Written evidence submitted by Raoul Robinson (PB30)

Procurement Bill Evidence Contribution

Section 1

S1. Defines procurement and distinguishes between “procurement” and “covered procurement”. The difference between them comes down to whether it is a public procurement which would itself then be a “covered procurement.”

A covered procurement is always subject to the proposed regulations but a procurement may not be. Covered procurement is then referred to 30 times within the Bill but is absent on many other occasions where it may be necessary to provide the same definition, as time has been taken to split it out within section 1.

For example, s.34(5) states that subsection 4 (of that provision) does not apply if due to complexity of a particular “procurement” etc. Should that not be a covered procurement given the definition at s1.?

Another example- under s.99 a court may make a number of orders, including suspension of the ‘procurement’. It is believed that the court will only be intended to make such order in relation to procurements subject to the procedures set out in the Bill- previously referred to as ‘covered procurements’. Similar questions exist for sections 69(4), 74(6), 80(2), 82(1), 88(2) 89(1),94(1), 95, 104 and 116.

Procurement as referenced in each of these provisions must be a covered procurement or otherwise would not be in scope of the Bill. It can then be inferred that this is the case, but then why is it necessary to split the definition of a procurement down in this way if it is not always used at the appropriate juncture?

Section 2

The UK Public sector contains a number of Public Sector Buying Organisations such as CCS, CPC, ESPO, NEPO, YPO and many others. It is difficult to determine with the proposed definition of a ‘Contracting Authority’ if such organisations are within scope of the regulations.

S.1(4) indicates “centralised procurement authority” is included, but they must themselves be a “contracting authority” to be in scope.

Contracting authorities in s.2 are clearly defined as a “public authority” (with a separate definition for utilities contracts) which is someone subject to “public authority oversight” but “does not operate on a commercial basis” (except for a carve out for vertical contracting arrangements set out in Schedule 2.)

That means to determine if a PSBO is a contracting authority, it has 2 criteria to test; if it is a public authority and if it operates on a commercial basis.

The first is easy to determine for most centralised procurement authorities being ultimately controlled by local authorities or government departments (although some will be excluded where they operate privately).

The second is more difficult to determine as most operate to generate some form of surplus which is often then re-invested into their owning authorities. S.2(4) provides examples of factors to be taken into account on whether a person operates under a commercial basis which is useful but not definitive.

More detailed guidance could be provided above "factors" to help answer this question as it will be more difficult for some than others as for example, Universities have struggles with this definition of scope in the past.

Section 5(1)

This section may create an unnecessary burden in some cases. Its purpose is to prevent the identification of a contract as another type which may have a higher threshold, but embed within it, services, or products which if bought on their own, would exceed the threshold for the regulations if bought alone.

The works threshold is currently £5,336,938 and services, £213,477. (For sub-central authorities). Under the current thresholds, if approximately 4-5% of a works contract, just under threshold is identifiable as a good or a service- then the contract overall must be considered over threshold, or the contracts split out.

This seems to indicate the potential for a significant number of works contracts could be considered over threshold which would seem disproportionate when considering the intent of having various thresholds in the first place.

It is acknowledged that under s.5(4) a contracting authority can have regards to the practical consequences of separating the services, effectively creating a reasonableness test to the application of the above but there is great potential within the provision to make the position much clearer if a percentage or fraction figure was included rather than the threshold value for that element of the overall project- particularly in instances where the project is intended for delivery through a single provider.

Section 9

Light touch contracts are not defined at all in the Bill.

Subsection (1) says as they are as defined in (2). (2) says specific services may be identified by an appropriate authority. – that means presumably they can vary over time and will require secondary legislation to be defined.

However, subsection (1) still is not correct as there are no services of any specific kind defined in (2). It is therefore inappropriate to indicate that the services are specified in (2). Instead (1) should make clear that the definition of a light touch contract is as defined by an appropriate authority which renders (2) completely redundant.

Section 10

There appears to be a contradiction in the wording.

"special regime contracts" are various types of agreements defined at (6), including light touch contracts, which were defined earlier at 9(1).

10(1) says if certain (possible missing word here?) of the goods can reasonably be supplied under another contract that would not be a special regime contract and would not be less than the threshold amount then they are not special regime contracts.

However the definition of a light touch contract at 9(1) says that it is a contract that is "wholly or *mainly*" for the supply of specified services- if mainly, that means part could not be light touch and still be defined as light touch, but under 10(1), the same might not be a special regime contract if the value of that element was over threshold.- e.g. a £4m social care package that is wrapped up with a £200k software system- is that then a standard contract?

Is it then possible to have a light touch contract that is not a special regime contract? If this is the intent, which rules would the contracting authority apply when awarding the light touch but not special regime contract?

Section 12

Is it intended for the public procurement principles to apply directly to Contracting Authorities?

Contracting Authorities must have regard to the procurement 'objectives' at 12(1).

The core principles are then found in Section 13, but it doesn't say Contracting Authorities need to have regard to them, only that the minister for the crown must give due regard to the fixed principles when creating the National Procurement Policy Statement.

Legally it may be interpreted that principles and objectives may have different standards of achievement attached to them. A principle is a fundamental truth whereas an objective is a thing aimed at. A goal.

Would a Contracting Authority be at fault if it did not fully achieve a procurement objective where it is not a principle, just a goal to be hit? Can a minister for the crown dismiss an underlying procurement principle in updating the National Procurement Policy Statement after they have had regard to them?

Splitting the core tenets of public procurement into objectives and principles weakens their overall impact unnecessarily for most public procurements in a way that may be unhelpful in building trust in public bodies to procure fairly and for the benefit of UK citizens.

It would be much clearer for Contracting Authorities to continue having to apply the procurement principles directly to their procurements as the benefits of creating objectives instead does not create any measurable benefit nor was any such benefit identified in the Government response to the Green Paper on Transforming Public Procurement.

Section 12(2)

Under one procurement objective, the Contracting Authority must treat suppliers the same unless a difference between the suppliers justifies different treatment.

What difference would justify such different treatment? Could a Contracting Authority allow an easier access process for SMEs for example?

