Procurement Bill – Written Evidence Submission

January 2023

UK Anti-Corruption Coalition

Introduction and Summary

The UK Anti-Corruption Coalition brings together the UK's leading anti-corruption organisations working to reduce corruption in the UK and reduce its role in facilitating corruption abroad. Our coalition consists of experts in various sectors across this policy space, including procurement, illicit finance, and sanctions, and we regularly input to policy processes through letters, briefings, joint statements and submissions to inquiries, and consultations.

We welcome many aspects of the Procurement Bill and share the broad aims to reform the UK's system. However, we would like to highlight 5 areas where we believe the legislation could be improved – otherwise, we risk new measures being undermined and public trust in the integrity of the system will continue to decline. **As the single biggest area of British government spending, a third of all public expenditure[1], critical anti-corruption safeguards must be in place to minimise waste of taxpayer money, ensure fair competition in the tendering process, and to prevent scandals similar to those that emerged as a result of the poor emergency procurement system.[2]**

- Even without the risk of emergency situations, such as the pandemic, **procurement is recognised by the OECD, European Commission, and the UN Office of Drugs and Crime as the biggest corruption and fraud risk area for governments**.[3]
- As part of the government's ongoing Anti-Corruption Strategy, a report found that nearly **a quarter of 86 surveyed local authorities faced procurement fraud in the 2017-2018 financial year**, with the government likening the situation to an iceberg, noting more potential incidents beneath the surface.[4]

5 areas for improvements in the Bill:

1) **The publication of key transparency data for public contracts**
2) **Making the debarment and exclusion regime more effective**
3) **Strengthening conflict-of-interest mitigations**
4) **Increased Parliamentary scrutiny for direct awards in emergency situations**
5) **Simplifying dispute resolutions and allow the option of public interest challenges**

All amendments can be found at the bottom of this document.

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1) The publication of key transparency data for public contracts

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. Our group was uneasy with this proposal, as details of thousands of contracts would be left in the shadows, inaccessible to the public.

However, without an impact assessment, the Cabinet Office have now increased this threshold

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[1] https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_procurement_WEB_4.pdf
[2] https://www.theguardian.com/uk-news/2022/nov/23/revealed-tory-peer-michelle-mone-secretly-received-29m-from-vip-lane-ppe-firm
[3] OECD (2016), Preventing Corruption in Public Procurement, p.6; European Commission (2014) EU Anti-Corruption Report, p.21; UN Office of Drugs and Crime (2013) Guidebook on anti-corruption in public procurement and the management of public finances, p.1.
[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890748/Fraud_and_corruption_risks_in_local_government_procurement_FINAL.pdf

£5 million, resulting in a further backwards step for transparency within the procurement system. **Using the government's own data, we estimate that approximately 1,000 contracts worth £4 billion would not have been required to publish this key data if the £5 million threshold rule was applicable for the 2022 calendar year.**

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."*[5]

The rationale behind the change is to reduce the burden of these requirements on contracting authorities by focussing on larger contracts, yet 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.[6]

We urge the government to reverse this decision and to amend **Clause 52 (1) and 53 (3)**, to insert a threshold of £2 million. The government should complete an impact assessment for this shift in policy the threshold remains at £5 million, report how many contracts would no longer be required to publish this key data, and note the total value of these contracts.

Additionally, 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 and to include, but not limited to, payment information, key performance indicators, reports of investigations under Clause 61, the debarment list, and for awards under framework agreements.

2) Making the debarment and exclusion regime more effective

Exclusion and debarment from procurement are powerful anti-economic crime tools which help protect the public purse from rogue actors and improve corporate governance standards. The Bill contains some very welcome debarment-related provisions including establishing a central debarment register and introducing a new regime for excluding companies that is more ambitious than the EU model currently in place in the UK. **However significant gaps remain that could undermine the effectiveness of these new rules**. To ensure the debarment and exclusion regime is as effective as possible, we recommend:

- Clearer rules for when suppliers convicted of wrongdoing can contract.
- The inclusion of crucial corporate offences for bribery, money laundering, and sanctions evasion on the list of offences that form the basis for exclusion.
- Contracting authorities be given the power to exclude suppliers where there is evidence for, not just a conviction for, wrongdoing.

Firstly, **Clause 58** of the Bill gives the contracting authority wide discretion to consider whether a supplier is excluded or excludable after engaging in wrongdoing. For example (clause 58 (1) (c)) allows companies to contract based on "commitments" that steps will be taken to prevent wrongdoing occurring again, rather than showing they have concretely taken steps to do so.

