PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

PROCUREMENT BILL [*LORDS*]

Fourth Sitting

Thursday 2 February 2023

(Afternoon)

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Monday 6 February 2023

The Committee consisted of the following Members:

Chairs: Clive Efford, † David Mundell

† Bhatti, Saqib *(Meriden)* (Con)
† Blackman, Kirsty *(Aberdeen North)* (SNP)
† Burghart, Alex *(Parliamentary Secretary, Cabinet Office)*
† Clarke-Smith, Brendan *(Bassetlaw)* (Con)
Duguid, David *(Banff and Buchan)* (Con)
† Eshalomi, Florence *(Vauxhall)* (Lab/Co-op)
† Evans, Chris *(Islwyn)* (Lab/Co-op)
† Fletcher, Nick *(Don Valley)* (Con)
† French, Mr Louie *(Old Bexley and Sidcup)* (Con)
† Gibson, Peter *(Darlington)* (Con)
Greenwood, Lilian *(Nottingham South)* (Lab)
† Jones, Gerald *(Merthyr Tydfil and Rhymney)* (Lab)
† Marson, Julie *(Hertford and Stortford)* (Con)
† Randall, Tom *(Gedling)* (Con)
† Russell-Moyle, Lloyd *(Brighton, Kemptown)* (Lab/Co-op)
Tracey, Craig *(North Warwickshire)* (Con)
Whitley, Mick *(Birkenhead)* (Lab)

Sarah Thatcher, Huw Yardley, Christopher Watson, *Committee Clerks*

† attended the Committee

Public Bill Committee

Thursday 2 February 2023

(Afternoon)

[David Mundell *in the Chair*]

Procurement Bill [*Lords*]

Clause 23

Award criteria

2 pm

Chris Evans (Islwyn) (Lab/Co-op): I beg to move amendment 12, in clause 23, page 18, line 4, at end insert—

"(3A) Where—

(a) the contracting authority is the Ministry of Defence, and

(b) the contract concerns defence or security,

the award criteria must be weighted so as to advantage United Kingdom suppliers."

This amendment would give advantage to UK based suppliers in the case of defence or security contracts under the Ministry of Defence.

As has been said during the Committee's proceedings, when done well, defence procurement strengthens our UK economy and UK sovereignty. Labour in government would make it fundamental to direct British defence investment first to British businesses, with a higher bar set for any decisions to buy abroad. That is the objective behind the amendment.

The Government really have missed an opportunity in the Bill to put British businesses first. We should be using it to ensure that we buy, make and sell more in Britain. Across the country, we have amazing British businesses, with the capability to support all the country's defence and security procurement needs. Our steel, shipbuilding, aerospace and material industries are national assets and treasures. We need to support them.

If we want to use legislation to empower British business, we need to ensure that British business has the first bite of the cherry of the investment on offer. For the good of our country, we should want to see as much as possible of our equipment designed and built here in the United Kingdom. There are those who think that putting that in the Bill is not necessary, and that being a British business that supports jobs and industry in the UK should speak for itself. Sadly, as we have seen, that is not true.

I draw attention to the recent signing of the contract for fleet solid support ships, which was awarded to a Spanish-led consortium. The Government claim that the contract will support 1,200 jobs across the UK and 800 at Harland & Wolff in Belfast, but it is worth noting that the Government have included no guarantees of those jobs in the contract itself. Under the terms of the contract, the Spanish company will do the majority of the complex manufacturing of the ships, which requires most of the expertise and technology transfers that underpin the project. Instead of investing in the UK's own abilities in design and technology, we are paying Spain to strengthen its abilities.

To return to my point, the Government chose that Spanish state-subsidised bid over a bid that would have sustained more than 2,000 jobs directly in the design and building of the FSS ships and about 1,500 jobs in the wider UK supply chain, and supported about another 2,500 in local communities around the UK—not insubstantial figures. The award of that contract comes at a critical time for the UK shipbuilding industry. Today, we have already had a statement on the Floor of the House about British Steel. The GMB union has released research to show that shipbuilding and ship repair employment in Great Britain has fallen by 80,000 jobs since the early 1980s. Not only is that a massive decline in skills in the UK industry, but it poses a threat to the UK sovereign defence manufacturing capability at a time of international uncertainty.

I do not need to tell the Committee that this country has a skills gap that desperately needs to be fixed. According to the National Audit Office report on the digital strategy for defence published in October 2022, the Ministry of Defence is having difficulties recruiting and retaining the necessary workforce, because its pay rate cannot compete with the private sector. Some defence companies are actively trying to resolve the issue by recruiting through apprenticeship programmes, such as that at Rolls-Royce, which announced 200 new apprenticeships at its new nuclear skills academy in Derby, and the apprenticeship scheme at Leonardo, where I went last year to speak with the apprentices in Yeovil about their hard work.

Apprenticeships, however, cannot exist without the work to do. One of the main issues that defence companies come to me with is the sustainability of workflow. That makes employers reluctant to take on apprentices for fear that they will not have enough work or money to support them. For apprentices themselves it does not make the defence industry look like a stable place to grow their career. We need long-term investment in apprenticeships and skills development in the UK. There needs to be a culture change in Government to put the growth of local industries first and to review the pipeline of all major infrastructure projects to explore how to increase the materials made in Britain and to upskill the workers to get the jobs of the future.

Such concerns are spread across the whole United Kingdom. The Scottish Affairs Committee has raised those concerns regarding Scottish shipyards. In its report, "Defence in Scotland: military shipbuilding," which was published on 23 January, the Committee said:

"Recent developments have introduced uncertainty about some orders in the pipeline and whether it sets out a clear 'drumbeat' of orders needed to sustain Scottish shipyards."

UK workers deserve better than that uncertainty.

When discussing the UK defence industry, we must not forget the importance of small and medium-sized enterprises in the supply chain. We know that shipbuilding contracts can help to deliver benefits for the wider economy and in shipbuilding communities. If contracts keep going abroad, work for SMEs will also go abroad, and the skills will go with them.

Public money should be spent for the public good. We should always consider the wider value to society. Our smaller local businesses are at the heart of that. The amendment would advantage British businesses in

bidding for defence and security contracts. As a result, it would also advantage UK businesses in the supply chain.

If we are serious about defence procurement, we must commit to buy, sell and make more in Britain. It is crucial, now more than ever, that we have a procurement system that supports our sovereign capabilities, ensuring that UK businesses have the advantage when it comes to securing defence and security contracts.

The Parliamentary Secretary, Cabinet Office (Alex Burghart): It is a pleasure to serve under you this afternoon, Mr Mundell. Before I turn to amendment 12, I would like to refer back to our previous sitting. I said that I would get back to the hon. Member for Brighton, Kemptown, who is not in his place at the moment but will have the advantage of being able to read *Hansard* later. His question was whether a procuring authority can reject a bid if it requires a supplier to pay the real living wage. The short answer is yes. That option is very much open to procuring authorities. I am sorry that I could not provide him with that information earlier, because I know that he would have been happy to hear it.

Amendment 12, tabled by the Opposition, seeks to ensure advantage to UK-based suppliers for defence or security contracts. Defence contracting authorities will determine the right procurement approach on a case-by-case basis. That ensures the delivery of the most effective solution for the armed forces while ensuring value for money, taking into consideration factors including the markets concerned, the technology we are seeking, our national security requirements and the opportunities to work with international partners, before deciding the correct approach to through-life acquisition of a given capability.

The defence and security industrial strategy sets out a strong commitment to maintaining onshore industrial capability in key capability segments, such as those that are fundamental to the UK's national security. That commitment does not always preclude the involvement of foreign-based firms, as long as they conduct the work in the UK and comply with certain security conditions.

I understand that the Labour party wishes to burnish its patriotic credentials—that is all for the good, I am sure—but to listen to the speech by the hon. Member for Islwyn, one could be forgiven for not understanding that 90% of defence spend is already within the UK. Indeed, the fleet support ships that he referred to will be built to a British design, with the majority of the construction at the Harland & Wolff shipyards in Belfast and Appledore and all the final assembly being completed at the Harland & Wolff shipyard in Belfast, bringing shipbuilding back to Northern Ireland. In our Westminster Hall debate the other day, it was good to hear the hon. Member for Strangford (Jim Shannon) praising that, and saying what a difference it would make to people and businesses in his community.