Subsection (3) would indicate this is not the case- anything that gives an unfair advantage is not permitted, but then again (4) itself contradicts (3) in regards to considering SME's in particular and the possibility of removing or reducing barriers.

In reading the provision, it states that Contracting Authorities should not treat differently, unless different treatment is justified, but only where it doesn't put a party as an unreasonable advantage or disadvantage subject to whether that different treatment would remove barriers to participation.

This section provides a good example of how difficult and confusing the proposed draft can be at points which directly contradicts its stated intentions of simplifying public procurement.

Section 13

Subsection (10) says a Contracting Authority must have regard to the National Procurement Policy Statement except in specific circumstances set out in subsection (11).

Such circumstances exclude awards under a Framework. It is assumed this is because the core procurement would have already been completed in line with the NPPS, a Contracting Authority doesn't need to have further regard to the NPPS when awarding a contract under that Framework.

I would ask why not?

Why not also require that the Contracting Authority using a framework also have regard to the NPPS in these circumstances as it should include the assessment of the framework as a suitable tool for use by the Contracting Authority? It seems odd that a guidance documents relevance stops after the point at which a framework is established but before public funds are allocated to a contract.

Section 13(1)

The wording "may" indicates that it is at the ministers discretion as to whether to publish a National Procurement Policy Statement ("NPPS") or not. Would it be possible under this Bill that the NPPS could be recalled and not replaced at all, at which point would the objectives (and principles) also cease to apply to public procurements?

It is clearly unlikely to happen, but it is also clearly a possibility where the minister is afforded the discretion to publish an NPPS or not.

It may be beneficial to clarify if the Minister would be permitted to withdraw the NPPS or just to replace it.

Section 16 (4) and (5)

Contracting Authorities are permitted to conduct preliminary engagement which is a crucial step for good procurement for various reasons. Like the existing rules, Contracting Authorities can also gain assistance of the supplier market to help them built those procurements, leaning on their expertise and knowledge to shape a procurement.

Also similar to existing rules, under s.16, where the Contracting Authority determines a supplier subsequently has an unfair advantage in a subsequent competition, they can be treated as an excluded (not excludable meaning there is no choice afforded to the Contracting Authority after it has established that an unfair advantage has been created).

This produces two potential negative outcomes in attempting to balance fairness in a procurement.

- A disengaged supply chain unwilling to provide genuine support to help identify needs for fear they may be excluded at future stages; or

- Perhaps less likely but just as possible, weaponization of the provision, where a Contracting Authority deliberately engages and then rejects tender submissions from a bidder it does not want to work with.

The exclusion grounds set out in clause 16 have a clear goal in mind which is to ensure fair competition and to avoid a tender being skewed towards that supplier whom offers its assistance. However, a mandatory exclusion leaves little room for a Contracting Authority to do anything other than identify if an advantage has been created which is most cases, it is assumed that the engagement will have created some natural advantage.

For example, if I am invited to pre-engage to develop an opportunity, I may contribute a factor or element overlooked by the Contracting Authority that my business excels in. It would be difficult to see how, if I contributed in that manner and the Contracting Authority embedded the requirement how that would not give me an unfair advantage even if provided in good faith or one that could then be avoided.

More flexibility may be achieved by changing (5)(a) to treating the supplier as excludable rather than excluded to allow discrepancy in situations where a supplier has clearly been acting in good faith, not realising that they may have inadvertently excluded themselves from the opportunity. The onus would then be placed on the Contracting Authority to apply the objectives and allow for continued competition.

This is particularly poignant as the clause only prevents unfair advantages created by preliminary engagement but not all types of unfair advantages which then penalises suppliers looking to assist the public sector, but not those who have an advantage by their position as an incumbent withholding TUPE information from other bidders for example.

Alternative options may be to provide a restricted scope of an unfair advantage to one that is a higher standard than just any unfair advantage, possibly to a targeted unfair advantage or significantly unfair advantage.

A third alternate may be to carve out the exclusion for suppliers where evidence can be shown they have acted in good faith in engaging. However, this proposal does have issues in that it would pass the burden of evidence to suppliers to show that they had acted in good faith, which they may only realise they need to evidence this after an exclusion has already happened.

Section 17(1)

Any premarket engagement requires a Preliminary Market Engagement Notice ("PMEN") to be published.

There is no requirement for when this notice needs to be published other than before the tender is published.

Based on a reading of this clause, it is feasible under this condition to publish the PMEN and then on the following day, issue the competition notice.

It would be better if a PMEN is necessary, to publish the notice before engagement commences, not before publishing the tender notice to make the notice useful as a tool.

There is also a query around what the purpose of the notice is when Planned Procurement Notices may also be published. It seems unnecessary to retain both types of notice as they both achieve the same goal of notifying the market that an opportunity is incoming. Removing one or the other would

simplify Contracting Authority administrative burdens without impacting the objectives of completing the notice in the first place.

Where choosing between the two- the mandatory requirement under PMEN seems to offer a more robust process for engaging with the public than the Planned Procurement Notice.

Section 19(3)

Under this provision, a Contracting Authority may disregard a tender from a supplier who intends to subcontract all or part of the contract to a supplier who is not a UK or treaty state supplier. Both those terms are defined further into the Bill at separate stages and for treaty state suppliers- are suppliers within those regions covered by the 24 agreements or treaties set out in Schedule 9 of the Bill.

The increase in globalisation means that most suppliers will have part of their service provision centred in another country, whether that is in the form of physical manufacturing or service centres or even as simple as hosting their IT systems abroad or in the cloud.

To what degree would a Contracting Authority be justified in dismissing a tender from a bidder if it is known that they have some form of connection to a non-treaty state supplier, even is superfluous to the delivery of the core elements of the contract requirement?

The provision itself serves an important purpose of controlling where public bodies procure their services. The provision could be improved by explaining what "part" of a subcontract could lead to a tender dismissal by stating that it needed to be a key or proportionate element of the service provision, not something insignificant or superfluous to the core purpose of the contract.

Section 20

The Competitive tendering procedures set out in the Bill provide the most exciting and problematic prospects in the new regime.

The increase in flexibility offered within the proposal under this Bill is sorely needed to increase innovative procurement into the public sector but in turn, it must be accepted that where each Contracting Authority has a significant increase in scope to improve its tendering procedures, a supplier looking to tender will likely be faced with a new procedure and set of rules to follow for every opportunity they wish to tender for.

Where the aim is to increase SME engagement, increased flexibility of process built into the competition itself runs the risk of making opportunities inaccessible to local businesses, not understanding how procurement works if it differs on every engagement and no training being made available due to the lack of standardisation within the processes.

Further, because the process is so clearly documented within the current regime- removing that detail, although necessary to allow innovation will also make it much more difficult to establish if the regulations are breached during the tender process, outside of mandated administration, such as for notices.

This means again that smaller businesses are less likely to challenge procurement procedures due to a lack of understanding of what is or isn't permitted and conversely an increase in procurement challenges by larger suppliers, seeking to profit from a Contracting Authority's own uncertainty as to what might be permitted or how the objectives may be met.

It may be that the increases in flexibility offered by the procedures may come with an inadvertent disadvantage of benefitting larger, experienced suppliers at the extent of local supply and an increase in burdens on the UK judicial system, at public expense created by uncertainty as to how the regulations should be applied due to that flexibility.

It is acknowledged that within the Bill 12(4) and 85 requires a Contracting Authority to have regard to potential barriers that may be faced by SME's in competing for an opportunity and Section 20(3) around creating a procedure that is proportionate but it does not translate into a firm commitment that SME's will not be disadvantaged by the proposals set out in the Bill simply due to the time needed and technical knowledge required to compete for public contracts which is already prohibitive.

Section 20(3)

A procedure must be a proportionate means of awarding a public contract.

This means that the procurement must avoid a process that is complex or burdensome which will help ensure the procedure is suitable and is not deliberately complex to limit competition and this is made clear in the supporting guidance to the Bill.

Proportionality is a subjective measure and to make the provision work, it is anticipated that proportional must mean proportional to the procurement requirement itself which is also supported by a reading of s.22(5).

Although it does not appear to be the intent, is it possible then using this section to interpret that the provision could be breached by a Contracting Authority if a procurement is under designed or not complex enough?

That does not look like the intent, but it seems feasible that using the term of 'proportionality', there is a balance to be struck between a procurement that is too complex or too simple for its purpose which may inhibit Contracting Authorities from simplifying processes to support SME engagement.

This view is also supported by a reading of s.22(5) that when considering proportionality, a contracting authority must have regard to the nature complexity and cost of the procurement but not necessarily the potential supply chain whom could bid for it.

Section 20(5)

There is an important distinction to be drawn between competitive procedures and competitive flexible procedures with the former being a catch all term for all procedures and the latter being a specific procedure.

On reading s.20(5) it is clear it will be possible to exclude a supplier from competition by reference to not meeting the conditions of participation, but this relates specifically to the competitive flexible procedure. No similar provision exists in s.20 for the open procedure.

It appears clear then that due to inclusion of one procedure and not the other, under an open tender, no supplier would be excluded at all, and all tenders must be received and considered.

This understanding is then contradicted by s22(7) which states that a supplier may be excluded from a competitive tendering procedure (so a flexible or an open procedure) if it does not satisfy a condition of participation. - that means 20 and 22 seem to not make sense together- made slightly more confusing by the similarities of terms.

It would then be better at s.20(5) to state that these conditions apply to competitive procedures, excluding (b) which is specific to the flexible procedure, which could then be moved to 20(4).

Section 21

Before publishing a tender, a Contracting Authority will need to publish a “notice”.

Where it needs to publish this notice is not specified.

S.21 directs readers to s.95 which says information will need to be shared…including through a *specified* online system, but no such system is set out in the bill- it is clear that Contracting Authorities would continue to publish on Contracts Finder and Find a Tender Service in theory but if it is not specified within the regulations, would be possible to publish a notice in a different online location until such point one is specified, without breaching the regulations?

Section 22(9)

This provision describes what an association is between two suppliers for the purposes of interpreting 22(8).

The interpretation of this provision indicates that a group of companies, operating under a parent would not be ‘associated’ unless they are either named directly in the tender as being included or if they will enter into a binding agreement.

From experience, many group companies will have centralised operations under their parent company such as for payroll, IT security, policies, accreditations, legal or other elements without which they would not be able to deliver the tendered services but for which they may take for granted as day to day business disconnected to the intended services and so not name the parent in the initial bid or have a formal agreement in place for that support.

S.71 does show that the Contracting Authority may make the award of a contract conditional on a direction that formal legal arrangements be entered into, but this seems unnecessary for suppliers in a group structure where association can be determined by a means other than a legally binding contract.

The provision could be improved by interpreting group companies reliant on a central operational structure.

Section 23(5)

Paragraph 172 of the guidance document indicates the list of what can be considered subject matter is non-exhaustive, but this contradicts the drafted section which provides a finite list of 4 items that can be used for determining the subject matter of the contract.

Either the guidance is incorrect or an additional section is needed to show this list is non-exhaustive as intended.

Section 23(6)(b)

This section relates to what ‘subject matter’ is for the purposes of light touch contracts.

As this provision is split from (5), relating to other contracts, it is inferred that if a reference element is included in (6) and not (5), then it should be excluded from consideration under (5).

(6)(b) in particular says that the subject matter might include the “different needs of different service recipients” but this element in setting award criteria could definitely be true for other forms of contract that are not light touch contracts too.

With the way it is drafted, such award criteria could not be set against different users’ needs in that case, because the list of criteria as previously stated appears to be finite and inclusion of this consideration on (6) but not (5) implies it is excluded from consideration under (5).

This may be an unintended restriction on the freedom to establish award criteria.

The same query may also be true of (6)(c).

Section 24(1)

Under this section, award criteria may be refined as part of a competitive flexible procedure. To do so, it requires that the notice or the tender documents provide for the refinement.

It is not clear why it is necessary to indicate that the refinement would be covered in the notice OR the documents and why not require that it be included in both.

With the current draft, the issue it creates is that it means the supplier needs to go searching for where the refinement may be, instead of knowing that it must be in the notice, the tender document or both.

It would seem 24(1)(b) ensures the type of refinement can only occur/be identified before bids are submitted- thus the type of refinements must be known up front by bidders but it says only where it ”is yet to invite bidders”

If it’s yet to invite bidders to tender, what would be the benefit in just having the details concerning the refinement in the tender as such documents will not be visible until the tender is published and bidders are invited to submit some form of bid.

It would seem to make sense that the refinement must go in the notice. Even then though- that notice is itself an invitation to tender so 24(1)(b) should read that it can only refine criteria if that info is available at a point at which it invites tenders, not BEFORE it invites tenders as currently drafted.

Section 24(4)

Under this criterion, the notice must be republished or provided again if the refinement is undertaken. If the original notice provided for the refinement, what is the intended benefit of re-providing or republishing the notice if the refinement changes no additional detail?

This may create additional administrative duties for Contracting Authorities without increasing transparency within the process. It could be improved by stating that it would only be necessary to republish a notice where the refinement provides additional or new data not previously published in the original notice.

Section 25

Using this section, a Contracting Authority can require that a supplier sub-contracts the supply to another supplier IF that supply could otherwise be procured under s41 (special cases).

However, how does a CA force a supplier awarded a contract to subcontract to a chosen third party without restricting that entity's ability to be unhindered and able to enter into contracts of its own free will?

It is presumed but not clear that the condition of insisting on a subcontract would need to be included in the initial competition, so the supplier impacted would know in advance that they would need to subcontract it out if they won the contract.

It is noted that the sections states it relates "in awarding" a contract meaning this right to demand a subcontract would not relate to existing contracts, only those being awarded at the time the need was identified.

It must then be questioned what benefit the provision creates at all as special cases can be procured differently already. As a minimum, it would be more reasonable if Contracting Authorities had to declare this subcontracting requirement as part of the tender or within the notice to avoid situations where a Contracting Authority attempts to enforce its rights to insist on the subcontract but the supplier refuses as it itself is not subject to the regulations, or alternately, to avoid the Supplier spending resources preparing a tender when it ultimately cannot accept an award due to this requirement existing but of which it was not aware when it prepared its tender.

Section 26(1)

What is an excluded supplier as defined in this section?

This question is answered later in the bill. s.37(1) tells us that Contracting Authorities need to remove suppliers if they are an "excluded supplier under s.57(1)(a)" which, turning to that section- provides a full definition for an excluded supplier.

However, without reading the full instrument or searching for key words, it is not clear on reading this clause 26(1) what an excluded supplier is at all.

In order to make this provision more accessible it would be beneficial to include a definition of an excluded supplier in key definitions rather than as a clause or, similar to 37(1) point the reader to the correct meaning of an excluded supplier at 57(1)(a) instead of s.37(1) itself.

Sections 26 and 27

Section 26 covers excluding suppliers from a competitive award (as previously defined, this would be either an open or a flexible procedure.)

Section 27 covers excluding suppliers from a competitive flexible procedure.

The result is that a Contracting Authority conducting a flexible procedure needs to follow both s.26 and 27 which means checking if any exclusions apply before allowing a supplier to participate and then assessing again if the supplier is excluded or excludable before assessing the submitted tenders.

It seems unnecessary to check for exclusions more than once within a single procedure. The issue may be connected to the use of terminology and could be easily rectified where s.26 makes clear it relates to open procedures rather than competitive awards.

Section 28(7)

This provision states subsections (3) and (4) do not apply if the subcontractor is an associated person.

Those subclauses state that if after requesting information, a Contracting Authority considers that the Supplier intends to subcontract to a subcontractor that is excluded or excludable then the supplier itself can be treat as excluded or excludable.

Associated persons are defined at s.26(4) as a person a supplier relies upon to satisfy the conditions of participation.

Not applying subsections (3) and (4) to this provision means that a Contracting authority would be able to ask for information to determine if an associated person is excluded or excludable but the Contracting Authority could not then use that information to go on to exclude or consider excluding the supplier.

The benefits of this approach are not clear- it seems as though the references in subsection (7) could be wrong possibly or as a minimum, the intent explained.

Section 29(1)

This sections states that if the Contracting Authority intends to “disregard a tender under section 26 or 28.”

S.26 does have a specific term around disregarding a tender at s.26(1). S.28 does not provide any term around disregarding a tender, only excluding a supplier.

It is noted that s.28(5) states “before disregarding or excluding a tender” so it is clear there is an intent that a Contracting Authority should be able to disregard a tender under s.18, but still, no specific right exists in s.28 under the current draft.

It is not wholly clear to me what the difference is between excluding a supplier and dismissing a tender other than perhaps the stage at which the action takes place, but a small amendment may be required to s.28 to make clear tenders can be disregarded as well as suppliers excluded.

Section 30

This section allows Contracting Authorities to exclude suppliers for improper behaviour.

However, it feels like there may be a missed opportunity within this section. From experience, I have seen particularly issues with suppliers where a winning bidder having previously agreed to specific terms and having been awarded the opportunity attempting to re-negotiate contracts post award, leveraging the difficulty a Contracting Authority may have in re-awarding the contract to another supplier to gain additional concessions.

I would like to ask that the definition of what constitutes improper behaviours at subsection (4) be extended to prevent suppliers using the regulatory framework to leverage negotiations post award but pre-execution of a contract. This would give Contracting Authorities confidence to exclude the winning supplier after award and move to the next best offer without the need to conduct the whole procurement again.

Sections 20-30

I understand a significant amount of development is going into the creation of the digital platform that underpins a number of improvements planned by the Bill.

It is then surprising to see Chapter 2, processes for competitive award does not contain any references or provisions relating to use of the digital platform for the purposes of conducting the procurement procedure or any aspect of it, although it is acknowledged that this may be included in secondary legislation or enshrined in the National Procurement Policy Statement.

Section 34

S.34 relates to the process for awarding a contract under a dynamic marketplace. S.35 establishes how to create a dynamic market.

