



Lord True CBE  
Minister of State  
Cabinet Office 70 Whitehall London SW1A 2AS

ADDRESS: Interested Peers

7th June 2022

My Lords,

### **PROCUREMENT BILL: SECOND READING**

I am writing to you as a speaker in the Second Reading debate for the Procurement Bill, or as a Peer who has expressed a keen interest in this Bill. I will be using this letter to address some of the issues I did not have time to cover in my closing speech.

Thank you to all who attended the Second Reading, it was a lively discussion and I welcome the interest and constructive comments raised during the session.

#### **Scope of the Procurement Bill**

In response to the point the noble Lord, Lord Coaker raised on the scope of the Procurement Bill, I can assure you that exemptions have only been taken where there is a credible commercial or security case for doing so, or where it would be entirely inappropriate (such as in the case of employment contracts or land agreements). An exemption exists for Private Utilities where they operate in a competitive environment, where it wouldn't be appropriate to regulate for procurement as the competitive market regulates itself. In the future, we intend to exempt private utilities further, to reduce the regulatory burden to no more than is considered necessary for the sector to operate, bearing in mind the role they have, and is required by our international agreements. Similarly, there are clear reasons why some defence procurement should be exempted in the interests of national security. In addition, the Health and Care Act 2022 will create a bespoke provider selection regime, which makes particular provision for the procurement of certain healthcare services (ie patient treatment services) by a limited cohort of contracting

authorities, and these will be exempt from the scope of the Procurement Bill. Taking this into account, we estimate the procurement bill to cover over 75% of all procurement spend across the public sector.

### **Litigation costs for small businesses**

The noble Lord, Lord Mendelsohn's point about litigation costs. As the noble Lord noted, small businesses can already refer private sector organisations to the Office of the Small Business Commissioner (OSBC).

The OSBC was set up by the Government under the Enterprise Act 2016 to tackle late payment and unfavourable payment practices in the private sector. Whilst this is focused on private sector business, the Cabinet Office has already established a service where businesses can raise late payment complaints. The Public Procurement Review Service has been successful in releasing over £9m of late payments for businesses and investigates complaints about poor procurement practice by contracting authorities.

Additionally, with a more transparent regime, any breaches during the procurement process will be identifiable by suppliers earlier enabling issues to be raised and rectified without the need for formal Court litigation.

### **China and supply chain resilience**

The noble Lord, Lord Alton of Liverpool, raised concerns about Chinese technology companies. I take these concerns extremely seriously. As I mentioned in my opening speech, this Bill will strengthen the approach to excluding suppliers where there is clear evidence of their involvement in forced labour or other Modern Slavery practices. We are also making it clearer that any serious breach of ethical standards applicable to a supplier can be considered to be professional misconduct, which may lead to exclusion.

We are also taking action in the Procurement Bill to introduce a new ground for exclusion specifically to address situations where a supplier poses a threat to national security. The new exclusion ground allows contracting authorities to exclude suppliers and their bids where the authority considers the supplier (or a person connected to them) poses a threat to the national security of the UK. Before excluding a supplier on this ground, the contracting authority must secure approval from the Minister for the Cabinet Office.

It will be up to contracting authorities to apply the grounds for exclusion for each procurement, and guidance will be provided to assist contracting authorities in identifying threats to national security.

The noble Lord also raised the issue of supply chain resilience. This was also raised by the noble Lords, Lord Stevens of Birmingham and Lord Mendelsohn. Government has a responsibility to ensure the services it operates and the contracts it has in place are sufficiently secure and robust, and that the suppliers delivering and supporting these services have the correct controls and practices in place to maintain the integrity of these services.

The Cabinet Office has published extensive guidance Playbooks on Sourcing in different sectors and suppliers of critical public service contracts are obliged by their contracts to provide resolution planning information. Although major insolvencies are infrequent, in such cases this will help ensure the government is prepared for any risk to the continuity of critical public services and enable their orderly transfer to a new supplier or delivery in-house.

