



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

64th Report, 2013 (Session 4)

Procurement Reform (Scotland) Bill

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Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
 - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
 - (c) general questions relating to powers to make subordinate legislation;
 - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
 - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
 - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
 - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
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Delegated Powers and Law Reform Committee

64th Report, 2013 (Session 4)

Procurement Reform (Scotland) Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 5 November and 3 and 10 December 2013 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Procurement Reform (Scotland) Bill at stage 1 (“the Bill”)¹. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)².

OVERVIEW OF BILL

3. This Bill was introduced by the Scottish Government on 3 October 2013. The Infrastructure and Capital Investment Committee is the lead Committee. The Bill is also being considered by the Local Government and Regeneration Committee.
4. The Bill introduces a degree of regulation for procurements, concerning the tranche of public contracts which are above certain financial thresholds, but below the thresholds contained in the Public Contracts (Scotland) Regulations 2012 (SSI 2012/88). Section 2 defines the procurements which are regulated by its provisions as “regulated procurements”. Various provisions apply to regulated procurements, but not “EU-regulated procurements” which are defined by section 35(1).

¹ Procurement Reform (Scotland) Bill [as introduced] available here:
http://www.scottish.parliament.uk/S4_Bills/Procurement%20Reform/b38s4-introd.pdf

² Procurement Reform (Scotland) Bill Delegated Powers Memorandum available here:
http://www.scottish.parliament.uk/S4_Bills/Procurement_Reform_DPM.pdf

5. The Bill in broad terms makes further provision in relation to public procurements, most notably creating obligations concerning advertising, community benefits and procurement strategies. The Bill seeks to establish a national legislative framework for sustainable public procurement. It places some general duties on Scottish contracting authorities regarding their procurement activities, and there are specific measures aimed at promoting good, transparent and consistent practice in procurement.

6. The Bill also places some administrative requirements on larger spending contracting authorities to publish procurement strategies and annual reports. The requirements are designed to aid visibility of the purchasing activities of these bodies, and how they will meet their procurement obligations.

Delegated powers provisions

7. The Committee considered each of the delegated powers in the Bill.

8. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

Section 4(2) – Excluded contracts

Section 5(2) – Estimated value of contract

Section 14(2)(e) – Annual procurement reports

Section 18(3) and (4) – Publication of contract notices and award notices

Section 25 – Technical specifications

Section 31 (apart from the new section 82A((4) and (5)) – Amendment of the Climate Change (Scotland) Act 2009

Section 31 (inserting new section 82A((4) and (5)) – Amendment of the Climate Change (Scotland) Act 2009

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

Section 37 – Ancillary provision

Section 39 - Commencement

9. At its meeting of 5 November, the Committee agreed to write to Scottish Government officials to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the Annex.

10. In light of the written responses received by the Committee, it agreed that it did not need to draw the Parliament's attention to the following delegated powers:

Section 3(3) - Regulated contracts

Section 11(6) - Procurement strategy (significant procurement expenditure)

Section 20(5) - Community benefit requirements in major contracts

11. The Committee's comments and, where appropriate, recommendations on the other delegated powers in the Bill are detailed below.

Section 1(2) and (3) - Contracting authorities

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Affirmative procedure

12. Section 1(1) of the Bill defines "contracting authority" for the purposes of the Bill. Initially, this is one of the 69 bodies or persons listed in the schedule. It is also any other person who is a contracting authority for the purposes of the Public Contracts (Scotland) Regulations 2012 ("the 2012 Regulations"), and all of whose functions are exercisable in or as regards Scotland but do not relate to reserved matters under the Scotland Act 1998.

13. Section 1(2) confers a power on the Scottish Ministers to modify the meaning of "contracting authority". Section 1(3) clarifies that this can be done either by amending the list of bodies or persons in the schedule, or by amending subsection (1). This in effect will also allow section 1(1)(b) to be varied. That subsection links the definition of "contracting authority" to other persons who are contracting authorities under the 2012 Regulations, but whose functions are exercisable in or as regards Scotland, and do not relate to matters reserved to Westminster.

