

PROCUREMENT REFORM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Procurement Reform (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE BILL PROVISIONS

3. The Scottish Government and wider Scottish public sector have been working towards improved procurement for a number of years. The Procurement Reform (Scotland) Bill (herein referred to as the Bill) is intended to build on the work achieved so far. 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.
4. The Scottish Government's strategic vision is that the Bill should be effective in promoting sustainable procurement and good practice in procurement without creating unnecessary risks or burdens on contracting authorities and suppliers. The Bill will focus on placing a small number of general duties on contracting authorities regarding their procurement activities and some specific measures aimed at promoting good, transparent and consistent practice. These measures should help encourage local level action within organisations with the aim of building procurement capability/capacity and maximising public procurement's contributions to wider socio-economic and environmental policy objectives. The Bill will also place some administrative requirements on larger spending contracting authorities to publish annual procurement strategies and reports, which will aid visibility of the purchasing activities of these bodies and how they will meet the provisions of the Bill. The Bill is in 5 parts:

- Part 1: Key concepts and application of the Bill
- Part 2: General duties and procurement strategies
- Part 3: Specific duties
- Part 4: Remedies
- Part 5: General

RATIONALE FOR SUBORDINATE LEGISLATION

5. The Bill contains a number of provisions which delegate powers to Scottish Ministers. In deciding whether legislative provisions should be specified on the face of the Bill or through subordinate legislation, the Scottish Government has had regard to the need to:

- Strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances with the benefit of experience, without the need for primary legislation;
- Anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament;
- Make proper use of valuable parliamentary time;
- Allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation; and
- Consider the frequency of amendment.

6. In deciding which form of parliamentary procedure is appropriate, a balance must be struck between the different levels of scrutiny involved in the negative and affirmative resolution procedures. In the Bill the balance reflects the view of the Scottish Government on the importance of the matter delegated by Parliament.

GENERAL SUBORDINATE LEGISLATION PROVISION

7. Section 38 (Subordinate legislation) provides that certain specified powers to make orders or regulations are subject to the affirmative procedure, and any other orders (other than commencement orders) or regulations made under the Bill are subject to the negative procedure.

8. The delegated powers relating to the Bill are listed below. These detail what the power does, why the power was taken and why the selected parliamentary procedure has been considered appropriate.

Delegated powers

Section 1 - Contracting authorities.

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure

Provision

9. Section 1(2) confers a power on Scottish Ministers to modify the meaning of “contracting authority” for the purposes of this Bill. An order may be used also to add a person to the list, or to modify or remove existing entries in the schedule.

Reason for taking power

10. One of the policy intentions of the Bill is to apply the measures in the Bill to a single set of bodies being only those covered by the EU Directive and corresponding Scottish Regulations and whose functions do not relate to reserved matters within the meaning of the Scotland Act 1998.

11. The reason for taking this power is to provide sufficient flexibility to enable Ministers to adjust the definition of “contracting authority” to ensure continued consistency with EU procurement law, without having to resort to primary legislation.

12. This power also enables Scottish Ministers to update the list of contracting authorities where necessary, as bodies or offices are abolished or newly created or their names are changed.

Reason for choice of procedure

13. Section 38(2) provides that an order under section 1(2) is subject to affirmative procedure. This will enable Parliament to consider and decide whether it is appropriate to amend the definition of a “contracting authority” and any amendments to the schedule in order to impose public procurement duties under the Bill on a new body or to remove such obligations from an existing body.

Section 3 – Regulated contracts

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure

Provision

14. Section 3 defines what is meant by a “regulated contract” and in doing so sets financial thresholds for “public contracts” and “public works contracts”. Section 3(3) provides that the Scottish Ministers may, by order, amend the table in section 3(2) so as to substitute for the financial threshold figures specified there for the time being such other figures as they consider appropriate.

Reason for taking power

15. Over time inflation may reduce the real value of the threshold figures. The reason for taking this power is to provide the Scottish Ministers with the flexibility to adjust the threshold figures to reflect changes in the value of money. As these threshold figures are set at a level below the

higher financial values set out in the Public Contracts Regulations, it is not considered necessary to set a limitation on the power to adjust the figures set out in section 3(2).