We must understand that there is already a good tradition of this approach. The Bill, though stipulations elsewhere, will actually make it easier for British small and medium-sized enterprises to bid for these contracts. We will also have better publication of pipelines, which will help them too.

While I appreciate what the hon. Member for Islwyn is trying to do with his amendment, there is a real risk that, if it was passed, we would see some defence authorities occasionally being forced to accept much more expensive contracts, perhaps with lower capability, and that would be to the detriment of both taxpayers' money and, more significantly, the capability of our armed forces. I therefore respectfully ask, on those practical grounds, that the amendment be withdrawn.

Chris Evans: The Minister mentioned the hon. Member for Strangford, whose nickname is the hon. Member for Westminster Hall, he speaks in so many Westminster Hall debates—I think he lives there. I listened to what the Minister said, and I appreciate that 90% of contracts are in this country. However, the amendment would be a shot in the arm not only for our defence industries, but for our steelmaking capabilities, so I will press it to a vote.

Question put, That the amendment be made.

The Committee divided: Ayes 4, Noes 8.

Division No. 16]

AYES

Blackman, Kirsty	Evans, Chris
Eshalomi, Florence	Jones, Gerald

NOES

Bhatti, Saqib	French, Mr Louie
Burghart, Alex	Gibson, Peter
Clarke-Smith, Brendan	Marson, Julie
Fletcher, Nick	Randall, Tom

Question accordingly negatived.

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clause 24 stand part.

Alex Burghart: The clause explains what we mean by "award criteria". They are the criteria against which contracting authorities assess tenders under a competitive tendering procedure, and the clause sets out the rules that apply to them.

The clause requires that award criteria are clear, measurable and specific, comply with the rules on technical specifications, are a proportionate means of assessing tenders, and relate to the subject of the procurement. The clause requires that the way in which tenders are evaluated is transparent and set out in the assessment methodology, and that contracting authorities set out the relative importance of the criteria.

The clause makes it clear that award criteria can cover a wide range of things, from price to how things are produced to what happens at the end of the solution's lifecycle, provided criteria relate to the subject matter of the contract. The rules allow a contracting authority to limit the number of lots that it wishes to award to a single supplier, when it has broken down a larger procurement into smaller lots or components. Where the contract is for light-touch services, which are person-centred services, reference is made to additional matters that can be considered to be relevant to the subject matter of the contract.

We want contracting authorities to be confident when designing and running procurement procedures. An area that often causes confusion is how far award

[Alex Burghart]

criteria can be iterated during the process. Given the flexibility afforded to contracting authorities under the new regime, clause 24 makes it clear that award criteria may be added to through greater detail, or tweaked to add clarity during a procurement procedure, but any such refinements to award criteria should be made at specified points. The clause does not allow for wholesale changes to award criteria. For example, during a procurement procedure that allows for a research phase, a design phase and a development phase, the overarching criteria will remain constant, but the specifics may evolve. That is what the clause seeks to achieve.

Florence Eshalomi (Vauxhall) (Lab/Co-op): It is a pleasure to serve under your chairship, Mr Mundell.

Clauses 23 and 24, as the Minister highlighted, relate to the award criteria and their refinement before the invitation of tenders. Award criteria for procurement need to be finely balanced to achieve the best deal for the public. If they are too narrow, we risk missing out on innovative processes, and the potential to save the taxpayer money and deliver those services efficiently; if they are too broad, we risk delivering substandard and inappropriate services.

In the lead-up to our consideration of the Bill, I spoke to different groups and charities. They said that broad contract terms often mean that contracting authorities end up awarding the contract to the cheapest bidder. That is despite the charities offering more bespoke and important services that address the needs of procurement far more substantially.

2.15 pm

I hope that the measures in the Bill will mean that those deciding on award criteria are given appropriate flexibility when making decisions. For example, the change from most economically advantageous tender to most advantageous tender should boost the ability of contracting authorities to consider matters such as social value when deciding on contract award criteria.

The importance of social value when considering procurement bears repeating. It is important not just for charities and social enterprises, but for the economy. The Confederation of British Industry stated in its submission:

"Social Value is an already proven tool for delivering social, economic, and environmental benefits as part of public-private partnership and suppliers to government are often well-versed in the requirements around social value. Good approaches to social value can maximise the impact of every pound spent and when done in genuine partnership with suppliers can have a significant positive impact for communities and the environment. Businesses welcome the renewed focus on social value both in the Bill and in proposed amendments".

As I said previously, however, that has to be balanced against the need to set realistic targets, to create desirable contracts and to ensure value for money in procurement. Clearly, such decisions can be complex. I therefore have a few questions for the Minister about the help that contracting authorities will get when deciding on award criteria.

Will the Government issue guidance and provide a template for what they expect a set of award criteria for a certain service to look like to other contracting authorities? Will the Government ensure that good practice is developed across the country, and allow for the easy sharing of information on award criteria? Again, I highlight the fact that procurement officers are often stretched, and information on what has worked well in other areas could be vital to producing the greatest value for money. Information on things that have created headaches in other areas can be useful to avoid the same pitfalls happening across the country. I hope that the Minister will consider issuing such guidance and will ensure that different authorities talk to each other to establish best practice in the new system.

Alex Burghart: I am glad to be able to give the hon. Lady that assurance.

Question put and agreed to.

Clause 23 accordingly ordered to stand part of the Bill.

Clause 24 ordered to stand part of the Bill.

Clause 25

Sub-contracting specifications

Question proposed, That the clause stand part of the Bill.

Alex Burghart: The clause sets out a specific and somewhat technical provision, whereby a contracting authority can either permit or direct a supplier to subcontract the supply of goods, services or works to another supplier.

In certain procurements, circumstances exist where part of the contract needs to be subcontracted to a specified supplier. That could be due to economic or technical reasons relating to requirements of interchangeability or interoperability with existing equipment, services or installations. It could also be due to the protection of exclusive rights.

For example, a contracting authority might require the use of certain technical software that is owned by a single supplier. Therefore, in such procurements, a contracting authority may need to nominate a particular subcontractor that must be used. For direct award under clause 41, however, a contracting authority may only require a supplier to subcontract the supply of goods, works or services to a particular supplier where the justifications for a direct award set out in schedule 5 also apply to the subcontractor.

Florence Eshalomi: The clause states that where a contract could be supplied to a supplier under a direct award, the contracting authority can mandate that a supplier that wins a competitive tender process must subcontract the supply of those works, goods and services to the supplier that could have supplied the contract via a direct award. We have discussed the issues of subcontracting and of direct awards, and we will discuss them further under clauses 71 and 41 respectively. This clause is relatively uncontroversial, in that it seeks to ensure that the mechanisms for direct awards can apply via a subcontract. We therefore do not wish to oppose the clause and are happy for it to stand part of the Bill.

Question put and agreed to.

Clause 25 accordingly ordered to stand part of the Bill.

Clause 26

EXCLUDING SUPPLIERS FROM A COMPETITIVE AWARD

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clauses 27 and 28 stand part.

Alex Burghart: We come to the clauses concerning the exclusion of suppliers. I appreciate that there is considerable interest in these clauses, and rightly so; they are an important part of the Bill.

Clause 26 sets out the basic principles governing the exclusion of suppliers from competitive award of contracts. Subsection (1) provides that contracting authorities must disregard tenders from suppliers that are "excluded". Excluded suppliers are defined in clause 57 as those in respect of which a mandatory ground for exclusion applies, as set out in schedule 6, and the issues in question are likely to occur again, or that are otherwise treated as excluded suppliers under the Bill.

Subsection (2) provides that contracting authorities must consider whether a supplier is an "excludable supplier" before assessing tenders, and may, at their discretion, disregard tenders from such suppliers. Excludable suppliers are those in respect of which a discretionary exclusion ground applies, as set out in schedule 7, and the issues in question are likely to occur again.

Subsection (3) requires contracting authorities to give the supplier the opportunity to replace an associated person, such as a subcontractor that the supplier is relying on, to meet any conditions of participation, if the exclusion situation pertains to such a supplier.

Clause 26 is essential to give effect to the exclusions regime set out in the Bill with regard to the assessment of tenders, which protects contracting authorities and the public from suppliers that may not be fit to compete for public contracts. However, the clause does not provide the detailed grounds for exclusion and the process for how authorities should apply them. Those are set out in clause 57 and in schedules 6 and 7, which we will come to on a future day.