14. The Committee asked the Scottish Government for explanation of a couple of matters. First it sought clarification of the policy intentions underlying section 1(2) and (3).

15. Second, section 1(1)(b)(i) and (ii) appear to have the effect of excluding from the Bill (in line with the policy objective) certain bodies that are "contracting authorities" which are subject to the procurement requirements in the Public Contracts (Scotland) Regulations 2012, but which have functions in reserved areas. These include the UK Ministers of the Crown and government departments, the House of Commons and House of Lords, the National Assembly for Wales and the Northern Ireland Assembly Commission. This power is however capable of being used to amend those subparagraphs.

16. The Scottish Government has clarified in response to the Committee that the DPM could have been clearer in its explanation of the underlying policy intentions. The power is proposed so that there will be flexibility to amend section 1(1)(b), as there may be a need to exempt bodies which are not listed in the schedule to the Bill, but nonetheless covered by the 2012 Regulations. Also

should there be a need to adjust the schedule to remove a body, there may also be a need to ensure they are not caught under the wider provision in section 1(1)(b).

17. The Committee agrees with the Scottish Government's approach that the exercise of this power is subject to the affirmative procedure.

18. The Committee notes however that the Scottish Government has not commented on why the power is proposed to modify section 1(1)(b), so far as the power might be used to propose adding certain bodies which currently are not proposed to be within the scope of the Bill. That is, there are certain bodies which are "contracting authorities" subject to the procurement requirements in the Public Contracts (Scotland) Regulations 2012, but which have functions in reserved areas. The Committee is not clear as to the policy objective, in that respect.

19. **The Committee therefore draws to the attention of the lead Committee that section 1(1)(b)(i) and (ii) exclude from the Bill certain bodies that are "contracting authorities" which are subject to the procurement requirements in the Public Contracts (Scotland) Regulations 2012, but where the functions of the body are not wholly exercisable in or as regards Scotland, or functions relate to matters reserved to Westminster. These include the UK Ministers of the Crown and government departments, the House of Commons and House of Lords, the National Assembly for Wales and the Northern Ireland Assembly Commission.**

20. **The Committee is not clear why the power is proposed in section 1(3) to amend those restrictions in section 1(1)(b)(i) and (ii). By such amendment some additional bodies that have functions in reserved areas, or functions both in regard to Scotland and otherwise, could potentially be included as "contracting authorities" for the purposes of the Bill, though they are excluded in the current proposal. The Committee considers that the acceptability of this power depends on whether the underlying policy objective is acceptable, and that is not clear to the Committee from the documents accompanying the Bill or the Scottish Government's written response.**

21. **The lead Committee might accordingly consider this further.**

Section 7(1) – Dynamic purchasing systems

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative procedure

22. A dynamic purchasing system ("DPS") is generally an electronic system through which a "contracting authority" as defined by the Bill may buy goods, services or works. (For the Bill, the goods, services or works must be commonly used by the authority and readily available on the market.)

23. Section 7(1) of the Bill contains a general power for the Ministers to make provision by regulations about dynamic purchasing systems. This may

include provision applying the Bill to the establishment and operation of a DPS as it applies to the carrying out of a regulated procurement, with modifications stated in the regulations. It may also include modifying the application of the Bill to a contract awarded under a DPS.

24. The Committee sought an explanation why this general power is appropriate, and of the underlying policy intentions for how the power could be exercised.

25. The Scottish Government in its written response has explained that its intention is that key parts of the Bill will apply to the establishment of a DPS, in a similar way as they apply to a framework agreement. It is explained that the new Proposal for an EU Directive on Public Procurement [2012.2011, COM (2011) 896]³ seeks to address an issue which has made DPSs impractical. Under the current Directive purchasers are required to run a new competition each time a contract is awarded, which has defeated the object of the system.

26. When the proposed Directive is transposed, the Scottish Government expects that the new procedure in it would be widely adopted. How it is used and what issues it might highlight for businesses and the public sector will only become fully apparent once a body of experience of their use develops. The Scottish Government intends therefore to provide a degree of flexibility in the Bill's application to the establishment and operation of DPSs, to enable it to take account of that experience.