[5] https://hansard.parliament.uk/Lords/2022-11-30/debates/5D74C5CD-FACB-43DB-BC2E-653F8C7DFD92/ProcurementBill(HL)
[6] https://www.cgdev.org/blog/learning-slovakias-experience-contract-publication

We therefore recommend the **removal of clauses (c) and (e) from Clause 58 (1),** which gives contracting authorities almost total discretion to allow a supplier that should be excluded the ability to continue contracting. We also recommend the **removal of Clause 58 (3),** which limits the ability of the contracting authority to require all available evidence it needs to make an assessment as to whether a supplier is reliable.

Secondly, there are significant gaps in the Bill in the list of corporate offences that form the basis of mandatory exclusion from public procurement. These include Section 7 of the Bribery Act – the primary corporate offence under the Act – which contains a 'failure to prevent' bribery offence for corporates. It is an anomaly that other offences under Sections 1, 2, or 6 are included as mandatory exclusion grounds, and that a failure to prevent facilitation of tax evasion is also included in the Bill, but the failure to prevent bribery at section 7 is not.

Similarly, it is an anomaly that money laundering offences under the Proceeds of Crime Act are included as mandatory exclusion grounds, but criminal offences under the Money Laundering Regulations 2007 (MLRs) – which as the recent conviction of NatWest bank for money laundering under the MLRs shows are an important means of holding companies to account for money laundering and failure to prevent it - are not. The same goes for sanctions evasion offences, with the Bill containing no reference to criminal offences for sanctions evasion being grounds for mandatory exclusion.

Third, as the Bill currently stands, contracting authorities are only able to consider excluding suppliers against whom there has been a conviction of economic crimes. **In the US debarment regime, officials can act on evidence rather than wait for a conviction.** Furthermore, a 2020 government review of fraud and corruption in local government procurement specifically highlighted that the government should "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 law enforcement that have not yet resulted in a prosecution."[7]

The Bill as currently drafted empowers contracting authorities to exclude suppliers where they have sufficient evidence of modern slavery and human trafficking, and where they consider a supplier has engaged in a cartel offence, but does not empower them to take similar action where they have evidence of financial and economic crime such as fraud or corruption. **Given procurement is the biggest corruption and fraud risk area for governments, ensuring authorities can act where they have evidence of wrongdoing is crucial to protect the integrity of procurement, rather than leaving authorities powerless to act.**

Ensuring that authorities can exclude companies where there is good evidence of financial and economic crime, particularly where investigations are underway but might take many years to result in enforcement action – as long as it is accompanied by due process appeal rights for the companies concerned which the Bill contains – will also incentivise good corporate governance by suppliers and connected persons.

3) Strengthening conflict-of-interest mitigations

[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890748/Fraud_and_corruption_risks_in_local_government_procurement_FINAL.pdf

The Bill provides some welcome measures such as new obligations for the assessment and mitigation of conflicts of interest, the inclusion of potential conflicts of interest, and an obligation to exclude a supplier where conflicts cannot be avoided, or a supplier fails to take steps to avoid any unfair advantage such conflicts may bring.

However, the Bill falls short of fully implementing recommendations made in the various independent reviews into procurement, including from the National Audit Office,[8] two reports by Sir Nigel Boardman commissioned by the government,[9] and a government review of corruption and fraud in local government procurement published in June 2020.[10]

Following recommendations from these reviews, the Bill should be amended in key three ways to better address conflicts of interest in procurement by including:

- A broader range of actors for whom conflicts of interest should be considered, with reference to 'indirect' as well as 'direct' influence.
- Robust and mandatory requirements on suppliers to declare conflicts of interests.
- Measures to ensure consistency of application of the conflict-of-interest rules.

Firstly, the Mone affair, the VIP lane, and other COVID procurement scandals have shown that indirect influence over procurement decisions can pose a real risk to public perceptions about the fairness and integrity of procurement. The 'VIP lane', as well as the Owen Paterson affair, demonstrate that members of parliament who may have private interests can also seek to influence government procurement decisions in favour of those interests.

It is not specified on the face of the Bill what the term 'influences' may include, and it is not clear how the contracting authorities will interpret the term. To ensure that it is interpreted widely, the Bill should contain specific language to reflect indirect influence (which might include lobbying), and the wide range of people who may exert such influence, including: civil servants, special advisors, contractors, consultants, members of parliament and political appointees.

Second, suppliers should make a conflict-of-interest declaration which includes a statement on whether they are employing or retaining (whether in a consultancy, advisory or other role) **any individuals who have held ministerial, or senior office within the civil service in the past 2 years as well as whether any current public official (including ministers, civil servants, and parliamentarians) have a financial interest in the company**. In addition, suppliers should provide written confirmation of compliance with the Suppliers Code of Conduct, or any future guidance that replaces it.

