

Financial Scrutiny Unit Briefing

Procurement (Reform) (Scotland) Bill

– Parliamentary consideration prior to Stage 3

8 May 2014

14/31

Allan Campbell

This briefing summarises Stage 1 and Stage 2 consideration of the Procurement (Reform) (Scotland) Bill, introduced in the Parliament on 3rd October 2013. The Bill makes a range of reforms to the rules on public procurement in Scotland, and needs to be seen within the wider context of the EU rules governing procurement. Stage 3 consideration of the Bill is due to take place on 13 May 2014.



CONTENTS

EXECUTIVE SUMMARY	3
INTRODUCTION AND POLICY CONTEXT	4
PARLIAMENTARY CONSIDERATION	4
KEY ISSUES AT STAGE 1 AND STAGE 2.....	5
SOURCES	20
RELATED BRIEFINGS	22

EXECUTIVE SUMMARY

The Procurement Reform (Scotland) Bill was introduced in the Parliament on 3rd October 2013. Stage 3 of the Bill is due to take place on Tuesday 13 May 2014. The Bill aims to make a number of changes to public procurement in Scotland. Public procurement in Scotland is governed by a detailed and complex framework of European law and the Bill is necessarily framed within this existing EU legislation. The overall legal framework includes principles deriving from the Treaty on the Functioning of the European Union, European Union directives on procurement and European Court of Justice and national court case law.

Some of the key issues to arise during Stages 1 and 2 are as follows—

- whether to extend the general and specific duties in the Bill to include other matters, in particular whether public contracts can stipulate payment of the “living wage”
- tension between the general duties in section 8 of the Bill and the Sustainable Procurement Duty in section 9
- to what extent SMEs and the third sector will be helped to apply for and win public sector contracts
- operation of the provisions on Community Benefit Requirements
- various issues around the criteria for exclusion of bidders for public contracts, including for blacklisting and tax avoidance, and
- the importance of the statutory guidance to the eventual success of the Bill’s policy intention.

INTRODUCTION AND POLICY CONTEXT

The [Procurement Reform \(Scotland\) Bill](#) (“the Bill”) was introduced in the Parliament on 3rd October 2013. The [Policy Memorandum](#) set out the broad intention of the Bill—

“It aims to establish a national legislative framework for public procurement that supports Scotland’s economic growth by delivering social and environmental benefits, supporting innovation and promoting public procurement processes and systems which are transparent, streamlined, standardised, proportionate, fair and business friendly. The Bill will focus on a small number of general duties on contracting authorities regarding their procurement activities and some specific measures aimed at promoting good practice. These measures should help encourage local action within organisations with the aim of building procurement capability and capacity and maximising public procurement’s contributions to wider socio-economic and environmental policy objectives.”

Public procurement in Scotland is governed by a detailed and complex framework of European law and the Bill is necessarily framed within this existing EU legislation. The overall legal framework includes principles deriving from the [Treaty on the Functioning of the European Union](#) (OJEU 2010), European Union directives on procurement and European Court of Justice and national court case law. The [SPICe Briefing published on the Bill’s introduction](#) (Campbell 2013) discusses the EU framework in detail.

At the time of the Bill’s introduction the reform of the EU Procurement Directives was still to be finalised. The final form of the new Directives was agreed in early 2014 and Scotland (in common with other jurisdictions across Europe) now has two years in which to transpose the Directives into Scots law. The Scottish Government intends to consult on this in summer 2014, with a view to bringing forward revised Scottish regulations in 2015.

For the purposes of scrutiny of the Procurement Reform Bill, it is important to note that the process of transposing the new Directives is separate from the Bill process.

PARLIAMENTARY CONSIDERATION

The Infrastructure and Capital Investment Committee (ICI Committee) was designated lead committee on the Bill. Along with the Finance Committee and Delegated Powers and Law Reform Committee (DPLR Committee), both the Local Government and Regeneration Committee and the Health and Sport Committee took evidence and contributed to Stage 1 scrutiny. The Stage 1 debate was held on 20 February 2014.

Stage 2 was referred back to the ICI Committee and took place over two meetings on 12 and 19 March 2014. Stage 3 of the Bill is scheduled for Tuesday 13 May 2014.

Full details of parliamentary consideration to date can be found [on the Bills section of the Parliament’s website](#) (Scottish Parliament 2014).

