spotlight on corruption

Procurement green paper:

Government must look to its WTO allies for lessons on handling conflicts of interest

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Summary

- Government green paper on procurement reform provides opportunity to put an end to conflicts of interest problems identified in NAO and Boardman reviews
- Transition from EU to WTO procurement rules does not prohibit the adoption of a tough national strategy
- Government should look to US and Canada as examples of how strong deterrents and enforcement can mitigate conflicts of interest

Introduction

In response to growing concern over how the Cabinet Office was handling conflicts of interest during Covid-19 emergency procurement phase, the Boardman review[1] was commissioned in September of last year with the remit to assess how contract awards for communications services were made during the early stages of the pandemic.

Published two months later, and after the highly critical NAO report[2] into government procurement, the review recommended "stronger enforcement" of conflict of interest rules, as well as several improvements, including: improved training and record keeping as well as the need for a central register of declarations.

If implemented, the report's 28 recommendations (including 12 on conflicts of interest) will go some way to restoring integrity to the Cabinet Office. However, and as the NAO report underlined, issues surrounding conflicts of interest are a concern across government and as such, Boardman's recommendations on procurement processes should be adopted by every government department.

The findings of the NAO and Boardman reviews underline the need to overhaul the UK's approach to handling conflicts of interest rules. In this sense, December's announcement of the government's green paper on procurement[3] is significant and provides an opportunity for a rethink and to tighten up the rules so that public contracts are awarded fairly.

Current approach undermined by weak compliance

Prior to Brexit the UK's approach to public procurement was guided by the Public Contracts Regulations[4] (PCRs) based on EU directives. In accordance with these rules, during procurement procedures contracting authorities have the responsibility "to take appropriate measures to ensure that competition is not distorted" and require bidders to complete a standard selection questionnaire.[5] The form requires bidders to declare whether they are aware of any potential conflicts of interest (and if so, to provide details) of any potential conflicts as defined in Regulation 24[6] of the PCRs.

In addition to the PCRs, the UK has in place a supplier code of conduct[7] (although not legally enforceable) requiring companies to take appropriate steps to mitigate against any real or perceived conflicts of interest. Further requirements are defined in the terms and conditions of government contracts, framework agreements and dynamic purchasing systems (DPS).[8]

As established in the PCRs, if potential conflicts are identified during tenders, contracting authorities and suppliers should take steps to remedy them. This can include removing conflicted individuals from the process, re-assigning tasks or withholding certain bits of relevant information from the individual with the aim of establishing 'ethical walls' to ensure integrity. If the conflict cannot be effectively remedied, and after a supplier has been given ample opportunity to demonstrate otherwise, then contracting authorities can enforce a discretionary exclusion[9] as a last resort.

The government made a bullish rebuttal[10] of many of the NAO's findings on weaknesses in emergency procurement. It does not, however, contest its conclusion that during the COVID procurement emergency government departments did not always adhere to regulations relating to conflicts of interest. In three of the four case studies included in its report, the NAO concludes that contracting authorities failed to identify supplier conflicts of interest, record any documentation or detail steps taken to mitigate the risks, effectively ignoring their obligations under Regulations 24 and 84 of the PCRs. Two cases in particular have attracted criticism:

- Ayanda Capital was awarded a £253 million contract[11] by the Department of Health & Social Care despite its advisor working closely with the Board of Trade at the same time.
- Public First Ltd was awarded a £840,000 contract[12] by the Cabinet Office despite its owners previously having worked with Michael Gove.

The shortcomings identified in the NAO report are repeated in Boardman's review which concludes that there "remains considerable discretion" in the way government departments collect conflict of interest declarations. To remedy this situation, the review calls for a more coordinated and centralised approach including improved record keeping, consideration of prior professional or personal relationships with individuals in government and an enhanced role for the Central Commercial Team to provide expert procurement advice to individual departmental business units.

The government's green paper on procurement provides an opportunity to implement these recommendations and if done so would go a long way toward re-establishing integrity in the UK's public procurement market.

UK's transition to WTO procurement rules should prompt a rethink on conflicts of interest

As of January 1st the UK is party to the WTO Government Procurement Agreement (GPA)[13] and has signalled its intention to reform its approach to procurement through the publication of December's green paper "Transforming public procurement."[14]

In its current form, the green paper references '6 principles for public procurement' (including on integrity, transparency and fair competition) but these do not contain specific indications as to the direction of travel on standards relating to conflicts of interest.

The WTO Government Procurement Agreement contains minimum conflict of interest standards but the government has a free hand to implement additional tougher rules. After last year's COVID procurement debacle, it is essential that in future all parties are made aware of their obligations to detect, disclose and take steps to remedy any potential conflicts.

Suppliers failing to comply with rules should face having their contracts being cancelled, and if serious enough, should be subject to further action being taken by investigating authorities. This should be backed up by introducing stronger deterrents such as strengthening the scope for retrospective action against suppliers for non-compliance. In addition, all government officials involved in procurement exercises and other relevant parties (e.g. civil servants, contractors, consultants, special advisers, and other political appointees) must be reminded that failure to declare actual or perceived conflicts of interest could lead to investigation and disciplinary action.

