spotlight on corruption

Spotlight on Corruption submission to the consultation on transforming public procurement.

Organisation overview:

Spotlight on Corruption is an anti-corruption charity that works to end corruption within the UK and wherever the UK has influence. We undertake detailed, evidence-based and impactful research on the implementation and enforcement of the UK's anti-corruption laws, looking for ways in which they can be improved. Our vision is for a society where strong, transparent, and accountable institutions ensure that corruption is not tolerated.

1. Introduction

We welcome the opportunity to contribute to this consultation on transforming the UK's approach to public procurement. In particular, our consultation response is concerned with ensuring that the new procurement regime is transparent and as robust as possible in preventing corruption, fraud and conflicts of interest. In our view, this would bring clear economic and social benefits to the UK, reduce fraud and corruption, create a level playing field for companies, protect the public purse and enhance trust and confidence in government procurement.

Fraud and corruption in public procurement cost the UK substantial sums of money. At central government level, the Cabinet Office estimates that the UK loses between £2.8 billion and £22.6 billion annually due to fraud and error, with procurement fraud the dominant type of fraud detected.[1] At the local level, a recent review of corruption risks in local procurement calculated that between £275 million and £2.75 billion could be lost annually due to fraud and error.[2] Nearly a quarter of local councils in the UK (23%) had experience of corruption or fraud in procurement processes in the 2017-2018 financial year.[3]

The COVID-19 pandemic has highlighted the considerable reputational risks to government when public procurement, particularly in an emergency context, is - or is perceived to be - fraudulent, corrupt or compromised by conflicts of interest. In late 2020 and early 2021, a series of reports published by independent oversight bodies, including the UK's National Audit Office, the Parliamentary Public Accounts Committee, and the independent Boardman Review, found that the government had failed to properly document potential and perceived conflicts of interest in emergency procurement of Personal Protective Equipment (PPE). The Department of Health admitted to the Parliamentary Public Accounts Committee that the costs of fraud in PPE procurement meanwhile "*could run to millions of pounds*."[4]

All three of these reports underline the need for the government to urgently reform public procurement and put in place policies and mechanisms to combat fraud, corruption and other unlawful and unethical behaviour. As the UK transitions to the World Trade Organisation (WTO) Government Procurement Agreement (GPA), 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. To do so, it must go beyond the minimum standards of the

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[1] Cabinet Office, *Cross-Government Fraud Landscape Annual Report* 2019, February 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864268/Cross-Government_Fraud_Landscape_Annual_Report_2019_WA__1_.pdf
[2] Ministry of Housing, Communities and Local Government, *Review into the Risks of Fraud and Corruption in Local Government Procurement*, June 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890748/Fraud_and_corruption_risks_in_local_government_procurement_FINAL.pdf
[3] Ibid.
[4] Public Accounts Committee, *COVID-19: Government Procurement and supply of Personal Protective Equipment,* February 2021, para 15.

GPA and adopt a tough national strategy based on a realistic reflection of the current arrangements' deficiencies and an equal commitment to incorporate best practice from other countries.

Spotlight's responses to the submission are included below - with Q's 16-22 on the proposed debarment regime attached together with supporting comments on the weaknesses affecting the present system and the measures required to bring the new regime in line with international best practice.

Key Recommendations:

1. The government should implement a robust national procurement strategy which draws on international best practice, including with the introduction of a False Claims Act, and legally enforceable codes of conduct for suppliers.

2. The government should establish an independent procurement Ombudsman with powers to intervene where necessary to ensure contracting authorities and suppliers comply with the new framework.

3. The government should commit to transparency by default throughout the procurement cycle, and ensure that public contractors are subject to the Freedom of Information Act.

4. A fair dispute resolution should be established, and a new procurement Tribunal with specialised procurement judges to hear legal challenges, with the right of non-parties bringing procurement challenges on public interest grounds enshrined.

5. The government should ensure that the exclusion regime is as effective as possible, by ensuring that convictions for fraud as well as failure to prevent bribery and tax evasion are grounds for mandatory exclusion from procurement subject to self-cleaning. The central debarment list and properly resourced centralised function for assessing exclusion decisions, ensuring they are applied on a cross-government basis, and for assessing whether a company has self-cleaned are essential to protect the integrity of public contracting.

2. Our response to the consultation

Q1. Do you agree with the proposed legal principles of public procurement?

- **Public good:** We welcome the government's proposal to legislate to ensure local authorities "have regard to" the public good. The government will need to develop clear benchmarks for specific social, environmental, ethical, economic and public safety objectives that can be defined as 'the public good' and performance indicators, and these will need to be independently audited to ensure the additional discretion this introduces does not increase corruption risks. We also recommend that the new National Procurement Policy Statement should include a specific reference to protecting the integrity of procurement as a primary objective of the new system.
- **Value for money:** This concept should go beyond a narrow economic focus to ensure public procurement can be used as a means to capture social value, understood as the cumulative collective benefit to the community that the procured goods or services deliver over the lifetime of the contract. Having identified the connection between the Sustainable Development Goals (SDGs) and its ambition around social value (see 'Guide to Using the Social Value Model'), the government should substantially increase progress towards the SDGs through its commercial activities.
- **Transparency:** Ensuring transparency during procurement exercises is a vital component to combat corruption, ensure proper accountability and to protect the public purse. As part of the new framework the government should commit to "transparency by default" across the whole contracting cycle, including introducing the Open Contracting Data Standard (OCDS), and extend the freedom of information regime to all public contractors. Under the UK's current approach, the Public Contracts Regulations 2015 (PCRs) require authorities to publish details of contract awards within 30 days[5] while additional guidance issued by the Crown Commercial Service recommends information is published within 90 days.[6] The recent High Court ruling that the Secretary of State for Health and Social Care acted unlawfully by failing to publish contract information relating to emergency PPE procurement in a timely manner, shows the importance of transparency even in emergency contexts and particularly where there is no

[5] https://www.legislation.gov.uk/uksi/2015/102/regulation/50/made
[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524351/Guidance_on_transparency_requirements_for_Contracts_Finder.pdf

competitive tender. The government must ensure transparency is properly embedded into the new framework by committing to making public procurement open by default and to publishing details of call offs from framework agreements to bring them in line with dynamic purchasing systems contracts.