Clause 27 sets out the basic principles governing the exclusion of suppliers from competitive, multi-staged procurements. Those provisions are needed in addition to clause 26 to ensure that contracting authorities consider the exclusions at the start of multi-stage procedures, as well as when considering tenders.

Subsection (1) provides that contracting authorities must apply the exclusions regime to interested parties at the outset of all multi-staged procurements. For those procurements, authorities should consider whether each interested supplier meets any of the grounds for exclusion and, if so, whether the issues in question are likely to occur again, and whether that supplier is to be treated as an excluded supplier under the Bill for other reasons.

If a supplier is an excluded supplier under subsection (2), the authority must prevent the supplier from participating in, or advancing any further in, the procurement. Where the supplier is an excludable supplier under subsection (3), the authority may, at its discretion, permit the supplier to participate. That has the effect of making exclusions a gateway into the procurement.

Subsection (4) requires contracting authorities to give the supplier the opportunity to replace an "associated person", such as a subcontractor the supplier is relying on, to meet any conditions of participation, if the exclusion situation pertains to such a supplier.

Clause 27 is essential because it gives effect to the supplier exclusion regime set out in the Bill, which protects contracting authorities and the public from suppliers that may not be fit to compete for public contracts. However, as with clause 26, clause 27 does not provide the detailed grounds for exclusion and the process for how authorities should apply them. Those are set out in clause 57 and schedules 6 and 7.

Clause 28 deals with exclusions and subcontractors. It sets out the circumstances in which contracting authorities must, or may, consider whether the exclusion grounds apply to subcontractors that the bidder in question intends to work with, and how to apply the exclusion regimes where that is the case. Importantly, that is not limited to direct subcontractors of the bidder but includes other subcontractors further down the supply chain.

Subsection (1) requires contracting authorities to request information from suppliers about all intended subcontractors and to check that they are not on the debarment list. Subsection (2) then allows contracting authorities to request additional information about any subcontractors and consider whether they are excluded or excludable suppliers. Contracting authorities may choose to do that for particular types or categories of subcontractors, such as all first-tier subcontractors or service-critical subcontractors.

If a subcontractor is an excluded supplier under subsection (3), the contracting authority must disregard their tender and exclude them from taking part in a competitive tendering procedure. If the subcontractor is an excludable supplier under subsection (4), the contracting authority may disregard their tender or exclude them from the procedure. Before disregarding a supplier's tender or excluding them from a procedure under this clause, under subsection (5), the contracting authority must give the supplier the opportunity to replace the subcontractor in the supply chain in order to avoid itself being excluded.

We know that some of the worst corporate misconduct and unlawful behaviour occurs deep in supply chains to Government. That is particularly true with respect to forced labour and other modern slavery abuses. This clause is essential to ensure that the same standards to which we hold bidders for contracts can be applied all the way down the supply chain.

Florence Eshalomi: Clauses 26 to 28 concern the exclusion of suppliers on the grounds listed in schedules 6 and 7 related to mandatory and discretionary grounds for exclusion. We support the inclusion of exclusion grounds in the Bill. In the Green Paper "Transforming Public Procurement", the Government said:

> "The current procurement regulations allow contracting authorities to take into account the past performance of a supplier on only very limited grounds and commercial teams often have to rely on bidders' self-declarations rather than objective, evidence-based information. We can act now to raise the bar on the standards expected of all suppliers to the public sector and ensure that outstanding small suppliers are able to secure more market share, increasing productivity and boosting economic growth."

[Florence Eshalomi]

I am sure that there is complete agreement on that in the Committee today. There can be no question but that we should not give public money to those convicted of wrongdoing or acting in a way that damages the country and our communities.

Clauses 26 to 28 put into place terms to bring the mandatory exclusion grounds from schedule 6 and schedule 7 into force by using the language of "excluded" and "excludable", as defined in clause 57. Of course, the strength of this clause is heavily determined by the strength of the grounds for exclusion.

We are pleased to see some steps forward from the system inherited from European Union directives, which was brought into power in this country via the Public Contracts Regulations 2015. In particular, we are pleased to see environmental misconduct implemented as a discretionary exclusion ground. Our environment is a key natural asset that provides us with the building blocks for living in this country. Those who seek to damage our environment—for example, by dumping waste and causing significant damage to plant or animal life—should not be given Government contracts. We are also pleased to see national security within the system, although, as the Minister can guess from our planned amendments, we feel that this could have a stronger presence in the Bill, with some of the ambiguity removed.

When reading through the clause, we had some concerns about how it will be applied and some of the doors that it leaves open on discretionary exclusion grounds. Although the Bill is clear that those excluded on mandatory grounds must be disregarded from a tendering process, it is not clear on the fate of suppliers that fall foul of the discretionary grounds. Here, the Bill says that contracting authorities "must consider" whether a supplier is excludable on discretionary grounds but "may disregard" their tender, as the Minister said. This discussion may seem similar to ones we have already had, but this could have far more serious consequences.

For example, let us say that a supplier is decided to be a national security risk following an assessment by a contracting authority and that is confirmed by the Government via the provisions in clause 29. That supplier then applies for a tender to another contracting authority. What is stopping that contracting authority awarding this contract, should it so wish? There does not seem to be any mechanism to permanently exclude an excludable supplier in the Bill. Even when the Government consider a threat so severe that it should go on the debarment list, the Bill would still allow authorities to apply the "may" rather than the "must" exclude part.

I am sure the Minister will say that he will issue clear guidance on this and that contracting authorities should, of course, exclude a supplier in this case, but these are serious grounds for exclusion; we all agree on that. We cannot leave it to chance that a contracting authority uses the powers as they are written in the Bill, rather than as the Minister wishes. At the very least, that creates ambiguity around the whole system.

2.30 pm

Even if the Government want to give contracting authorities some flexibility, why should a supplier that is found to have violated one of these exclusionary grounds so seriously in one area that it is to be disregarded then be granted another contract? Surely a risky supplier is a risky supplier in any public procurement. Is it not better for the Minister to create a clear system of exclusion that removes suppliers that violate these grounds from the procurement system entirely?

We thought long and hard about tabling an amendment to replace this provision—there is a "must" in the Bill—but we thought that the best mechanism was to raise it in Committee today, so will the Minister answer on some of these issues? If we are not satisfied with his response, we will not hesitate to look at how to explore this later on in the Bill. If the reason for the "may" is to allow contracting authorities to have smaller hurdles for using their exclusionary powers, surely he must see that that creates a big problem for suppliers. If some authorities can use their powers sparingly and others use them tightly, how can suppliers tell whether they will be excluded before putting in an application?

We are clear that we do not want suppliers with serious breaches of the excludable grounds to have public contracts but, equally, we do not want them to waste their time and money due to uncertainty about whether they will be disregarded. We do not want suppliers to be put off bidding because they are unsure whether they will be disregarded on some of the more minor parts of the discretionary system.

These are serious matters with wide-ranging implications, and there cannot be the ambiguity that currently exists in the Bill. That is also important for the scope of the Bill and the scope of the discretionary exclusion regime in schedule 7. If the powers will be used quite liberally by contracting authorities, we should be careful about what we put in on the discretionary exclusion grounds. It is surely not the intention to see companies excluded for minor breaches that may fall under some of those grounds. However, if the powers are to be used sparingly, we should be more ambitious in schedule 7 and perhaps more prescriptive to ensure that we capture everything that we think should be excluded. For example, we may want to put in a clause on issues such as discrimination, workers' rights and not considering the public good to capture particularly egregious forms of abuse in this area. The truth is that we do not know in the drafting of the Bill as it stands, and it does not make for good legislation for contracting authorities to be going in blind on how they should apply the clauses. I hope that the Minister agrees on that.

Finally, on a more minor point, I hope that the Government will publish an easy-to-follow guide to the exclusion system. I understand why legislation sometimes requires references to different parts of the Bill, but it felt particularly difficult to work out the specific meaning of the clause and how it applies to suppliers. Using "excluded" and "excludable" suppliers as near-synonyms for mandatory and discretionary grounds for exclusion further adds some level of muddiness around what the clause means. I do not doubt the competence of procurement professionals in this country, but the Government should not make the comprehension of such an important part of the Bill more difficult than it needs to be. This is particularly true as the current system is pretty self-contained in one part of the Public Contracts Regulations 2015.

