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ForUs 2021-4

Placing people at the
heart of procurement

Procurement Bill

Submission of written evidence to the Public Bill Committee

February 2023



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INTRODUCTION

Procurement for public good

Aspire wholeheartedly supports policies that seek to improve public services and reduce inequalities. Never before have public services been so important for people living in the UK. Strengthening them to bring greater support to the growing number of disadvantaged through reducing inequalities that exist within and between communities should be an integral and dynamic part of the country's economic and social recovery.

Aspire supports goals that aim to speed up and simplify the procurement process, place public value at their heart and widen the opportunities for responsible small businesses, charities and social enterprises to innovate in public service delivery.

Aspire therefore welcomes participation in the development of the Procurement Bill and supports the approach which links procurement to public benefit and strategic development of policy at both a local and national level.

Under the Bill, wider social and environmental factors can be considered both in establishing the condition of participation and in the award of contracts. While Aspire considers that this has been possible, with some exceptions, under the current legal system - as evidenced by the devolved frameworks of law within Scotland and Wales - in England and Northern Ireland, with notable exceptions, risk averseness within the commissioning of public authorities has limited the consideration of these wider factors. In particular, as a Real Living Wage Employer, Aspire welcomes the fact that the Minister has clarified that the Real Living Wage can be required as a condition of contract.¹

The Bill opens up the opportunity for public authorities in England and Northern Ireland, in particular, to put public good at the heart of the procurement process, linking purchasing power to local and national policy priorities and innovating to reduce poverty and inequality.

Sustainable Development Goals

Aspire considers that the UN Sustainable Development Goals are a public value charter for all organisations. They are the framework in which good procurement should sit. They are based on the principle that no-one should be left behind and all of the 17 goals are equal. They aim to stimulate action up to 2030 in areas of critical importance for humanity and the planet.

Creating public value should involve the public services setting a direction and public purpose for public and private actors to collaborate and to innovate to solve societal

¹ Fourth sitting, Procurement Bill Committee 2nd February 2023. As a Good Work Standard Employer we anticipate that public authorities could make this too a condition of participation within the competitive flexible procedure should this be considered appropriate. Similarly, the intrinsic value of social enterprises or cooperatives within the context of local market delivery could be recognised in developing community-based economies as a means of reducing local inequality.

problems. This provides them with a proactive market shaping role enabling them to dictate the conditions of contract, engaging local people and organisations in the design and delivery of services and in encouraging a plurality of providers within a mixed economy.

Local public services working in partnership with the private, not for profit sectors and civic society can identify specific community needs identifying people, places and problems that require local solutions and collaborative working. These needs should help to frame the services provided by public bodies and organisations such as housing associations that provide public services. Working on these requires addressing the detail that constructs individual and daily lives, and thinking that is smaller, less ambitious for scale and more ambitious to make a difference to the lives of real people.

Positive action and supported employment

We are delighted that the Government has chosen to bring forward legislation on supported employment. We were concerned that no mention was made of this in the Green Paper and that the Bill, as first presented in the House of Lords, was weakly drafted in relation to supported employment. We are pleased that the Government has engaged with the Lords and brought forward amendments which strengthen the law. Clause 32 provides real potential to address structural deficiencies in current labour market practices and in particular to build and strengthen community-based delivery of services and community based markets.

Diversifying supply chains

The Bill seeks to expand the opportunities for small businesses, social enterprises and the charitable and voluntary sector to participate within the procurement process. Community-based organisations working within the public sector can play an important role in addressing structural reform, reducing inequalities, promoting innovation and helping to shape public services in ways that are more inclusive, responsive and closer to their local communities.

Public procurement could have a key role in bringing continuous improvement and innovation to the delivery of services influencing the shape of the market for the wider public good. Much of the success of future legislation will therefore depend on how far and to what extent public authorities are enabled to carry this out at a time when they are under severe pressures. Building up the capabilities and capacities of commissioning authorities to collaborate with community based organisations is crucial to this process.

Aspire's submission

Our submission draws upon our lived experience of the procurement process and our recommendations are framed within that context. It focuses on a number of key areas where we consider the Bill could be strengthened and improved including:

- Definition of public authority

- Valuing contracts
- Supported employment and positive action
- Equalities
- Fair play and Access to justice for SMEs

We have tried to go through the Bill on a Clause by Clause basis so the order of issues discussed does not necessarily indicate the importance of the proposed change.