Reason for choice of procedure

16. A significant modification of threshold could significantly affect which contracts are covered by the provisions within the Bill. It is accordingly considered appropriate that any order made under these provisions should be subject to the greater level of parliamentary scrutiny that the affirmative procedure provides.

Section 4 – Excluded contracts

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure

Provision

17. Section 4 provides that Scottish Ministers may, by regulations, provide that contracts of a description specified in the regulations are excluded contracts for the purpose of section 3.

Reason for taking power

18. Procurement may be fully regulated, partially regulated or not regulated at all. Fully regulated procurements are those which are subject to the application of all the rules laid down by the regulations that give effect in Scotland to European Directive 2004/18/EC. The starting point for the Bill is the excluded contracts under the Regulations implementing that Directive, and subsection (2) provides a power to modify the kinds of contracts which are excluded contracts for the purposes of the Bill.

19. The reason for taking this power is to provide sufficient flexibility to enable Ministers to define and then modify where required the description of an excluded contract, for example to ensure continued consistency with EU procurement law.

Reason for choice of procedure

20. These delegated powers will be subject to affirmative procedure which will allow for a more detailed level of parliamentary scrutiny. This is considered appropriate as any variation would be amending the types of contracts that are excluded, and significant modifications could significantly affect which contracts are covered by the provisions within the Bill.

Section 5 – Estimated value of contract

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative procedure

Provision

21. For the purposes of the Bill, the estimated value of a contract is the sum (not including value added tax) which the contracting authority expects to pay under the contract. Section 5(2) provides that Scottish Ministers may, by regulations, make further provision about how the estimated value of contract is to be determined.

Reason for taking power

22. These delegated powers allow Ministers to set out further detail of how the estimated value of a contract is determined, and provides sufficient flexibility for Scottish Ministers to ensure that these provisions are kept up-to-date. It is considered appropriate for these provisions to be made by regulations rather than on the face of the Bill itself, as they are matters of fine detail more appropriate for subordinate as opposed to primary legislation and, as such, they can be changed more easily.

Reason for choice of procedure

23. The negative procedure is considered appropriate for these powers as Section 5(1) provides the general rule for determining the estimated value of a contract. It is the detail of how the estimated value of a contract is determined that will be subject to the subordinate legislation.

Section 7 – Dynamic purchasing system

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative procedure

Provision

24. 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

25. 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

26. The negative procedure is considered appropriate for this power as a Dynamic Purchasing System is a procedure through which a contracting authority may buy goods, services or works and is not controversial.

Section 10 – Supported businesses

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Scottish statutory instrument

Parliamentary procedure: Negative procedure

Provision

27. Section 10(4) provides that Scottish Ministers may, by order, amend section 10 so as to modify the meaning of “supported business” for the purposes of the Bill.

Reason for taking power

28. As an exception to the requirement to treat all bidders equally and without discrimination (section 8(1)), section 10 permits a contracting authority to seek offers in a regulated procurement from supported businesses only.

29. Having set out the broad principles within the Bill itself, these delegated powers allow Ministers to modify the definition of “supported business” for the purposes of the Bill where required for example to ensure consistency with European procurement law, the relevant EU Directive and corresponding regulations should they be amended in future.

Reason for choice of procedure

30. It is not considered that a more detailed level of parliamentary scrutiny will be required for this provision as it is largely technical in nature. Therefore, this order is subject to the negative procedure.

Section 11 – Procurement strategy

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Scottish statutory instrument

Parliamentary procedure: Negative procedure

Provision

31. Section 11(5)(d) provides that Scottish Ministers may, by order, specify other matters in addition to those listed at section 11(5) that are to be considered by contracting authorities when preparing a procurement strategy.

Reason for taking power

32. These delegated powers provide Scottish Ministers with the capacity to add to the list in section 11(5). This will enable Scottish Ministers to keep under review and to refresh the information that should be contained in a procurement strategy to reflect changing circumstances and practice without having to amend primary legislation.