- **Integrity:** The WTO GPA requires the UK to maintain minimum integrity standards during public procurement exercises but, in the absence of any specific guidelines, leaves the government a freehand to develop its own national strategy. The UK should be looking to reflect best international practice on integrity in public procurement to provide a gold standard that fits with its Global Britain ambitions and serves its long-term economic interests. To do this it should give serious consideration to adoption of similar legislation to the US False Claims Act, which creates civil and criminal liabilities for economic operators making false declarations to contracting authorities including for failing to declare conflicts of interest. In 2020, the Department of Justice recovered $2.2 billion in settlements and judgments from civil cases under the Act, which involved fraud and false claims against the government.[7] Canada meanwhile has a legally enforceable code of conduct which consolidates the Canadian government's measures on anti-corruption and conflicts of interest and applies to both contracting authorities and economic operators.[8]Legislating in this area would promote integrity, act as a strong deterrent and provide the government with enhanced powers to cancel contracts and strengthen the scope for retrospective action, including recovery of funds, against suppliers for non-compliance.
- **Fair treatment of suppliers:** Suppliers of all sizes as well as non-economic operators (i.e. those affected by a procurement decision or with a legitimate public interest in contesting a procurement decision) should have access to a review and/or complaints mechanism such as an independent tribunal. This mechanism should have the powers and sufficient resources to review procurement decisions to ensure fairness across the new system. It should be housed in the new independent procurement regulator/oversight body (as discussed in Q2) and have the power to hear complaints and provide dispute resolution. Emerging case law has established that there is a strong public interest in non-economic operators being able scrutinise government through judicial review of procurement decisions.[9] The availability of judicial review should be formalised in the regulations and a new procurement Tribunal to hear legal challenges should be established.
- **Non-discrimination:** the new framework must guarantee equal treatment for all suppliers with any exemptions from this principle only being permitted in tightly controlled, pre-defined emergency scenarios to reduce the possibility of arbitrary awards and the perception of cronyism entering the process.

Q2. Do you agree there should be a new unit to oversee public procurement with new powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities?

Yes. However, in our view, the government should go further by establishing a fully independent procurement regulator such as an Office of Procurement Ombudsman[10] with a broad mandate to oversee the implementation of the new framework and to intervene where necessary to ensure contracting bodies at both central and local government comply with the regulations.

In our view the unit, or Ombudsman, should undertake the following roles:

2a Undertake reviews into individual contract awards
The Ombudsman should be equipped and resourced to undertake ex-post reviews into contract awards employing a similar investigative approach to that used by the National Audit Office i.e. conducting interviews with all parties involved in a procurement decision and assessing all relevant documentation including procurement logs, due diligence results, spending details and any bid documents.

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[7] https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020
[8] Canadian Code of Conduct for Procurement https://www.tpsgc-pwgsc.gc.ca/app-acq/cndt-cndct/contexte-context-eng.html. The OECD has noted that the code "provides all those involved in the procurement process – public servants and vendors alike – with a clear statement of mutual expectations to ensure a common basic understanding among all participants in procurement." https://www.oecd.org/governance/procurement/toolbox/search/code-of-conduct-for-procurement-canada.pdf
[9] See paragraph 104 in the High Court Judgement on the Good Law Project's challenge to the Department of Health and Social Care's decision to not publish contracts highlighting "the powerful public interest" in bringing a challenge. https://www.11kbw.com/content/uploads/glp-judgment-approved-final.pdf
[10] The proposed Ombudsman could be modelled on the Canadian Office of the Procurement Ombudsman (OPO) included in the portfolio of the Minister of Public Services and Procurement Canada and would consolidate the work of the Public Procurement Review Service, Crown Representatives, Single Source Regulations Office, some responsibilities of the Crown Commercial Service.

Its mandate would allow it to undertake reviews into: high-risk contracts to monitor compliance with guidelines and also at random; contracts where the body has received information raising legitimate concerns; or on a thematic basis to identify best practice across contracting authorities. Where reviews identified poor performance, the body would have the powers to intervene to improve the commercial capacity of a contracting authority.

2b Operate an independent complaints mechanism/dispute resolution process
The Ombudsman would receive, assess and investigate information relating to specific contract awards and would accept information from both economic operators, relevant stakeholders and individuals with legitimate public interest concerns. To discharge this function properly, the Ombudsman should be designated as a 'de facto' prescribed person for the disclosure of wrongful acts within the procurement process by whistleblowers.[11] The body would operate an alternative dispute resolution mechanism for complainants which would be complemented by a specialist procurement Tribunal to hear legal challenges (see our response to questions 30-33).