I hope the Minister will assure me that there will be adequate and easy-to-follow training and guidance from the Government by the time that the system is in place. That would help to put our minds at ease, and the minds of all the businesses that come forward.

Alex Burghart: On that final point, the hon. Lady will have heard me say that we intend to introduce a major programme of training and guidance across many areas covered by the Bill, as part of breathing new life into procurement in our country.

On the hon. Lady's previous points, this part of the Bill deals with the creation of the mechanism, the details of which are dealt with subsequently in the Bill. The mechanism is that there are some discretionary grounds for exclusion and some mandatory grounds for exclusion. When we get to the relevant clauses and schedules, we will be able to put our arguments, and she and her party can say whether they think that certain issues should be mandatory or exclusionary. I think she will see, when we get there, that sometimes there are grounds for mandatory exclusion on particular issues, but sometimes, on a different version of the same issues, there can be grounds for discretionary exclusion. As I say, we will get into the detail of that as we progress.

Question put and agreed to.

Clause 26 accordingly ordered to stand part of the Bill.

Clauses 27 and 28 ordered to stand part of the Bill.

Clause 29

Excluding a supplier that is a threat to national security

Florence Eshalomi: I beg to move amendment 18, in clause 29, page 20, line 42, leave out

"paragraph 14 of Schedule 7"

and insert

"paragraph 42A of Schedule 6".

This amendment is consequential on Amendment 15.

The Chair: With this it will be convenient to discuss the following:

Amendment 15, in schedule 6, page 104, line 25, at end insert—

"National security

42A A mandatory exclusion ground applies to a supplier if a decision-maker determines that the supplier or a connected person poses a threat to the national security of the United Kingdom.".

This amendment, together with Amendment 16, would move national security from among the discretionary exclusion grounds in Schedule 7 to the mandatory exclusion grounds in Schedule 6.

Amendment 16, in schedule 7, page 110, leave out lines 28 to 31.

See explanatory statement to Amendment 15.

Amendment 17, in schedule 7, page 111, line 39, leave out sub-sub-paragraph (e).

See explanatory statement to Amendment 15.

Amendment 19, in clause 78, page 53, line 38, leave out

"paragraph 14 of Schedule 7"

and insert

"paragraph 42A of Schedule 6".

This amendment is consequential on Amendment 15.

New clause 1—*National Security Procurement Committee—*

"(1) The Secretary of State must establish a committee, chaired by the Minister for Resilience, to consider (a) national security and (b) cyber security within the Government's supply chain.

(2) The committee must consider whether suppliers should be excluded on the basis of the discretionary exclusion ground in paragraph 14 of Schedule 7 (threat to national security).

(3) The committee must review ongoing major government contracts, with focus on threats to national and cyber security.

(4) The committee must meet no less than once every three months."

This new clause will mandate that a new committee must be set up with a view to proactively identifying potential security threats within the Government's supply chain.

New clause 4—*Dependence on high-risk states—*

"(1) The Secretary of State must within six months publish a plan to reduce the dependence of public bodies upon goods and services which originate in whole or in part in a country considered by the United Kingdom as a high risk sourcing country.

(2) For the purposes of this section, a country is considered a high risk sourcing country by the United Kingdom if it is defined as either a systemic competitor or a threat in the latest Integrated Review of Security, Defence, Development and Foreign Policy."

Florence Eshalomi: Amendments 18 and 15 to 19 relate to the discussions that we just had—on clauses 26 to 29 stand part—on exclusion and excludable grounds. Taken together, the amendments would move the national security ground for exclusion from schedule 7 to schedule 6. In practice, that would mean taking the consideration that a supplier is a threat to national security from being a discretionary to a mandatory ground.

As I mentioned, we considered removing the distinction between mandatory and discretionary grounds entirely in the Bill, and to some degree, the amendment serves as the first step towards considering wider reform of these parts of the Bill. However, we believe there is a particular case for national security to be a mandatory, not a discretionary ground.

Perhaps the Minister can cast his mind back to Second Reading, over a month ago. During that debate, Members on both sides of the House raised a number of valid concerns about national security in procurement. We in the Opposition share those concerns. Procurement deals with our basic infrastructure and offers a million doors into our country to those who represent a security threat. We cannot be too arrogant to believe that those who represent such a security threat cannot think of innovative ways to get access to critical and sensitive information.

Just last month, we heard how SIM cards capable of tracking location were found in ministerial cars, which was very concerning. We need to think about all the data that could be revealed and the sensitive information that could end up in the hands of malign actors. Even for minor contracts, important information about the country could be extracted without our knowledge. It is worth reiterating that we cannot be too arrogant about knowing what information is sensitive and what is not.

As we enter the age of the internet, our data and the strength of our infrastructure become more valuable and at even greater risk. There is no room to open up the operating strands of the country to national security risks. Doing so confers unnecessary risk on the state.

[Florence Eshalomi]

Let me take the Minister's mind back to the speech from his hon. Friend the hon. Member for Rutland and Melton (Alicia Kearns). He can look at some of the points she highlighted if he doubts the severity and importance of the issue. She made a powerful case, and the test for what constitutes a national security threat should be strong, as it is in the Bill.

Clause 29 provides that suppliers may be excluded on those grounds only with the express permission of a Minister. It is right to have that test in the Bill, as no one wants contracting authorities making decisions on such important matters. However, it makes no sense for there to be such a high-level test in the Bill if no high-level response comes with it. It also makes no logical sense to the path of decision making in the Bill. It also makes no logical sense for the path of decision making in the Bill. If the matter is so important that the decision to exclude cannot be left to authorities, why do contracting authorities have discretion to decide whether to disregard a tender? Surely at the very least the decision to disregard a tender should also be taken at Secretary of State level. Under the Bill, even when the Secretary of State decides to place a supplier that is deemed to be a national security threat on the debarment list, contracting authorities still have discretion over whether to award the contract.

It does not take much imagination to see that an under-resourced contracting authority might decide that national security issues were not relevant to a small contract, and that could inadvertently open a door to sensitive information being shared. We are clear that there are no circumstances where a national security threat should be awarded a Government contract.

There is an unacceptable and unknown threat associated with having suppliers that are considered a national threat in our procurement system. I welcome the positive Government amendments that go in the direction of acknowledging that; the Bill is a step forward on national security. However, amendments 15 to 19 are the only way to close the loopholes in our procurement system.

In the Select Committee, the hon. Member for Rutland and Melton said that

"we must ensure we do not end up in a relentless whack-a-mole trying to hunt down the companies responsible for such things. We need to focus on the components within sensitive industries or sensitive items, and to ensure that any public body procuring such components or companies within relevant industries must come to someone for a second review. That means we are not attacking a specific country and saying China's products are bad or saying that certain companies are awful; we are doing due diligence in sensitive areas. That is why we need a SAGE-style committee on public procurement specifically looking at national security."

We completely agree with that sentiment. New clause 1 is an attempt to bring to life that committee in the style of the Scientific Advisory Group for Emergencies. As I said on amendment 11 to clause 13, there are a multitude of examples from the past decade of procurement giving rise to national security concerns, the latest of them involving SIM cards being found in ministerial cars; I mentioned that earlier. We are seeing the same questions arise throughout our debates. What damage has already been done? How much will it cost to repair? How did we not spot this earlier? These are all good questions. Without fail, the answer to all those questions is that the cost and damage is far greater than if we had acted earlier and prevented concerns from arising.

I hope the Minister will agree that new clause 1 aims for a cultural change in national security and procurement. We cannot afford to be reactive when it comes to national security threats. The sooner we act, the less valuable information we lose, and the less risk we are at from the threats that we identify. The SAGE-style committee could consider whether a supplier could be excluded on national security grounds. It could also consider wider threats across the supply chain. In his closing remarks on amendment 11, the Minister said:

"National security is, of course, of paramount importance."—[*Official Report, Procurement Public Bill Committee,* 31 January 2023; c. 63.]

That being so, I hope that he will support new clause 1.