In addition to formal parliamentary consideration of the Bill, the contents of the Bill and proposed amendments (especially in relation to the living wage) have been the subject of a number of debates and parliamentary questions.

KEY ISSUES AT STAGE 1 AND STAGE 2

The remainder of this briefing sets out some of the key issues raised during the Bill's progress through Stages 1 and 2.

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
Breaking contracts into smaller lots			
<p>Bill does not mandate that large contracts be broken up into smaller lots, although this will be an option in transposing the new Directive on procurement.</p>	<p>The Committee asked the Scottish Government “to provide clarification on its approach to consulting on the implementation of the upcoming European procurement directive in Scotland and whether, for example, it might examine using this to provide opportunities for contracts to be divided into smaller lots where this is both feasible and appropriate.”</p>	<p>The Government confirmed that the new Directive will include this option, and that the main policy driver behind this provision is increasing SME participation, and went on to highlight that “section 9 of the Bill requires contracting authorities to consider, before carrying out a procurement, how the procurement process can facilitate the involvement of small and medium sized enterprises, third sector bodies and supported businesses. We expect this to require public bodies to consider carefully the size and structure of procurement exercises with a view to ensuring that, unless legitimate business needs dictate otherwise, contracts are accessible to SMEs.”</p>	<p>No amendments.</p>
Section 1 – Contracting authorities			
<p>The Bill sets out to achieve consistency between its provisions and those contained in the Public Contracts</p>	<p>On Scottish Water, the Committee recognised “the argument for consistency in the application of procurement law in respect of utilities and that, should Scottish Water be brought within the scope of the Bill it would be</p>	<p>The Government confirmed that “Separate European legislation applies to utility companies like Scottish Water and that taking a different approach to EU legislation</p>	<p>Two amendments were lodged to bring Scottish Water (James Kelly’s amendment 35), and</p>

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
<p>(Scotland) Regulations 2012. However, there was some debate at Stage 1 over the possible inclusion of other bodies within the scope of the Bill.</p>	<p>a complex undertaking to draft provisions that would sit with European utilities legislation. However, the Committee seeks the view of the Scottish Government in response to the argument that there is benefit to bringing Scottish Water into the scope of the Bill, where its smaller contracts could be subject to provisions such as the sustainable procurement duty and procurement strategies.”</p> <p>“During informal discussions with the third sector it was brought to the Committee’s attention that arm’s-length external organisations (ALEOs) are not specifically covered by the provisions in the Bill. The Cabinet Secretary clarified that “whether an ALEO will be subject to the bill’s provisions will depend on the ALEO’s status. An ALEO that to all intents and purposes is a public body is likely to be covered, but an ALEO that is an institutionalised public-private partnership might not be covered”. The Committee asks the Scottish Government to consider how it might ensure that all ALEOs are covered by the Bill’s provisions.”</p>	<p>on procurement could risk creating confusion in the application of the Bill. Furthermore, it does not seem appropriate to single out individual organisations either for inclusion where they are not regarded as public bodies for the purposes of EU law or for exclusion where they are regarded as subject to the Public Contracts (Scotland) Regulations 2012.”</p> <p>“Whether or not an ALEO is subject to the provisions of the Bill will depend on its individual status. Those which are, to all intents and purposes, public bodies are likely to be covered. Any ALEOs which, like HubCos, are institutionalised public/private partnerships will be outwith the scope of the Bill. The distinction between the types of ALEO is important because existing EU procurement law will require that ALEOs which are institutionalised public private partnerships are created following an EU law compliant process and like HubCos, this type of ALEO is free to operate as a private sector body.”</p>	<p>“Hubcos” (Tavish Scott’s amendment 1) into the scope of the Bill. Both were not agreed to.</p>
<p>Section 8 – general duties</p>			
<p>Section 8 provides that a contracting authority must, in carrying out a</p>	<p>The Committee considered “the balance of the powers at sections 8 and 9 to be an important issue for the successful</p>	<p>In response, the Government recognised the tensions highlighted by the Committee, but noted that this</p>	<p>A large number of amendments were lodged to both</p>