Where we have thought it relevant to do so we have provided examples of our experiences to support our recommendations. We have also provided suggested drafted amendments where considered appropriate.

PROPOSALS FOR CHANGE

Definition of a public authority

Clause 2 refers to the definition of a public authority.

Aspire recommends that the relevant annexes of the UK Government's coverage schedules of the World Trade Organisation Government Procurement Agreement (GPA) are included as a Schedule to the Act.

The relevant annexes are Annex 1 – 3.

Why is this needed?

The purpose of this recommendation is to ensure that there is wider clarity clearly demonstrated on the face of the Bill of the definition of a public authority for the purposes of the legislation.

It is accepted that the definition of public authority is wide. It covers a large number of organisations; organisations acting in different capacities may not be public authorities for those purposes. During the Bill Committee questions were raised in relation to universities and registered housing providers.² There are others where similar clarity is required.

Clarity of the definition is vitally important for small organisations which may seek redress from the new Public Procurement Review unit, as part of improving the future procurement process. The annexes list the authorities subject to the GPA and it seems sensible from a transparency point of view that these should be contained within the Procurement Bill schedules themselves.

Further information

The costs of taking a case to the High Court are prohibitive to small organisations and disproportionate to the profit generated by lower value contracts. This is a particular barrier to small community organisations which may be operating on a low or no surplus basis.

If barriers are to be removed for small business then there needs to be independent oversight of the process, where effectively small businesses are barred through lack of resources from effectively challenging individual decisions. Lack of clarity of definitions may mean that even the current oversight provided by the Bill may be denied to SMEs. It is Aspire's experience that those who use the procurement regulations may seek to avoid oversight when challenged by arguing that they do not apply to them (see case examples below).

Placing the annexes of the schedules within the body of the Act will help to give clarity to public organisations that they are public authorities under the new Act.

² First Sitting,

Aspire proposes a further change under *Fair Play* below that an authority of a public nature that uses the procurement legislation to procure public services will for the purposes of investigation by the new procurement review unit be deemed to be a public authority that can be subject to investigation. Those who have used public procurement regulations to procure services should not be able to subsequently avoid interrogation and enquiry of their procurement practices, as lack of interrogation of well-founded claims may institutionalise bad practice and prevent improvements being made which could affect the overall participation of small organisations within the procurement process.

Case examples

- A. Registered provider - Aspire was concerned that a housing association provider had awarded the contract to a contractor that had submitted an abnormally low price. Initially the housing association agreed to a review but this process was not completed by them, and the housing association awarded the contract to the other supplier. Aspire referred the matter to the Public Procurement Review Service (PPRS). Although the Housing Association had used the restricted procedure under the Public Contract Regulations 2015 (PCR), it refused to accept that it was a public authority for the purposes of investigation by the PPRS. PPRS explained to Aspire that in the case of Registered Housing Providers it was up to them whether they defined themselves as a public authority.
- B. Other public body - Aspire carried out a review of a recent procurement with a public body where there were a number of issues of concerns including lack of detailed feedback about the claim. Aspire had submitted the lowest price and had lost because a quality question was assessed as below grade, despite the fact that a covering note had said that there was nothing wrong with the quality of Aspire's bid. The PPRS took up the case for Aspire and was then informed by the public organisation that they could not come under the remit of the PPRS because of exogenous factors. Following a further review by the PPRS it confirmed that it was unable to take up the case on behalf of Aspire as the organisation had said it could not apply to it.

Value of the contract

Clause 4 refers to the value of the contract.

Aspire recommends that the Bill clarifies when the value of the contract is either net or inclusive of VAT, and that this clarification is contained within Schedule 3 of the current Bill.

The existing PCR provide for valuations net of VAT; while the published thresholds under GPA provide for VAT inclusive figures.

Why is this needed?

The value of the contract is advertised in notices and in procurement information. This value is currently net of VAT. The value of contracts for the purposes of determining whether a contract is below or above threshold is now inclusive of VAT as a result of membership of the GPA.

In all public sector procurement tenders, tenders submitted are net of VAT.

Throughout the Bill there are numerous references to value and all of these need clarity as to whether they are VAT inclusive or net figures. We have highlighted the one that we consider to be the most important.

This has created confusion for some commissioning bodies and could confuse suppliers particularly those SMEs who have less experience of the process. A small business that mistakenly put in a tender exclusive of VAT when the amount required was inclusive of VAT could if the error was not rectified find themselves in financial trouble. Correcting the error if such a business was successful would probably mean that the commissioning authority would need to run the procurement again.