Clause 29 adds provisions relating to exclusion on national security grounds; it ensures that the grounds for exclusion are verified by the Secretary of State. Declaring that a supplier is a threat to national security is serious, and it is right that there be scrutiny in the system to ensure that contracting authorities do not do it lightly, or without due care. I hope the Minister can inform me how that will interact with the debarment test that he mentioned. Given the scrutiny and certification that is needed if a supplier is to be disregarded on the grounds that they are a national security threat, it is logical that the great bulk of those suppliers will end up on the debarment list. Can the Minister confirm whether that is the case? If it is not, what circumstances relating to national security would lead to a supplier not being added to the debarment list?

2.45 pm

Alex Burghart: New clause 1 would legislate for the establishment of a committee to consider the threat to national security and cyber-security from suppliers in supply chains delivering public contracts. The Government take national security considerations extremely seriously, and we understand the importance of countering threats to our security throughout our supply chains. We recently demonstrated that through our action to remove Chinese surveillance equipment from sensitive sites across the Government estate. The inclusion of the national security exclusion ground in schedule 7 to the Bill will bring about a significant improvement to the existing EU-derived regime. It will allow a supplier to be excluded on national security grounds, even when the procurement does not meet the bar for exemption on those grounds.

We understand the intention behind the hon. Lady's new clause, but it duplicates aspects of the new procurement regime underpinned by the Bill. I have already mentioned the ability to exclude a supplier on grounds of national security. The Bill requires any contracting authority that wishes to rely on those grounds when excluding a supplier or rejecting their tender to first notify a Minister of the Crown, who must be satisfied that the supplier should be excluded.

The notification not only ensures that the Minister agrees to the exclusion, but serves to alert them, if they are not already aware, that there may be security concerns about the supplier. The Minister may accordingly decide to investigate the supplier under clause 60, which could lead to the supplier being placed on the debarment list under clause 62. Furthermore, if a supplier already holds a public contract and is found to meet any exclusion ground, clause 77(2)(b) enables the contract to be terminated. Clause 77(2)(c) extends that to subcontracts.

As with exclusion, any proposed termination on the grounds of national security must be brought to the attention of the Minister for a decision; again, that could trigger debarment from future procurements.

Under the new clause, the proposed committee would also consider threats to cyber-security. Existing policy in this area is detailed in procurement policy note 09/14. That mandates that where contracts have certain characteristics, suppliers must meet the technical requirements prescribed by the Cyber Essentials scheme. That applies when ICT systems and services supplied by the contract either store or process data at official level. In addition, the MOD, through the defence cyber protection partnership, has developed the cyber-security model that is to be applied to its procurements to ensure cyber-security-related risks are adequately managed throughout the life of the contract.

In short, contracting authorities are already alive to the need to consider national security, including cyber-threats, when procuring public services, and are well placed to review their contracts and supply chains for such threats, bolstered by the provisions of the Bill. However, I am mindful of the concerns raised by colleagues on Second Reading, and those concerns will continue to inform Government thinking as we move forward.

Amendments 15 to 19 seek to make exclusion on national security grounds mandatory, rather than discretionary. Any risk to national security should of course be taken very seriously indeed, but it is right that we leave some scope for nuance and flexibility in the application of the exclusion ground. Suppliers may pose a risk in some contexts, but not in others. For instance, in a relatively innocuous procurement, the exclusion of a supplier might not be merited if the contracting authority was confident that there was no potential for harm. A company that might raise concern in the manufacture of one technical device might also produce paper clips, which would not be a threat to national security.

It is important to note that contracting authorities must consider all exclusion grounds, mandatory and discretionary, against every supplier in each procurement. Any decision not to exclude a supplier that poses a national security risk must be weighed against that risk, and I am confident that contracting authorities will do so carefully.

Kirsty Blackman (Aberdeen North) (SNP): I understand what the Minister is saying, but if the contracting authority is spending public money on those paper clips, it is funding a company that can breach national security and do things that are against the national interest. The contract may not be a risk to national security, but the company is, so surely it should be a mandatory, rather than a discretionary, exclusion.

Alex Burghart: There would be a balance of risks. Not all security threats are proven. Of course, it is up to the authority to assess the concerns at the time.

Question put, That the amendment be made.

The Committee divided: Ayes 5, Noes 8.

Division No. 17]

AYES

Blackman, Kirsty	Jones, Gerald
Eshalomi, Florence	
Evans, Chris	Russell-Moyle, Lloyd

NOES

Bhatti, Saqib	French, Mr Louie
Burghart, Alex	Gibson, Peter
Clarke-Smith, Brendan	Marson, Julie
Fletcher, Nick	Randall, Tom

Question accordingly negatived.

Clause 29 ordered to stand part of the Bill.

Clause 30

EXCLUDING SUPPLIERS FOR IMPROPER BEHAVIOUR

Question proposed, That the clause stand part of the Bill.

Alex Burghart: Clause 30 requires contracting authorities to exclude suppliers that have gained an unavoidable, unfair advantage in a procurement as a result of improper behaviour in relation to that procurement, and suppliers that have failed to provide an accurate and complete list of connected persons and associated persons when requested to by the contracting authority.

Subsections (1) and (2) are clear that exclusion as a response to improper behaviour, defined in subsection (4), is a last resort. It is to be used only where the supplier has gained an unfair advantage that cannot be remedied other than by exclusion. Subsection (3) requires contracting authorities to give suppliers the opportunity to remedy their improper behaviour. When suppliers seek to tilt the playing field in their favour via misrepresentation or undue influence, and fail to remedy that, it makes fair and open competition for contracts impossible, and it is taxpayers who pay the price.

Transparency is another essential component of fair procurement, so subsections (5) and (6) are clear that suppliers that are not prepared to disclose full and accurate details of their connected persons, including beneficial owners and directors, or associated persons—for example, subcontractors that are relied on to meet conditions for participation in the procurement—are not fit to bid for public contracts. Contracting authorities must know who owns or has control over the suppliers with which they are contracting. The clause will support them in gaining that knowledge.

Florence Eshalomi: As the Minister has highlighted, clause 30 concerns the exclusion of suppliers who behave improperly during the procurement process. It is important that we do not tolerate improper behaviour in procurement. Many procurement contracts are public-facing and require a huge amount of trust, because the suppliers represent the contracting authority to the public. If there is evidence of misleading and improper behaviour that betrays a lack of integrity during the procurement process, it will raise doubts about whether such behaviour may flow through into how the company carries out the contract. Critical goods are procured via these processes, which are vital to the way our country functions, and we cannot let those who embellish their evidence during the tendering process have access to our supply chains.

The Opposition support the clause, but I have a few questions about how it will work. What steps will be taken to establish improper behaviour during the tendering process? What steps can be taken if information comes

[Florence Eshalomi]

to light after the award of a contract? It is crucial that improper influence does not permeate into our procurement system; the measures in the Bill can prevent that, but there also needs to be transparency in the system so that we can spot things like undue influence and prevent improper behaviour from falling through the cracks. What steps is the Minister taking to ensure that undue influence, both formal and informal, is spotted during the procurement process?

I must also ask what consistent remedy is available to contracting authorities that find out about breaches following the award of a contract. Let me take hon. Members back to the covid-19 scandal, when billions of pounds-worth of unsellable personal protective equipment was written off. I know that that was not all due to fraudulent behaviour from suppliers, and that some fraudulent behaviour would not fall under the clause if a competitive tender were used. However, it is shocking that the Government admitted on 20 December 2022, in answer to a parliamentary question, that only £18 million of taxpayers' money had been clawed back from PPE contracts.

There needs to be stronger clawback and remedies when suppliers act improperly. Perhaps that is a matter of culture more than legislation, as many contracts include such a clause, but it would still be helpful to hear what the Minister thinks needs to be done to ensure that more public money is clawed back from those who act improperly.

Alex Burghart: In answer to the hon. Lady's final point, the Government are absolutely seeking to recover public money. The Department of Health and Social Care has been in a process of mediation, but obviously there will come a point at which mediation may need to lead to litigation. Contracts have been drawn up in a way that ensures that we can do the right thing by taxpayers.

On the hon. Lady's earlier point, I can reassure her that we will publish guidance to support contracting authorities in this area, so that they can conduct due diligence on suppliers and their connected persons.

Question put and agreed to.

Clause 30 accordingly ordered to stand part of the Bill.

Clause 31

Modifying a section 19 procurement

Question proposed, That the clause stand part of the Bill.