From a drafting perspective, it feels backwards, as temporally one would first establish the dynamic market, and then award a contract under it. For ease of reference, the draft would be improved by switching the regulations to avoid confusion to suppliers looking to understand its application.

Section 34(4) and (5)

These subsections are designed to allow for suppliers to be considered for inclusion if they have submitted a request to join the marketplace. The section as set out makes the timing of those considerations confusing.

Without recounting the relevant provisions, the wording in S.34(4) and (5) infers that where exceptional circumstances do not apply, a Contracting Authority should consider all applications received before date for submitting a request to participate or the deadline for submitting the first and final tender.

This creates a reality that any supplier whom submits a request to join the marketplace before the deadline for the tender opportunity or request to participate should be entitled to submit a bid for that opportunity.

It is clear why this would be desirable, to provide the maximum chance of allowing a supplier to compete in an opportunity but it means that a request to join could be received 2 days before the tender closing date and if the Contracting Authority does not assess that request to join immediately and update the competition in their e-tendering system to allow access to the new supplier, the supplier may be prevented from competing, which would breach this regulation.

This puts an overly burdensome expectation on Contracting Authorities to continually check and process new requests immediately to join the marketplace or else suppliers would be able to argue they have been prevented a chance to bid fairly.

A more realistic proposal would be to exclude suppliers or dismiss bids from suppliers who do not submit an application to join the marketplace before a fixed time before the competition closes, to allow a reasonable period of time for the application to join to be reviewed.

The issue is less significant where the deadline relates to a request to participate, as this is a clear cut-off point after which tender documents would be made available and every supplier who had submitted a request should be entitled a chance to bid.

Section 35

Clarification would be beneficial as to how this clause operates.

(1) states contracting authorities may establish a marketplace. (2) states arrangements established by "a person" in relation to a utilities dynamic market can be treated as if they are established under this act.

A natural reading is that the omission of person from establishing an arrangement under (1) means a private person or company not identifiable as a contracting authority could not establish a general dynamic marketplace- only a utilities dynamic market.

Can it be confirmed if this reading is correct and is the intended interpretation?

Section 37(2)

Under subsection (1) the contracting authority must exclude a supplier if they are on a debarment list. Under (2) the contracting authority has a discretion to exclude a supplier in other circumstances including where they are an excluded supplier under s.57(1)(a)

Under a flexible competitive procedure, (the necessary process for awarding a contract under a dynamic marketplace,) a contracting authority must exclude an excluded supplier under s.27(2).

A supplier could then potentially be an excluded supplier, remain as a member of a dynamic market but never be awarded a public contract because of the condition under s.27 on exclusion.

Why then, allow the contracting authority discretion to accept an excluded supplier into a marketplace if it cannot then award them a public contract?

It would seem to make sense that where the supplier was an excluded (not excludable) then they should be excluded by the Contracting Authority, it is not clear why an opportunity is afforded to accept the supplier, by the inclusion of the word "may".

Section 38

Fees relating to membership of dynamic markets can be charged but in any case other than utilities must be a fixed percentage applied to the estimated value of an awarded contract.

Where the contract value ranges significantly, the percentage of fee taken may become disproportionate where the fee is fixed. In such circumstances, bodies have in the past introduced a range of fee % based on the value of the contract to ensure the fee remains proportionate to the value of the contract.

It would be beneficial to clarify the position on fees to make clear if a range of fixed percentages would be an acceptable interpretation of what "fixed" means.

Section 39

Under the marketplace, the Contracting Authority must publish a notice stating the intent to create the marketplace and after it is created publish a notice to confirm it is created.

There are no timeframes provided for when the initial notice should be published, meaning in the current draft, a Contracting Authority could publish both notices almost instantaneously rendering the transparency they are trying to achieve redundant.

It seems an unnecessary administrative burden to need to publish more than one notice at the beginning of the marketplace. It would be more efficient to state a marketplace is going to be created and allow a minimum timeframe for members to join before the first flexible competitive procedure is conducted than control the process with two separate notices which serve the same purpose of informing the public that a market is available to join.

It is also clear that the Contracting Authority will need to publish a further notice when it intends to run a competitive flexible procedure under the marketplace too (except under a utilities marketplace), meaning there is a minimum of three notices required before an award can be made under a dynamic marketplace. Again, it would seem more relevant with less red tape to issue a notice when establishing the marketplace and another when a flexible, competitive procedure commences.

Section 41(4)

Under s.41(2) a Contracting Authority can award a contract to an excluded supplier and s.41(4) it must also consider before awarding a contract, whether a supplier is an excludable supplier. It is not directly stated but it is inferred by S.41(2) that the contracting authority must consider if the supplier is an excluded as well as an excludable supplier.

Any doubts in this interpretation could be easily resolved by amending 41(4) to include considering excluded as well as excludable suppliers.

Section 43(1)

A direct award may be possible where a procedure has been carried out and there has been no suitable bids- similar to the current regulations.

However one requirement to justify use of this procedure at (1)(c) is that the Contracting Authority must consider that an award under s.19 “is not possible”.

Using possibility as a standard of measurement is difficult due to its subjectivity. If a direct award is possible for a contract opportunity under this s.43, it should then in almost all cases, also be possible to award that same contract under s.19. even where the same may be difficult to achieve.

It is not then clear what makes an award under s.19 possible or not. Changing that test away from possibility to reasonable practicability would make the provision much more certain as to its application.

It would be much clearer to create a test as to whether it is practical to award a contract under s.19 if 43 could otherwise apply and that then can be subject to a reasonable provision in terms of applying that test which could involve the complexity of the requirement, evidence of available suppliers, communication issues and other applicable factors which could be tested using a reasonableness test.

Section 45(2)

Frameworks are identified as being contracts but they do not have the necessary consideration when developed to fall within the definition of a common law contract.

Traditionally, no promises are made in relation to subsequent contracting opportunities, volumes of contracts or commitments to bid- it’s not clear then how they can be defined as a contract, as they operate more as a written, agreed process or a framework for creating a contract at least until a

subsequent contract is awarded, which may crystalise some elements of the framework, transforming it into a binding agreement at that point.

This terminology may clash with the common law legal definition of contract without providing any clear benefit beyond categorisation within this Bill.