2c Develop and enforce a legally enforceable supplier code of conduct
At present the UK's Supplier Code of Conduct relies on voluntary compliance and is not legally enforceable.[12] As noted above, Canada has in place a supplier code of conduct underpinned by legislation[13] that applies penalties to contractors found to have violated any of the provisions including inaccurate declarations.

2d Record and manage conflicts of interest declarations
Conflict of interest declarations should be recorded for all central government agencies and contracting bodies, both for suppliers and officials, at a central level, to ensure they are managed properly throughout the procurement process. This process should be informed by the recommendations of the Boardman review and include developing policy and guidance for contracting authorities on how to handle and mitigate conflict of interests risks.

2e Ensure consistency and cross-department implementation of debarment
The new body would be given the powers to make cross-government debarment decisions to exclude economic entities engaged in corrupt and other prescribed practices from participating in public procurement. (*Spotlight on Corruption detailed proposals for the debarment regime are set out in response to Q's 16 to 22*)

2f Undertake thematic reviews to develop best practice
Thematic and sector specific reviews should be undertaken to identify best practice and develop new guidance for contracting authorities.

2g Operate a secure, anonymous reporting mechanism for whistleblowers and competitors.
A dedicated, anonymised whistleblower procurement hotline and secure mail drop box should be established to receive information from relevant parties and the general public. The Ombudsman should be designated as prescribed person for the disclosure of wrongful acts.

If the government were to adopt the Ombudsman approach it would be essential that the body meet the standards of regulators identified by the Committee on Standards in Public Life to avoid 'regulatory capture.'[14] If taking the central unit approach, the government must ensure that this unit operates in a fully transparent manner, publishing regular reports on its activities and results.

Q3. Where should the members of the proposed panel be drawn from and what sanctions do you think they should have access to in order to ensure the panel is effective?

The proposed independent panel for the central unit must be robustly independent and completely free from conflicts of interest to establish public confidence. It should include diverse groups of stakeholders including procurement experts from academia and civil society. The panel should include expertise in best practice on open data and digital

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[11] According to the Association of Certified Fraud Examiner, 43% of of all fraudulent behaviour is identified internally by whistleblowers. Reference: AFCE, 2020, Report to the Nations, page 19. https://acfepublic.s3-us-west-2.amazonaws.com/2020-Report-to-the-Nations.pdf
[12] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779660/20190220-Supplier_Code_of_Conduct.pdf
[13] Financial Administration Act and the Federal Accountability Act. Canada operates a federal procurement agency that includes 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. The agency also operates a Federal Contracting Fraud Tip Line to handle disclosures from the public.
[14] See the report of the Committee on Standards in Public Life: Striking the balance.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/554817/Striking_the_Balance__web__-_v3_220916.pdf

transformation. The panel must also be robustly transparent, publishing minutes of meetings, holding a conflicts of interest register, and engaging proactively with stakeholders. The panel should not be subject to non-disclosure agreements.

To protect the panel's independence, its members should declare any financial interests, and that these are made publicly available in a central online location in machine-readable format. In addition, members leaving the panel should be expected to undergo a 'cooling off period' prior to take up any employment with businesses who are in receipt of, have bid for, or plan to bid for government contracts.

Q4. Do you agree with consolidating the current regulations into a single, uniform framework?

Yes. Consolidating the current regulations into a single uniform framework would increase efficiency by opening the possibility to standardise all bidding instruments and contracting authorities' eProcurement systems, thereby reducing the burden on economic operators to navigate between different contracting authorities application processes. This approach should build on existing standardisation drives (e.g. the Crown Commercial Service (CCS) Standard Template for Framework Contracts for Common Goods and Services and the Cabinet Office's Short Form Terms and Conditions) to create a uniform system that would lead to a significant reduction in transactions costs as well as facilitating the government wide adoption of the Open Contracting Data Standard (OCDS).

It is essential that proper procurement rules and procurement transparency are applied across all public bodies, or bodies in receipt of public money. We are concerned by suggestions[15] that the government is planning to create bodies outside of these rules such as the Advanced Research and Invention Agency. Creating exemptions of this kind undermines the government's procurement reform initiative, and has the potential to create two-tier procurement systems.

Q5. Are there any sector-specific features of the UCR, CCR or DSPCR that you believe should be retained?

We think sector-specific features should be minimised, and the broad 'national security' exemptions for defence procurement should be curtailed and subject to specific and very tight criteria.

Conversely we think the sector-specific Single Source Regulations Office should be given powers to investigate single source bidding on a cross-government basis and not just in defence contracts. The number of single bids in UK government procurement has significantly increased in the past decade with Spend Network calculating a 476% increase in single bids between 2012 and 2018. Emergency procurement during Covid has exacerbated this trend. The SSRO should also be given enhanced powers to compel documents from contractors, and could play a crucial role in ensuring greater value for money and protection of taxpayers' funds. Ultimately, if the government were to establish an independent procurement regulator, as we recommend, the functions of the SSRO carried out on a cross-government basis, should be incorporated into that body.

Q7. Do you agree with the proposal to include crisis as a new ground on which limited tendering can be used?

While Spotlight on Corruption recognises that emergencies require urgent procurement responses, we have concerns that the concept of "crisis" is too vague and open to abuse. We strongly recommend that this wording be reconsidered and "national emergency" be used instead. There should be a clear legal definition of 'national emergency'. Furthermore, it is essential that the lessons are fully learned from the government's handling of the COVID-19 procurement emergency, including lessons from other jurisdictions where best practice for emergency procurement has developed. The use of direct awards in an emergency is always a risk to the public purse and the reputation of government, and the government should develop a 'best practice' toolkit for future emergencies, which looks at how accelerated tendering, and modification of existing contracts can be used, as well as the safeguards needed, to ensure that transparency and conflict of interest standards are maintained.