Alex Burghart: There will be times when changes need to be made to the terms of a procurement. Clause 31 sets the scope for such modifications, with the intention of striking a balance between permitting changes required by contracting authorities and preventing abuse of that flexibility, for example to suit a particular supplier. Modifications are allowed in all procedures, but—with the exception of light-touch contracts, which have greater flexibility—they must be confined to non-substantial changes. In essence, that prevents a change that would be likely to impact the market response to the procurement.

Where a permitted modification is made, the contracting authorities must, in consequence, consider revising the time given to suppliers to respond to the invitation to tender or request to participate. The making of modifications will also be transparent, as the contracting authority must provide revised documentation that highlights the changes.

Florence Eshalomi: Clause 31 relates to the modification of a section 19 procurement prior to the deadline for submitting a request to participate in the procedure, where there has been no invitation to submit such requests. This sensible clause has proportionate provisions relating to the alteration of contracts. It is right that contracting authorities should be able to modify terms early in the process and carry out later alterations where they are not substantial, or relate to light-touch contracts.

3 pm

It is also right that contracting authorities consider timeframes when substantial alterations are made. This is useful for bidding suppliers, which may need time to reassess their bids. Again, I hope that contracting authorities will consider SMEs when they are making contracts, and I refer the Minister to some of the evidence we have received on the Committee.

Mr Cram mentioned that even a simple bid can run into four figures, so if an SME sees a contract that it feels is good and offers value for money, and that it believes it can win, it may invest a significant amount of money into developing the bid prior to the deadline for submitting a request to participate in a procedure or for submitting a tender. If the terms are changed and make the contract unattractive to an SME, it would simply lose the money that it has invested, despite the increased time limits. Will the Minister ensure that there is not a culture of contract changes, so that SMEs do not lose a disproportionate amount of money during the process?

Alex Burghart: As the hon. Lady will know, we have included provisions throughout the Bill to make sure that bids are more accessible for SMEs and that we have a level playing field. In that respect, the clause is no different from others in the Bill.

Question put and agreed to.

Clause 31 accordingly ordered to stand part of the Bill.

Clause 32

Reserving contracts to supported employment providers

Alex Burghart: I beg to move amendment 32, in clause 32, page 23, line 22, after "operates" insert "wholly or partly".

This amendment would mean that an organisation could meet the test of being a "supported employment provider" if it only partly has the purpose of providing employment or support to disabled or disadvantaged individuals.

The Chair: With this it will be convenient to discuss the following:

Amendment 92, in clause 32, page 23, line 23, leave out "or disadvantaged".

This amendment, together with Amendment 93 would ensure that provisions related to supported employers are targeted at disabled individuals, in line with the Public Contract Regulations 2006.

Government amendment 33.

Amendment 93, in clause 32, page 23, line 25, leave out "or disadvantaged".

This amendment, together with Amendment 92 would ensure that provisions related to supported employers are targeted at disabled individuals, in line with the Public Contract Regulations 2006.

Amendment 94, in clause 32, page 23, line 25, leave out "30" and insert "50".

This amendment would increase the threshold for an employer to be considered supported from 30% of disabled or disadvantaged staff to 50%, in line with the Public Contract Regulations 2006.

Clause stand part.

Alex Burghart: Amendments 32 and 33 seek to ensure that the provision is applied widely and as intended, so as to support disabled or disadvantaged people who might otherwise struggle to find employment effectively. Many of the organisations that wish to provide that assistance through the delivery of public contracts do so via arrangements commonly referred to as "employment programmes", which can be established by one organisation or a number of organisations working together. We need to ensure that those programmes can qualify for a reserved contract. Amendments 32 and 33 therefore seek to clarify that the 30% threshold for disabled or disadvantaged workers can be applied to the programme or part of an organisation, and not just to the organisation as a whole. Where a programme is established as a result of organisations working together, each organisation can contribute to the 30% threshold.

The amendments also seek to clarify that, in order to qualify, an organisation does not necessarily need to have been set up with the sole purpose of assisting disabled or disadvantaged people in employment, but the part of the organisation interested in delivering the contract must have that purpose. This may be a subsidiary or a specific project within an organisation. Where it is applied to a programme made up of a number of organisations working together, the purpose applies to the programme.

Clause 32 allows procurements to be reserved for organisations that provide employment and/or assistance in finding and retaining employment for disabled or disadvantaged people, allowing public procurement to support organisations that assist people who might otherwise struggle to access the labour market, while delivering public services to a high standard. Such companies are often not for profit and will therefore benefit from a more level playing field when competing for a reserved procurement than might otherwise be the case. In order to qualify, the organisation, or an arrangement between organisations, must have the aim of assisting disabled or otherwise disadvantaged people in employment, and at least 30% of the workforce must be disabled or otherwise disadvantaged.

Florence Eshalomi: I thank the Minister for his explanation of amendments 32 and 33. We support the use of supported employers and believe that they could go even further, as I will argue in relation to our amendments 92 to 94, but I will first touch on amendments 32 and 33.

We are concerned that Government amendments 32 and 33 expand the definition of supported employment provider so that it would apply where the part of the organisation delivering the contract would meet the relevant thresholds, which could potentially allow for a further watering down of the requirements. Has the Minister considered the potential of the amendments to limit the effectiveness of supported employment by allowing more providers that are not focused on the needs of disabled people to access reserved contracts, or even the potential for larger contractors to game the system? We do not intend to push the amendments to a vote, but I would welcome clarity from the Government and I hope that the Minister's response will satisfy me. We reserve our right on that.

On amendments 92 to 94, supported employment is a long-established practice and plays an important role in increasing employment opportunities for disabled people. The principle of reserving contracts so that only supported employment providers can bid for them is welcome. However, there are concerns that the Bill does not set a sufficiently high bar for an organisation to be a supported employer, dilutes the aims of reserving contracts and potentially opens the system to abuse.

The Public Contracts Regulations 2006 required 50% of employees to be disabled people, which provided a greater focus on the specific aim of supporting the employment of disabled people. Clause 32 instead enshrines the weaker standard defined in the Public Contracts Regulations 2015, which require only 30% of workers to be disabled or disadvantaged. That potentially limits the impact of supported employment in providing employment opportunities for disabled people.

Concerns have been raised that that approach does not fully recognise the importance of deaf and disabled people's organisations, or DDPOs, which not only provide supported employment but have a wider role in society. There are clear links between the work of DDPOs and social value. DDPOs protect and uphold disabled people's rights, campaign for equality and inclusion, and provide a range of peer-led accessible services. Their services support disabled people in accessing services and entitlements, challenging discrimination and exclusion, and having choice, control and independence.

Amendments 92 to 94 would return to the broad definition of a supported employment provider set out in the Public Contracts Regulations by requiring 50% of employees to be disabled and placing a greater emphasis on the role of DDPOs. Inclusion London, a membership body for DDPOs in London, defines a DDPO as an organisation the management committee or board of trustees of which has at least 75% representation from deaf and disabled people, the staff of which is made up of at least 50% deaf and disabled people at all levels of the organisation, and that works to provide services for or works on behalf of deaf and disabled people.

Amendments 92 and 93 would remove "disadvantaged" from the definition. Disability is clearly defined in the Equality Act 2010, which provides a more robust definition that would ensure that the aim of reserving contracts is effectively targeted at the right providers. Did the Government consider the merits of the 2006 definition in preparing the Bill, and did the Government assess whether that definition more effectively targeted the measure of reserving contracts? Will the Minister consider engaging with DDPOs to ensure that the benefits of those organisations are considered in implementing the Bill?

Alex Burghart: Amendments 92 to 94, tabled by the hon. Lady, seek to reduce the scope of application of clause 32, which allows procurement to be reserved for supported employment providers. The clause is consistent with the requirements in regulation 20 of the Public Contracts Regulations 2015, which has functioned well since coming into force. Amendments 92 to 94 seek to revert to procurement rules from 2006, which have long since been repealed.

Amendments 92 and 93 seek to remove the support to disadvantaged people who may struggle to access the labour market. "Disadvantaged" is deliberately undefined in the Bill to enable contracting authorities, particularly local government, to address challenges in the employment landscape at any point in time. The underlying objectives could be to assist those who traditionally struggle to access the labour market, such as the long-term unemployed, prison leavers or care leavers. It is our intention that this clause be capable of broad application, at the discretion of the contracting authority. Amendment 94 would result in fewer organisations, including not-for-profit organisations, being able to qualify for a place in a reserved procurement.