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
<p>regulated procurement, treat relevant economic operators equally and without discrimination and act in a transparent and proportionate manner, and that a contracting authority must comply with the sustainable procurement duty set out at section 9. The Bill at section 8(3) states that a contracting authority must not do anything under the sustainable procurement duty that conflicts with the general duty at section 8(1).</p>	<p>implementation of the sustainable procurement duty. The Committee therefore requests that the Scottish Government provides further information on how a contracting authority might balance these two provisions, indicating how it might address the matter in guidance for contracting authorities.”</p>	<p>“is already the reality for public bodies managing procurement activity. Contracting authorities should already be working to secure best value from their procurements. This is about striking an appropriate balance between social, environmental and economic value. That balance may differ from one procurement to another.”</p>	<p>Section 8 and Section 9, which attempted to introduce new duties related to various employment practices, including the proposed “Scottish Living Wage Duty”, lodged by James Kelly (amendments 36 and 39), which was not agreed to.</p> <p>The debate around the living wage has centred around whether it is possible to include provision requiring contracting authorities to specify that the living wage must be paid by all contractors in receipt of public sector contracts. The debate is set out in detail under discussion of section 22 below.</p> <p>Other amendments that were not agreed to on employment</p>

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
			<p>practices covered topics such as: trade union recognition, equal pay audits, childcare requirements, and wage ratios.</p> <p>Similarly, amendments were also considered but not agreed by the Committee on adding a number of climate change-related duties.</p>

Section 9 – Sustainable Procurement Duty

<p>This provision sets out that a contracting authority before carrying out a regulated procurement must “consider” how in conducting the process it can improve the economic, social and environmental wellbeing of the authority’s area, facilitate the involvement of SMEs, third sector bodies and supported business in the process and</p>	<p>“The Committee considers that many of the points raised on the extent of the sustainable procurement duty are linked to the need to balance the provisions of the Bill with appropriate guidance that has a statutory weight. The Committee seeks the assurance of the Scottish Government that the statutory guidance to be published on procurement strategies and annual procurement reports will be extensive and robust enough to impose the kind of cultural change sought by stakeholders. The Committee also seeks clarification of whether guidance will be published in relation to the sustainable procurement duty itself.”</p>	<p>“It is important that, for higher spending public authorities, there is clarity about how the authority intends to carry out its procurement activities and in particular how those activities will contribute to carrying out the authority's functions, to delivering value for money and how it will contribute to meeting the general duties in the Bill.</p> <p>The strategy should set out the authority's general policy on use of community benefits in procurement and its policy on consulting and engaging with those affected by its procurements. The strategy should also set out how the authority intends</p>	<p>Responding to the Committee’s conclusions, Nicola Sturgeon’s amendment 8, on statutory guidance on the duty, was agreed to.</p> <p>Again, a range of issues were raised in amendments that attempted to add to the duty in various ways, including an attempt to widen the duty, procurement of</p>
--	--	--	--

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
<p>promote innovation. The section also sets out that, in carrying out the procurement, the authority has a duty to act with a view to securing improvement to the economic, social and environmental wellbeing of an authority's area.</p> <p>There was much debate in Stage 1 evidence over the range of issues and duties that could be added under the broad umbrella of "sustainable procurement"</p>	<p>"The Committee considers that there is a possible case for a definition of micro-business to be included in the Bill and reference to micro-business to be added to section 9. This would help to ensure that they are incorporated into procurement decisions and the procurement strategies and annual reports of contracting authorities. The FSB has also suggested to the Committee that annual reports should contain a breakdown of spending with micro, small, medium and large businesses. The Committee asks the Scottish Government to comment on these proposals in advance of Stage 2 consideration."</p>	<p>to ensure that its contractors and their sub-contractors pay promptly. We anticipate that guidance on the sustainable procurement duty will reflect the Marrakech Task Force approach mentioned above, once this has been tailored to reflect Scottish priorities. This includes a 'Prioritisation Methodology' to help public bodies to identify the opportunity to contribute to the National Outcomes through the course of their procurement activity and a self-assessment tool that will allow public bodies to assess their progress in embedding sustainable procurement and a planning process and accompanying guidance on the changes they need to make."</p> <p>"We would expect this to be addressed in the detailed guidance that will support the preparation and publication of procurement strategies. We intend to address this through further development of Public Contracts Scotland (PCS) so that the contracts registers published on PCS will separately identify those contracts which have been awarded to micro, small and medium sized businesses."</p>	<p>food and to tie procurement to the public sector equality duty.</p> <p>Amendments on fair trade were not moved or were withdrawn, although an amendment on fair trade in relation to section 11 was agreed to (see below).</p>