Section 45(4)(b)

This section allows for a form of direct award in specific circumstances. Within this, the core 'terms' of the public contract must be set out in the framework.

It would be beneficial to clarify if 'terms' means in the traditional sense, the clauses of the subsequently awarded contract or if it means the terms or procedures that may be applied to use and establishment of the framework or if it is both.

Section 46 (10)

This tells us that the meaning of a "competitive section process" relates to the process for the award of a contract in accordance with a framework.

I interpret this as meaning that this competitive selection process doesn't directly apply to the creation of the framework but applied to the creation of contracts within the framework – known as a 'procurement under a procurement arrangement' within the Bill but commonly referred to as a Call Off Contract.

If s.46 applies to the call off process, it is not clear how then a contracting authority conducts a selection process for the creation of the actual framework under the open process?

It could be argued that the above is a misinterpretation and that the section is a competitive process for the first stage of selection for the subsequent award of a contract, which is the creation of a framework but this is countered by the specific wording in (10) that says 'the award of a public contract *in accordance* with a framework' inferring the framework must already be in existence at the point at which the selection process set out in s.46 is carried out.

Without some initial selection process for the framework- frameworks will either be open to all to join during the period they are open to entrants or with lack of guidance on whether frameworks can be restricted for entry in any way, any selection process at all could be applied to the joining of the framework initially.

Could it be clarified if the processes set out in Chapter 2 for establishing a public contract by using some form of selection process applies to the creation of an open framework?

Section 47(2)

This section currently provides a broad interpretation of what might justify an extension due to the nature of the goods.

Could the fact that the goods do not change often in terms of specification justify an extension because the requirement will not change for a long period?

Conversely could an extremely complex procurement be extended beyond 4 or 8 years because its nature means it proves very difficult to procure?

It is noted the test for whether the 4 or 8 year limit can be extended relates to the nature of the goods, services or works but does not consider the scope of potential competition available in the market, meaning it's entirely possible to award a 10 year framework in a competitive market, thereby restricting open competition for an extended period of time, because a Contracting Authority may have found a justification for doing so due to the nature of the goods.

With the current draft for these terms, it's reasonable to assume that 4+ and 8+ frameworks will become more than just an exception to the rules unless there is clear rules provided for what would justify an extension due to the nature of the subject matter of the procurement.

Section 53(3)

In relation to KPIs within s.52, it was clear that it applied to contracts over £5m but excluded frameworks. For section 53(3), due to the lack of information to the contrary and due to the explicit exclusion in s.52, it is assumed that a Contracting Authority will need to publish a framework contract if the value exceeds £5m.

It is not clear if the requirement would be to publish the draft version of a framework or every live framework entered with every supplier regardless of whether the terms were identical or not.

Either way, the potential volume of data both in publishing this information and the wider requirement across the public sector is potentially huge in terms of data storage and will also have a direct impact on carbon production when considering net zero targets.

The Bill does not currently state where such contracts would need to be published but it should be questioned, depending on where the information is to be hosted, how such a database of contracts could be reasonably supported to make them both visible and searchable in a reasonable fashion.

Thought must also be had towards the intended benefits of publishing contracts.

It is assumed that it will ensure public procurement becomes more transparent. However in publishing live contracts, it is assumed that some information will need to be redacted from the published copies of contracts in order to protect Suppliers commercial confidentiality and with the ability to redact information, it will be difficult for any member of the public looking to see the contracts to know what information is missing. This could mean any potentially interesting piece of information can be easily redacted without any scrutiny rendering both the intent of the provision void and a significant increase in administrative red tape for contracting authorities having to redact all contracts prior to publications.

Section 54(4)

There are no specific timeframes provided for flexible competitive procedures awarded in reference to a framework (a call-off contract), meaning that a competition may need to be open for a minimum period of 25 days. This is the same timeframe as other, open tenders. However, under a framework call-off, the competition has already been restricted by reference to the participation conditions and the initial assessment.

It would stand to reason then that the minimum time period for a competition under a framework could be shorter, similar to under a dynamic marketplace without compromising the integrity of the process. This would make the regulations more robust without reducing principles and objectives that underly the reasons for the rules existing in the first place.

Section 60(5)

Contracting authorities are pressed for resource and will find the administration under the Bill more burdensome than the current regime, requests for assistance from an appropriate authority should allow for a reasonable and realistic timeframe for them to be responded within.

It would help contracting authorities feel confident to challenge unreasonable requests if there was a reasonable provision applied to requests for information in this instance.

Section67(8)

An invoice is valid if it is electronic OR sets out the required minimum information. The use of or here infers any invoice which is electronic would be valid, regardless of whether it contains the minimum required information or not. The provision should state and/or to show that the requirements are inclusive rather than exclusive, but also allowing still, invoices in other formats if agreed in the contract (as the requirement for electronic invoicing is implied but not mandated as a means of submitting such invoices.)

Section 68

There are some practical concerns around the operation of this provision which is reliant on information not currently available.

Where public bodies must publish a notice every 6 months to declare compliance with the payment provisions of the bill- the vast number of notifications that must be published, if centralised could mean swamping online systems with information, burying other notices within the platform for a period during the expected submission window. It may also create system capacity issues with the volume of notices that will inevitably be required.

Alternately if the notification was published elsewhere, then its purpose may be limited where it is not clearly available where such notices are available per public authority.

Further, I would also expect most if not all public authorities will have at sometime within a 12-month period failed to pay a supplier within a 30 day period. As we do not know what the 'specified information' will be for the notice, will it be possible to publish a notice if a non-compliance has occurred.

In addition, where a non-compliance does occur both with the 30 days requirement and the requirement to publish the payment compliance notice, it is not at all clear what the consequence of that will be as none of the remedies set forth in the Bill lend themselves to an adequate response in the event of non-compliance.

Where an implied 30-day payment term already exists, the most effective action possible is allowing the affected suppliers to exercise their contractual rights under that contract rather than a centralised response. Therefore, it is arguable that the party most benefitting from knowing if a payment is made within 30 days is the supplier waiting for the payment. The benefit of publishing a wider statement would then be achieving significantly diminished returns without their being some other effect which may be outweighed by both the administration required to deliver the notice and the risk of the notices being overwhelming in terms of submissions for any party to use or for the publication system to accept.