27. The Committee accepts that a general power to regulate DPSs may be required in principle. The policy objective also appears to be to have the scope to apply regulations about DPSs to contracts within the threshold levels prescribed by the Bill. That is, contracts below EU threshold values, but above those thresholds defined by the Bill.

28. The Committee does not accept, however, the approach taken by the Scottish Government in its written response, that the negative procedure is a suitable level of scrutiny for the regulations because this "would relate to the administrative detail of a type of procurement procedure". A general, substantive power is sought to make regulations about DPSs. This includes in particular, but is not limited to, applying provisions of the Bill to DPSs as they apply to carrying out a "regulated procurement", and with such modifications as the regulations might specify. Provision might also be made modifying the application of the Bill to a contract awarded under a DPS (section 7(1)).

29. The Committee accordingly accepts the power contained in section 7(1) in principle. Given the proposed general scope of this power to make provision about dynamic purchasing systems, it considers though that the exercise of this power would be more appropriately scrutinised by means of the affirmative procedure.

Section 10(4) – Supported businesses

³ [EUR-Lex - 52011PC0896 - EN](#)

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative procedure

30. Section 10 permits the restriction of contract opportunities to supported businesses (but not for an “EU-regulated procurement” to which provisions of the 2012 Regulations apply).

31. A “supported business” is an economic operator who operates a supported business, employment programme or factory under the 2012 Regulations (regulation 7). This covers services, job schemes and establishments where more than 50% of the workers are disabled persons, unable to take up work due to the nature or severity of their disability.

32. 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. (“Supported businesses” are also referred to in section 9(1), in relation to the sustainable procurement duty proposed in that section).

33. The Committee sought an explanation why it is appropriate to confer this power to enable any modification of the meaning of “supported business” for the purposes of section 9(1)(a) and 10, apart from a modification which is consequential on the amendment of the corresponding definition of “supported business” in regulation 7 of the 2012 Regulations.

34. The Scottish Government has confirmed in its written response that on reflection, such a change in the definition of “supported business” could be effected by consequential amendment, when transposing the proposed new EU Directive on public procurement. It is proposed to omit section 10(4) by amendment at Stage 2.

35. **The Committee notes that the Scottish Government has undertaken to bring forward an amendment at Stage 2 which would propose to omit the power in section 10(4), as not required. The Committee will consider that amendment after Stage 2.**

Section 11(5)(d) – Procurement strategy (other matters)

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative procedure

36. The Bill provides that contracting authorities which expect to have significant procurement expenditure in the next financial year (over £5M) must prepare a procurement strategy setting out how they intend to carry out regulated procurements (section 11). Authorities must comply with their strategies, so far as reasonably practicable (section 13). Section 11(5) sets out what the strategy must cover (including how the authority intends to ensure that its regulated procurements will contribute to the carrying out of its functions and deliver value

for money). Section 11(5)(d) provides the power by order to specify other matters, as well as those listed.

37. The Committee sought further explanation why the negative procedure has been considered a suitable level of scrutiny for the exercise of this power. The Scottish Government has explained in the written response that an additional matter that might be prescribed for the strategy could be (by way of an example) an authority's approach to the procurement of food and drink. It is not yet clear what is of sufficiently high priority to merit inclusion in procurement strategies in future. The Government has considered that the negative procedure is an appropriate level of Parliamentary scrutiny of the exercise of the power as it will relate to the detailed content of the strategies to be established under section 11.

38. The Committee considers that it is not a sufficient explanation for the proposal to apply the negative procedure that it will be used to prescribe more detailed matters for a procurement strategy than those set out in section 11(5). Where the Scottish Ministers propose to specify by order such additional matters, section 13 provides that the contracting authority must ensure that its regulated procurements in a financial year are, so far as reasonably practicable, carried out in accordance with the strategy.

39. Accordingly the significance of the effects on the contracting authority will depend on what may be proposed in an order, to be included in a procurement strategy. The written response to the Committee also explains that decisions on additional priorities for strategies are yet to be made.