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
Section 10 Supported businesses			
<p>This section was inserted to make an exception to the requirement at section 8(1) to treat all bidders equally and without discrimination. It allows a bidder who does not meet the definition of a supported business to be precluded from participating in a competition on that basis alone. This does not mean that a contract can be awarded directly to a supported business without competition but rather that the competition will be amongst supported businesses only.</p>	<p>“The Committee understands that the Scottish Government has used its supported business framework to try to raise awareness of their importance. The Cabinet Secretary also advised the Committee that the definition of supported businesses may be widened by the future directive. It is, however, clear that considerations should be built early into the procurement process in order for opportunities to engage with supported businesses to be prioritised. The Committee therefore considers that the Bill should place a requirement on contracting authorities to include in their annual reports how they have engaged with supported businesses and used the supported businesses framework within each reporting year.”</p> <p>“The Committee also invites the Scottish Government to respond to the proposal that a social enterprises/supported businesses element should be included in the Bill’s community benefit requirements.”</p> <p>“The Committee notes that the Scottish Government has agreed to bring forward an amendment to address the issue raised by the DPLR Committee in relation to the power at section 10(4) of the Bill and will examine this amendment as part of its Stage 2 considerations.”</p>	<p>In response the Government stated that “we intend to address this point through further development of Public Contracts Scotland (PCS) so that the contracts registers published on PCS will separately identify those contracts which have been awarded to supported Businesses.”</p> <p>The Government also noted that the current definition of community benefits is “intended to give scope for increased engagement with social enterprises/supported businesses, without limiting other positive opportunities for participation and social cohesion that may arise. We are currently undertaking some research that will investigate the impact the clauses are having. The research will focus on the impact that the clauses can have on groups that are under-represented in the workplace.”</p>	<p>Amendment 9 from Nicola Sturgeon which was lodged in response to DPLR committee on the definition of supported business, was agreed to.</p>

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
Section 11 Procurement strategy and Section 14 Annual procurement reports			
<p>These sections of the Bill provide that those contracting authorities that expect to have an annual spend on regulated procurements of more than £5,000,000 (excl VAT) must prepare a procurement strategy (or review an existing one) and produce an annual report.</p>	<p>“The Committee considers that the success of the Bill’s provisions on sustainable procurement and community benefit lie to a considerable extent with contracting authority investment in the production of a procurement strategy and annual procurement report which place emphasis on these matters. The Committee seeks the Scottish Government’s assurance that both the strategies and reports will be monitored effectively and that any deficiencies will be addressed.”</p> <p>“The Committee also invites the Scottish Government for its comments on the role of the Accounts Commission and the Auditor General for Scotland in monitoring the performance of contracting authorities via their procurement strategies and procurement annual reports.”</p> <p>“The Committee welcomes the provision at section 16(4) that “contracting authorities must have regard to any guidance issued under this section” and requests that any available detail on the nature of this guidance be provided to the Committee as soon as possible.”</p>	<p>In its response the Government stated that “As we have stated in response to paragraph 67, we would envisage the governance bodies associated with procurement reform in Scotland, including the Reform Board which I chair with assistance from John McClelland, taking a very close interest in reports and the national picture. Being public documents, procurement strategies and annual reports will help increase visibility and support local accountability. We would also expect these documents to be used in internal and external audit and scrutiny processes.”</p> <p>“We expect both internal and external auditors to take a keen interest in compliance with the Bill in general and to take a particular interest in how the strategies and annual reports will provide tangible evidence of procurement performance.”</p> <p>“Guidance required under the Bill will be prepared with the appropriate amount of stakeholder involvement. This, in itself, will take time, but it is right that we take the necessary time to ensure that the guidance is developed in partnership with stakeholders.”</p>	<p>Nicola Sturgeon’s amendment 15 – which was a response to the Committee recommendation on including reports on community benefits in Annual reports – was agreed to.</p>