There is an opportunity to embed better monitoring in a new government-wide oversight unit proposed in the green paper. Based in the Cabinet Office, this would be composed of an expert panel responsible for centrally managing mandatory and discretionary exclusions of affected suppliers.

Implementing measures such as these will ensure high standards are baked into the UK's procurement market from the outset as it makes the transition from EU to WTO rules. Spotlight on Corruption views this as the ideal moment to consider best practice from elsewhere to inform the UK's approach.

Conflicts of interest: US and Canada both have tough national strategies in place on top of WTO commitments

Both the US and Canada take considerably more robust approaches to managing conflicts of interest and the practices outlined here demonstrate how countries can go beyond minimal international obligations at WTO level to implement effective national strategies.

US: companies failing to declare conflicts of interest face prosecution

In contrast to the UK, the US has specific rules around supplier conflicts of interest that if violated, can result in prosecution and fines, even if companies are unaware of the conflict[15] at the time of submitting bids.

Companies failing to disclose conflicts of interest are liable under the US False Claims Act (FCA)[16] (enacted during the Civil War) which prohibits companies from obtaining money from the

government on the basis of false information and can result in both criminal and civil sanctions being applied.

On receiving information as to potential conflicts of interests or upon its discovery through an audit procedure, contracting authorities can issue an administrative subpoena for information to clarify the extent of the conflict and whether the company took steps to proactively manage any potential issues during its dealings with the contracting authority. If a serious conflict is identified, authorities can report their concerns to a US Attorney's office for investigation. If a case is brought, companies can either defend their actions in court or reach a settlement.

The US government has a strong record on pursuing companies for civil FCA violations and each year the US Department of Justice (DoJ) releases detailed statistics[17] on monies recovered through FCA violations (focused mainly on cases of fraud). The FCA places maximum penalties of $22,363 plus no more than treble the government's actual damages - which can in some cases equal three times the amount of the full contract price.[18]

The DOJ uses the FCA Act actively as a tool to combat procurement and other contracting frauds. In 2019 alone the US government collected a total of $3 billion[19] from FCA settlements. In addition, members of the public can file lawsuits against companies through *qui tam*[20] provisions, and if successful can result in whistleblowers receiving a portion of any fines levied.

In December 2018 a Tech Company and its CEO agreed to a $110,000 settlement[21] with the United States Attorney's Office for, in part, for failing to disclose a conflict of interest during the course of the company's bid for a defence contract.

Canada: legally enforceable supplier code of conduct

Canada has in place a supplier code of conduct[22] underpinned by the Financial Administration Act[23] and the Federal Accountability Act[24] that aims to promote integrity in the country's £86 billion annual procurement market[25] (including federal, provincial, territorial and municipal governments.)

At the federal level, suppliers are bound by rules on accurate declarations and must not have paid any fees to anyone covered by the scope of the country's Lobbying Act[26], or employ public servants in any role that is incompatible with their official duties. Unlike in the UK, Canada's code of conduct is legally enforceable and suppliers are subject to penalties for acting in violation of the two Acts.

Other measures adopted by the country's federal procurement agency[27] include the creation of a Fairness Monitoring Program (FMP) as a formal oversight mechanism that works to ensure that procurement procedures are conducted in a fair, open and transparent manner while the agency also operates a Federal Contracting Fraud Tip Line.

Some commentators have argued[28] that recent Canadian case law has encouraged companies to take an active approach to declaring potential conflicts to avoid any future criminal liability.

Recommendations: procurement green paper provides opportunity to strengthen conflicts of interest rules and enforcement

As the UK transitions to the WTO procurement agreement the government has an opportunity to introduce new standards that will deliver on the green paper's stated commitment to transparency, ensuring value for money and fair treatment of suppliers.

Aligning its standards on handling conflicts of interest with the best practice outlined here would allow the UK to turn the page from last year's procurement debacle and to ensure integrity in the UK's £292 billion per year[29] procurement market as it transitions to WTO rules.

Spotlight on Corruption recommends that the government:

1. Create criminal and civil liability for suppliers failing to declare conflicts of interest and enable law enforcement authorities to investigate the most serious breaches.
2. Introduce a legally enforceable supplier code of conduct which provides detailed potential conflict of interest scenarios and mitigation strategies.
3. Create a central register of conflict of interest declarations accessible to officials in all contracting authorities undertaking procurement exercises. The register should be integrated with IT systems so that relevant conflict of interest register entries are visible to officials at the point a supplier registers for a tender and throughout the procurement process.

Ensure that there are dedicated staff within the proposed procurement oversight unit based in the Cabinet Office responsible for maintaining the central register, ensuring consistency in how departments record and manage conflicts of interest, and providing training across all departments.

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Spotlight on Corruption works to end corruption within the UK and wherever the UK has influence.

Our vision is for a society where strong, transparent, and accountable institutions ensure that corruption is not tolerated.

We believe that by holding the UK government to account for enforcing its anti-corruption law and scrutinising the performance of the UK enforcement bodies and the UK courts, we can help end impunity for corruption.

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