40. **The Committee therefore accepts the power contained in section 11(5)(d) in principle. Given the potential for an order to have significant effects on contracting authorities, the Committee considers however that the affirmative procedure would be a more appropriate level of Parliamentary scrutiny of the exercise of the power.**

Section 16 – Guidance

Power conferred on:	The Scottish Ministers
Power exercisable by:	Guidance
Parliamentary procedure:	None

41. Section 16 provides that the Ministers must issue guidance to contracting authorities on the preparation and publication of procurement strategies and annual procurement reports. Contracting authorities must have regard to any such guidance issued.

42. The Committee therefore asked the Scottish Government whether it is intended that this guidance will be published on issue, and if so whether this could be provided for by amendment of section 16. The guidance is intended for publication, but the Government has considered that an amendment is not needed, as "issue" in section 16 is considered to be a standard term in this context, implying publication.

43. Initially the Committee notes that there is a difference in the drafting, as between the example cited in the written response where “issue” was considered sufficient, and section 16 of this Bill. Section 17(5) of the Police and Fire Reform (Scotland) Act 2012 provides that the chief constable must ensure that the policing of Scotland is done with due regard to any recommendations made “or guidance issued by the Authority” on the policing of Scotland. Section 16(1) of the Bill proposes that the Scottish Ministers must issue the guidance to contracting authorities. The Committee is not persuaded that provision for issue to contracting authorities provides, by necessary implication, for a requirement to publish.

44. In any case the Committee considers that a requirement to publish the guidance can be made clear to readers quite simply, by stating this in the section. The Committee also considers that this guidance is sufficiently significant that a copy of it should be laid in Parliament on publication.

45. The Committee considers therefore that section 16 should be amended at Stage 2, to make clear that the guidance to contracting authorities on the preparation and publication of procurement strategies and annual procurement reports shall be published on issue. It should also be provided that on publication a copy shall be laid in Parliament.

Section 21 - Guidance on community benefit requirements

Power conferred on:	The Scottish Ministers
Power exercisable by:	Guidance
Parliamentary procedure:	None

46. Section 21(1) provides that the Ministers may issue guidance on the use of community benefit requirements. The guidance may cover specific matters as set out in section 21(2). Contracting authorities must have regard to any guidance issued.

47. As for the power to issue guidance under section 16, the Scottish Government intends to publish this guidance. The Committee similarly considers that the requirement to publish should be made clear by amending the provision at Stage 2, and that a copy should be laid in Parliament.

48. The Committee considers that section 21 should be amended at Stage 2 to make clear that the guidance on the use of community benefit requirements shall be published on issue. It should also be provided that a copy shall be laid in Parliament.

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

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative procedure

49. Section 22(1) provides that Scottish Ministers may by regulations require a contracting authority to exclude an economic operator from a “regulated procurement” process (except for an EU-regulated procurement), if the operator or certain other persons have been convicted of an offence specified in the regulations. Those other persons are a director, secretary, office-holder, or partner of the economic operator, or another person having powers of representation, decision-making or control in relation to the operator.

50. The regulations may also specify evidence that is to be conclusive in determining whether a person has been convicted, and circumstances in which a contracting authority may award a contract to an operator, despite being otherwise prohibited from doing so under the regulations.

51. The Committee sought an explanation why the scope of this power could not be drawn more narrowly- for instance to reflect the list of the exclusions which are contained in regulation 23(1) and (2) of the 2012 Regulations, even if subject to possible amendment by regulation. Paragraph 88 of the Policy Memorandum states that it is intended to use this power to “draw-down” the list of exclusions from the 2012 Regulations into the Bill, thus ensuring consistency with those Regulations (which implement EU law requirements).

52. The Scottish Government in its written response has confirmed that, while it would be logical for the Bill to mirror the list of exclusions in the 2012 Regulations, the flexibility may be needed to adopt a different approach. The precise list of exclusions under the proposed new EU Directive will not be the same as in the current Directive (2004/18/EC), and what is appropriate for higher value contracts may not be appropriate for those of lower value.