As a result of the pandemic, inshoring or reshoring has risen up the policy agenda. From a UK Government procurement perspective, inshoring is one possible option amongst a range of delivery options. Bids that feature inshoring as part of the solution need to be considered in the same way as all other bids and should only be accepted if they offer the most advantageous offer, including consideration of best value for money based on whole life costs, following a legally compliant procurement.

Inshoring for resilience may seem appropriate for critical supply chains where there is a vulnerability that cannot be removed through other levers, for example; to reduce a high dependence on a single supplier where there are inadequate options to diversify; and to meet high demand during a crisis where international supply is insufficient. However, inshoring alone cannot reduce the vulnerability to a potential demand spike (such as a future pandemic) and as such other approaches are more appropriate to mitigate that risk. Further, except in some cases, such as national security, as a general rule, to insist that suppliers are based in the UK would not be compliant with our obligations under our international agreements, which I have explained, bring significant benefits. What we can do, however, is reduce reliance on single suppliers, whether based abroad or in the UK, and ensure we have a diverse range of suppliers able to meet our needs.

### **Interaction with the Health and Care Act 2022**

Many of my noble Lords, Baroness Hayman, Baroness Brinton, Baroness Noakes, Lord Hunt and Lord Stevens asked about the procurement of healthcare services. The intention is that the provisions in the Procurement Bill will be disapplied for a tightly defined subset of healthcare services provided to individuals (i.e. patients and service users), and only to the extent that these are procured by relevant healthcare authorities including NHS bodies and local authorities. This will enable the forthcoming healthcare procurement regulations to be made under the Health and

Care Act 2022 to establish the regime which will regulate these services. This separate regime will be called the 'Provider Selection Regime'.

The scope of the Provider Selection Regime will be supported by reference to Common Procurement Vocabulary (CPV) codes which help procurement personnel classify their contract notices consistently and to make it easier for suppliers and contracting authorities to find notices. An indicative list of these healthcare-specific CPV codes was included in DHSC's recent consultation exercise on the Provider Selection Regime<sup>1</sup>.

Cabinet Office and DHSC continue to work closely together to ensure that the forthcoming healthcare procurement rules include the appropriate CPV codes, and any clarification where the CPV code in question is wider than the intended scope of the PSR.

Regulations and Guidance to be brought forward by DHSC will set out transparency requirements for decisions made under the Provider Selection Regime. These requirements will be built around the specific processes used under the Provider Selection Regime to award contracts. This was also an area that DHSC consulted on recently ([as above](#)).

The Procurement Bill retains the longstanding concept of light touch rules for health, education, social services and some other services contracts. The scope of this is intended to be similar to the existing light touch regime under the Public Contracts Regulations 2015<sup>2</sup>; the CPV codes currently covered can be found at schedule 3 of those regulations. The Bill will continue to cover healthcare services out of the scope of the PSR, and when procured by authorities outside the relevant authorities definition of the Health and Care Act 2022.

### **Below threshold procurements**

The noble Lord, Lord Fox referred to non discrimination obligations on contracting authorities in relation to procurements below World Trade Organisation Government Procurement Agreement thresholds.

The non-discrimination rule at clause 82(1) has to be read in conjunction with clause 81(1) and (2). The rule applies only where a treaty state supplier is entitled to the benefits of an international agreement specified in Schedule 9 and only to the extent that the procurement in question is covered by that agreement.

Currently only the UK-EU Trade and Co-operation Agreement (TCA) has obligations on below threshold procurement, and very limited obligations at that. Articles 287 and 288 of the TCA require with regard to any procurement - so this includes below threshold - that contracting authorities in the UK must treat EU-owned suppliers

---

<sup>1</sup> [Provider Selection Regime: supplementary consultation on the detail of proposals for regulations](#)

<sup>2</sup> <https://www.legislation.gov.uk/uksi/2015/102/made/data.pdf>

established in the UK no less favourably than UK-owned suppliers. EU suppliers not established in the UK do not benefit from this provision. The non-discrimination rule at clause 82(1) therefore currently applies only to this limited obligation with regard to below threshold procurement. This provision is reciprocal and therefore also benefits UK suppliers established in European Union states.

