

Written evidence submitted by Michael Bowsher QC (TB18)

Written Evidence: Trade Bill 2019-21

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1. I have been in private practice as a Barrister since 1985 and am now in practice in England & Wales, Northern Ireland and the Republic of Ireland. The core of my practice concerns the processes for procurement of government contracts and their performance. I advise on these matters in the UK, Ireland and in a range of other jurisdictions around the world.
2. Since 2013 I have been increasingly active teaching procurement law at King's College London on various graduate degrees. I set up and now direct a distance learning diploma and Master's course in public procurement law at King's.
3. In this short note of evidence I focus only on a few of the many procurement law issues raised by the Trade Bill.
4. Procurement law seeks to protect or promote a number of important outcomes for society. Historically it has been all too easy to dismiss the necessity for procurement law by failing to note the broad significance of these outcomes. A core concern with this Trade Bill is that by providing for procurement legislation to be implemented simply as an implementation of a trade measure without any acknowledgment of these other necessary outcomes is to diminish the prospect that procurement law will be effective in pursuing these goals. This would be to repeat the very same error that was made in 1991 when procurement law was implemented in the UK simply as an implementation of EU internal market law obligations in secondary legislation without any recognition of the wider issues. This has meant that all too often policy makers, procurement officials and the courts have focussed on internal market issues to the detriment of other core societal goals.
5. This submission addresses 4 points. It focusses on the first as the others are perhaps second order matters. They nonetheless should also be addressed in the relevant primary legislation
 - a. The need to establish in primary legislation the full range of goals to be achieved by procurement law to avoid (i) undue focus on trade issues and (ii) a lack of attention on core societal goals such as public sector integrity or climate change requirements.
 - b. The need to consider how tenderer exclusion could be better run on a centralised basis.
 - c. The definition of the extent to which outsourcing of supplies and services should be required in the UK, particularly as that is currently required on a broader basis than GPA would require.

- d. Given that it is only practical to apply a single set of procedures and principles in a particular procurement process, there is a need to consider how the procurement chapters of the GPA and multiple trade arrangements will all be taken into account in the single procurement code which will have to be applied by purchasers.

1. Potential Distortion of Procurement Law by focussing on its Trade Component

6. The current basis of procurement law is, of course, in EU law and that provides a broad basis for establishment of range of measures. Placing procurement law only within a trade-related measure may in due course raise significant practical and legal difficulties. If the past is anything to go by, it will facilitate those who seek to diminish the role of procurement law in pursuing other goals.
7. Procurement law is not only a trade related issue. The essential reason for having any procurement law is and has always been to ensure that expenditure of taxpayers' money is done in a way that respects standards of integrity, good value and the like. Of course the trade aspect of procurement law is significant, but for most citizens and taxpayers their primary concern with public procurement is that the contracts that are procured perform effectively, involve good use of tax funds and do not involve or enable abuse of power or misuse of funds.
8. It would be unfortunate if the scope and effect of procurement law appeared to be limited to trade issues only as it would deny United Kingdom taxpayers the sorts of legal protections over the use of their money that is now regarded as a usual protection in the modern world. Rather procurement law should focus and explicitly focus on the goals and values which it ought to be pursuing.

Value and Integrity

9. The terms Value and Integrity are short hand for a range of important goals in the interests of all taxpayers and citizens. It is worth emphasising how important it is that procurement law secures these goals and it is regrettable that the key importance of these goals would not get any recognition in primary legislation if the only basis for procurement legislation were as currently expressed in this Trade Bill. This is not just a question of presentation. Procurement law inevitably has to reconcile a range principles and policies and it would be a retrograde step if the trade basis of this measure were to be taken in future to indicate a primacy of trade concerns over these core goals.
10. The pursuit of these goals is now a matter of great international concern. There has been a substantial body of discussion about these issues in recent months and years. To take one example, see this reference to concerns raised by the OECD about integrity in public procurement exacerbated by the Covid-19 crisis and its aftermath. See https://read.oecd-ilibrary.org/view/?ref=129_129931-ygg2xb8gax&title=Public-Integrity-for-an-Effective-COVID-19-Response-and-Recovery. See also the recent report of the International Public Sector Fraud Forum at

