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*Dear Pauline Sheil,*

**PROCUREMENT BILL: PROCEDURES**

I write following Committee Day 5 of the Procurement Bill on 18 July 2022 and the Group 3 discussion on 'competitive procedures'. There were three non-government amendments in this group (96, 105 and 107) which were not moved, but I promised to provide more detail on:

- a) an appropriate situation in which a fully open tendering procedure would not be required (in light of amendment 105); and
- b) how a contracting authority can take into account considerations from the perspective of the supplier (in light of amendment 107).

***When it is appropriate not to use the open procedure under 19(2)(a)***

As indicated in my speech, open, selective and 'limited tendering' (direct award) are globally recognised procurement processes. These are reflected in available procedures under existing procurement law (the Public Contracts Regulations 2015 or PCR).

The open procedure under the PCR is popular where the requirement is well defined and straightforward; price is likely to be the key feature. There is no advance pre-qualification stage for suppliers; any interested party can submit a tender and a large number of tenders are often received (and need to be assessed by the contracting authority). The open procedure is maintained in the new regime.

However, an improvement to the PCR position of having multiple different procedures which allow for a 'selection' stage (and are prescriptive about how those are run) is our new flexible process in 19(2)(b), which allows contracting authorities to design procurements where the competitive pool may be limited in different ways.

For example, the procurement of a software product might have multiple stages. Stage 1 could assess suppliers' qualifications as part of the conditions of participation. Stage 2

could narrow the field further through the assessment of a prototype or product testing. A final stage could then assess the shortlist of bidders against the award criteria.

As required by clause 19(1), the competitive tendering procedure will need to be detailed and run in accordance with the tender notice and associated tender documents, so the procedure will be known to suppliers at the commencement of the procurement.

*Competitive procedure being proportionate from supplier perspective*

To counterbalance the flexibility given to contracting authorities to design a competitive procedure, we want to ensure that procedures do not become overly convoluted or burdensome for suppliers by contracting authorities 'over-engineering' the procedure.

We believe that clause 19(3) achieves this, as it says "*a contracting authority must ensure that the procedure is a proportionate means of awarding the public contract, having regard to the nature, complexity and cost of the contract*" (emphasis added).

Set against 19(2)(b), 19(3) is indeed intended to ensure that procedures are not designed in a manner that is unnecessarily complex or burdensome for suppliers but this is achieved via the contracting authority having to consider what is proportionate in the context of the contract, without supplier interests driving the specifics of the process used to award public contracts.

We consider it would be going too far to say contracting authorities need to consider this 'from the perspective of the suppliers' (that addition would also make it too subjective a test).

We believe that these assessments are best considered by contracting authorities in the round following preliminary market engagement (see clause 15). Otherwise it would be possible for prospective suppliers to assert that a procedure is not proportionate when it doesn't suit them (in reliance on the obligation placed on contracting authorities in this clause). However, a legitimate challenge could be raised in the context of the clause (as drafted) if it is clear that the design of the procedure is disproportionate to the contract requirement. Further, the procurement objectives in clause 11 would apply.

I hope this additional explanation is helpful to understand the approach taken to clause 19 and alleviates concerns raised during committee.

I will also place a copy in the House library.

*Yours ever,  
Jane*

**BARONESS SCOTT OF BYBROOK**