Increasing the percentage of the workforce who must be disabled—or disadvantaged, as the clause is currently drafted—from 30% to 50% may at first appear as an incentive for organisations to have more disabled employees, and therefore appear laudable. However, in reality, it will reduce the competitive market. A threshold of 50% will be a very high target for most organisations looking to bid on their own. Similarly, employment programmes are often the result of collaboration between commercial and not-for-profit organisations, which contribute to meeting the threshold. We have taken steps to ensure those sorts of arrangements can qualify. Significantly increasing the threshold may put those collaborations at risk—we would not want to see that.

Suppliers might feel obliged to establish more complex supply chains to meet the threshold, which could hinder the quality of delivery and could drive up costs. Alternatively, suppliers might simply choose not to bid for Government contracts.

Ultimately, if a reserved procurement is to be successful, it requires competition. The smaller the pool of qualifying organisations, the less likely a reserved competition will be viable, meaning contracting authorities will not be able to use the provision, and the direct support to the people and organisations the clause aims to benefit will be lost.

Amendment 32 agreed to.

Amendment made: 33, in clause 32, page 23, line 24, leave out from "individuals" to end of line 26 and insert "where—

(a) disabled or disadvantaged individuals represent at least 30 per cent of the workforce of the organisation,

(b) if a particular part of the organisation is to perform the contract, disabled or disadvantaged individuals represent at least 30 per cent of the workforce of that part of the organisation, or

(c) if more than one organisation is to perform the contract, disabled or disadvantaged individuals represent at least 30 per cent of the combined workforce of—

(i) those organisations,

(ii) where a particular part of each organisation is to perform the contract, those parts, or

(iii) where a combination of organisations and parts is to perform the contract, those organisations and parts."—*(Alex Burghart.)*

This amendment would mean that an organisation could meet the test of being a "supported employment provider" if part of the organisation meets that test and that part is to perform the contract, or the test is met by the combined workforce of organisations or parts of organisations that will together perform the contract.

Clause 32, as amended, ordered to stand part of the Bill.

Clause 33

RESERVING CONTRACTS TO PUBLIC SERVICE MUTUALS

Question proposed, That the clause stand part of the Bill.

Alex Burghart: Clause 33 operates similarly to clause 32, but allows only specific procurements to be reserved for organisations that have spun out of the public sector to provide social services, with company decisions managed by company employees. Those companies are known as public service mutuals.

Public service mutuals play a vital role in supporting communities at a local level, delivering essential services and contributing to economic growth. However, they may struggle to compete with larger or more well-established suppliers, and it is therefore appropriate that we encourage these public service mutuals by enabling competition in certain limited circumstances among only those organisations that meet the requirements of this clause.

Subsection (6) provides a full definition of a public service mutual body for the purposes of applying this clause. For example, in order to qualify, the company must be run on a not-for-profit basis or restrict the distribution of profits to its members. The exact list of services that can be reserved under clause 33 will be provided in secondary legislation under subsection (8). All reservable services are also light-touch services; examples include adult educational services and rehabilitation services.

Florence Eshalomi: As the Minister has mentioned, clause 33 gives contract authorities the ability to reserve certain light-touch contracts for public service mutuals. I am pleased to discuss this matter; as a very proud Labour and Co-operative MP, I am happy to have another opportunity to talk about how fabulous co-operatives are and how they can benefit the public sector. It is fair to say that the Minister and I agree that public service mutuals have so much to offer in terms of innovation and how they can help the wider public sector. The running of services by people rooted in their community helps to bring an understanding of local needs to the heart of public service mutuals, and they can also improve both employee morale and the quality of services for users.

3.15 pm

This clause hinges on the definition of the light-touch regime; however, the impact of the clause is directly linked to the impact of the light-touch regime. As I said in my speech on clause 19, there is concern about the definition of the light-touch regime. The Delegated Powers and Legislative Reform Committee has said of the Bill that:

"It does not explain why it is considered appropriate for the power to be so broad that the issue of which kinds of contracts are to be subject to the 'light touch contract' regime is left entirely to regulations. There is nothing of substance on the face of the Bill to limit the discretion afforded to Ministers to allow less rigorous regulation for contracts of a kind that they choose to specify in regulations. Clause 8(4) lists three factors which Ministers must consider but without saying what effect these factors are to have. The Memorandum suggests that the provision made in exercise of the power will simply be a list of CPV codes"—

that is, common procurement vocabulary codes—

"but the power need not be exercised in that way."

In conclusion, the Committee said that

"the reasons given by the Government for leaving entirely to regulations the question of which contracts should be subject only to the 'light touch' regulatory regime are inadequate; and unless the Government can fully justify doing otherwise, the Bill should include criteria for determining which contracts should be subject to that regime."

I am again concerned that the Government have not moved to justify their stance to a greater extent than simply pointing to the existence of CPV codes. Many people feel that that is inadequate.

I am going back to the concerns that I raised the other day about the light-touch regime, which the Minister did not fully respond to. I hope that he can explain the light-touch regime a bit further today and say how it will apply to this clause specifically and to the rest of the Bill in general.

Alex Burghart: The hon. Lady will have heard me say on Tuesday about the light-touch provisions that the Government are heavily hemmed in by our international obligations in this area. The codes to which she referred are very specific and they are not included in the Bill because they are extremely numerous. I think there are about 500 of them, so it would have been very difficult for us to put them all in the Bill. However, I am grateful that she supports the general thrust of the clause.

Question put and agreed to.

Clause 33 accordingly ordered to stand part of the Bill.

Clause 34

COMPETITIVE AWARD BY REFERENCE TO DYNAMIC MARKETS

Question proposed, That the clause stand part of the Bill.

The Chair: With this, it will be convenient to discuss clauses 35 to 40 stand part.

Alex Burghart: This substantial grouping of clauses is of considerable importance to the Bill.

Clause 34 relates to the awarding of contracts under the new concept of a dynamic market. This is a highly flexible commercial tool. Dynamic markets are established by contracting authorities and essentially are "live" lists of suppliers that are pre-qualified to deliver certain types of contracts.

Dynamic markets are similar to existing dynamic purchasing systems, in that they will allow for suppliers to be admitted to the market if they meet the conditions of membership. To maximise the benefits of this flexible purchasing tool, we have significantly broadened the type of contracts that can be awarded in dynamic markets. Dynamic markets will be available for all types of procurement and not just for commonly used goods and services, as was the case for dynamic purchasing systems.

Clause 34 is the first in a series of clauses relating to dynamic markets. It allows a contracting authority that has established a dynamic market to award contracts under the market by undertaking a competitive flexible procedure. The use of a dynamic market does not avoid the need to comply with the usual rules for a competitive flexible procedure under clause 20.

Subsection (1) allows contracting authorities to restrict procurements to suppliers that are members of a dynamic market or a part of the market, for example if the dynamic market comprises categories of works or services. A supplier will be a member of a dynamic market if the market allows for the award of the contract in question by that contracting authority and the supplier has been admitted to the market. Subsection (3) requires contracting authorities to disregard tenders from suppliers that are not members of the dynamic market.

Dynamic markets are open to new suppliers to join at any time, as long as they meet the conditions for membership, which is a substantial improvement on the way things have been done up to this point. For that reason, subsection (4) requires contracting authorities to consider membership applications from non-member suppliers before excluding them from the procedure or disregarding their tenders. Subsection (5) says that the only exception to that is where, due to the complexity of the procurement, the application for membership cannot be considered in the timescales set out by the contracting authority for requests to participate or tenders.

Clause 35 sets out how dynamic markets, including utilities dynamic markets, may be established. It allows contracting authorities to establish arrangements known as dynamic markets, which are essentially live lists of suppliers that are pre-qualified to deliver certain types of contracts for the purpose of contracting authorities awarding contracts to suppliers that are members of the dynamic market.

Subsection (2) defines a utilities dynamic market, which is a particular type of dynamic market for the award of utilities contracts by utilities. Subsection (3) allows utilities to award utilities contracts under a utilities dynamic market established by any person, as long as the market has been established in accordance with the rules applicable to utilities dynamic markets as established by private utilities.