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864310/Fraud in Emergency Management and Recovery 10Feb.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864310/Fraud_in_Emergency_Management_and_Recovery_10Feb.pdf)

11. This is also of considerable interest in recent domestic reviews. For instance MHCLG has just published its review into risks of fraud and corruption in procurement. See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890748/Fraud and corruption risks in local government procurement FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890748/Fraud_and_corruption_risks_in_local_government_procurement_FINAL.pdf)
12. As regards the importance of securing good value in public contracts, it is important also to note the standards of good conduct in the tendering process which it is now intended to promote through the recent update of the Outsourcing Playbook 2.0 for a professional matter. See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891144/Outsourcing Playbook JUNE 2020 WEB.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891144/Outsourcing_Playbook_JUNE_2020_WEB.pdf)
13. Many criticisms have been made of procurement law in the form that has been applied in the United Kingdom pursuant to EU law. Much of that criticism flows from the over-complex structure and lack of clarity in the law about what it was seeking to achieve. Procurement law has important work to do to support the state and it would be regrettable if its purpose were obscured and diminished by treating it as just another trade measure.
14. Many of these concerns will be enhanced as ever more is revealed about the difficulties in promoting value and integrity in those PFI contracts that have not delivered for the taxpayer. Procurement law needs to place the pursuit of these goals at the centre of its legislative aims, not just the implementation of certain trade deals.

Using Public Purchasing for Good

15. There is now increasing pressure on those responsible for procurement policy to use the purchasing power of the state to drive broad goals such as climate change and social goals. Some progress has been made. Perhaps the most interesting UK measure has been the Public Services (Social Value) Act 2012 which, despite its brevity has been a catalyst for real change as it has inspired local purchasers to look to see what can be done to use the power of their purchasing. Importantly it has done so not by mandating single goals or blunt tools. It has encouraged purchasers to look to what they can achieve. A useful summary of the position is set out in the summary of reports about application of that legislation at <https://www.gov.uk/government/consultations/social-value-ingovernment-procurement>. Although the relevant consultation has closed that does not yet seem to have produced an outcome.
16. Of course one person's legitimate social goal may be an inhibition on trade or a measure that damages the environment. Procurement practice is filled with examples of unintended consequences. Further, solutions that work in one place can be

ineffective or positively damaging somewhere else. For that reason the Social Value Act model of empowering purchasers to implement improvements towards an overarching goal and then to look to review their effects over a multi-year period seems likely to be most effective.

17. A similar model might be applied to other core goals such as environmental requirements, or the abolition of modern slavery. Often it is easy enough to demand that a contract take steps to meet a goal or requirement but if it falls outside the ready control of the parties to the contract that can often create substantial cost for very little gain. Instead a purchasing authority should be required in each case to give some thought about what it can and should do before initiating the purchasing process.
18. Finally it is remarkable in the current environment that so little has been said about the promotion of health outcomes. It is surprising that even health sector service contracts are often not clearly awarded or assessed by reference to the health outcomes they produce. There are often many complex metrics involved here but this must be an area where a public health service would be well placed to focus on whether a particular contract was meeting key health outcomes and if it were not to look to other metrics in later contracts.

Proposal

19. A good start would be to identify the core goals that procurement is to pursue and to require of all purchasers covered by the procurement regime to show that they have had regard to need to promote key goals in an effective manner. This would mean that those who had sought to contract without giving thought to these matters could be challenged and the application of irrational approaches could also be considered by those politically responsible for procurement. The legislation could then impose a requirement for a review as to what has or has not worked with a view to focussing the power of procurement after that review period.
20. One way of achieving this might be to expand the approach in section 1(3) of the Public Services (Social Value) Act 2012 and require all authorities making purchases to show that before they initiate a purchasing process that they have considered how the contract that it is proposed to procure might secure each of the following goals.
 - a. Good Value
 - b. High Standards of Integrity
 - c. Specific Environmental Goals set at Local or National Level
 - d. Specific Social Goals set at Local or National Level
 - e. Specific Health Outcomes
 - f. Elimination of Modern Slavery
 - g. Other Goals set periodically at Local or National Level

It may be that for some repeated contracts reliance can be placed on some periodic review of these matters by the authority so that each purchase does not need to be held up. For one off or substantial purchases it would surely be desirable for specific

consideration to be given to each of these matters. One would have thought that drafting could be modelled around the approach of the 2012 Act.