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[15] https://www.gov.uk/government/news/bill-introduced-to-create-high-risk-high-reward-research-agency-aria

Q9. Are there specific issues you have faced when interacting with contracting authorities that have not been raised here and which inhibit the potential for innovative solutions or ideas?

Freedom of Information should be extended to all public contractors.
It is essential that freedom of information legislation is extended to all public contractors to ensure that there is proper accountability for public funds. We support bringing contractors that deliver major public goods, services or infrastructure directly under the Act in relation to their public sector contracts in line with the existing right to obtain environmental information from contractors providing environmental services for public authorities. In order not to place an unfair burden on SMEs or charities bidding on contracts, we support the introduction of a dual approach meaning that smaller entities should be subject to Freedom of Information requests through the contracting authority but not exempted. Information relating to a procurement exercise would be automatically considered to be held on the authority's behalf and accessible via an FOI request.

Q13. Do you agree that the award of a contract should be based on the "most advantageous tender" rather than "most economically advantageous tender"?

Yes. The concept of "most advantageous tender" should be broadened to include non-economic factors such as 'social value' understood as the potential cumulative benefit the procured goods or service can contribute to the community. The concept of 'social value,' however, should not act as justification for arbitrariness to enter the system and it should be properly qualified to ensure that contracts awarded on this basis are done according to a widely accepted criteria and leave a full paper and audit trail. Introducing this broader award criteria will need to be met by robust safeguards to prevent the category becoming a new anti-corruption risk. This could be offset by the introduction of a public centralised conflicts of interest database available to all contracting authorities.[16]

In addition, we think contracting authorities should be given great powers to use 'good' tax conduct as a criteria for contract awards. This would mean suppliers bidding on contracts would need to have their beneficial ownership in the public domain, have published all their financial statements including of any parent or sister companies, and have a published 'tax policy' strategy in the public domain. In addition, it is essential that to avoid the mistakes of the COVID procurement response, suppliers when requested by contracting authorities must provide information on their supply chains to avoid the scenario in which contracting authorities can award contracts to newly incorporated intermediaries with limited influence over the manufacture or delivery of supplies.

Q14. Do you agree with retaining the basic requirement that award criteria must be linked to the subject matter of the contract but amending it to allow specific exceptions set by the Government?

Yes. In some limited pre-defined circumstances it may prove beneficial to introduce certain exemptions in order to allow contracting authorities to award contracts in support of wider strategic policy aims. Again, this must not be used as a justification for arbitrariness to enter the system which would pose a clear corruption risk. In order to prevent this, the government must introduce clear guidance for contracting authorities on how this would work in practice and in addition, publish information on how often such exceptions are being applied. Specific exceptions should be agreed by the Independent Expert Panel, and a framework for how these exceptions will be applied must be approved by Parliament.

Q15. Do you agree with the proposal for removing the requirement for evaluation to be made solely from the point of view of the contracting authority, but only within a clear framework?

Yes. Removing this requirement will enable a contract authority to take into consideration wider impacts of a tender which will additionally facilitate the implementation of an effective debarment regime that can consider a range of conducts as cause for exclusion. Again, in order to guard against abuse, the government must introduce clear guidance for contracting authorities on how this would work in practice and in addition, publish information on how decisions are being taken on this basis.

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[16] The US Office of Financial Stability (OFS) successfully operates a conflict of interest database according to the an assessment undertaken by the US Government Accountability Office https://www.gao.gov/assets/650/648468.pdf

Q16. Do you agree that, subject to self-cleaning fraud against the UK's financial interests and non-disclosure of beneficial ownership should fall within the mandatory exclusion grounds?

Yes. We agree that fraud against the UK's financial interests should fall within the mandatory exclusion grounds. However, it is essential that a conviction for fraud should also fall within the mandatory grounds and that this is not confined to fraud against the UK's financial interests. For a full analysis of how to ensure the post-Brexit exclusion regime will be effective please see Annex 1.

As noted above (Q1), if the UK government is serious about defending fraud against the UK's financial interests, it should give serious consideration to the introduction of a False Claims Act, modelled on the US. This should include a 'qui tam' provision whereby whistleblowers with evidence of procurement fraud can approach contracting authorities, and if a prosecution for such a violation is secured, then be rewarded financially.[17] Additionally, the government should give consideration to 'behaviour' clauses in public contracts, particularly where a company is under investigation for wrongdoing such as fraud, or is considered to be high risk of engaging in such activity.

We also agree that failure to disclose accurate and up to date beneficial ownership information should result in a mandatory exclusion being applied in order to ensure that taxpayer funds are spent in a transparent and accountable way.

Reforms in this area must be developed to align with wider government policy such as the overhaul of Companies House currently being undertaken by BEIS that are expected to result in new verification processes of beneficial ownership data.[18] Under the new system, contracting authorities should assign corporate IDs to all bidders that are indexed to verified data from Companies House, creating a 'Single Source of Truth.' Under this model, suppliers entering the procurement portal would be asked to confirm whether the ownership data was current, and if not would be required to update the company's PSC information at Companies House.