Further information

It is established GPA practice that the thresholds are calculated including VAT and UK legislation has been amended to reflect this.

So long as it is clearly stated within the Act, Aspire considers that it is preferable to retain the status quo as it is standard practice for quotations in relation to contract price to be exclusive of tax.

However, the Bill as currently drafted could also be construed to mean that in the future notices and award notices should be published exclusive of VAT. That is why clarification of value should be included in a Schedule to the Act.

Case example

In reviewing a public procurement a central public body maintained that its advertised opportunity involving an upper limit of £120,000 was below threshold. As the threshold is now £138,000 for central government bodies, it appears that an error was made by the commissioning authority.

Supported employment and positive action

Clause 32 refers to supported employment in which contracts can be reserved. It is possible that such contracts would not need to apply a multi-stage approach and could effectively be carried out as a single process, similar to the open procedure.

Aspire recommends a number of further changes to the Bill in relation to supported employment to: indicate that a single procedure, similar to the open procedure can be used by authorities; clarify that framework contracts can be reserved for supported employment and to make it clear that the exclusions to contract referred to under Clause 20 also includes the ability to create reserved contracts under Clause 32.

Why are these changes needed?

The supported employment provisions provide public authorities with an innovative way to work with community based organisations and national organisations to overcome institutional discrimination and to shape the market to address systemic disadvantages caused by institutional discrimination. These changes provide further clarification on how and when reserved contracts may be used within the procurement process.

Clause 20 Competitive tendering procedures

Proposed amendment 1

Clause 20, page 15, line 9, after “appropriate” add “including a single-stage award procedure with reservations under Section 32,”

This amendment would help to clarify on the face of the Bill that a single stage award procedure can be carried out for reserved contracts.

Proposed amendment 2

Clause 20, page 15, line 23 after “22” add “(b) by reference to reserving contracts under Section 32;”

This amendment would help to clarify that the exclusion of suppliers may be made by reference to Section 32.

Clause 36 Dynamic markets membership

Proposed amendment 3

Clause 36, page 25, line 36 after “contracts.” insert “(2) A contracting authority may set conditions under sub-section 1 by reference to reserving contracts under Section 32.”

This amendment would help to clarify that public authorities can create dynamic markets for reserved organisations under Section 32.

Clause 46 Frameworks competitive tendering process

Proposed amendment 4

Clause 46, page 31, line 30 after “contract.” insert (2) A contracting authority may set conditions under sub-section 1 by reference to reserving contracts under Section 32.”

This amendment would help to clarify that public authorities can create frameworks for reserved organisations under Section 32.

Further information

Much labour market activity has focused on supply side measures for people who are disadvantaged by the labour market including training and CV presentation, yet all too often the pathway of many is to move into low paid, insecure, “bad employment” which can intensify previous reasons why people are absent from the labour market. Providing public support to “good” employment organisations could help overcome in-work issues that arise, acting to prevent churn in the labour market. It could also help other programmes such as individual work placement.

Clause 32 can help to build up a mixed economy and promote economic, social and environmental improvements in the marketplace through:

- using it as an adjunct to in-house provision to support people disadvantaged by the labour market into sustainable and good employment;
- addressing the issue of disability discrimination in terms of both access to employment and the terms of employment experienced by disabled people;
- taking positive action to promote the social economy if an alternative is required as a means of promoted mixed economies which are not solely reliant on profit-led business;
- taking positive action to reserve contracts for women led, black or minoritised community-led businesses;
- reserving contracts for people with lived experience, for example, to support the co-production of services;
- promoting “Good works” suppliers as part of an economic development strategy designed to promote inclusive growth;
- incorporating use of the Clause in larger contracts e.g., local authority waste contracts to establish neighbourhood reuse centres as part of the circular economy or requiring larger contractors where it has been decided that these should not be broken into lots to reserve part of their contracts for subcontracting companies under Clause 32.

Strengthening equalities within the Bill

Public procurement has a potentially powerful role to play in developing a more responsive market that addresses inequalities. This is particularly important in the light of the Covid Pandemic and the Cost of Living Crisis which has intensified inequalities within our local communities.

Aspire proposes that the current Bill should be amended to ensure that all public authorities when making strategic decisions about procurement should have due regard to exercising them in a way that is designed to reduce inequalities of outcome which result from socio-economic disadvantage.

Why are these changes needed?