21. Each purchasing entity could then be required to review the successes or failures of its attempts to pursue and promote these goals in a periodic review which would feed into a broader national process of the type being undertaken for the 2012 Act.

2. Further Proposal: Centralised System for managing Exclusion of Tenderers

22. Increasing focus needs to be placed on the processes for excluding bidders from public procurement because of past misdeeds such as fraud, corruption, anticompetitive behaviour or involvement in modern slavery. These have important effects on the practical application of procurement law but they may also be of increasing significance in trade matters.
23. The immediate cause for concern is the consultation by the EU Commission announced on 17 June 2020 which might lead to exclusion of non-EU bidders for extended periods if they are in receipt of state aid that does not meet standards set by the EU. This will immediately become a substantial trade defence weapon for the EU for use against UK entities, particularly in circumstances where many UK entities will have received support to survive the shocks induced by Covid-19 or Brexit. Thought needs to be given to how this is going to link into a trade remedies procedure.
24. It also makes it necessary to give thought to the operation of bidder exclusion processes in the United Kingdom. At present they are run by each contracting authority on a contract by contract basis even though in many cases the matters raised cut across a broad range of purchasers and involve entities with substantial interests in public service provision. There really needs a more effective, central entity that can take on the role of investigating and ruling on the bidding status of entities following revelations about previous questionable behaviour. It would be sensible to consider providing a legislative basis for establishment of a central body for management of these exclusion decisions as is being done in some EU countries.

3. Further Issue: Scope of Procurement Law and In-House Arrangements: NHS

25. I have not sought to address here the complex issue as to how far procurement law enables or hinders the “privatisation of the NHS”. Some of these concerns are not very clearly stated. The very real issues around the impact that trade negotiations may have on pharmaceutical purchasing relate only in part to procurement law and are probably more closely focussed on other matters such as the operation of NICE. They are plainly going to arise in negotiations with the United States but may not be so relevant in the arrangements covered by the Trade Bill.
26. More broadly, there is a problem because the current structure of the NHS operates on the basis of a tender-based commissioning process which imposes tender procedures in circumstances which would often not be required by the GPA. Real care

needs to be taken to consider how far that deliberate over-implementation of procurement law obligations needs to be taken forward.

27. Even where the need for outsourcing demands the application of some contract processes it is important to ensure that procurement law established in the UK should be concerned only with the tendering of contracts rather than the establishment of any presumption or obligation to open up service provision to contracting. At the moment some real protection is provided by Regulation 12 of the Public Contracts Regulations 2015 which enable some contracts to be kept “in-house” without any tendering. It would be sensible to embody that in legislation so that that could not be undermined in a future trade deal and then to give consideration as to how it could be amended so as to more clearly and effectively define what parts of state activities should or should not be put out to contract.

4. Further Issue: Impact of Multiple Trade Agreements on Procurement Legislation

28. I note that the Trade Bill does not relate to arrangements with other nations that do not involve transitioning from existing EU arrangements. This may create something of an oddity as it is hard to see how it can be coherent to have different procurement legislation for different bidders depending upon their origin. It would lead to quite unnecessary complexity and potential unfairness in processes involving bidders from different places with different regimes.

29. The reality is therefore that even if different procurement arrangements are negotiated with different nations, and even if they differ from those provided for under the GPA it is likely that for most purposes only one body of legislation will be applicable to a particular tender. (There might of course be different regimes for different categories of contract, say defence, health and so forth).

30. This may not be particularly problematic, but it does mean that eventually a single procurement regime will have to be put in place pursuant to powers under section 1 and section 2 of the current Trade Bill and also other legislation for new arrangements. Such legislation will probably not provide a great deal of differentiation for bidders from different nations.

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