To ensure equal treatment for UK and non-UK suppliers, a register containing the beneficial ownership information of non-UK entities bidding on UK contracts should be set up and managed by Companies House.[19] Non-UK entities wishing to bid on UK contracts will be required to register with Companies House and have their beneficial ownership information verified. We accept that acquiring reliable data can be a challenge but also note that all EU countries have committed to establishing business registers with beneficial ownership information, as have the UK's Crown dependencies. Where the contracting authority can not verify a company's ownership status then a mandatory exclusion should be applied.

Smaller contracting authorities should be supplied with additional guidance based on international best practice and where necessary additional resources to help establish processes to verify beneficial owners during procurement exercises, especially where economic operators use complicated ownership structures (e.g. A/B shares, trusts located in non-transparent jurisdictions).

Ensuring that the government has up to date beneficial ownership information on all bidders (both UK and non-UK) would bring additional benefits to procurement. The data could be used to run automated due diligence checks to identify errors and anomalies, but would also raise red flags for potential conflicts of interest or bidder connections to politically exposed persons. There is also evidence from the US that such analysis can be used as a tool to identify cases of bid rigging between suppliers.[20]

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[17] According to the latest figures from the US, the Justice Department recovered $1.6 billion in settlements and judgements from civil cases involving violations of the False Claims Act under the qui tam provisions and paid out $309 million to whistleblowers. https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020

[18] These reforms are expected to be passed into law sometime between 2022-2023. See statement made by Lord Callanan in the APPG for Anti-Corruption and Fair Taxation on 25 February 2021.

[19] The UK has previously committed to implementing a PSC register for foreign entities. See: Overview Document: Draft Registration of Overseas Entities Bill, UK Department for Business, Energy & Industrial Strategy, July 2018, 5, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727901/2._FINAL_Overview_document__1___1_.pdf.

[20] US Government Accountability Office's (GAO) review of 32 cases of defence procurement identified cases of "price inflation through multiple companies owned by the same entity to falsely create the appearance of competition".

This type of analysis of beneficial ownership information will also provide the government with a powerful tool to better understand the financial health of supplier companies and whether companies are obfuscating financial liabilities of other entities within an ownership structure that could be used to hide debt or losses that undermine a supplier's ability to deliver on a public contract.

Overall, collecting more detailed beneficial ownership data will lead to the creation of a rich source of data on suppliers and procurement. Mining this data could be used to underpin the development of evidence based policy with the potential to promote further improvements to the system.

Q17. Are there any other behaviours that should be added as exclusion grounds, for example tax evasion as a discretionary exclusion?

The corporate criminal offences of failing to prevent bribery or tax evasion should be added to the grounds for mandatory exclusion as these are the primary corporate offences for these crimes. This would also close down the anomaly that a company convicted of these offences does not currently need to declare such convictions when bidding for contracts.

Much greater emphasis and support should be given to contracting authorities to use discretionary exclusion for grave professional misconduct, including where there has been repeated regulatory violations, and where there is strong evidence of wrongdoing, despite no conviction. Furthermore, failure to declare a conflict of interest, or deliberate misinformation about a conflict of interest, should be more regularly penalised through discretionary exclusion.

It is also necessary to harmonise the debarment process across different types of awards to ensure that a behaviour that creates a ground for exclusion may be considered by an authority undertaking a call off from a framework contract.

Attention must also be given to situations where a contractor engages in behaviour that incurs exclusion, or evidence of such behaviour emerges, after a contract has been granted. In particular a mechanism must be established whereby contractors can be removed from framework agreements in these instances.

Q18. Do you agree that suppliers should be excluded where the person/entity convicted is a beneficial owner, by amending regulation 57(2)?

Yes. Regulation 57(2) should be amended, but it should be done so that mandatory exclusion can be applied to cover sister companies, parents and subsidiaries. This is a vital amendment insofar as the regulation in its current form has meant that companies can use complex corporate ownership structures to avoid consequences for convictions. This proposed amendment should reflect the theory of a single economic entity from competition law, which should be transposed into procurement law.

Q19. Do you agree that non-payment of taxes in regulation 57(3) should be combined into the mandatory exclusions at regulation 57(1) and the discretionary exclusions at regulation 57(8)?

We support the government's plans to introduce non-payment of taxes as grounds for mandatory exclusion, but would also support giving greater powers for authorities to exclude companies on a discretionary basis for failing to show evidence of complying with 'good tax practices' i.e. if a contractor uses legal but dubious arrangements to artificially reduce tax obligations. In addition, contractors should be required to have published consolidated profit and loss accounts so contracting authorities can observe whether companies are meeting their tax liabilities as well as demonstrating their economic viability to deliver on contracts.

Q20. Do you agree that further consideration should be given to including DPAs as a ground for discretionary exclusion?

Yes - this is essential to reflect emerging case law from DPA hearings. Public authorities must be able to consider all wrongdoing committed by a supplier regardless of how it was prosecuted meaning that a specific discretionary

ground for exclusion covering deferred prosecution should be included.

However, it is essential that this is done in conjunction with careful consideration of how to incentivise corporate self-reporting of wrongdoing. In particular, in order not to impact negatively on incentives to self-report wrongdoing, it is essential to ensure that convictions for failure to prevent bribery and facilitation of criminal tax evasion offences result in consideration of mandatory exclusion. It is inherently unfair that SMEs currently face greater risk of exclusion than larger companies, as they are more liable to be prosecuted for substantive (or main) offences, whereas the primary corporate offences that cover large companies do not incur the same risk. In order to make good on the government's promise to ensure a greater level playing field in procurement for SMEs, it is essential that this serious unfairness is removed.[21]

Q21. Do you agree with the proposal for a centrally managed debarment list?