Without understanding the specific information required, it is difficult to understand how difficult administratively it will be to produce the information, whether it will need to be split per public

contract or whether it would be a general statement of compliance. In reviewing the intended benefit of the provision, it should be balanced against the likelihood of that benefit actually being achieved given quires linked to its practicality and the additional administrative burden being placed on public sector bodies.

Section 70(3)

In relation to the requirement to notify of breaches or under performance. A breach of a contract is an objective measure that could be evidenced in order to show a breach has occurred. However, as is common in relation to contract management, it is potential that a supplier could dispute that a breach has occurred at all.

In terms of publication of that breach, it may be beneficial to clarify if a contracting authority would be expected to publish a breach regardless of whether it has been accepted by the supplier or whether such notification should only come after a notice has been issued so it is clear exactly what point the period for publishing details of the breach comes.

In addition, notifications under 70(4) required a contracting authority to also publish a notice if it "considers" performance is not to its satisfaction. Consider infers an element of choice which could lead to abuse as the bar set for notification is then established by the contracting authority.

Arguably it would be possible for a contracting authority to publish a notice relating to a supplier's performance even where the performance itself complied with a minimum standard under the contract terms agreed between the parties.

Similar to other provisions, the benefits of publishing information in this format creates an administrative burden on contracting authorities. Perhaps more significantly in this case, the requirement can unduly impact on the reputation of public sector suppliers to a degree where suppliers may be hesitant to engage with the public sector where it risks damaging its brand due to the publicity it could receive from such publications and particularly where such notices come at the subjective interpretation of the contracting authority.

It would be preferable that the benefits intended by the publication be reviewed as to what outcome is intended by the publications. Will the information allow contracting authorities to disregard tenders from named suppliers? How will the threat of publication enforce better behaviours and performance from suppliers?

It would also be beneficial to determine if a review or appeals process would be available for suppliers to challenge such publications, allowing them equal opportunity to disagree with a contracting authorities publication particularly in relation to the subjective measure of performance as considered by the contracting authority.

Such a suggestion may be difficult to practically manage but suppliers should be afforded an opportunity to as a minimum, respond to a subjective interpretation of performance as delivered by the Contracting Authority.

Section 71(2)

This requirement seems irrelevant. If a contractor has subcontracted elements of delivery to a third party, by the definition of what a contract is under UK common law, it will have entered into a legally binding agreement with that subcontractor as soon as the conditions for creating a contract have been achieved.

It may be that the intent of the provision may not be around forcing a supplier to enter a contract, so much as entering into a contract that is easily identifiable *as* a contract which is always more difficult to evidence if it is not written. To that end, the provision may be improved by a requirement that that legally arrangement be in writing.

Section 71(3)(a)

The condition here feels backwards. In order to enter a legally binding agreement that is a subcontract, the initial contract must be let, even if both transactions are immediate. It is impossible for a supplier to enter a legally binding agreement for a subcontract before it itself has entered into an agreement.

There may also be a missing option in relation to s.73(3). A supplier may not have entered into a subcontract for a variety of reasons, many not its own fault. The provision misses an opportunity to highlight where the supplier, having previously indicated it may use a subcontractor, decides it can deliver the whole contract itself without subcontracting it.

To that end (d) could be added to allow for acceptance of the supplier delivering the subcontracted provision directly.

Section 71

Businesses in the UK operate under a general principle that they are able to enter into legal binding agreements with largely whomever they want.

The section as a whole, although it does not directly encroach on that principle of freedoms afforded to business, runs the risk of putting suppliers in at minimum an awkward position and at worst an untenable one in regards to forcing a supplier into an unwelcome relationship.

Where such risks occur, there is also concern that they may be exacerbated for smaller organisations who organically operate quicker and more flexible than larger organisations but whom also may be reliant on the contract they have just won, to continue their operations. This provision may then curtail the natural advantages of running a small business where they are shackled to subcontracting to a third party later in the process.

Equally, it is also not clear what would happen if the subcontract commenced and the relationship later breaks down or sours between the contractors. Or even as simple as, what prevents the contractor entering a subcontract as instructed and then immediately terminating that contract by way of a break clause?

It is then questionable then how enforceable the provision is practically although its intent has a clear benefit to holding suppliers to account in accordance with their original bids.

Section 72(1)

Please can it be confirmed that for the purposes of interpreting the payment provisions that a definition of invoice within the Bill includes a payment notice as commonly used in the construction industry?

Section 72(2)(b)

This inclusion is unnecessary S.71(1) states sections (2) to (5) of s.67 apply to subcontract arrangements. Because they are named, it is already then clear (8) does not apply, rendering (b) unnecessary.

Section 72(5)

The use of the term and the definition of a "public subcontract" as being one substantially for the performance of the public contract could be extended to other provisions to provide additional scope- for example would it not be beneficial for the subcontract referred to in s.71 to be a "public subcontract" to avoid any argument that a contracting authority could force a supplier into entering an ancillary or minor subcontract?

Section 73(3)(c)

A modification may be substantial if it materially changes the economic balance in favour of the supplier.

Can we confirm when assessing that balance shift- whom is the party on the other side of that exercise. Should it be the balance when compared to other potential suppliers who had the opportunity to compete for the contract or should it be the contracting authority itself?

Section 73(9)

This states contracts cannot be moved to another supplier unless a novation is required by reason of corporate restructure or similar. Most novation activity seen is in relation to the incumbent falling into administration or wound up. A restructure normally means rearranging operations, finances, management structure internally within the organisation itself which would not normally warrant a novation unless the restructure was within a group.

Can it be confirmed that the administration or winding up of a business would be a "similar circumstance" under Schedule 8 para 9?

Section 74

Modification notice must be published before the modification itself happens. This will mean that if a planned modification did not occur after a modification notice has been published, it will give an incorrect impression of the terms agreed if such modification is never finalised.