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
Section 16 – Guidance			
Section 16, as well as other related sections provide for the issuing of guidance on various matters.	“The Committee notes that the DPLR Committee recommends that guidance provided for at sections 16, 21 and 24 should be published on issue and supports this recommendation.”		Nicola Sturgeon’s Amendments 18-23, 26, 29 and 30 address the concerns raised by the DPLR Committee, were agreed to.
Sections 19-21 Community benefit requirements etc			
The Bill defines a community benefit requirement as a contractual requirement imposed by a contracting authority either relating to training and recruitment and the availability of sub-contracting opportunities, or which is otherwise intended to improve the economic, social or environmental wellbeing of the authority’s area in a way additional to the main purpose of the contract in which the requirement is included, and applies to contracts valued at	“The Committee recognises that the community benefit requirement is mandatory for contracts above the £4m threshold but seeks information from the Scottish Government in relation to how the inclusion of a community benefit requirement will be encouraged in contracts of a lower value.”	<p>The Government confirmed that “there is nothing to preclude contracting authorities from seeking to include community benefit requirements in contracts below the financial thresholds, where appropriate.”</p> <p>“The Bill has two provisions that will drive the use of community benefit clauses:</p> <ol style="list-style-type: none"> 1. The Sustainable Procurement duty that seeks social, economic and environmental benefits from public procurement. Community Benefits are viewed by Scottish Government as integral to sustainable procurement and consequently to compliance with the sustainable procurement duty. 2. A requirement that, for contracts with an estimated value of £4m or more, public bodies consider use of the clauses and provide a summary 	<p>As noted above, the sections on annual reports have been amended to include reference to community benefits.</p> <p>Amendments were lodged to lower the threshold for community benefits, but were defeated.</p>

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
<p>£4 million or more.</p>	<p>“The Committee considers that section 14(2) of the Bill on annual procurement reports must specify that contracts that include community benefit requirements should be reported upon and detail of the community benefits achieved should be provided. The Committee considers that monitoring of this type of contract is of substantial importance that is unlikely to lessen and, as such, a provision requiring this to be undertaken should be included on the face of the Bill.”</p>	<p>of the requirements in the contract notice, followed by a statement of the expected benefits to be derived in the contract award notice. In cases where public bodies are not including community benefits, they must provide the reason for this in the contract notice.”</p> <p>“Statutory guidance on use of the clauses is planned. This approach is intended to mainstream appropriate use of the clauses within the wider context of sustainable procurement and to drive their inclusion in all possible higher value contracts.”</p> <p>“On reflection we agree with this point and can confirm that we intend to introduce an amendment at Stage 2 which will meet the Committee's recommendation. The research mentioned earlier is expected to result in development of the existing monitoring framework for community benefits. The original monitoring framework was produced to provide a shared framework and set of definitions to enable organisations to collect consistent and comparable data that tracks the impact of Community Benefits. Based on this work we have asked the researchers to provide recommendations on the</p>	

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
	<p>“The Committee understands the balance which is intended to be struck between legislation and guidance. However, as drafted, the success of the community benefit requirements rests to a great extent with the guidance and the Committee therefore requests further information on this guidance as soon as possible.”</p>	<p>monitoring and evaluation of the clauses which will be used to inform development of the monitoring and reporting of community benefits. The agreed approach can be communicated through the proposed guidance on community benefits.”</p> <p>“As I have stated in my response to the question at paragraph 94, guidance required under the Bill will be prepared with the appropriate amount of stakeholder involvement. This, in itself, will take time, but it is right that we take our time and ensure that the guidance is developed in partnership with stakeholders. I am happy to undertake to involve the Committee in that process at the appropriate time.”</p>	