Yes. Public procurement in the UK is split amongst multiple government departments and agencies, as well as between central and local government resulting in the current system relying heavily on self-declaration by those bidding for contracts. There is little evidence that performance and qualification information is captured in a way that is easily accessible for contracting authorities and there is considerable scope for variance in how self-declarations are made, monitored or followed up. This allows companies or directors to escape detection for wrongdoing or poor behaviour for instance by establishing a company under a new name. The creation of a single central database capturing such information would save significant time and resource for contracting authorities, as well as creating greater consistency in the implementation of the rules.

We also strongly recommend that decisions about whether a company has self-cleaned or not should also be taken centrally, within the new central unit, and that the unit should get expert independent advice on whether a company has self-cleaned before allowing an operator that should face mandatory exclusion to tender for public contracts. Individual contracting authorities do not have the expertise to assess this, and it would be inappropriate for self-cleaning to be based on self-certification by the company.

Q22. Do you agree with the proposal to make past performance easier to consider?

Yes. Poor performance of previous contracts should be considered more broadly at the evaluation stage. In addition, contracting authorities should be able to consider the overall structure of the business entity including criteria relating to its ability to a deliver on a contract, or whether it has been incorporated solely to act as a middleman between a contracting authority and a supplier.

Q27. Do you agree that transparency should be embedded throughout the commercial lifecycle from planning through procurement, contract award, performance and completion?

Yes. We support the proposals to embed structured, machine-readable OCDS data from every Contracting Authority across the commercial lifecycle of a procurement exercise.

Q28. Do you agree that contracting authorities should be required to implement the Open Contracting Data Standard?

Yes. Implementing the OCDS across all procurement activities would streamline and centralise procurement data. From a specific corruption angle, this would make it harder for entities to defraud the government and would create a reliable data trail in order for the new procurement unit to effectively investigate cases of alleged procurement fraud and corruption.

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[21] For further analysis, please see our submission to the Bill Committee for the Financial Services Bill: https://publications.parliament.uk/pa/cm5801/cmpublic/FinancialServices/memo/FSB06.htm

Q30. Do you believe that the proposed Court reforms will deliver the required objective of a faster, cheaper and therefore more accessible review system? If you can identify any further changes to Court rules/processes which you believe would have a positive impact in this area, please set them out here.

We support the specialisation of judges to hear procurement hearings, and the objective of developing a faster, cheaper and more accessible review system. On balance, and considering the considerable pressures on the court system, we think the government should consider creating a tribunal to hear procurement challenges from the outset which would be able to draw on the expertise of independent fraud specialists able to provide complex technical support where needed. There would be significant advantages to new post-Brexit rules being heard from the beginning by the same court which would build up the case law on the new rules in a consistent manner.

We think the court rules for this Tribunal should specify that those with a public interest function or a legitimate public interest as well as economic operators can challenge a procurement decision. Additionally, any faster review system must be accompanied by robust open justice processes, with judgements and court documents made public to ensure easy access to emerging case law.

ANNEX 1: Debarment

The green paper presents an opportunity for the UK to establish a well-designed debarment regime which would bring substantial economic and social benefits to the UK and would demonstrate to its allies that it is committed to ensuring a competitive but fair business environment. More specifically, a well functioning regime would;

a. promote greater public trust in government and protect the government from association with unlawful behaviour;[22]
b. incentivise companies to put in place corporate compliance procedures to prevent and detect fraud, corruption and collusion and deterring such acts;
c. encourage companies to self-report wrongdoing and cooperate with law enforcement authorities in order to avoid debarment, thereby reducing the financial burden on the criminal justice system of lengthy investigations into corporate malpractice;
d. create a level playing field for companies that abide by the rules; and
e. improve value for money for public procurement.

In addition, installing an effective debarment regime would help the UK to achieve its international objectives through:

1. **Aligning its approach with its closest international partners, international bodies and emerging international best practice.**
   The US actively promotes debarment in its trade deals with other countries[23] while the current administration has signalled that combatting corruption will be a major cornerstone of its international agenda and has reaffirmed the US' commitment to cooperating through multilateral organisations. If the UK were to Implement an effective debarment regime it would align its standards with the US and best meet best practice identified by the international bodies such as the OECD[24] and the UN.[25]
2. **Meeting debarment clauses in new priority trade arrangements.**
   As the UK attempts to meet its 'Global Britain' agenda and accede new trade partnerships it is likely to face greater scrutiny over its procedures for debarring corrupt bidders. The UK has already applied to accede to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) which requires countries

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[22] See Sue Arrowsmith, "A taxonomy of horizontal policies in public procurement," in S. Arrowsmith and P. Kunzlik (Eds.) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions,* Cambridge University Press, 2009, https://www.cambridge.org/core/books/social-and-environmental-policies-in-ec-procurement-law/taxonomy-of-horizontal-policies-in-public-procurement/42ED7A8F206BB71A18E9FC2D65E8933F; Robert Anderson, Alison Jones and William E. Kovacic, "Preventing Corruption, Supplier Collusion and the Corrosion of Civic Trust: a procompetitive program to improve the effectiveness and legitimacy of public procurement," *forthcoming*.
[23]The US actively promotes debarment in its trade deals with other countries. The United States-Mexico-Canada Agreement (USMCA, Article 13:17) specifically envisages "measures to debar, suspend or declare ineligible from participation …. a supplier that the Party has determined to have engaged in corruption, fraud or other wrongful acts relevant to a supplier's eligibility." Other US free trade agreements go further, requiring Parties to "identify the suppliers determined to be ineligible under these procedures, and, where appropriate, exchange information regarding those suppliers or the fraudulent or illegal action." https://ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file423_10348.pdf
[24] See OECD Convention on Combatting Bribery of Foreign Public Officials
[25] See the UNODC legislative guide to implementation of the UN Convention Against Corruptionhttps://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf

to have in place a debarment regime.[26] In addition, any potential trade deal with the US will entail matching its standards on debarment provisions. Additionally, it will be in the UK's interests to ensure that Free Trade Agreements contain clauses similar to those in US trade deals to ensure that UK contracting authorities can get accurate information on foreign bidders including records on their past performance.