The Bill currently covers England, Wales and Northern Ireland in terms of the substantive legislation, but only authorities in Wales have a socio-economic duty currently within their legal framework. Aspire's amendment would remove this anomaly.

Clause 12 Covered procurement objectives

Proposed amendment 5

Clause 12, page 9, line 38 after "reduced" insert "(c) when making decisions of a strategic nature have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage."

Further information

Section 1 of the Equality Act 2010 provides that public bodies specified in the Act when making decisions of a strategic nature about how to exercise their functions must have due regard to the desirability of exercising them in a way that is designed to reduce inequalities of outcome which result from socio-economic disadvantage. This duty has only currently been implemented in Scotland and Wales in the UK. The duty is being used to improve and enhance decision-making and combining this with the powers to reserve contracts under Clause 32 could be a powerful lever for tackling some of the structural disadvantages faced by people within the labour market.

Fair play and removal of barriers for SMEs

Access to justice

While Aspire welcomes the amendment to the Bill contained within Clause 12 that addresses the barriers of SME participation, it is regrettable that this is unenforceable under the Bill as currently drafted.

In reality, however, the Bill confers few enforceable rights for many smaller businesses and community organisations, as the rights conferred on participating organisations can only be enforced through the courts.

These are simply not accessible to many small businesses which lack the resources to fund lawyers and with the cost of a procurement challenge comparable, at least, to the costs of the current thresholds for goods and service contracts. Thus, the balance of power within the procurement process firmly lies with the public authority when small organisations wish to challenge practice.

While we welcome the Government's proposals to provide full information of disclosure, this will not help smaller organisations to obtain an individual remedy if it appears that a public authority has not acted according to the objectives of the Bill as currently contained within Clause 12.

While the Bill also provides for general regulatory oversight through an appropriate authority under Part 10, this will not provide an individual remedy for organisations.

This situation is neither fair nor equitable for smaller organisations.

It also mitigates against SME participation if there is no right of redress if things are perceived or, are, in reality unfair or unlawful. This, itself, impacts unequally on organisations that are more representative of their communities, as they are likely to be smaller businesses with fewer resources. If the odds are stacked against you from the start, why take part in that process?

Supporting public authorities to meet their legal obligations

Our concern is that as it currently stands that the UK government may be failing in its GPA agreement. The GPA requires "*the procuring entity conducting the procurement shall encourage the entity and the supplier to seek resolution of the complaint through consultations. The entity shall accord impartial and timely consideration to any such complaint in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement . . .*"

Indeed, the courts also require such an approach, according to guidance from the Technology and Construction Courts all parties are to seek to avoid court action and it suggests the following approach for pre-court action:

"1) The potential claimant will send a letter before claim to the contracting authority. This should identify the procurement process to which the claim relates; the grounds

then known for the claim (both factual and legal); any information sought from the authority; the remedy required, and any request for an extension of the standstill period and/or a request not to enter into the contract for a specific period of time and/or not to do so without a specified period of notice to the potential claimant. The letter should propose an appropriate, short, time limit for a response.

2) The authority should promptly acknowledge receipt of the letter before claim, notify its solicitors' details and (if requested) indicate whether the standstill period will be extended and if so, by how long. The authority should then provide any information to which the claimant may be entitled as soon as possible, and send a substantive response within the timescale proposed by the claimant, or as soon as practical thereafter.

3) Having exchanged correspondence and information, the parties should continue to make appropriate and proportionate efforts to resolve the dispute without the need to commence proceedings.”³

Options

In its response to the Green Paper Aspire supported the idea of a procurement tribunal. It was disappointed that the government did not take this idea further, at least for lower value claims.

Aspire was also disappointed that a proposal for independent review by commissioning authorities was not taken up as this seemed a sensible approach which complies with simple complaints procedures and is a normal part of any contractual arrangement, however big or small.

Aspire believes that consideration should be given to developing an independent Ombudsman system for dealing with low value procurement complaints if a low value tribunal is not considered appropriate. It is possible that consideration could be given to some form of levy. It hopes that this will be kept under review by the Government.

As a minimum Aspire considers that there should be a legal duty on public authorities to set up a process to seek resolution of differences through consultations and that these consultations should mirror the guidance provided by the courts.

Proposed Amendment 6

Clause 97 Duties under this act enforceable in civil proceedings

Clause 97, page 63, line 37, after “Part.” insert “(5) “A contracting authority must respond to a supplier’s complaint in a timely and impartial manner that not prejudicial to the supplier’s participation in ongoing or future procurement.”

