over £110 billion so we are concerned about a potential lack of transparency on the award of contracts (call-offs) under such frameworks. Also, such contracts could be awarded directly to a supplier without following a competition among the preselected framework suppliers. This would be a type of direct award but is not covered by a transparency notice.

OCP recommendation: We recommend the obligations of contracting authorities to publish Contract Award notices should explicitly include contracts placed under framework agreements.

CHAPTER 5 AFTER AWARD, STANDSTILL PERIODS AND NOTICES

Clause 50 Contract award notices and assessment summaries

OCP recommendation: Clause 50 should be modified to require contracting authorities to publish a Contract Award Notice for the award of contracts (also known as call-off contracts) under framework agreements quoting the reference of the Framework Agreement so that there is full transparency on which suppliers are receiving contracts under a Framework Agreement. See our comments on Clause 45 "Frameworks".

Clause 53 Contract details notices and publication of contracts

As mentioned in 2.3 above, we are concerned at the raised threshold for publishing contract documents, particularly as it seemed to be done with little justification or assessment of the negative impact on transparency.

We understand the government's point about balancing burdens on local authorities and contracting authorities generally but a more considered analysis would be expected and it marks a big change in the intent, especially as the evidence from other countries is that

contract publication fosters accountability and competition (such as [evidence from Slovakia which publishes all its public contracts](#)).²²

OCP recommendation: Review the proposed increase in the threshold for the publication of contract documents set out in the bill and assess the impact on transparency before making a decision on what if any changes should be made to the existing threshold for publication.

CHAPTER 6 GENERAL PROVISION ABOUT AWARD AND PROCEDURES

Clauses 59-65 Debarment

The comprehensive new supplier exclusion regime in Clauses 59-65 is a positive development, especially creating a public debarment register (in Clause 62) for the first time. It is also positive that the assessment of whether a company is excludable must be made at the tender, rather than award, stage.

PART 4 MANAGEMENT OF PUBLIC CONTRACTS

Clause 77 Implied right to terminate public contracts

We believe that provisions should be strengthened to aid recovery of public money where contractors abuse the system and are in breach of their contracts and attempts at mediation have failed. See Recommendation 2.7 on clawback provisions.

PART 5 CONFLICTS OF INTEREST

These provisions are central to restoring public trust after the VIP Lane and multiple other conflict of interest concerns in UK public contracts. The Boardman Review Recommendations should be implemented in full.

See Recommendation 2.8 on enhancing the provisions with this section including requiring that suppliers submit a conflict of interest declaration and extending the definition of to whom a conflict of interest may occur.

Clause 92 General exemptions from duties to publish or disclose information

OCP recommendation: As mentioned in Recommendation 2.4, the language around commercial confidentiality should be tightened to clarify that "Sensitive commercial information" in 92(1)(b) is where "there is overriding evidence that it would prejudice the commercial interests of any person if it were published or otherwise disclosed".

PART 9 REMEDIES FOR BREACH OF STATUTORY DUTY

We think it is a shame that simplification or improvement to dispute resolution processes is missing from the Bill as it causes huge amounts of risk aversion and blocks innovation. Failure to create more agile ways to resolve conflicts also risks undermining the new flexible award processes under the Bill. Recommendation 2.8 proposed ways to address this by mandating alternative dispute resolution before litigation.

²²Learning from Slovakia's Experience of Contract Publication <https://www.cgdev.org/blog/learning-slovakias-experience-contract-publication>

PART 10 PROCUREMENT INVESTIGATIONS

A clear proposal in the Green Paper was a new Public Procurement Review Unit in the Cabinet Office which would be in charge of monitoring the application of the regulations and with the powers to review and, if necessary, intervene in case of systematic non-compliance.

We note that having a clear regulatory authority, responsible for enforcing standards and monitoring the state of a national procurement market using data and insights, is a powerful driver for improvement and fair play in procurement in many of the other 30+ countries where OCP works. Improving oversight is also especially important given the rest of the new Act gives more discretion and new powers to authorities to award contracts according to social criteria which need careful oversight to avoid favouritism and to ensure fair play.

Certainly, some of the powers are reserved to do this in Part 10 but the ambiguity is unhelpful and the danger is that such a unit can be then repealed or weakened at a future date without parliamentary scrutiny.

OCP recommendation: Clearly reference and empower the planned Procurement Review Unit and establish a clear mandate for the planned PRU in the Act. Strengthening the PRU's independence is important, especially so that the government is not 'marking its own homework'.

SCHEDULES

Schedule 2 — Exempted contracts

One of the key rationales for the reform is to establish a single rulebook for the award of public contracts in the UK to address the patchwork of current regulations. The core of the Act does this under Clause 11 " Covered procurement only in accordance with this Act," but there are multiple exemptions, carve-outs and derogations that could immediately undermine this objective, especially as regards contracts under the NHS, defence and utilities, which are some of the biggest spenders across government. Let's remember that special treatment and exemptions in healthcare procurement are at the root of the deeply problematic PPE procurement response during the pandemic.

Importantly, some of those exemptions appear to be at Ministerial discretion and not bound by the provision of an overriding public interest to explain why doing things differently is needed, and importantly how it will be more likely to achieve the core objectives of the Act (in Clause 12 "Covered procurement: objectives").

OCP recommendation: Limit all the exemptions so we have a single rulebook for UK procurement and remove the opt outs or significantly tighten the language to require a very clear justification for any exemption and evidence that this would be in the overriding public interest whilst still achieving the objectives and principles in the Bill.

Schedule 7 — Discretionary exclusion grounds

As per Recommendation 2.4, we think that it is important to allow credible evidence of financial and economic criminal activity, such as fraud, money laundering, bribery or sanctions evasion to enable discretionary exclusion even if there has not yet been a conviction by a court.

We thank the Committee for considering our evidence and recommendations.

- Ends -

23 January 2023