Reason for choice of procedure

33. This order is subject to negative procedure which is considered appropriate as it is not considered that a more detailed level of parliamentary scrutiny will be required for a provision of this nature, particularly given that it is administrative in nature.

Section 11 – Procurement strategy

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure

Provision

34. Section 11(1) states that a contracting authority which expects to have significant procurement expenditure in the next financial year must, before the start of that year prepare a procurement strategy setting out how the authority intends to carry out regulated procurements, or review its strategy for the current financial year and make such revisions to it as the authority considers appropriate. Section 11(4) provides that an authority has significant procurement expenditure in a year if the sum of the estimated values of the contracts to which its regulated procurements in that year relate to is greater than £5,000,000. Section 11(6) provides that Scottish Ministers may, by order, substitute another sum for that amount.

Reason for taking power

35. Over time inflation may reduce the real value of the threshold figures. The reason for taking this power is to enable the Scottish Ministers to adjust the threshold figures to reflect changes in circumstances including inflation and changes in EU legislation without having to amend primary legislation.

Reason for choice of procedure

36. A significant modification of the threshold could significantly affect which contracting authorities would be subject to the provisions contained within section 11. The order is therefore subject to affirmative procedure which will allow for a more detailed level of parliamentary scrutiny.

Section 14 – Annual procurement reports

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Scottish statutory instrument

Parliamentary procedure: Negative procedure

Provision

37. Section 14(2)(e) provides that Scottish Ministers may, by order, specify other matters in addition to those listed at section 14(2) that are to be included by contracting authorities when preparing an annual procurement report.

Reason for taking power

38. Section 14(2)(e) enables Scottish Ministers to supplement the list in section 14(2). This will enable Scottish Ministers to keep under review and to refresh the information that should be contained in an annual procurement report to reflect changing circumstances and practice without having to amend primary legislation.

Reason for choice of procedure

39. This order is subject to negative procedure which is considered appropriate as it is not considered that a more detailed level of parliamentary scrutiny will be required for a provision of this nature, particularly given that it is administrative in nature.

Section 18 – Publication of contract notices and award notices

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative procedure

Provision

40. Section 18(3) provides that Scottish Ministers may, by regulations, make further provision about the publication of contract notices and award notices. Section 18(4) lists some specific matters that the regulations may, in particular, cover.

Reason for taking power

41. The Bill sets out overarching requirements for a contracting authority to publicise its intention to seek offers in relation to the proposed contract on the Public Contracts Scotland website. The Bill also places a requirement on contracting authority to publicise the award on the Public Contracts Scotland website.

42. Having set out these requirements in the Bill itself, it is considered that the detailed processes and procedures are relatively technical matters that are more appropriate to be dealt with in subordinate legislation.

Reason for choice of procedure

43. These delegated powers allow Ministers to make further provision by setting out the matters of detail regarding publication of contract notices and award notices, so it is proposed that these regulations be subject to negative procedure, rather than the higher level of scrutiny which accompanies the affirmative procedure.

Section 20 – Community benefit requirements in major contracts

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure

Provision

44. Section 20(5) provides that Scottish Ministers may, by order, modify section 20(1) so as to substitute for the figure specified there for the time being such other figures as they consider appropriate. Section 20(1) provides that the section on community benefit requirements in major contracts applies where a contracting authority proposes to carry out a regulated procurement in relation to which the estimated value of the contract is equal to or greater than £4,000,000.

Reason for taking power

45. Over time inflation may reduce the real value of the threshold figures. This power enables the Scottish Ministers to adjust the threshold figures to reflect changes in the value of money and changes in circumstance and practice without having to resort to primary legislation. It will enable Scottish Ministers to change thresholds to best ensure that they deliver the policy outcome in light of experience regarding how the provision works.

Reason for choice of procedure

46. Ministers recognise that this power impacts on one of the core provisions of the Bill. It is considered that this provision should, accordingly, be subject to the affirmative procedure which will allow for a more detailed level of parliamentary scrutiny.

Section 22 – Exclusion of economic operators on grounds of criminal activity

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative procedure

Provision

47. Section 22(1) provides that Scottish Ministers may, by regulations, require a contracting authority to exclude an economic operator in specific circumstances. Section 22(2) provides some criteria that the regulations may cover.