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
Section 22-24 Exclusion of economic operators and selection of tenderers			
<p>Section 22 sets out a regulation-making power allowing Scottish Ministers to require contracting authorities to exclude economic operators from a regulated procurement process where convicted of a criminal offence. It allows regulations to cover matters such as evidence and exceptions.</p> <p>Section 23 provides a power for the Scottish Ministers to make regulations about the selection of economic operators to take part in a procurement process. It allows these regulations to cover minimum standard requirements (such as financial standing, technical ability or other characteristic), criteria which can be used to exclude or include</p>	<p>The following is the complete extract on the living wage from the Committee's report:</p> <p>"122. The Committee received considerable evidence stating that the Bill should ensure that public contracts must include a requirement to pay the living wage. The STUC was concerned that the living wage "is not mentioned in the bill or in any of the supporting documents."</p> <p>123. European law was a significant component of the Committee's consideration of this issue. Correspondence from the European Commission to the Scottish Government indicates that such a provision would be likely to conflict with the Posting of Workers Directive in that a living wage set at a higher level than the UK's minimum wage is unlikely to meet the requirements of the directive. The Scottish Government takes the view that it is unable to include a mandatory requirement in the Bill on the living wage due to the position of the Commission. However, the Cabinet Secretary stated in correspondence—</p> <p>"Whilst we cannot make payment of the living wage a requirement in contracts, we do want to encourage good practice by employers and have looked at ways in which we can take a range of workforce related matters into account in the procurement process. So the</p>	<p>"The Government responded to the Committee's conclusion (in bold below): "The guidance will set out how purchasers should consider a bidder's general approach to engagement with its workforce, including remuneration in circumstances where this is a matter which is likely to be relevant to the quality of service provided by the bidder. We would expect this to apply to service contracts which are dependent on the commitment of staff, such as, for example, social care, catering and cleaning. In effect, companies which are able to demonstrate that they have a well managed and well motivated workforce, and that this will support the quality of service, should have a competitive advantage over those which have a poorly managed and motivated workforce and who are, as a result, less likely to perform the contract to a high quality standard."</p>	<p>As noted under section 8 above, amendments on the living wage were not agreed to, and have been the subject of much debate in the Parliament outwith this formal bill procedure, most recently on 23 April, when a Labour Party debate focussed on the issue.</p> <p>During this debate, Nicola Sturgeon stated that: "I confirm that I have lodged a Government stage 3 amendment that will put the reference to remuneration and payment of the living wage on the face of the bill. I also advise Parliament that I have lodged another stage 3 amendment that will require public authorities to set out in their procurement strategies their policy</p>

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
<p>tenderers and the procedure to be followed when determining whether or not to include an economic operator.</p> <p>Section 23(3) sets out examples of criteria that may be specified in the regulations, including conviction of an offence, failure to pay tax, an act of misconduct, distorting competition, lack of a necessary licence, non-membership of regulatory body where required, financial difficulty such as insolvency, or administration and where performance in relation to another regulated procurement was not satisfactory.</p> <p>In addition to these regulation-making powers, the Bill gives the power to Scottish Ministers to issue guidance about the</p>	<p>Bill proposes that the Scottish Government should have the power to issue statutory guidance on workforce matters in procurement, including remuneration.”</p> <p>124. Dave Watson of Unison considered that—</p> <p>“The key legal issue is that for the living wage to be lawful in procurement it has to be linked to the performance of the contract.”</p> <p>125. He further developed this point in evidence stating that “it will all boil down to a potential challenge under the posted workers directive”. He concluded that “If you really want to bottom out the theoretical legal challenges, our counsel opinion has shown how that can be achieved through a small amendment to the bill. Frankly, though, the chances of a legal challenge are absolutely minimal.</p> <p>126. The Committee noted the criticism of the approach taken by the Scottish Government from a number of witnesses, including how the question on the living wage was asked of the European Commission. Whilst this evidence has highlighted serious considerations concerning EU law, the Committee noted the current position of the Commission “that requirements regarding the level of wage payable to posted workers may not go beyond the mandatory rules for</p>	<p>“Regulation 23 of The Public Contracts (Scotland) Regulations 2012 provide the criteria for the exclusion of economic operators, these include circumstances where obligations relating to the payment of taxes under the law of any part of the UK or of the relevant state, have not been fulfilled. Section 23 of the Bill allows regulations to determine the basis on which to exclude suppliers in respect of regulated procurements.</p> <p>We anticipate that the same exclusion grounds which apply in the 2012 Regulations will apply to the Bill. Consultation with stakeholders on the secondary legislation under the Bill will allow this issue to be explored and to consider whether it would be proportionate for any additional exclusion grounds to apply to the Bill. It should be noted, however, that not all tax avoidance schemes represent a failure to fulfil obligations in law. Some schemes, even quite aggressive schemes, may be lawful and in that case a company could not be excluded from participation.”</p>	<p>on ensuring that the companies with which they contract pay the living wage.”</p>