Issues with the current debarment regime

Under the existing system underpinned by EU rules, UK contracting authorities are required to exclude bidders under certain circumstances where they have been convicted for fraud, money laundering, corruption, modern slavery, terrorism, and breaches of tax obligations and on a discretionary basis where they have engaged in grave professional misconduct. There is, however, no information in the public domain confirming whether any company has ever been excluded from bidding in the UK on grounds of corruption, suggesting that debarment has been a theoretical rather than a real threat for companies. In addition, the possibility of exploring discretionary exclusion for grave professional misconduct has not up until now been used.

The current rules have been largely ineffective across EU as a whole[27] for the following reasons;

- implementation has been left to individual contracting authorities, who are often focused on awarding contracts at speed while avoiding potential risks of litigation;
- there is limited central training or guidance to ensure consistency in application; and
- it relies heavily on self-declarations by bidders with no central or comprehensive source for verifying these declarations.
- contracting authorities are over reliant on convictions despite being in possession of evidence of fraud, corruption and other wrongdoing. This has meant, in practice, that a company engaging in fraud may be free to continue winning contracts long after a contracting authority has evidence to a civil standard of potential fraud or corruption

What would make an effective debarment regime?

There is emerging consensus among procurement specialists about the components of an effective debarment regime[28] which include;

1. Establishing clear policy goals for the regime

The ultimate policy goal of a debarment regime should be that public contracts are only given to trustworthy contractors. Additionally, the debarment regime should support and amplify the government's key policy goals in tackling economic crime, such as fraud and corruption, by providing an enforcement tool against those who breach those rules.

2. Requiring effective internal controls as a condition of contracting

Ensuring that companies that want to contract with government have established internal controls to prevent fraud, corruption, money laundering and tax evasion, including clawback clauses for senior executives who have overseen companies found to have engaged in such misconduct, will help send a clear signal about what government expects of contractors and help improve corporate governance standards across the UK. Being able to evidence such controls should be a requirement for inclusion on approved contractor lists.

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[26] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – a trade deal which the UK has applied to join – meanwhile, includes a clause on 'integrity in public practices' which requires signatories to have in place criminal or administrative measures to address corruption in public procurement. This may include rending ineligible those who have engaged in fraud or other illegal actions and must include measures to prevent conflicts of interest. Trans-Pacific Partnership Trade Deal, Chapter 15, Government Procurement, para 15.18, https://ustr.gov/sites/default/files/TPP-Final-Text-Government-Procurement.pdf

[27] The EU Procurement Directives in theory provide scope for individual countries to implement national level debarment regimes, only a few, including Germany, have chosen to do so. Furthermore, recent EU case law militates against such regimes, by establishing that individual contracting authorities must not be bound by decisions about a contractor's trustworthiness made by another contracting authority. This means that a corrupt contractor excluded by one authority could continue to seek contracts from other authorities in the hope they will be less rigorous in their application of the rules. Ultimately, this lack of consistency fails to drive corrupt contractors out of public procurement.

[28] See: Christopher Yukins and Michal Kania, "Suspension and Debarment in the US Government: Comparative Lessons for the EU's Next Steps in Procurement," *19-2 UrT 47 (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3422499;* Collin Swan and Belita Manka, "Risky Business: Does Debarring Poor Performers Mitigate Future Performance Risks?", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3287348

3. Ensuring that contractors can be suspended or debarred where there is sufficient evidence of corruption and fraud, not just where they have been convicted, subject to due process safeguards and where they have not self-reported
Convicted companies that have not cooperated with law enforcement and do not have independent evidence of remediation should face a realistic prospect of suspension or debarment from public procurement. This would boost incentives for companies to self-report wrongdoing and cooperate with authorities to avoid such a sanction, improving criminal justice outcomes and saving precious criminal justice system resources.

Understanding whether contractors are subject to ongoing investigations by enforcement or regulators is crucial to preventing the serious reputational risk to the government from contracting a company later found guilty of fraud or corruption. Suspending contractors from procurement if they are under investigation could provide a real incentive for them to cooperate with law enforcement authorities to bring speedier resolutions to corporate investigations. This would also act as a deterrent to other companies who take steps to frustrate open investigations while continuing to bid for public contracts.

Where contracting authorities find credible evidence of potential fraud or corruption by a contractor, this too should be properly assessed as potential grounds for suspension from public contracts. Due process safeguards need to be developed however to make this effective such as allowing companies a right of defence and an opportunity to appeal such decisions.

4. Centralising decision-making and guidance to ensure consistency and ensuring that properly trained officials, of senior rank, are empowered to take exclusion/debarment decisions
Individual contracting officials may lack experience of how to investigate and assess evidence of corruption and fraud, and of corporate remediation efforts. As a result, they are likely to avoid taking action to debar companies even where they believe wrongdoing may have occurred in order to avoid the cost and delays which litigation by contractors might bring.