53. It will only be at the point when the Scottish Government comes to transpose the new Directive into domestic law that it will have to finalise which types of offence will result in mandatory exclusion. (Political agreement between the European Commission, Council and Parliament on the text of proposed new Directive was reached on 17 July 2013 and it is considered unlikely that there will be any further significant change to the text, although the Scottish Government is continuing to monitor events. The Directive is anticipated to be approved by the European Parliament in January 2014 (paragraph 7 of the Policy Memorandum)).

54. The Committee notes initially that the position in the written response is somewhat different to that stated in paragraph 88 of the Bill Policy Memorandum, which indicates that the starting position is to “draw down” into regulations the list of mandatory exclusions which are contained in regulation 23(1) and (2) of the 2012 Regulations.

55. The Committee has a concern that in principle the scope of the power to make regulations in section 22(1) is drawn extremely broadly to enable regulations to prescribe any offence, when conviction would result in a mandatory exclusion of an economic operator from a “regulated procurement” process under the Bill.

56. The Committee also has a concern that in principle the broad scope of this power is proposed owing to a perceived need to reflect- but

not necessarily duplicate- other provisions which are not in force or even in a proposed form at this stage. (That is, the list of mandatory exclusions which could in due course be transposed under the Proposal for an EU Directive on public procurement (COM (2011) 896)).

57. As the Scottish Government has indicated to the Committee, the regulations under section 22 will have significant effects for public bodies. The Committee considers that ultimately it is for the Parliament to determine whether this power is acceptable in principle. If so, it considers that the scope and significance of the power is such that the affirmative procedure would be a more suitable level of Parliamentary scrutiny of the proposed regulations.

58. The Committee also observes that, in principle, it would seem possible for the scope of this power to be narrowed. Some mandatory exclusions of economic operators might in principle be proposed in the Bill (such exclusions complying with the current EU law), while the power might allow for the amendment of this list by regulation. The Committee asks the Scottish Government to consider this further, for the purposes of its response to this report.

Section 23 – Selection of tenderers

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative procedure

Provisions

59. 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 a regulated procurement. (It is possible that such provision could set out discretionary grounds as to the exclusion/selection of bidders, as opposed to section 22 which concerns necessarily mandatory exclusion.)

60. As with section 22, the power does not apply to EU-regulated procurements. Section 23(1) provides the regulations could include provision about the use of minimum standard requirements to assess the suitability of bidders, the circumstances in which an operator may or may not be excluded on the basis of criteria stated in the regulations, or the procedure to be followed in determining whether to exclude a bidder.

61. Section 23(3) lists various criteria that could be specified as possible grounds for exclusion or non-exclusion of a bidder. The regulations may also prohibit contracting authorities from taking into account specified matters in such an assessment.

The power in principle

62. The Committee noted that the explanation in justification of this power contained in the DPM is somewhat different to that for section 22. There is an

intention through the use of this power to address “disproportionate requirements [which] 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.” It appears therefore that there is an underlying policy intention to confer a wide power, to be able to frame and adjust suitable provisions for the selection of operators to participate in “regulated procurements”. These could include grounds for non-exclusion, as well as further grounds for exclusion of bidders.

63. In other words, the Scottish Government’s declared policy intention is to specify a range of possible selection or exclusion criteria for “regulated procurements” by regulation. These may need to be adjusted in future. They could differ substantially from those currently specified in the 2012 Regulations for EU-regulated procurements, or could propose additional criteria (though the criteria will need to be compatible with EU law). Given that policy intention, the Committee accepts this power in principle.

The proposal for negative procedure

64. Similarly for the power in section 22 the Committee sought further explanation to establish whether the affirmative procedure could be a more suitable level of scrutiny of the exercise of the power. As above the power is widely framed and could be used to specify substantial matters as to the selection or exclusion of tenderers.

65. The Scottish Government in its written response has explained that contracting authorities are bound by the fundamental EU Treaty principles which include equal treatment, non-discrimination and proportionality. The Government could not use this power in a way which was unfair to certain categories of bidder, or which was disproportionate. It is considered that scrutiny of the regulations by the negative procedure is appropriate, given the constraints imposed by that overarching framework of EU law and that the selection of tenderers is an administrative matter.