This requirement is not on the face of the Bill and existing requirements for suppliers to submit conflict of interest declarations are based on voluntary compliance with the Supplier Code of Conduct. Inclusion in the Bill of a legal requirement for suppliers to declare conflicts of interest

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[8] https://www.nao.org.uk/wp-content/uploads/2020/11/Investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf

[9] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018176/A_report_by_Nigel_Boardman_into_the_Development_and_Use_of_Supply_Chain_Finance_and_associated_schemes_related_to_Greensill_Capital_in_Government_-_Recommendations_and_Suggestions.pdf;
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942347/Boardman_Report_on_Cabinet_Office_Communications_Procurement_FINAL_2_.pdf

[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890748/Fraud_and_corruption_risks_in_local_government_procurement_FINAL.pdf

and comply with the Code's requirement to mitigate against any real or perceived conflict of interest would significantly strengthen integrity in procurement.

Sir Nigel Boardman further recommended that suppliers disclose whether current or former ministers or senior civil servants are employed directly or retained by the firm on their tender documents prior to every procurement exercise. Including this requirement in the Bill would embed transparency into the procurement process.

Third, the Bill should include the NAO's key recommendation that public authorities maintain clear documentation of management of conflicts of interest.[11] In particular, the Bill should be amended to ensure that: 1) the relevant authority produces guidance within 4 months of this Bill coming into effect that lays out how conflicts of interest must be managed on an end to end basis through the procurement process; 2) each contracting authority collects conflicts of interest management records in a central manner and shares these records with the relevant appropriate authority on at least an annual basis; and 3) each contracting authority issues an annual public report on how they have managed conflicts of interest in procurement.

Finally, these measures would be much easier for procurement officials in contracting authorities to implement if other recommendations regarding improving conflicts of interest management more generally were speedily implemented. This includes recommendations made by Nigel Boardman that:

- Centrally managed publicly accessible and register of standardised conflict of interest declarations be created.
- Government departments be required to publish detailed conflicts of interest guidance covering all aspects of identifying, managing, and mitigating conflicts of interest, including disciplinary measures that will be taken where there are breaches.

We recommend amendments to **Clauses 80, 81**, and the introduction of a **New Clause 82** to the effect of the above.

4) Increased Parliamentary scrutiny for direct awards in emergency situations

Overpriced contracts make poor use of public money, while substandard delivery can undermine trust in public institutions. Awarding contracts directly, without the rigour of market engagement, significantly increases the risk of both scenarios, limits the ability of innovative new suppliers to engage in public contracting, and may even lead to costly legal challenges.

For these reasons, direct awards should only be used in extremely limited and exceptional circumstances - these emergency powers are usually reserved for threats to life, such as we have seen during the pandemic. There are two welcome safeguards in the Bill:

- A requirement for contracting authorities to publish the details and rationale for direct awards before they are given.
- The use of affirmative procedure for these regulations, meaning that they will cease to have effect unless parliament votes in favour of them within 28 days.

[11] https://www.nao.org.uk/wp-content/uploads/2020/11/Investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf

The risk arises, however, once Parliament's consent has been granted. The power to revoke the regulations lies with the Secretary of State, but there are no sunset clauses that would allow parliamentarians to periodically authorise these measures and no obligation on the Secretary of State to explain why they remain in place. Clarity over the rationale for these powers and limits on their use are necessary to prevent an over-reliance on high-risk direct awards.

We recommend that any regulations made under **Clause 42** expire at the end of the period of 60 days after the day on which they were made – subject to renewal by Parliament.

5) Simplify dispute resolutions and allow for the option of public interest challenges

The ambitions in the Green Paper to simplify and improve dispute resolution around procurement are absent from the Bill. Without it, the threat of costly litigation will stifle innovation and much of the flexibility that the Bill seeks to introduce elsewhere, we understand that the Government has heard clear feedback to this effect from many local authorities.

Even if the Government's original ambition of creating a specialist fast-track tribunal has been stymied by wider issues in the justice system, we think there is still an important option to support a mandatory alternative dispute resolution (ADR) procedure.

- We note positive mediation to examples of procurement mediation are already happening in the UK (including resolve public procurement disputes in the construction sector) which can serve as inspiration.[12]
- We also note that this is becoming best practice elsewhere in the EU.

The key would be to require ADR to be explored before issuing a judicial claim, not after. This could expand access to ADR, as well as reduce its upfront costs. We recommend inserting a **New Clause 99** to this effect. 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.

There should also be the option of bringing a **public interest challenge** to a 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). 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.[13]

[12] http://constructionblog.practicallaw.com/the-use-of-mediation-to-resolve-public-procurement-disputes-draft/
[13] https://documents1.worldbank.org/curated/en/817871496169519447/pdf/WPS8078.pdf

FULL TEXT OF AMENDMENTS

1) Transparency

In Clause 52 (1), and Clause 53 (3), remove "£5 million" and insert -
"£2 million".