For a debarment and suspension regime to work it needs highly qualified, properly trained and fully independent senior officials to take key decisions on contractor reliability and qualification. It also needs to be consistently applied across government and local government through providing centralised guidance and advice on issues such as how long companies should be debarred for and the specific steps they need to take in order to re-qualify for eligibility. Any such centralised function needs to be properly resourced to be effective.[29]

5. Creating a central database of qualification and performance information on contractors
Public procurement in the UK is split amongst multiple government departments and agencies, as well as between central and local government. The UK regime relies heavily on self-declaration by those bidding for contracts. There is little evidence that performance and qualification information is captured in a way that is easily accessible for contracting authorities and there is considerable scope for variance in how self-declarations are made, monitored or followed up. This allows companies or directors to escape detection for wrongdoing or poor behaviour for instance by establishing a company under a new name. The creation of a single central database capturing such information would save significant time and resources for contracting authorities.[30]

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[29] In the US, Suspension and Debarment Officers in key government departments take the decision about whether companies should be disqualified from bidding, while a central Interagency Suspension and Debarment Committee (ISDC) acts as a forum to coordinate suspension and debarment practice and develop a and develop a unified policy at a federal level. The Multilateral Development Banks have similarly centralised debarment functions which enable effective information-sharing. In Germany a central authority (the German Competition Authority) has responsibility for determining whether a company has taken sufficient remedial In the US, Suspension and Debarment Officers in key government departments take the decision about whether companies should be disqualified from bidding, while a central Interagency Suspension and Debarment Committee (ISDC) acts as a forum to coordinate suspension and debarment practice and develop a and develop a unified policy at a federal level. The Multilateral Development Banks have similarly centralised debarment functions which enable effective information-sharing. In Germany a central authority (the German Competition Authority) has responsibility for determining whether a company has taken sufficient remedial action to become an approved public contractor. Source: Christopher Yukins and Michal Kania, "Suspension and Debarment in the US Government: Comparative Lessons for the EU's Next Steps in Procurement," *19-2 UrT 47 (2019)* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3422499.
[30] The US currently has such a database of excluded entities integrated into its System for Award Management (SAM). The database is public. Similar exclusion lists are published by the Multilateral Development Banks. The EU Commission meanwhile operates an Early Detection and Exclusion System (EDES) – a centralised database containing information on contractors that pose a risk to the EU's financial interests, available to all those implementing EU funds. EDES only publicly lists those excluded in serious cases. https://ec.europa.eu/budget/edes/index_en.cfm. Germany has recently established a Competition Register implemented by the German Federal Cartel Office which lists final judgements on fraud, bribery, money laundering, tax evasion and other offences where they can be attributed to a company. Source: Dr Pascal Friton, International Procurement Developments in 2018: Part II – Debarment in EU Public Procurement Law – Tentative Progress or Treading Water? http://publicprocurementinternational.com/wp-content/uploads/2019/03/YIR_session_2pt2_2019_Pascal-Friton.pdf

If the UK were to establish such a database it would enable it to more easily receive and reciprocally share information about unreliable contractors with other jurisdictions including the US, EU, and Germany.[31] If it were coupled with a push to ensure new free trade agreements contain clauses similar to those in US trade deals, which require identification of ineligible bidders and exchange of information, this could significantly help UK contracting authorities who currently struggle to get accurate information about the criminal records of overseas companies to vet them during tenders.[32]

6. Enhancing detection by establishing a procurement-specific anonymous reporting tool for whistle-blowers and competitors

Enhancing the detection of fraud, corruption and collusion in procurement is essential to any effective debarment/exclusion regime.[33] Ensuring that competitors, who may often be the first to detect irregularities,[34] can make secure and anonymous tip-offs, would significantly enhance such detection. Whistle-blowers similarly should be given secure, properly proteccted routes to feed evidence of corruption, fraud and collusion to a central procurement function.

7. Using complementary tools to encourage compliance such as administrative agreements

As the US regime shows, complementary measures alongside suspension and debarment can encourage companies to come clean about misconduct and to implement remedial measures. These include entering into published administrative agreements which specify what remedial measures a contractor must undertake in order to be eligible for government contracts. Such agreements can be particularly useful where competition would be severely restricted if a company were debarred from procurement.

Contact: Susan@spotlightcorruption.org

[31]https://www.worldbank.org/content/dam/documents/sanctions/other-documents/2019/jun/SD%20Survey%20Event_May%2022%20Session%20Summary%20(Updated%206.3.19).pdf

[32] United Kingdom Anti-Corruption Strategy 2017-2022, Year 2 update, July 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902020/6.6451_Anti-Corruption_Strategy_Year_2_Update.pdf

[33] Emmanuelle Auriol and Tina Soreide, 'An economic analysis of debarment' *International Review of Law and Economics* 50 (2017): 36-39. http://publicprocurementinternational.com/wp-content/uploads/2019/01/IRLE-2017-Auriol-Søreide.pdf

[34] Complaint from non-winning competitors is one of 8 significant red flags found to have a high correlation with incidences of corruption. See Joras Ferwerda, Ioana Deleanu and Brigitte Unger, "Corruption in Public Procurement: Finding the Right Indicators" *European Journal of Criminal Policy and Research* 23 (2017): 245-267. https://link.springer.com/article/10.1007/s10610-016-9312-3