It may not be necessary to amend the Bill in this regard as it is clear why the notice is required, but Contracting Authorities should be allowed the opportunity to withdraw notices after publication where the modification is never completed.

Section 84(2)

For contracts of any value, Contracting Authorities will have a process for introducing new suppliers which may include some form a financial analysis, commonly linked to a credit reference agency.

A contracting authority should in maintaining a healthy supply chain maintain some form of analysis of a supplier's financial suitability or else risk awarding a contract to supplier who cannot support the requirement.

The restriction under s.84(2) may prevent such an analysis occurring but only where the Contracting Authority have invited tenders- meaning where there is no competition, it would be able to assess its chosen supplier's suitability in reference to its financial capacity.

In interpreting the section – (1) could be read in a way that the restriction is limited to whether a supplier is allowed to submit a tender. After the submission of a tender the actual award of the contract itself could be subject to the passing of a financial assessment.

It would be useful if this could be clarified and if it is intended that no financial assessment should take place, a question asked regarding how a contracting authority should maintain a financial stable supply chain if it is prevented from such assessment at the point of awarding a contract.

Section 86(1)

Within the Bill as a whole, we have seen that contracting authorities will have to publish a significant number of notices for transparency purposes. It may not be necessary to have a specific notice for below threshold tenders if the intended purpose of the notice could be achieved through the publication of the same notice form used for over threshold procurements.

This could reduce development costs in the creation of notices within the online platform without reducing the transparency aims of the Bill. Other notices could also be potentially amalgamated in the same fashion.

Section 86(3)

Contracting Authorities will be required to publish award notice after entering into a contract under (3).

(5) says such a notice should set out that the contracting authority intends to award a contract. However, (3) indicates it must have already entered into that contract before it publishes the notice. (5) instead, should state that the notice sets out that the contracting authority has awarded a contract.

Whole Bill

One major claim both within the Green Paper on Transforming Public Procurement and the Procurement Bill Explanatory Notes is that the new regulations will create "a simpler regulatory framework" by reducing the number of regulations from 350 regulations to 122 regulations but this is wholly misleading and disputable looking at the bill in its current form.

Of the 350 regulations referred to under the current regime, most were duplications of similar or identical terms in each set of regulations that the Bill is attempting to amalgamate.

It cannot be said that be bill will make public procurement simple just because it is reducing the number of regulations, where for each authority, the number of regulations that apply to it will be largely similar.

For example, a Local Authority operating under the Public Contract Regulations 2015 will have regard to 122 regulations under the current regime. Under the new regime, it will still need to have regard to 122 regulations.

If we are to judge the complexity of the regime by the number of provisions it contains, then clearly repeated reference to secondary, unknown legislation of which there may be 24 or more other pieces of secondary legislation within the Bill clearly indicates an intention that the new

procurement regime contain more regulations pertinent to any single contracting authority than under the current regime. It cannot then be said to be made simpler and has completely missed the mark in reducing red tape.

This is also without acknowledging the fact that Scotland itself is not to be bound by the majority of the regulations, which complicates matters when attempting cross boarder procurement collaborations such as through the use of procurement tools like frameworks where the method of procurement and the regulatory regime will conflict. In the future, will a Scottish public authority be able to compliantly access and call off a contract from an 8 year PSBO framework for example?

Further, the lack of clarification as to the content to be include in secondary legislation has made the Bill difficult to determine exactly how it itself will or should operate in some cases.

Secondary legislation is mentioned multiple times throughout the Bill and is essential for providing understanding on some procedures and definitions- such as the contents of a contract notice and how the same may reasonably impact the bodies it seeks to govern.

It is not clear how Parliament or those authorities to be governed by the Bill are able to properly understand the impact the Bill has without those instruments, in such a way that Parliament is being asked to vote on a major legislative measure that is not complete.

Finally on the issue of simplicity- I have found the Bill difficult to navigate, particularly around definitions. Definitions are scattered throughout the Bill meaning reading any single provision in full often means visiting several others as well as relying on secondary legislation which is currently unavailable. There is a Schedule that lists where definitions can be found but I argue that it would have been much clearer to collate the definitions themselves in one location rather than have them sometimes scattered within the regulations and sometimes collated such as in Part 1.

Again, it is wholly unclear how this Bill intends to achieve its objective of making public procurement simpler or by extension, more accessible for SME's whom will not have the luxury of time to review these regulations to determine if they have been treated fairly.

Regarding transparency and reasonable access to justice under the Bill, requirements for notices are so extensive to inevitably fulfil that goal but it must be questioned at what cost this comes in terms of man-hours needed to complete the number of notices per procurement exercise. Given the breadth of organisations in scope of the regulations, it should be carefully scrutinised as to exactly how each form of notice is intended to increase the public knowledge in a way that justifies the expense of doing so.

Finally, overall, the Bill represents a missed opportunity to overhaul public procurement in relation to access to justice and review for most suppliers.

The remedies in particular still require court action, which is inevitably expensive, reserving it to those larger organisations whom can afford it, shutting out access to a lot of SME's.

This is also a missed opportunity to relieve pressure on an overburdened justice system too, particularly as the introduction of the Bill will raise questions about the validity of long standing interpretations in procurement law, increasing the number of cases seen until such time that the UK establishes a new foundation of case law to replace or affirm the old.

The proposed review service itself which will inevitably be the target location for most complaints for those unable to pay for legal support is disappointingly short of powers to support fair procurement other than to make recommendations and no clear direction on what would happen

should a Contracting Authority disobey those recommendations, including those to report on reasons why it has done so.

In all, the Bill represents an unrealised opportunity in relation the public procurement afforded by the UK's exit from the EU.

It is an incoming regime that is remarkably like the existing one, with additional steps in the process, creating unnecessary red tape.

There are some positive observations to be made too. Additional freedoms around the creation of a procurement itself will be welcome and allow public bodies to create innovative procurements and the transparency provisions are so extensive as to be enviable in any true democracy. Such should not come at the cost of alienating the supplier markets we rely on though.

I look forward to seeing what the next steps will be for the Bill and the secondary legislation and would like to thank you for the opportunity to contribute and the time you have taken to consider my notes.

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