Reason for taking power

48. The Bill provides Ministers with a power to make regulations to exclude suppliers from being awarded a contract if they meet any of the criteria set out in those regulations.

49. These delegated powers allow Ministers to set out the matters of detail regarding exclusions of economic operators on grounds of criminal activity. This provides sufficient flexibility to

enable Ministers to modify the detailed provisions, for example to ensure continued consistency with EU procurement law.

Reason for choice of procedure

50. These delegated powers enable Ministers to set out the matters of detail regarding exclusion of bidders, so it is proposed that these regulations be subject to negative procedure as the higher level of parliamentary scrutiny accompanying the affirmative procedure is not required.

Section 23 – Selection of tenderers

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative procedure

Provision

51. Section 23(1) provides that Scottish Ministers may, by regulations, make further provision about the selection by contracting authorities of economic operators to participate in the procurement process. Section 23(1) lists some specific matters that the regulations could, in particular, include. These regulations may also prohibit contracting authorities from taking into account specified matters in such an assessment.

Reason for taking the power

52. There have been instances where disproportionate requirements have been imposed on suppliers by contracting authorities, for example requiring a disproportionately high level of annual turnover evidenced by accounts over a number of years or excessive levels of insurance cover. The result of a contracting authority imposing requirements that are not proportionate in the manner described above is that many smaller potential contractors who would be capable of fulfilling the contract are excluded.

53. These delegated powers allow Ministers to set out detailed matters on the assessment of the suitability of tenderers, including the circumstances in which an economic operator may or may not be excluded on the basis of criteria specified and the procedure that is to be followed by contracting authorities in determining whether or not to exclude an economic operator. This provides sufficient flexibility to enable Ministers to modify the detailed provisions, for example to ensure continued consistency with EU procurement law and to ensure these matters are kept up-to-date.

Reason for choice of procedure

54. These delegated powers allow Ministers to set out the matters of detail regarding assessment of the suitability of tenderers in relation to a regulated procurement, so it is proposed that these regulations be subject to negative procedure.

Section 25 – Technical specifications

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative procedure

Provision

55. Section 25(1) provides that Scottish Ministers may, by regulations, make provision about the use of technical specifications in regulated procurements (other than EU regulated procurements). Section 25(3) lists some specific matters that the regulations may, in particular, make provision or further provision about.

Reason for taking power

56. The European Directive (2004/18/EC) and the Public Contracts (Scotland) Regulations 2012 that give effect to that Directive in Scotland make provision in relation to technical specifications in relation to works, materials, goods or services to be procured. The regulations require that where a contracting authority wishes to lay down a technical specification it must do so in the relevant contract documents.

57. It is considered important to ensure consistency of approach, where appropriate, between the Bill and the regulations that give effect to that Directive in Scotland. Therefore, the policy intention is that the measures set out in regulation 9 of the directive should be applied to procurements that will fall within the scope of the Bill. However, it is not appropriate for all of the detail regarding technical specifications to be within primary legislation. The matters set out above will be technical in nature and Ministers will require flexibility to adjust the provisions from time to time to take account of changes in practice and changes to EU procurement law.

Reason for choice of procedure

58. These delegated powers enable Scottish Ministers to set out the matters of detail about the use of technical specifications. It is therefore considered appropriate that these regulations be subject to negative procedure.

Section 31 – Amendment of the Climate Change (Scotland) Act 2009

Powers conferred on: The Scottish Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Provision

59. Section 31 creates a new section 82A of the Climate Change (Scotland) Act 2009 (“the 2009 Act”). That new section provides a power for the Scottish Ministers, by regulations, to require specified contracting authorities to ensure that a certain proportion of things procured comprise of or include recycled material or are designed to be recycled. Subsection (3) sets out the kinds

of provision that can be made, and subsection (4) provides for guidance to be given to enforcement authorities by the Scottish Ministers.

