

PROCUREMENT REFORM (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Procurement Reform (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 7 – Dynamic purchasing system

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative procedure
Amended or new power: Amended

Provision

2. A Dynamic Purchasing System is a procedure through which a contracting authority may buy goods, services or works. Section 7(1) provides that Scottish Ministers may, by regulations, make provision about dynamic purchasing systems.

Reason for taking power

3. These delegated powers allow Scottish Ministers to make further provision on the application of the provisions of the Bill to dynamic purchasing systems and contracts awarded under them. This will ensure continued consistency with EU procurement law, without having to resort to primary legislation.

Reason for choice of procedure

4. These delegated powers will be subject to the affirmative procedure which will allow for a more detailed level of parliamentary scrutiny. While the proposed power relates only to the application of the provisions of the Bill to dynamic purchasing systems and contracts awarded under them, the general scope of the power means that affirmative procedure is considered appropriate. No changes were made to the substance of the power at Stage 2. However, an amendment was made that has the effect of providing that regulations under section 7 will be

subject to the affirmative procedure rather than the negative procedure (as was provided by the Bill on introduction).

Section 10A – Contracts for health or social care services

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative procedure
Amended or new power: New

Provision

5. Section 10A(3) provides that Scottish Ministers may, by regulations, make provision specifying what is a health or social care service.

Reason for taking power

6. The proposals within the new EU Procurement Directive (Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC) recognise that certain categories of service continue by their very nature to have a limited cross-border dimension, including certain social, health and educational services.

7. As an exception to the requirement to treat all bidders equally and without discrimination (section 8(1)), section 10A permits a contracting authority to award a contract for a health or social care service without seeking offers in relation to the proposed contract. This power allows Scottish Ministers to make provision specifying what is a health or social care service for the purposes of the Bill, for example to ensure consistency with European procurement law, the relevant EU Directive and corresponding regulations.

Reason for choice of procedure

8. It is not considered that a more detailed level of parliamentary scrutiny will be required for this provision as it will simply be used to define what is a health or social care service for the purposes of this Bill and this is considered to be largely technical in nature. It is therefore considered appropriate that these regulations be subject to negative procedure.

Section 10C – Other circumstances in which contract can be awarded without competition

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative procedure
Amended or new power: New

Provision

9. Section 10C(1) provides that Scottish Ministers may, by regulations, specify circumstances in which a contracting authority may award a regulated contract without competition.

Reason for taking power

10. There are situations in procurement where contracts are required to be awarded without pursuing a competitive process. Under the proposed new EU Procurement Directive there will also be some types of contract which, similar to health and social care contracts, may be awarded without competition.

11. The reason for taking this power is to provide sufficient flexibility to enable Ministers to define and then modify where required the circumstances in which a contracting authority may award a regulated contract without competition, for example to ensure continued consistency with EU procurement law.

Reason for choice of procedure

12. The Scottish Government considers that affirmative procedure is appropriate as any variation would be amending the circumstances in which a regulated contract may be awarded without competition, and significant modifications could exempt further types of contract from the competition requirements.

Section 34A – Transfer of forum for proceedings to First-tier Tribunal

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative procedure
Amended or new power: New

Provision

13. Section 34A provides that Scottish Ministers may, by regulations, modify the forum for the remedies under the Bill so that proceedings may be brought before a tribunal rather than a court.

Reason for taking power

14. The Remedies Directive (Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts) allows for considerable flexibility for Member States to adopt an approach to remedies that is consistent with their particular national legal system and preferences. The Directive provides an option to introduce a form of administrative review body or tribunal that operates at a tier below the national courts and many other Member States have chosen to introduce such bodies as part of their implementation of the EU procurement Remedies Directives.

15. Scotland has given effect to the public procurement Remedies Directive in the Public Contracts (Scotland) Regulations 2012. When the Scottish Government transpose the new EU procurement Directive there will be an opportunity to revisit implementation of the associated

remedies Directive. In doing so, should the Scottish Government seek to provide for remedies before a tribunal; that would not extend to dealing with remedies under the Bill as it is drafted. This power therefore offers Scottish Ministers flexibility regarding the possibility of using the tribunal system as the forum for adjudication in procurement cases at some point in the future.

Reason for choice of procedure

16. These delegated powers will be subject to affirmative procedure which will allow a more detailed level of parliamentary scrutiny. This is considered appropriate as this power concerns amending the remedies in the Bill, and any modification would represent a significant change to the provisions in the Bill relating to the forum for adjudication.

This document relates to the Procurement Reform (Scotland) Bill as amended at Stage 2 (SP Bill 38A)

PROCUREMENT REFORM (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM