

Spotlight on Corruption Written Evidence to the Procurement Bill Committee

Spotlight on Corruption is an anti-corruption charity that shines a light on the UK's role in corruption at home and abroad. We want to see a society with strong, transparent and accountable institutions which ensure corruption is not tolerated and democracy flourishes both in the UK and globally.

Introduction

1. The Procurement Bill contains important new provisions to introduce a debarment regime in the UK and to tighten up conflict of interest rules for procurement. This is a once in a generation opportunity to ensure that these new provisions are as robust as possible. **In our view, there are several key omissions in the Bill which have the potential to significantly undermine the potential effectiveness of these important reforms, in particular:**
 - **limitations in the scope of the conflicts of interest provisions; and**
 - **crucial gaps in the exclusion and debarment provisions.**

A. Conflicts of Interest

2. The Procurement Bill is an important opportunity to show that recent conflict of interest scandals in procurement, particularly arising from COVID emergency procurement, are being taken seriously and will be prevented in future.
3. The Bill provides welcome new measures such as: obligations for the assessment and mitigation of conflicts of interest; the inclusion of potential as well as actual conflicts of interest; and an obligation to exclude a supplier where conflicts cannot be avoided or a supplier fails to take steps to avoid any unfair advantage such conflicts may bring.
4. However, the Bill falls short of fully implementing several key recommendations made in the various independent reviews about addressing conflict of interest in procurement. These reviews include one by the National Audit Office (NAO);¹ two by Sir Nigel Boardman commissioned by the government;² and a government review of corruption and fraud in local government procurement published in June 2020.³
5. Furthermore, as currently formulated the Bill potentially fails the 'PPE Medpro' or 'Mone' test – that is, the provisions are not robust enough to prevent the conflicts of interest exposed by the PPE Medpro scandal which are now actively under investigation by the National Crime Agency.

¹ <https://www.nao.org.uk/wp-content/uploads/2020/11/Investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf>

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018176/A_report_by_Nigel_Boardman_into_the_Development_and_Use_of_Supply_Chain_Finance_and_associated_schemes_related_to_Greensill_Capital_in_Government_-_Recommendations_and_Suggestions.pdf;

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942347/Boardman_Report_on_Cabinet_Office_Communications_Procurement_FINAL__2_.pdf

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890748/Fraud_and_corruption_risk_s_in_local_government_procurement_FINAL.pdf

What needs to change?

6. In our view, the Procurement Bill should contain:
 - a broader range of actors for whom conflicts of interest should be considered as well as a reference to ‘indirect’ influence;
 - robust and mandatory requirements on suppliers to declare conflicts of interests; and
 - measures to ensure consistency and transparency of application of the conflict of interest rules.

A. Specifying a broader range of actors for whom conflicts of interest should be considered and ensuring ‘indirect’ influence is covered.

7. To capture the wide range of influence on procurement decisions that might give rise to conflicts of interest, we propose the following amendment to the Bill:
 - In clause 80 (3), introduce the phrase ***“directly or indirectly influences”***.
 - In clause 80 (4) insert the following text:

“a person who can directly or indirectly influence” includes, but is not limited to—
(a) civil servants;
(b) government contractors or consultants and their employees;
(c) special advisers;
(d) parliamentarians; and
(e) political appointees.”
8. As the Mone affair and the VIP lane as well as other COVID procurement scandals have shown, indirect influence over procurement decisions pose a real risk to public perceptions about the fairness and integrity of procurement. The fact that a minister, special adviser, or politician referred a company for emergency covid procurement appears to have been at least entertained as part of the decision-making process by procurement officials in awarding contracts. While this was an emergency procurement context, it has exposed the vulnerabilities in the UK procurement regime and the potential for those in political office to influence procurement decisions.
9. Sir Nigel Boardman’s reviews specifically recommended that conflicts of interest in procurement should be identified in relation to a broad range of actors, including: civil servants, special advisers, contractors, consultants and political appointees.⁴ The ‘VIP lane’, as well as the Owen Paterson affair, show that members of parliament, who may have private interests, can also seek to influence government procurement decisions in favour of those interests.
10. As it is not specified on the face of the Bill what the term ‘influences’ may include, it is not clear whether the term will be interpreted narrowly or more widely by contracting

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942347/Boardman_Report_on_Cabinet_Office_Communications_Procurement_FINAL__2_.pdf, Recommendation 23.

authorities. To ensure that it is interpreted widely, in our view, the Bill should contain specific language to reflect indirect influence (which might include lobbying or financial interests), and the wide range of people who may exert such influence.

B. Robust and mandatory requirements on suppliers to declare conflicts of interest

11. To ensure that suppliers are effectively required to declare conflicts of interest they are aware of, we propose the following amendment to the Bill:

- Amend Clause 81 (2) to include after “reasonable steps”: ***“must include, but are not limited to requiring suppliers to:***

(a) Make a conflict of interest declaration before submitting a tender which includes

I. a statement on whether they are employing or retaining (whether in a consultancy, advisory or other role) any individuals who have held ministerial, or senior office within the civil service at Grade SCS1 or above within the preceding 2 years; and

II. a statement on whether any current public official including special advisers, ministers, and members of parliament has a financial interest in the company.

(b) Provide an updated conflict of interest declaration at any stage of the covered procurement if the declaration submitted at tender changes.

(c) Provide written confirmation of compliance with the Suppliers Code of Conduct, or any future guidance that replaces it.”

12. Sir Nigel Boardman specifically recommended that *“suppliers should be required to follow similar processes regarding declarations of actual or perceived conflicts of interest at the outset of a procurement, with appropriate sanctions for non-compliance.”* However, this requirement is not on the face of the Bill as a mandatory requirement. Nor does the Bill make it clear for contracting authorities what ‘reasonable’ steps would consist of.

13. Existing requirements for suppliers to submit conflict of interest declarations are based on voluntary compliance with the Supplier Code of Conduct. Inclusion in the Bill of a legal requirement for suppliers to submit conflicts of interest and comply with the Code’s requirement to mitigate against any real or perceived conflict of interest would significantly strengthen integrity in procurement.

14. Sir Nigel Boardman further recommended that suppliers disclose whether current or former ministers or senior civil servants are employed directly or retained by the firm on their tender documents prior to every procurement exercise. Including this requirement in the Bill would embed transparency into the procurement process.⁵ To ensure a scenario such as the Mone scandal is covered, we also recommend requiring suppliers to declare any financial interests in their company or in any connected person by a sitting public official including

⁵ Recommendation 19:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018176/A_report_by_Nigel_Boardman_into_the_Development_and_Use_of_Supply_Chain_Finance__and_associated_schemes__related_to_Greensill_Capital_in_Government_-_Recommendations_and_Suggestions.pdf

members of parliament, special advisers, and ministers.

15. There should finally in our view be real consequences for suppliers failing to declare conflicts of interest properly. This should include facing debarment from contracting. Currently suppliers only face the prospect of being excluded at the start of a procurement process where conflicts cannot be adequately managed. If suppliers are included in the scope of the conflict of interest provisions in the Bill, it will be important for new language to be included in the exclusions section to ensure suppliers can be excluded where they fail to declare conflicts of interest before submitting their tender.

C. Measures to ensure transparency and consistency in the application of new conflicts of interest rules

16. To ensure that the full range of recommendations made by recent reviews on managing conflicts of interest in procurement and best practice on managing conflicts are reflected in the Bill, we propose the following amendments:

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

17. The reviews carried out by Sir Nigel Boardman, as well as the National Audit Office and Local Government procurement review all recommended a raft of measures to ensure more robust management of conflicts of interest across government procurement. The Bill should in our view seek to reflect these recommendations, including the NAO’s key recommendation that public authorities maintain clear documentation of management of conflicts of interest.⁶

18. To ensure that all contracting authorities implement the measures in the Bill consistently it is essential that the new Procurement Review Unit issues guidance on, and provides oversight over, how conflicts of interest are managed. The guidance should reflect recommendations made by the Ministry of Housing, Communities and Local Government review into risks of fraud and corruption in local government procurement, that conflict of interest declarations are collected from all panel members ahead of procurements and that

⁶ <https://www.nao.org.uk/wp-content/uploads/2020/11/Investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf>

'nil' returns are included; and that there are accessible registers of interest.⁷

19. To ensure that there can be adequate public scrutiny over how contracting authorities are implementing the new conflict of interest provisions we also recommend that there be a requirement in the Bill for contracting authorities to report publicly at least annually on how they are managing conflicts of interest. The Procurement Review Unit should also publish an annual overview of how they are providing oversight on implementation of conflicts of interest.
20. There is no doubt that these measures would be much easier for procurement officials in contracting authorities to implement if other recommendations that have been made about improving conflicts of interest management more generally across government were speedily implemented. This includes recommendations made by Nigel Boardman that:
 - centrally managed publicly accessible and register⁸ of standardised conflict of interest declarations be created;⁹ and
 - government departments be required to publish detailed conflicts of interest guidance covering all aspects of identifying, managing and mitigating conflicts of interest, including disciplinary measures that will be taken where there are breaches.¹⁰

B. Debarment and exclusion amendments

21. Exclusion and debarment from procurement are potent anti-fraud and anti-corruption tools which protect the public purse from rogue actors and drive up corporate governance standards.¹¹ Nearly a quarter of local councils (23%) experienced fraud or corruption in 2017-2018.¹² Fraud costs the public purse up to 5% of government spending overall.¹³
22. It is highly welcome that the government has announced the creation of a central debarment register in the new Procurement Bill. Alongside the new debarment register, the Procurement Bill has also introduced a new regime for excluding companies from public contracts that departs in significant ways from the current EU based model.

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

⁸ Recommendation 1: Government should establish an effective method for ensuring compliance with governance processes and the wider regulatory framework.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018176/A_report_by_Nigel_Boardman_into_the_Development_and_Use_of_Supply_Chain_Finance_and_associated_schemes_related_to_Greensill_Capital_in_Government_Recommendations_and_Suggestions.pdf

⁹ Recommendation 20: "Declarations of interests should be recorded and logged alongside the departmental gift register and, where appropriate, this and other, relevant information should be made available to those responsible for procurement and contract management."

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942347/Boardman_Report_on_Cabinet_Office_Communications_Procurement_FINAL_2_.pdf

¹⁰ Recommendation 19:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942347/Boardman_Report_on_Cabinet_Office_Communications_Procurement_FINAL_2_.pdf

¹¹<https://www.sussex.ac.uk/webteam/gateway/file.php?name=csc-wp-series-hawley-what-makes-a-good-debarment-regime-sept-2020.pdf&site=405>

¹²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890748/Fraud_and_corruption_risks_in_local_government_procurement_FINAL.pdf

¹³ <https://www.gov.uk/government/publications/cross-government-fraud-landscape-annual-report-2019>

23. There has been very little use of exclusion in the UK to date under current EU-based rules and the new Procurement Bill is an opportunity to address the weaknesses in these rules. However, the current Bill as formulated contains some significant issues and crucial gaps which have the potential to seriously undermine the effectiveness of the debarment register and the exclusion regime and lead to the register standing empty for many years. This would undermine the reputation of the register and the UK's anti-corruption efforts in general so it is crucial to get this right at this critical stage in the Bill's development.

What needs to change?

24. In order to ensure that the debarment and exclusion regimes are as effective as possible, we recommend that:
- **There are clearer rules for when suppliers engaged in wrongdoing can contract.**
 - **Crucial corporate offences for bribery, money laundering and sanctions evasion are reflected in the list of offences that form the basis for exclusion.**
 - **Contracting authorities be given the power to exclude suppliers where they have evidence of, not just a conviction for, wrongdoing.**

A. Clearer rules for when suppliers engaged in wrongdoing can contract

25. To ensure that there are clearer rules for when a supplier can contract after engaging in wrongdoing and to reduce the discretion for contracting authorities, we propose the following amendments:
- **The removal of clauses (c) and (e) altogether from clause 58 (1), which give contracting authorities almost total discretion to allow a supplier that should be excluded to continue to contract for whatever reason.**
 - **The removal of clause 58 (3) which limits the ability of contracting authority to require whatever evidence is necessary to make their assessment about whether a supplier is reliable.**
26. Clause 58 of the new Bill significantly expands the circumstances in which companies can be deemed to have become reliable to contract after engaging in wrongdoing. This is very concerning given how few exclusions there have been so far under existing procurement regulations, not least because of fears from contracting authorities that they may open themselves to legal challenge in making exclusions. The current framing of Clause 58 will arguably make contracting authorities even less likely to exclude suppliers for wrongdoing because there are now even less clear criteria against which they can make such a decision and because the Clause introduces new grounds on which they may face a challenge if they do make an exclusion.
27. The new circumstances include (clause 58 (1) (c)) allowing companies to contract on the basis that they commit to taking steps to prevent wrongdoing occurring again, rather than showing they have concretely taken steps to do so. It is highly unlikely that contracting authorities will have capacity to follow up on whether companies have taken such steps. It is therefore essential that they are able to assess whether a supplier is reliable as it currently operates rather than as it promises to operate in the future.
28. The new circumstances also include (clause 58 (1) (e)) a new highly discretionary catch-all ground that contracting authorities can consider "*any other evidence, explanation or factor.*"