60. The new provision complements the existing powers in section 82 of the 2009 Act.

Reason for taking power

61. The existing power in section 82 of the 2009 Act, which has not yet been exercised, applies only to recycle. The delegated powers would allow Scottish Ministers to specify in regulations the procurement of certain quantities of reused and refurbished goods, as well as goods with high levels of recyclability and this would help Scotland realise the potential economic and environmental benefits of these procurement driven market investments. Complementing the existing power in the 2009 Act in this way would be in line with the waste hierarchy which prioritises reuse and refurbishment over recycling.

62. The approach taken in the Bill is to extend section 82 itself rather than establish a free-standing power. This should make it easier for those subject to regulations under this power to understand what is required of them.

Reason for choice of procedure

63. By virtue of section 96 of the 2009 Act, regulations under section 82A will attract the affirmative procedure because they require a higher level of parliamentary scrutiny.

Section 35 – The Directive, Public Contracts Regulations and EU-regulated procurements

Powers conferred on: The Scottish Ministers

Powers exercisable by: Order

Parliamentary procedure: Affirmative procedure

Provision

64. Section 35(2) provides that Scottish Ministers may, by order, amend the definition of “the Directive” so as to substitute for the Directive for the time being (section 35(1)) specified there such successor Directive as they consider appropriate. Scottish Ministers may, by order, also amend the definition of “the Public Contracts Regulations” so as to substitute for the regulations for the time being (section 35(1)) specified there such other instrument as they consider appropriate. An order under section 35(2) may make such consequential modifications to the Bill as the Scottish Ministers consider appropriate. The European Parliament is currently considering proposals for a new Directive which will replace the Directive and which will require implementation probably through new Regulations replacing the Public Contracts Regulations.

Reason for taking power

65. These delegated powers provide the Scottish Ministers with the flexibility to modify the definition of “the Directive” and the “Public Contracts Regulations” to ensure consistency with European procurement law, the relevant EU Directive and corresponding regulations. This order allows Scottish Ministers to make such consequential modifications to this Bill as they consider appropriate, particularly to ensure that the provisions in the Bill also remain consistent, where appropriate, with the rules in the EU Directive and implementing Scottish regulations.

Reason for choice of procedure

66. Such a modification could have a significant effect on the scope of the Bill. Accordingly, it is considered appropriate that any order made under these provisions should be subject to the greater parliamentary scrutiny that the affirmative procedure provides.

Section 37 – Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by: Order

Parliamentary procedure: Affirmative procedure (but only if the order adds to, replaces or omits any part of the text of an Act) otherwise negative procedure

Provision

67. Subsection 37(1) enables the Scottish Ministers, by order, to make supplementary, incidental, consequential, transitional, transitory or saving provision they consider necessary or expedient for the purposes of, in consequence of, or in connection with, any provision made by or under this Bill.

Reason for taking power

68. This is to provide sufficient flexibility to enable supplementary, incidental, consequential, transitional, transitory or saving provision to be made for the purposes of, in consequence of, or in connection with any provision made by or under this Bill without having to resort to primary legislation.

Reason for choice of procedure

69. Where a draft order under section 37(1) contains provision(s) that add to, replace or omit any part of the text of an Act it is thought to merit approval of Parliament before it can be made. Accordingly, draft orders of this nature are subject to the affirmative procedure. If an order this section contains no such textual amendments, it will instead be subject to the negative procedure.

Section 39 - Commencement

Power conferred on: The Scottish Ministers

Power exercisable by: Order

Parliamentary procedure: laid only

Provision

70. Sections 35, 36, 37, 38 and 40 come into force on the day of Royal Assent. Section 39(2) provides that Scottish Ministers may, by order, appoint days on which the other provisions in the Bill may come into force.

Reason for taking power

71. This will allow Ministers to time the commencement of the Bill to coincide with any necessary subordinate legislation and also allow Ministers to plan commencement appropriately. This order allows the flexibility for Ministers to make necessary, unforeseen, adjustments for the purposes of, in consequence of, or for giving full effect to, the Bill without having to resort to primary legislation.

Reason for choice of procedure

72. This power is subject to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010 (asp 10). This is typical for commencement orders.

This document relates to the Procurement Reform (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 3 October 2013

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