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
<p>selection of economic operators which contracting authorities must have regard to. The Scottish Government considers that it may address workforce related issues such as those raised by the Civil Society Organisation in Scotland on employment standards and the living wage via this guidance.</p>	<p>minimum protection provided for by the [Posting of Workers] Directive” and that consequently “A “living wage” set at a higher level than the UK’s minimum wage is unlikely to meet this requirement”</p> <p>127. The Committee notes the Scottish Government’s position on the living wage. However, given the extent to which the encouragement of its payment will rest within the guidance to be published under section 24 of the Bill, the Committee requests further information on how it intends to address this matter in draft guidance.”</p> <p>On blacklisting, “The Committee notes that the approach to be taken by the Bill to eliminate the practice of blacklisting via regulations will support the existing guidance and welcomes the Scottish Government’s ongoing dialogue with the trade unions on this matter.”</p>		<p>Amendments lodged but not agreed to under these sections attempted to provide a number of additional specific grounds for exclusion of economic operators, in terms of tax avoidance, blacklisting and zero hours contracts.</p>
Part 4 – Remedies			
<p>For those regulated contracts with a value between those set out in the Bill, and the EU thresholds, the Bill provides remedies for suppliers, similar (but not identical) to those in place for above-EU</p>	<p>“The Committee acknowledges and supports the establishment of a remedies regime under the Bill that is proportionate to the lower thresholds. However, given the evidence heard in relation to remedies, the Committee also supports the establishment of a tribunal or ombudsman and asks the Scottish Government to keep it informed of developments in this policy area.”</p>	<p>The Government’s response stated that: “I welcome the Committee's support for the establishment of a proportionate remedies regime. I note also the Committee's views on the establishment of a tribunal or ombudsman. This is an issue we intend to address in the context of implementation of the new EU</p>	<p>Amendments 31 and 34 from Nicola Sturgeon addressed this by providing for amendment of remedies by Affirmative Order. During Stage 2, the Cabinet Secretary</p>

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
threshold procurement at present.		procurement directives. The Scottish regulations implementing the Directives will also give effect to the corresponding Remedies Directive, 2007/66/EU. The Remedies Directive provides a legal basis for establishment of a review body sitting beneath the Courts, should we choose to exercise that option. We intend to bring forward an amendment to the Bill at Stage 2 which will allow us to vary the remedies in relation to the Bill to take account of any change of approach when we implement the new EU Directives.”	confirmed that issues around a Tribunal/Ombudsman would be considered in the Government's consultation on the new EU Directives.
Exemptions sought from the Bill – health and social care services and university and college research			
A number of exemptions were sought to removed certain types of contract from the scope of the Bill.	<p>On Health and Social Care services, “The Cabinet Secretary has informed the Committee that the Scottish Government intends to lodge an amendment to the Bill at Stage 2 to exempt health and social care contracts from the provisions in the Bill that relate to advertising and competition, whilst at the same time ensuring that, where possible, the provisions in the Bill continue to apply. The Committee welcomes this commitment.</p> <p>The Committee also asks the Scottish Government to consider how it might address the issues raised by CCPS and others relating to consultation and the continuity and standard of care, possibly via the</p>	“The procurement of care and support services is a complex area which poses a number of challenges for public bodies. In response to concerns expressed by service users, carers and providers Scottish Government published comprehensive guidance on the Procurement of Care and Support Services on 15 September 2010. The Scottish Government's guidance on the procurement of care and support service underlines the need for greater emphasis on quality rather than cost. It also recommends that Councils are proactive in involving	Both these issues were addressed through amendments from Nicola Sturgeon (amendments 5 and 10 and 11), which were agreed to.

Issue	ICI Committee's Stage 1 report	Government response	Stage 2 amendments
	<p>procurement strategy provisions at section 11(5) of the Bill.</p> <p>The Committee is aware that the upcoming directives are expected to introduce a light-touch regime for social care and health services and asks the Government for clarification on how its legislative approach to these services is expected to sit with EU law.</p> <p>On Universities and Colleges research, "The Committee has received assurances from the Cabinet Secretary that the particular circumstances faced by universities and colleges are being addressed in current discussions and the Committee welcomes this commitment. The Committee asks for an update on any impact on the Bill's provisions in advance of its Stage 2 consideration."</p>	<p>service providers in service design and the development of service specifications and that service users and carers are engaged as active partners in defining their requirements."</p> <p>The Government also set out its position on the new Directives.</p> <p>"We intend to bring forward an amendment at Stage 2 to exempt from the scope of the Bill contracts which are in relation to research and development activity"</p>	

