Written evidence submitted by Duncan Jones (PB28)

Summary

The latest draft of this bill contains several fundamental flaws. It misses the opportunity to modernize UK public sector procurement, and does not come close to justifying the government website's claim that it:

"*will place value for money, public benefit, transparency and integrity at the heart of our procurement system; they will modernise and unify our systems and processes; and they will get tough on the poor performers and fraudsters.*"

The most important changes that MPS should make to this bill, which I explain in more detail below, include:

1. **Reduce disgruntled bidders' rights to claim compensation by court action.** The continual need to prepare to defend every decision in court distracts buyers from their real priorities of value for money and public benefit.
2. **Move guidance on procurement best practice to separate Policy documents.** The Bill enshrines in law actions that aren't good procurement practice now, or may be superseded in future. Guidance on when and how to use different sourcing methods should be in a separate Policies and Guidelines document that a central Procurement Centre of Excellence (COE) continually monitors, enforces and refines.
3. **Strengthen protection of taxpayers against cronyism and corruption.** The bill should provide clearer guidance on which relationships create conflicts of interest and make suppliers and their connected persons liable to pay compensation and fines should they fail to declare all such conflicts.
4. **Require buyers to include suppliers' risk profile and performance history as award criteria.** Supplier risk is one of the top priorities for CPOs, yet this Bill barely mentions it. Award criteria should take into account the risk that a supplier may fail to perform a contract satisfactorily. They should also include an assessment of the risk that a supplier may do or may already have done (but not yet been convicted of) one of the actions mentioned in section 6.
5. **Encourage government departments to form mutually beneficial strategic partnerships.** The bill should require CA's to segment suppliers based on their strategic importance and permit favourable treatment of such partners if and only if they continue to deliver exceptional public benefit and value for money.

Duncan Jones' Credentials

I have recently retired from a career in Finance and IT. For the last 16 years I have studied procurement best practices as a Vice President with Forrester Research, including working with many large organizations in both private and public sectors. While at Forrester I published thought leading research on procurement technology trends, supplier management best practices, and on how Procurement can better address their organization's ESG priorities.

1. Reduce Disgruntled Bidders' Rights To Claim Compensation

a) Legal actions such as the recent MetOffice case make taxpayers pay twice for buyers' incompetence: overpaying for the flawed procurement and then compensating other

bidders. Worse, they force all buyers to spend so much time creating evidence to defend themselves in any court case that they cannot devote enough energy to making sound sourcing choices. In most government procurement scandals, the officials' defence is "we followed the right process", as if that should indemnify them.

b) This right to compensation does not exist in the private sector, so why should it exist in the public sector? The costs outweigh the benefits. There may be some circumstances in which a CA may agree to subsidize bidders' costs for submitting tenders, in order to ensure the best candidates submit bids, but that should be at buyers' discretion, not a court's.

c) Firstly, the Bill should shift the court's governance role to the new CoE, which would have the power to delay procurements while it considers a bidder's appeal. The bill should give that CoE rights to discipline or even fire officials who fail to follow its guidance. It should also be able to authorise reimbursement of bidding costs in some limited circumstances. The Bill should specifically prohibit claims for compensation beyond bidding costs.

d) Secondly, taxpayers and other relevant stakeholders should get a similar right to ask the CoE to review suspect procurements, similarly to how we can currently challenge suspect planning approvals. Courts would only get involved if there are allocations of corruption or abuse of conflicts of interest. In such cases the suppliers and connected persons, not taxpayers, should be liable to compensate plaintiffs.

2. Move Guidance On Best Practice To Separate Policy Documents

e) Far too much of the bill gives sourcing teams a legal obligation to do things that are not good practice, such as open tendering, or they would do anyway, such as defining sourcing decision criteria, and measuring suppliers against performance KPI. With due respect to MPs and Lords, you are not experts on procurement best practice and should not, therefore, try to cement your opinions in law. Empower a COE to create guidelines on different sourcing methods including when to use them. A COE should continually monitor, refine, and monitor compliance with these guidelines. In particular, it would ensure good use of Supplier Value Management (SVM) software, which is evolving so quickly that tomorrows' best practices will be very different from today's.

f) For example, Supplier Discovery tools such as Scoutbee and Tealbook can help buyers find suitable suppliers to invite to tender, rather than merely hoping that those suppliers see a published invitation. Category-specific procurement tools including Fairmarkit, Globality, & Labviva can enable safe self-service procurement by budget holders of low-risk products and services, freeing procurement to focus on higher risk and strategically more important purchases. SVM suites such as Coupa and Ivalua can use AI to alert managers to suspect transactions or patterns, such as a buyer awarding an exceptional proportion of contracts via direct award, a supplier with an unusual win rate, or purchase prices that ate out of line with what other organizations are paying for similar items. Fixing obsolete procurement principles in law will make it hard for CA's to adopt these new software-enhanced approaches.

g) Some examples of where the current Bill encourages poor practice and discourages good ones include:

- **Mention of open tendering as a permissible sourcing method.** Colin Cram's excellent submission explains why open tendering discourages good firms, especially SMEs, from bidding for government contracts. It is far better to pick a short list of qualified suppliers for

detailed evaluation, the ideal number depending on many different factors. Even picking a short list at random from a stable of pre-qualified firms would be better than inviting them all to tender and then trying to identify the best value bid.