(6) A contracting authority must make appropriate and proportionate efforts to resolve a dispute without the need to commence proceedings under this Part.

³ Courts and Tribunals Judiciary, *The Technology and Constructions Courts Guide*, October 2022

(7) A contract authority must accept any reasonable request for an extension of the standstill period and propose a timetable to resolve the dispute.”

The purpose of this amendment is to ensure that prior to the court proceedings there is a process in which complaints can be heard, and which may be responded to by the public authority. This will ensure smaller organisations with limited resources have access to a complaints procedure in which the standstill period can be extended for a short period while the dispute is being heard. In practice, Aspire has found that authorities have been willing to do this, as courts will take into account the duties of the parties to avoid action.

The benefits of this amendment are that they would provide a limited avenue for small businesses to pursue individual complaints, as well as potentially limiting the number of cases that were referred to the new Procurement Review Service. The complaints procedures of public authorities could be advertised in procurement documentation to ensure transparency.

We consider also that public authorities will benefit from using upheld complaints as a means of eliminating bad practice and that this will help them to reduce the barriers to participation of SMEs. If time and energy has been spent on submitting a tender, then equally if reasonable issues are being raised by smaller suppliers, this could be time and energy well spent if issues are considered, lessons learned and incorporated into best practice. This, in turn, will help to stimulate the wider participation of SMEs within the process.

Proposed Amendment 7

Clause 104 procurement investigations

Clause 104, page 67, line 35, after “Act” insert “(2) A contracting authority is relevant for the purpose of subsection (1) if it has taken any step taken for the purpose of awarding, entering into or managing (a) a contract or (b) a public contract.

This amendment aims to have the effect of ensuring that authorities who use the public procurement regulations cannot dismiss the oversight provided by the Bill (see earlier discussion under Definition, page 5).

Duty to consider lots

The duty to consider lots is a vital one for SMEs. Aspire proposes strengthening the provisions of the Bill so that SMEs can proactively raise questions about larger contracts. This amendment should not create additional burdens for public authorities as they would simply have to refer to their analysis of the issue required under Clause 18.

Proposed amendment 8

Clause 18 Duty to consider lots

Clause 18, page 13, line 39 after “so.” insert “(3) If the contracting authority considers that the goods, services or works could reasonably be supplied only under one contract the authority must provide reasons for doing so.”

Financial standing

Aspire welcomes the fact that audited accounts will no longer be required from organisations that are not legally responsible to produce them under accounting legislation. We are concerned, however, that the financial standing of SMEs may be of concern to some public authorities and that an important provision of existing legislation which helps to protect SMEs has been removed. We therefore recommend limits on the amount of turnover that can be taken into account, similar to those contained within the Public Contract Regulations 2015.

Proposed amendment 8

Clause 22 Conditions of participation

Clause 22, page 17, line 4, after “contract” insert “(c) “require a minimum yearly turnover from suppliers that exceeds twice the estimated contract value.”

This amendment would ensure that the financial conditions being asked of suppliers is not disproportionate to the value of the contract. It provides some protection for SMEs against disproportionate demands from public authorities.

About Aspire Community Works

Aspire Community Works is a community business that, amongst other objectives, aims to provide high-quality, sustainable, Real Living Good Work for people who are disadvantaged by existing labour markets because of institutional discrimination and other factors such as caring responsibilities.

The majority of Aspire's direct estate management and open spaces services are provided to public services and the overwhelming majority of these contracts are gained through use of the public procurement process. As a result, Aspire has gained valuable experience of the procurement process and uses its lived experience to inform policy and campaign for sustainable procurement which promotes community well-being.

In March 2021 Aspire published its guide to procurement, funded by Trust for London, 'Procurement for Community Public Good: A Guide'.

For over eleven years, we have experienced the good, the bad and the indifferent within the public procurement process. We have been frustrated by technical specifications that draw on the past and fail to integrate sustainable development and public value fully into their processes. We have challenged in the High Court, worked with authorities to review their decision making when we felt it was unfair, and have experienced the highs of success and the lows and the financial burden of failure.

Our lived experience (exclusively of the English system of procurement) demonstrates to us that change is required to enable greater dialogue, collaboration and innovation in developing public services in partnership with local communities. As part of that process, we set up a small Commission and have provided a guide to procurement for public good, to add our voice to the need for change. This response draws upon the work of the Commission and our ongoing experience of the procurement system.

FURTHER INFORMATION

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