Subsection (4) defines a utility as a public authority or public undertaking that carries out a utility activity or a private utility. Utility activities are set out in schedule 4; private utilities are defined in clause 2. Subsection (5) states that the establishment or modification of a dynamic market is not a contract for the purpose of the Bill, making it clear that all the rules on the award of contracts do not apply.

Clause 36 sets out the rules on how suppliers can become members of dynamic markets, including utilities dynamic markets. Subsection (1) allows contracting authorities to set conditions of membership that suppliers must meet in order to be admitted to a dynamic market. The conditions of membership must be a proportionate way of assessing suppliers' legal and financial capacity and technical ability to deliver contracts that might be awarded as part of the arrangement.

[Alex Burghart]

Subsection (2) prohibits conditions of membership that require the submission of annual audited accounts by suppliers that are not already required by law to have their annual accounts audited. It also prohibits conditions of membership that require insurances to be in place before the contract is awarded. As hon. Members will be aware, this is a major boon to SMEs that are seeking to get involved.

The restrictions on the conditions of membership of a dynamic market, set out in subsection (3), are similar to those applicable to conditions of participation in a competitive tendering procedure under clause 22. They include limiting conditions to those that are a proportionate means of ensuring suppliers have the relevant qualifications, experience and technical ability to perform the contract, ensuring that the conditions do not break the rules on technical specifications, and requiring that equivalents must be allowed where particular qualifications are required.

Subsection (4) says that when deciding on what is proportionate, the contracting authority must have regard to the types, complexity and cost of contracts that will be awarded through the dynamic market. Subsection (5) ensures that contracting authorities can require evidence that a condition of membership is met to be independently verifiable by a person that is not the supplier.

Subsection (6) ensures that dynamic markets remain open to new suppliers as long as the dynamic market is in operation. Applications for membership must be considered within a reasonable period and suppliers must be informed of the outcome of their application, with reasons. Suppliers that meet the conditions of membership must be admitted to the market in a timely manner. This measure is another great innovation. Where these systems have been in place previously, once the list is set up, it has been closed to new entrants. Now, new entrants will be permitted throughout the operation of the market.

Subsection (7) says that the membership of a dynamic market cannot be limited to specific numbers of suppliers and the conditions of membership cannot be amended during the lifetime of the arrangement.

Clause 37 outlines the rules on removing suppliers from a dynamic market. Any supplier that is on the debarment list for a mandatory exclusion ground must be removed from a dynamic market under subsection (1). It would be entirely inappropriate for suppliers subject to debarment on that basis to remain on a dynamic market.

Subsection (2) allows contracting authorities to remove a supplier from a dynamic market if it is an excluded supplier or has become an excludable supplier, or it is discovered to have been an excludable supplier when it applied for membership. Additionally, if the conditions of membership are no longer met, the supplier may be removed from the dynamic market. That provides contracting authorities with flexibility to manage their dynamic markets as they best see fit. Subsection (4) states that, before being removed from a dynamic market, a supplier must be told in writing of the decision and the reasons why.

Clause 38 sets out when fees can be charged to suppliers that participate in dynamic markets, including utilities dynamic markets. Subsection (1) allows for fees to be charged when a supplier is awarded a contract under a dynamic market—other than a utilities dynamic market, which is addressed separately. That avoids "pay to play" arrangements and ensures that fees are only chargeable if the supplier is awarded work. The fees must be calculated as a fixed percentage of the estimated value of the contract awarded. For utilities dynamic markets, subsection (2) states that fees may be charged in connection with obtaining and maintaining membership of the market.

Clause 39 sets out the transparency requirements for the creation and management of dynamic markets. Subsection (1) states that the notices are referred to as dynamic market notices. Subsection (2) requires contracting authorities to publish a notice before they set up a dynamic market. The notice must detail the authority's intention to establish the market. A notice is also required, under subsections (3), (4) and (5), once the dynamic market has been established or modified, or when the market ceases to operate. Additional content requirements for the various notices will be set out in secondary legislation under clause 93. Clause 39(6) states that private utilities are not required to issue a notice when a utilities dynamic market ceases to operate.

Clause 40 speeds up procurements and reduces the burden for utilities using a utilities dynamic market, or UDM, by only requiring utilities to provide tender notices for upcoming procurements to suppliers already on a UDM, or appropriate part of a UDM, instead of having to publish the notices. In practice, that means utilities can, for example, provide the tender notice to suppliers on the UDM as part of the associated tender documents as each procurement under the UDM is commenced.

In order to take advantage of that flexibility, the notice setting up the UDM must meet minimum information requirements, which will be set out in regulations under clause 88. Utilities must specify in the UDM notice that only members of the UDM will be provided with tender notices. The notice setting up the UDM will be published continuously and will remain open so that new members may join at any time. If accepted, they would then be entitled to receive future tender notices.

Florence Eshalomi: Clauses 34 to 40 relate to dynamic markets. Dynamic markets expand on the existing dynamic purchasing system scheme by allowing such markets to be used for all procurements. That means that a reliable and ready pool of bidders can be gathered, which the contracting authority has verified meets the conditions of participation for the contract. When used correctly, such market innovations help save contracting authorities significant amounts of money and time by requiring early scrutiny only once for similar contracts.

Labour does not oppose the proportionate use of that mechanism. However, we note that those who supplied written evidence to the Committee picked up on some concerns. The Local Government Association, in its submission, outlined concerns about terms that are present in the current system but missing in the Bill:

"Councils use dynamic purchasing systems to effectively deliver a range of services that need to be procured quickly, for example, adult's and children's residential social care, apprenticeship training, asbestos removal, cleaning services, home-based care services etc.

In particular, local authorities heavily rely on DPS for school transport procurement, where a significant number of contracts must be let quickly each summer as children are allocated school places. These contracts are straightforward, with pre-approved suppliers typically competing on price. These contracts have no cross-border implications so don't disadvantage operators in other countries as no operator without a local base is likely to bid.

Regulation 34(12) of the Public Contracts Regulations 2015 states: 'Sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and all selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.'

The Bill no longer allows this, and should therefore be amended to reinstate this important flexibility, to ensure that everything from school transport to social care services can be delivered on time for the individuals who rely upon…them".

3.30 pm

I know that the Minister has worked closely with the LGA on some of its concerns regarding the horizontal and vertical framework, so I hope that he has given thought to its ideas in this area and is planning an amendment. Any clarity he can provide on that would be very welcome.

Clause 37 relates to the removal of members from dynamic markets. I do not particularly want to open up that discussion again, following my earlier remarks, but I want to return to the concerns about the exclusion system and the removal of suppliers. In his written evidence, Richard Bonnar, professor of public procurement law and practice at the University of Leeds school of law, states:

"Clause 37 governs removal from a dynamic market once it has been established. Here there seems to be a further potential muddle. An authority has to remove a supplier which has (subsequently) been debarred on mandatory exclusion grounds. But, if the authority considers that a supplier is an excluded supplier otherwise than as a result of debarment it may (but does not have to) remove that supplier from the market. In other words, an excluded supplier is not mandatorily excluded from dynamic markets. This seems to fly in the face of the definition and the schema which the Bill is trying to establish and the Committee should consider whether 'may' should turn to a 'must'."

I would be grateful if the Minister could explain the rationale for that.

Finally, some of those who provided written evidence—the Civil Engineering Contractors Association, for example—also expressed concerns about the expansion of the scheme to cover all procurements, as they were not familiar with it in their sectors. I hope that the Minister will ensure that all sectors are fully consulted and are made aware of the mechanisms involved, and that the use of these markets will be proportional per sector.

Alex Burghart: As I have said, we think that dynamic markets are a fantastic opportunity to speed up procurement and to bring SMEs into procurement opportunities that they have not previously had. Obviously, dynamic markets are themselves a dynamic new development and, as I mentioned, a lot of training and guidance will flow from the Bill. However, obviously, we will be working with partners throughout the system to ensure that this new way of working works.

Question put and agreed to.

Clause 34 accordingly ordered to stand part of the Bill.

Clauses 35 to 40 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. —*(Julie Marson.)*

3.34 pm

Adjourned till Tuesday 7 February at twenty-five minutes past Nine o'clock.

Written evidence reported to the House

PB 18 Local Government Association
PB 19 Hikvision
PB 20 FREETHS
PB 21 Confederation of British Industry
PB 22 Zurich Insurance UK