- **Section 16 on Preliminary Market Engagement**. This is often a vital step in a good sourcing process, to explore alternative solutions to a problem, find innovative companies who may be able to contribute, and to start working with potential suppliers to assess their capabilities. Companies that use collaborative supplier evaluation processes such as design thinking workshops get better results than those that rely mainly on written responses to tenders. It enables a more Agile approach, that avoids trying to detail requirements prematurely. Yet the procurement bill forces buyers to penalize or even disqualify companies that support such pre-RFP activities!
- **Section 52 on Key Performance Indicators.** Why does the Bill have to prescribe this? Would any CA award a contract that does not have SLAs in it? Who has what legal remedies to enforce compliance with this rule? Why 3 KPIs? Who decides that a KPI is "clear and measurable"? Does this permit subjective stakeholder assessments, which are often the most crucial to ensuring good outcomes from any contract? The COE, not parliament should be responsible for defining and implementing modern supplier management best practices.

h) Ensuring that CA's follow policies and guidelines will require governance, monitoring, training, and performance management. If a buyer is failing to "take reasonable steps", publish "sufficiently clear requirements", or make sound choices between sourcing methods then the correct response is better management, not legal action. The COE will need teeth, including the right to demote or dismiss senior officials who consistently fail to ensure their Procurement departments deliver public benefit and value for money. Neither acts of parliament nor court cases can force officials to deliver public benefit if they are unwilling or unable to do so.

3. Strengthen Protection Of Taxpayers Against Cronyism And Corruption.

i) I won't repeat all the excellent recommendations in Spotlight on Corruption's submission, but I would emphasize the need to make guilty parties liable to compensate taxpayers and disadvantaged bidders. The Bill falls far short of Mr. Burghart's claim that it includes "*robust requirements for contracting authorities to ensure equal treatment and address conflicts of interest*."

j) The Bill should define conflicts of interest more broadly and more clearly, with examples such as (some of them may be familiar from recent news reports):

- The company's founder has donated 6 figure sums to the political party in government
- A fellow minister's boyfriend is a director
- A fellow party member's spouse will receive 25% of the contract value as a consulting fee
- A major shareholder is an economic adviser to the Prime Minister
- The PM used to work closely with the bidder's CEO
- A minister is a beneficial owner of a bidder, via an investment vehicle
- A civil servant has an oral agreement to become a director of the bidder when he retires in 2 years' time

k) Suppliers should be responsible for declaring all interests, rather than the buyer having to discover them. Any connection should disqualify the supplier unless the buyer can prevent it

gaining an unfair advantage. Taking "all reasonable steps" would not be sufficient if a significant risk still remained, or if the connection, once made public, would undermine public confidence in the procurement. Government organizations should be able to cancel contracts and claim damages from the supplier and the connected person if they discover previously undisclosed interests, even several years post-contract. This should include full recovery of any profit from the contract and any financial benefit that the minister or official received.

l) Section 80 clause 2 states:
There is a conflict of interest in relation to a covered procurement if—
a person acting for or on behalf of the contracting authority in relation to the procurement has a conflict of interest, or
a Minister acting in relation to the procurement has a conflict of interest.

"Acting … in relation to the procurement" is unclear and insufficient. The Bill should specifically prohibit any action that will unfairly benefit a supplier, including

- lobbying internally for a project to receive funding, knowing that 'their' company was likely to win the contract.
- Suggesting sourcing decision criteria that favour 'their' company over others.
- Promoting officials who make the 'right' decision and holding back the ones who do not.
- Sharing confidential information about the procurement, such as details of other firms' bids

m) Either the Bill itself or the separate Policy document should insist that CA's ensure they are making appropriate use of the latest technology to spot possible corruption and cronyism. Modern AI is a particularly powerful in this respect, including finding possibly undisclosed connections by aggerating many different supplier information sources, and by highlighting unusual buying behaviour.

