



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

Lord Wallace of Saltaire
House of Lords
London
SW1A 0PW

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4th August 2022

Dear Lord Wallace,

PROCUREMENT BILL: SAME TREATMENT

Thank you for your contributions to the debate on the Procurement Bill thus far during Committee. I offered to write on what criteria are used when the contracting authority decides they will treat suppliers differently under Clauses 11(2) and (3).

Clause 11(2) requires contracting authorities to treat all bidders the same, unless a difference between them justifies different treatment. The aim of this obligation is to ensure contracting authorities allow suppliers to compete on equal terms to win public contracts. Clause 11(3) is an important restriction on the ability of contracting authorities to permit different treatment, even if difference is justified. In any event, the contracting authority must do what it can to make sure it is not unfair.

On the face of it clause 11(2) gives contracting authorities a wide discretion on how to justify any decision on different treatment, insofar as there are no other provisions in the Bill which specifically limit that discretion. In reality, though, the discretion is much more limited than that. Any such treatment must not breach other provisions in the Bill, such as the prohibition on discrimination in clause 82 and must ensure that regard is had to the importance of the matters set out in clause 11(1)(a)-(d). Any justification must also be one that is relevant in the context of the Bill as a whole and must therefore be one that is relevant to the carrying out of a procurement, taking into account the things that the Bill is trying to achieve. So, for example, treating two suppliers differently because they employ more or fewer people in a given area would not be an appropriate justification for different treatment. But treating two suppliers differently because one has better qualified staff and a better track record

of delivering similar projects would clearly be an appropriate justification in the context of the Bill as a whole.

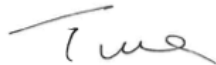
In addition to this, the normal standards of administrative law, such as reasonableness, will apply to any such decisions.

Different treatment does not necessarily mean that suppliers are competing on unequal terms. The different treatment might be a necessary adjustment to allow suppliers to compete in equal terms, for example, measures imposed on a supplier to mitigate conflicts of interest so that the other suppliers are not placed at an unfair advantage or disadvantage over others in relation to the specific procurement.

Another example might be where a contracting authority is attempting to ensure a level playing field for suppliers by reducing the inherent competitive advantage of an incumbent supplier. In those circumstances, the contracting authorities' procurement policies should provide sufficient information on how the authority deals with these common problems so the approach can be understood by all suppliers. This might, for example, involve publishing more information on the contract, including information that the incumbent supplier has access to that competitors may not.

Thank you again for your engagement on this. I will also deposit this letter in the House Libraries.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'True', with a horizontal line above it.

Lord True CBE