This gives contracting authorities free reign to come up with whatever reason they like to continue to contract with a supplier that has engaged in wrongdoing. Rather than making the exclusion regime more robust, these new circumstances in clauses (c) and (e) potentially undermine the exclusion regime altogether and create the risk that no companies will be excluded from contracting in the UK under the new regime.

29. Finally, Clause 58 (3) restricts the ability of contracting authorities to require evidence from suppliers on steps taken unless they are satisfied that it is proportionate to do so. This exposes contracting authorities to the potential risk of legal challenge if they ask for documentation to support their assessment as to whether the circumstances that gave rise to the exclusion ground are likely to occur again. Rather than empowering contracting authorities, the risk is that this clause sends the message that they should only use exclusion in a light-touch way if at all.

B. Crucial corporate offences for bribery, money laundering and sanctions evasion are reflected in the list of offences that form the basis for exclusion.

30. To ensure that the full list of corporate economic crime offences that suppliers may commit making them risky to contract with, and to ensure that there is greater fairness between large companies and SMEs in relation to exclusion, we propose that Schedule 6 of the Bill be amended in the following ways:

- a. **Insert in Clause 17 “An offence under Section 1, 2, 6 or 7, of the Bribery Act”.**
- b. **Insert in Clause 14, after “section 327, 328 or 329 of the Proceeds of Crime Act” the following: “or an offence under section 86, 88 or 92 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (money laundering offences).”**
- c. **Insert new Clause 19: “an offence under Schedule 3 of the Anti-Terrorism, Crime and Security Act 2001 (sanctions evasion offences)”.**

31. There are some serious gaps in the list of corporate offences that form the basis for mandatory exclusion from public procurement. These include:

- **Section 7 of the Bribery Act – corporate failure to prevent bribery offence.**
 - i. Section 7 of the Bribery Act contains a ‘failure to prevent’ offence for corporates. It is the primary corporate offence under the Act. While the ‘failure to prevent’ tax evasion has been included in the Procurement Bill as a mandatory ground for exclusion, the ‘failure to prevent’ bribery offence has not. This is inconsistent and anomalous, and will result in few companies that engage in bribery facing exclusion from public procurement.
 - ii. Although companies can also be prosecuted under sections 1, 2 and 6 of the Act, this is subject to the application of the ‘identification doctrine’ – an antiquated doctrine that is widely regarded by prosecutors at the CPS and SFO as unfair as it makes it hard to prosecute large global companies and easier to prosecute SMEs.¹⁴ The effect of this is that, unless Section 7 is included in the Bill, SMEs are more likely to face exclusion from public procurement for bribery offences than large companies.

¹⁴https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7g/uploads/2022/06/Corporate-Criminal-Liability-Options-Paper_LC.pdf, pp.40-41.

- iii. The inclusion of Section 7 in the Bill would encourage large companies facing investigations for bribery to self-report their wrongdoing to authorities and cooperate with them in order to avoid being excluded. This would help law enforcement bodies develop more effective enforcement of the Bribery Act.
- **Corporate money laundering offences.**
 - i. There have been very few if any corporate convictions for Sections 327-9 of the Proceeds of Crime Act. As the recent conviction of NatWest bank for money laundering under the Money Laundering Regulations 2007 shows, the criminal offences under these regulations (updated in 2017) are an important means of holding companies to account for money laundering and the failure to prevent it.¹⁵ It is anomalous therefore to include money laundering offences under the Proceeds of Crime Act but not criminal offences under the Money Laundering Regulations.
- **Sanctions evasion offences**
 - i. The Bill currently contains no reference to criminal offences for sanctions evasion. Given the government’s current policy of imposing sanctions to ensure its foreign policy goals in relation to Russia’s invasion of Ukraine, and the government’s ambition to use sanctions to achieve important foreign policy goals to be a ‘force for good’ globally, this is a major omission. Incorporating criminal offences for sanctions evasion in the Bill would make companies across the UK take their obligations to comply more seriously.