This amendment lowers the threshold at which authorities must publish key transparency data for contracts, including key performance indicators, publication of contracts, and contract change notices.

2) Debarment and Exclusion

In Clause 58 (1), remove - (c) and (e)

In Clause 58, remove - (3)

These amendments put limits on the wide discretion given to authorities to consider whether a supplier is excluded or excludable after engaging in wrongdoing.

In Schedule 6, Clause 14, at end add -
"or an offence under section 86, 88 or 92 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (money laundering offences)."

In Schedule 6, Clause 17, remove "1, 2, or 6" and insert -
"1, 2, 6, or 7".

In Schedule 6, insert - New Clause 19
"An offence under Schedule 3 of the Anti-Terrorism, Crime and Security Act 2001 (sanctions evasion offences)".

These amendments and New Clauses fix the anomalies within the grounds for exclusion regarding money laundering (ML) offences. ML offences under the Proceeds of Crime Act are included as mandatory exclusion grounds, but criminal offences under a) Money Laundering Regulations 2007 (updated 2017), b) section 7 of the Bribery Act 2010, and c) Schedule 3 of the Anti-Terrorism, Crime, and Security Act 2001 (sanctions evasion offences), are not.

In Schedule 7, after Clause 10, insert new Section and Clause
"Financial and economic misconduct"
New Clause 11: 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).
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).

This New Clause gives contracting authorities the power to exclude suppliers where there is sufficient evidence of economic crimes.

3) Conflict-of-interest measures

In Clause 80 (3), after "who", insert -
"directly or indirectly"

In Clause 80 (4), at end, add -
"A person who can directly or indirectly influence" includes, but is not limited to—
(a) civil servants;
(b) government contractors or consultants and their employees;
(c) special advisers;
(d) parliamentarians; and
(e) political appointees."

These amendments make distinctions between individuals that can influence procurement decisions directly and indirectly, as recommended in the Sir Nigel Boardman Report.

In Clause 81 (2), at end add -
"including, but are not limited to, requiring suppliers to:
(a) Make a conflict-of-interest declaration before submitting a tender which includes
I. a statement on whether they are employing or retaining (whether in a consultancy, advisory or other role) any individuals who have held ministerial, or senior office within the civil service at Grade SCS1 or above within the preceding 2 years; and
II. a statement on whether any current public official including special advisers, ministers, and members of parliament has a financial interest in the company.
(b) Provide an updated conflict of interest declaration at any stage of the covered procurement if the declaration submitted at tender changes.
(c) Provide written confirmation of compliance with the Suppliers Code of Conduct, or any future guidance that replaces it."

This amendment requires suppliers to submit conflict-of-interest declarations before submitting a tender.

After Clause 82, insert - New Clause 83
"Transparency of Conflict-of-Interest management:"
1. "The relevant appropriate authority will produce guidance within 4 months of the coming into effect of this Bill which lays out how conflicts of interest must be managed on an end-to-end basis through a procurement."
2. "Each contracting authority will collect conflicts of interest management records in a central manner, in accordance with requirements set out by the relevant appropriate authority, and share these records with the relevant appropriate authority on at least an annual basis."
3. "Each contracting authority will issue a public report on an annual basis on how they have managed conflicts of interest in procurement, including the number of steps taken in relation to

each clause of the Bill."

This amendment requires authorities to maintain conflict-of-interest management records and report on how they have managed conflicts-of-interest in procurement on an annual basis.

4) Direct Awards

In Clause 42, insert - new subsection (5) and (6)
(5) 'Regulations made under this section expire at the end of the period of 60 days beginning with the day on which they are made.'
(6) 'A Minister cannot issue regulations under this section within six months of the expiration of other regulations made under this section without issuing a statement to the House explaining why they are necessary.'

This amendment requires the Secretary of State, when making regulations under this Clause, to include a 60-day sunset clause on the day which they are made, subject to Parliamentary renewal.

5) Dispute Resolutions

After Clause 98, insert - New Clause 99
"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."

This amendment allows for the use of Alternative Dispute Resolution Mechanisms within the Bill's dispute resolution procedures.

MORE INFORMATION

If you would like any further information on this subject, please contact the Coordinator for the UK Anti-Corruption Coalition, **Peter Munro** – peter.munro@transparency.org.uk

The UK Anti-Corruption Coalition brings together the UK's leading anticorruption organisations who, through their work, witness the devastating impact of corruption on society.

www.ukanticorruptioncoalition.org

UK Anti-Corruption Coalition