4. Include risk profile and performance history as award criteria

n) The new bill should require CA's to include assessment of supplier-related risk as mandatory decision criteria, in line with the theme of protecting taxpayers, not bidders. Supplier risk is CPOs' top concern at the moment, but this Bill barely mentions it.

o) Assessment should include the likelihood of a problem arising and its potential impact, across all risk types including cyber-security, financial stability, supply resilience, and ESG compliance. Schedule 6 should permit a CA to exclude a supplier that it deems to be too risky. This may include a determination that there is a significant risk that a supplier may commit in future Factors that may indicate a signifor may already have committed one of the offences in Part 1, even if it has not yet been convicted of such an offence. Schedule 7 paragraph 3 should state:
A discretionary exclusion ground applies to a supplier if the decision-maker considers that there is a significant risk ~~sufficient evidence~~ that the supplier or a connected person has engaged in conduct or may in the future engage in conduct …

p) Possible warning signs of a breach of employment law that may fall short of the sufficient evidence test include the supplier's location and industry, financial performance, whistleblowers' complaints on social media, journalists' reports. Responsible organizations perform additional assessment so they can be confident that the actual risk is low.

q) For example, Leicester, where I live has a well-known problem with garment factories breaking employment laws related to work permits, minimum wage, health and safety, etc. Reputable clothing brands therefore perform site audits and other assessments, or require certification from 3rd parties such as Cedex, before purchasing from a Leicester clothing supplier.

r) The bill should explicitly permit rating of past performance, including subjective factors such as user experience, as appropriate decision criteria. Failure to reward good suppliers and penalize bad ones is another endemic problem with public sector procurement everywhere.

s) Schedule 7 permits buyers to exclude bidders that have "*not performed a relevant contract to the regulated authority's satisfaction*", but this is too vague and limiting. Firstly, it prohibits one department from taking into account a supplier's unsatisfactory performance on a different departments' contract. Secondly, it leaves a risk that excluded bidders may dispute in court a buyer's decision about which previous failures were "relevant" to the current procurement. Thirdly, it fails to consider performance history relative to other bidders. It would be better to say something like: "*whose performance history indicates, in the CA's opinion, a significant risk that it would not perform the contract to the CA's satisfaction*".

t) For instance, a buyer in HMRC considering Pinnacle for a call centre contract might reasonably want to exclude it on the basis of its performance of its MOD contract. Under the proposed Bill, Pinnacle could dispute that in court by claiming that the MOD's requirements were so different that its contract was irrelevant to the HMRC decision, that the HMRC cannot take into account the MOD's dissatisfaction, or even that the MOD is satisfied with performance, even though its not up to the standard the HMRC requires. Moreover, HMRC could award new contracts to a supplier with an even worse track record, because it does not have to exclude every under-performer just because it has excluded Pinnacle.

5. Encourage Departments To Form Strategic Partnerships.

u) The Bill should force CAs to segment suppliers using criteria such as their strategic importance, performance track record, company size, and innovation delivery. It should explicitly permit buyers to use suppliers' segment as a criterion in choosing short lists and awarding contracts. The COE would advise CAs on how best to segment suppliers, using advice from experts such as Forrester Research and Kearney.

v) I have studied for many years the benefits that leading organizations get by nurturing strong relationships with their most important suppliers. Politicians believe, incorrectly, that competition is the key to good procurement. The summary guide to the new bill states proudly that "*competition is at the heart of the regime*". In fact, this misguided obsession is the biggest flaw in public sector procurement around the world. Procurement could deliver better outcomes for citizens if it used competition less, and in a better targeted manner.

w) The best private sector purchasing leaders know when and how to use competition, and when not to. They understand the importance of long-term, mutually-successful strategic partnerships, that reward the best suppliers with sole-source relationships in a few key categories. They hold these partners to high standards in terms of attributes such as trust, transparency, and innovation. In return, the partner invests in the relationship, and receives rewards for over-delivering, such as outcome-based bonuses and fast-track contract renewal.

x) Procurement professionals who do not fully understand Strategic Partnerships express concern that they create too great a risk of corruption. They fear that awarding large contracts without competition would cause complacency and over-charging. My experience, in researching such partnerships across many leading firms, is that the benefits far outweigh these risks, provided the customer correctly manages them. Rigorous supplier management, with a focus on measurable outcomes, triggers rectification action at the first signs of deteriorating service. Techniques such as should-cost modelling prevent price gouging better than the fake sourcing processes that buyers use to give the illusion of competition when they want to renew an incumbent's contract.

y) One way to reduce the risk of overly close relationships would be to include in section 70 on performance assessment a requirement, for contracts above a certain size, to measure suppliers' performance as a strategic partner. For example, Forrester recommends collecting feedback from several stakeholders on trust, transparency, excellence, value alignment, and customer experience. Possible conflicts of interest do not matter much if a supplier is trustworthy, consistently delivers superior outcomes, and continually strives to maintain its desirable Partner status.

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