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Innovation & Skills

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Dear Lord McKenzie,

SMALL BUSINESS ENTERPRISE AND EMPLOYMENT BILL: COMMITMENTS TO WRITE

During the Grand Committee debate of the Small Business, Enterprise and Employment Bill I made two commitments to write with some additional information covering:

- (a) how the prompt payment legislation will be implemented and monitored; and
- (b) how LEAN procurement practices have contributed to supporting small and medium-sized enterprises (SMEs) in public procurement.

I am writing now to provide this information and also to provide the further information on the Mystery Shopper service which Lord Popat committed to providing.

Prompt Payment

As I explained during the debate, the Public Contract Regulations 2015 that the Government plans to bring into force early this year will place a duty on contracting authorities to pay their immediate suppliers within 30 days and to include terms in their contracts to pass these 30 day payment terms all the way down the public sector supply chain. As part of this duty, contracting authorities will be required to publish the number of invoices paid late to their first tier suppliers on an annual basis, to show how they have performed in this area.

The Government is developing new guidance for contracting authorities in relation to this prompt payment legislation. This guidance will seek for the first time to standardise the public sector's approach to the payment of invoices.

Government departments in particular will be required to publish performance data on both the Government's prompt payment policy of paying 80% of invoices within 5 days and their performance on paying all invoices within 30 days.

In addition, the Mystery Shopper service will be able to investigate whether contracting authorities are meeting their prompt payment duties. Mystery Shopper can respond to complaints made but is also able to carry out its own spot checks about compliance (and has investigated on this basis in the past). Mystery Shopper has also looked at whether suppliers are failing to pay their subcontractors as part of an investigation and will continue to investigate such matters.

You also asked whether the Government can provide stronger incentives to encourage the use of e-invoicing. The Government is clear that e-invoicing can support prompt payment, reduce errors and save costs for both suppliers and authorities. Clause 38 of the SBEE Bill contains a regulation making power to impose duties relating to accepting invoices by electronic means. The Cabinet Office has not included e-invoicing in the draft illustrative regulations (which have been provided to the House of Lords Library) provided for the purpose of the Lords' consideration of clause 38, for the reasons set out in the policy statement accompanying those regulations. So while it is too early to say exactly what regulations may be appropriate, the Government is currently working on the best ways to incentivise and achieve increased take-up of e-invoicing in central Government and the wider public sector, bearing in mind existing use and plans for e-invoicing by Departments and other public bodies. In doing so, the Government will continue to engage with interested parties, including the public sector, invoicing service and solution providers and suppliers to the public sector.

Finally, I stated in the debate that we would be happy for the Government to arrange for an appropriate Minister to write to the strategic suppliers to ensure prompt payment before the end of the Parliament. I am now advised that Strategic Suppliers are those suppliers with contracts across a number of Departments whose revenue from Government according to Government data exceeds £100m per annum and/or who are deemed significant suppliers to Government in their sector. The number currently stands at 34, not 100 as I suggested, but I can confirm that an appropriate Minister will be writing.

LEAN procurement

One of the biggest complaints from SMEs and other business groups has been that UK procurements are unnecessarily long, complex and bureaucratic, locking out smaller suppliers due to the expense incurred in bidding. Adopting LEAN sourcing principles should ensure that procurement is streamlined, and waste and repetition is removed from the process. The key principles of LEAN that support SMEs are the emphasis on pre-procurement market engagement, as well as shorter overall timescales, which have led to lower bid costs.

As a result of mandating LEAN sourcing principles in central government in January 2012 and setting a target that all but the most complex procurements must be completed within 120 working days, central government procurement timescales have more than halved from 208 to 102 working days. As a result of this and other measures to open up central government procurement, direct SME spend increased from £3bn (6.5% in 2009-10) to £4.5bn (10.5%) in 2012-13. SMEs benefitted from an additional £4bn (9.4%) of spend in the supply chain in 2012-13.

Mystery Shopper service

The clause, as you will remember, imposes a duty on contracting authorities to cooperate with investigations and provide documents and other information related to the investigation within 30 days. In the last six months alone there have been 15 instances during investigations of referrals and spot checks where the service has been unable to obtain any responses or get hold of documents. These new powers would have helped the service get answers in all of these cases.

Turning to the matter of publication, published results succinctly cover the focus of the investigations, the findings and, critically, the action agreed by the contracting authority to rectify the issues found. The service also highlights where a contracting authority has refused to accept its recommendations.

Publication of results is an important feature of the service as it enables the Government to highlight poor practice and the advice given to rectify it, from which other authorities can learn. It also provides a way of naming and shaming public bodies which do not accept recommendations. Where appropriate, it can also be used to name large suppliers who do not pay their small business sub-contractors promptly in public sector supply chains.

In addition, annual reports are published which highlight key themes and advice including the results of proactive public procurement spot checks. These findings have concluded that there remain issues relating to excessive qualification requirements being demanded by authorities in assessing financial strength, poor use of pre qualification questionnaires and poor payment practices. These publications are broadcast by twitter and potentially reach up to 4 million people.

I believe that publishing more information does not fit with the aim of publishing succinct, user-friendly reports, appropriate to the issue being investigated. Also, very often, the documents the Mystery Shopper service looks at, such as tender documents and pre-qualification questionnaires, are already publicly available on authorities' websites. Increasingly this type of information will be available via Contracts Finder.

A key element of Mystery Shopper is its agility. It would be time-consuming and wasteful to oblige them to publish the evidence considered, especially if they have to discuss with authorities if certain information is commercially sensitive, potentially requiring detailed redaction of documents prior to publication.

Mystery Shopper operates as a free-to-complainant service that allows them to raise concerns anonymously if they wish. Our experience has been that contractors and bidders are often anxious about whether the contracting authority will find out that they have complained, fearing it might cause problems for existing and future contracts. This is a reason why some contractors and bidders don't complain directly, especially about prompt payment issues. Mystery Shopper reassures bidders that it will preserve anonymity of complaints, but if it were required to publish evidence it has considered, some complainants might be put off using Mystery Shopper to air legitimate concerns. As the clause stands, the Minister can continue to publish reports of investigations in a flexible and user-friendly way, while respecting commercial confidentiality and preserving anonymity.

Finally, I was asked why clause 39 provides for the Minister for the Cabinet Office and the Secretary of State to carry out the Mystery Shopper service investigations and does not allocate any powers to the Minister to delegate. The Carltona principle, established by the Court of Appeal decision in *Carltona Ltd v Commissioners of Works and Others* [1943] 2 All ER 560, permits officials to act in a Minister's name without the need for a formal delegation of authority. Therefore clause 39 does not need to state that the Minister's powers may be delegated in order for the powers in clause 39 to be operated on behalf of the Minister by officials in the Cabinet Office. I hope this explanation assists.

I am copying this letter to those who contributed to the debate and placing a copy of this letter in the House libraries.

A handwritten signature in black ink that reads "Lucy Neville-Rolfe". The signature is written in a cursive, flowing style.

BARONESS NEVILLE-ROLFE DBE CMG