SOURCES

Campbell, A., et al. *SPICe Briefing 12/23: Public Procurement in Scotland*. Edinburgh: Scottish Parliament. Available at:

http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/Factsheets/SB_12-23rev2.pdf [Accessed 7 October 2013]

Campbell, A. *SPICe Briefing 13-67: The Procurement Reform (Scotland) Bill*. Edinburgh: Scottish Parliament. Available at:

http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_13-67.pdf [Accessed 7 May 2014]

Cabinet Office. (2013a) *Making public sector procurement more accessible to SMEs*. London: Cabinet Office. Available at: <https://www.gov.uk/government/consultations/making-public-sector-procurement-more-accessible-to-smes> [Accessed 7 October 2013]

Cabinet Office. (2013b) *Procurement policy note 05/13: modernising EU procurement rules*. London: Cabinet Office. Available at: <https://www.gov.uk/government/publications/procurement-policy-note-0513-modernising-eu-procurement-rules> [Accessed 7 October 2013]

Council Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Available at: <http://www.scotland.gov.uk/Resource/Doc/1265/0005177.pdf> [Accessed 28 February 2012]

Official Journal of the European Union C83/47, 30 March 2010. *Consolidated version of the Treaty on the Functioning of the European Union*. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF> [Accessed 7 October 2013]

Procurement Reform (Scotland) Bill [as amended at Stage 2] Session 4 2014. SP Bill 38A. Edinburgh: Scottish Parliament. Available at:

http://www.scottish.parliament.uk/S4_Bills/Procurement%20Reform/b38as4-stage2-amend.pdf [Accessed 8 May 2014]

Procurement Reform (Scotland) Bill [as introduced] Session 4 2013. SP Bill 38. Edinburgh: Scottish Parliament. Available at:

http://www.scottish.parliament.uk/S4_Bills/Procurement%20Reform/b38s4-introd.pdf [Accessed 7 October 2013]

Procurement Reform (Scotland) Bill: Explanatory Notes (and other accompanying documents) Session 4 2013. SP Bill 38-EN. Edinburgh: Scottish Parliament. Available at:

http://www.scottish.parliament.uk/S4_Bills/Procurement%20Reform/b38s4-introd-en.pdf [Accessed 7 October 2013]

Procurement Reform (Scotland) Bill: Policy Memorandum Session 4 2013. SP Bill 38-PM. Edinburgh: Scottish Parliament. Available at:

http://www.scottish.parliament.uk/S4_Bills/Procurement%20Reform/b38s4-introd-pm.pdf [Accessed 7 October 2013]

The Public Contracts (Scotland) Regulations 2006. SSI 2006/1. Available at:

<http://www.legislation.gov.uk/ssi/2006/1/contents/made> [Accessed 7 October 2013]

The Public Contracts (Scotland) Regulations 2012. SSI 2012/88. Available at:

<http://www.legislation.gov.uk/ssi/2012/88/contents/made> [Accessed 7 October 2013]

Scottish Government. (2012) *Correspondence between European Commission and Scottish Government on public procurement*. Available at: <http://scotland.gov.uk/Resource/0039/00397610.pdf> [Accessed 7 October 2013]

Scottish Government. (2013a) Personal communication [unpublished]

Scottish Government. (2013b) *Procurement Reform Bill Consultation - Analysis of Consultation Responses*. Available at: <http://www.scotland.gov.uk/Publications/2013/01/1908> [Accessed 7 October 2013]

Scottish Government. (2013c) *Public Contracts Scotland*. Available at: <http://www.publiccontractsscotland.gov.uk/> [Accessed 7 October 2013]

Scottish Parliament. (2013a) *Bills explained*. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/30590.aspx> [Accessed 7 October 2013]

Scottish Parliament. (2013b) Official Report 17 April 2013. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8385> [Accessed 7 October 2013]

Scottish Parliament (2014) *Procurement Reform (Scotland) Bill – bills section of the Parliament's website*. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/68170.aspx> [Accessed 8 May 2014]

RELATED BRIEFINGS

SB13/57 [The Procurement Reform \(Scotland\) Bill](#) (702KB pdf)

SB12/23 [Public Procurement in Scotland](#) (543KB pdf)

Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Allan Campbell on extension 85459 or email allan.campbell@scottish.parliament.uk. Members of the public or external organisations may comment on this briefing by emailing us at spice@scottish.parliament.uk. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament's Public Information Service at sp.info@scottish.parliament.uk.

Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.