Below WTO GPA thresholds there is flexibility for contracting authorities to restrict procurements to UK-only suppliers. However, to comply with the TCA, where the contracting authority elects to restrict competition in this way it must treat tenders from EU-owned suppliers established in the UK no less favourably than tenders from UK-owned suppliers.

### **Data protection**

In response to the noble Lord Fox's point on data protection, the new data platform will indeed deliver enhanced centralised data on UK public contracts and spending. All data sent by contracting authorities via our new procurement noticing regime will be published on a publicly available central digital platform, enabling contracting authorities, suppliers and the public to gain insight into UK public procurement.

The data gathered via the notices and displayed in the platform will relate solely to the public sector's commercial activity, including tender opportunities, award of contracts, spending and contract performance. The vast majority of this data is commercial. Sharing it will enhance the fair and transparent conduct of commercial activity across the public sector, saving taxpayers money and improving commercial outcomes.

A small amount of the information that we will collect (for example the names of any sole traders or partnerships working on government contracts) is likely to count as personal data and is therefore covered by the Data Protection Act. The Procurement Bill creates a legislative basis under article 6(1)(c) of the UK GDPR, permitting contracting authorities to share this data where the Bill requires them to. However, all such data must still be processed in accordance with data protection law.

As Lord Fox mentions, the UK data protection regime is currently being reviewed and DCMS has recently consulted on their proposals for reform in the document 'Data: A new direction'<sup>3</sup>. The UK's historic commitments to high data protection standards and public trust in personal data use will continue to be at the heart of our regime. The proposals build on the fundamental principles of the UK GDPR and these will continue to underpin the trustworthy use of data to support our world-leading digital ecosystem.

---

<sup>3</sup> <https://www.gov.uk/government/consultations/data-a-new-direction>

## **Housing Associations**

The noble Lord, Lord Best raised a question about the extent to which Housing Associations are covered under the Procurement Bill.

The test of whether a body is a contracting authority needs to be undertaken and applied on a case by case basis. It is not possible to say with certainty how that definition applies to every single Housing Association as they may all have slightly different characteristics that must be taken into account case by case. However, I have explained below in general terms how the definition works in the context of Housing Associations.

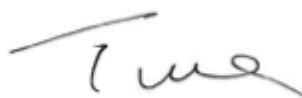
The proposed definition, as with its predecessor set out in the Public Contracts Regulations 2015, does not address individual bodies or categories of bodies explicitly. There are simply too many bodies that exist and that change over the course of time to address it this way. Rather, the definition incorporates a number of tests which determine whether a particular body is covered or not.

Registered Providers of Social Housing are included in our coverage schedules to the WTO Agreement on Government Procurement under the indicative list of bodies that may be covered. The new definition aims to ensure consistency with these commitments. In general terms it is likely that such bodies are undertaking 'functions of a public nature'.

So it follows that publicly funded Housing Associations would normally be in scope of the contracting authority definition, having met the relevant function and funding tests. On the other hand, privately funded providers of social housing that operate in a competitive commercial environment would not be in scope as they do not meet either the funding or control requirements set out in the definition.

I once again thank all peers who contributed to the debate, and look forward to committee stage, which I expect will be equally as constructive. I will be depositing this letter in the House library to allow all peers to access this information. My policy officials will be hosting a teach-in session on the digital platform ahead of committee. If you would like to attend this event then please contact [ppreformbillteam@cabinetoffice.gov.uk](mailto:ppreformbillteam@cabinetoffice.gov.uk).

**Yours sincerely,**

A handwritten signature in black ink, appearing to read 'True', with a long horizontal stroke above the first few letters.

**Lord True CBE**