C. Giving contracting authorities power to exclude where they have evidence not just a conviction

32. In order to give contracting authorities power to exclude where they have compelling evidence of wrongdoing, we propose an amendment as follows:
- a. In Schedule 7, after the section “Potential competition infringements” add new section ***“Financial and economic misconduct”*** as follows:
A discretionary exclusion ground applies to a supplier if the decision-maker considers that there is sufficient evidence that the supplier or a connected person has engaged in conduct (whether in or outside the United Kingdom) constituting (or that would, if it occurred in the United Kingdom, constitute) any of the following offences —
 - i. An offence under section 327, 328 or 329 of the Proceeds of Crime Act 2002 (money laundering offences).***
 - ii. An offence under section 86, 88 or 92 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.***
 - iii. An offence under Schedule Three of the Anti-Terrorism, Crime and Security Act 2001 (sanctions evasion offences).***
 - iv. An offence under section 2, 3, 4, 6 or 7 of the Fraud Act 2006 (fraud offences).***
 - v. An offence under section 993 of the Companies Act 2006 (fraudulent trading).***

¹⁵ <https://www.fca.org.uk/news/press-releases/natwest-fined-264.8million-anti-money-laundering-failures>

vi. An offence under section 1, 2, 6 or 7 of the Bribery Act 2010 (bribery offences).

33. The current Bill empowers contracting authorities to take action where they have sufficient evidence of modern slavery and human trafficking, and where they consider a supplier has engaged in a cartel offence, but does not empower them to take similar action where they have evidence of financial and economic crime such as fraud or corruption.
34. Currently, under the exclusion and debarment provisions in the Bill, Contracting Authorities are only able to consider excluding those against whom there has been a conviction, or where there is professional misconduct. There is no case law in the UK providing clarity about the precise definition or scope of the previous definition of “grave professional misconduct” in current procurement legislation. While the new definition of “professional misconduct” is welcome, and states that it includes ‘impropriety’, it is not clear whether this will fully cover the situation where a Contracting Authority has evidence or knowledge of any of financial and economic offences but there has been no conviction. There is a risk that professional misconduct may be interpreted solely as findings by professional bodies of ethical breaches rather than covering broader ethical or legal breaches, or lesser ethical breaches than criminal conduct. Empowering contracting authorities to consider evidence where they have it or are able to get it, as this amendment clarifies, will enable them to take action, while not putting a duty on them to do so.
35. The ability of Contracting Authorities to act on evidence is critical to protecting the integrity of public procurement. In the US debarment regime, debarment officials can act on evidence rather than waiting for a conviction.¹⁶ Furthermore, a 2020 government review of fraud and corruption in local government procurement specifically highlighted that the government should *“see if more could be done to allow procurers to exclude bidders from the process (with reasonable cause and without the requirement to disclose), for example when there are known concerns with law enforcement that have not yet resulted in a prosecution.”*¹⁷
36. Ensuring that Contracting Authorities can exclude companies where there is good evidence of financial and economic crime, particularly where investigations are underway, is particularly important given the historically low levels of prosecution of companies and individuals for economic and financial offences in the UK despite huge reported increases in crimes such as fraud, in large part because of serious lack of resourcing for law enforcement. Fraud convictions for instance have declined by two-thirds over the past 10 years.¹⁸ Furthermore, a supplier may be most at risk of being unreliable before rather than after a conviction, and investigations by law enforcement can take many years to result in enforcement action.
37. Introducing this new clause, as long as it is accompanied by due process appeal rights for the companies concerned as outlined in the debarment provisions in the Bill – will incentivise good corporate governance by suppliers and connected persons and empower contracting authorities to crack down on corruption and fraud in procurement.

For more information please contact: James@spotlightcorruption.org

¹⁶ <https://www.doi.gov/sites/doi.gov/files/faq-suspension-and-debarment-for-website.pdf>

¹⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890748/Fraud_and_corruption_risks_in_local_government_procurement_FINAL.pdf

¹⁸ <https://publications.parliament.uk/pa/ld5803/ldselect/ldfraudact/87/87.pdf>