66. The Committee accepts that any regulations will need to comply with the EU Treaty requirements which the Government refers to. It considers however that this does not determine the appropriate level of Parliamentary scrutiny of the regulations. It is clear to the Committee that this power is proposed as a general framework for further provision by regulation, and could be used to specify substantial matters as to the selection or exclusion of tenderers in a “regulated procurement” process.

67. The Committee therefore accepts the powers contained in section 23 in principle. The Committee observes however that ultimately it is for the Parliament to determine whether these powers are acceptable. The powers amount to a framework which will enable the detailed specification by regulation of the selection criteria for economic operators participating in a “regulated procurement”.

68. Given the potential for the regulations to have significant effects on contracting authorities and economic operators, the Committee considers

that the affirmative procedure would be a more appropriate level of Parliamentary scrutiny of the regulations.

Section 24 - Guidance on selection of tenderers

Power conferred on:	The Scottish Ministers
Power exercisable by:	Guidance
Parliamentary procedure:	None

69. Section 24 enables the Ministers to issue guidance about the selection of economic operators to take part in the process relating to a “regulated procurement”. The guidance may particularly cover the use of questionnaires to assess suitability of bidders, and the matters relating to recruitment and terms of engagement of persons involved in producing, etc., the subject matter of the procurement that are to be taken into account in assessing the suitability of a bidder. Contracting authorities must have regard to such guidance.

70. The Committee sought an explanation in correspondence why it is appropriate for such matters to be set out in guidance (which is not proposed to be subject to Parliamentary procedure) rather than in subordinate legislation.

71. The Scottish Government’s written response has explained how the focus will be on more practical and best practice matters. The guidance will, in particular, be used to address the way that public bodies use pre-qualification questionnaires (“PQQs”) and the way that they should address workforce matters, in particular procurement exercises. On workforce matters the Scottish Government would intend to use the guidance to promote scrutiny of a company’s approach to its workforce, in circumstances where this is likely to be relevant to its ability to perform the contract and/or the quality of service it is offering.

72. The Scottish Government considers that guidance is more appropriate, as public bodies require a significant degree of flexibility in their approach to these issues, which will vary between procurements. The flexibility is also considered to be needed to vary the guidance over time, to reflect any changes to the legal framework, or new developments in best practice on these issues.

73. The Committee also asked whether a requirement to publish the guidance could be provided for by an amendment. The Government’s written response on this aspect was the same as for the guidance proposed by sections 16 and 21. The Committee takes the same view that there should be provision for a requirement to publish, and that a copy of the guidance should be laid in Parliament.

74. The Committee accordingly accepts the power to issue guidance on selection of tenderers contained in section 24, in principle. Similarly to the powers to issue guidance in sections 16 and 21, the Committee considers that section 24 should be amended at Stage 2 to make clear that the guidance shall be published upon issue. A copy should also be laid in Parliament.

ANNEX

Correspondence with the Scottish Government

On 5 November 2013, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

Section 1(2) and (3) - Contracting authorities

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Affirmative procedure

1. Subsection (1) of section 1 defines “contracting authority” for the purposes of the Bill. Subsection (2) confers a power on Scottish Ministers to modify the meaning of “contracting authority”. Subsection (3) clarifies that this can be done either by amending the list of bodies or persons in the schedule, or by amending subsection (1).

2. The policy intention underlying Section 1(2) and (3) is explained in the Delegated Powers Memorandum as - “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.”

3. The Committee therefore asks the Scottish Government whether the policy intention could be clarified, given that certain bodies listed in the Schedule to the Bill do have some functions which relate to reserved matters, and this seems at odds with that statement in the Delegated Powers Memorandum?

4. Section 1(1)(b)(i) and (ii) appear to have the effect of excluding from the Bill certain bodies that are “contracting authorities” which are subject to the procurement requirements in the Public Contracts (Scotland) Regulations 2012, but which have functions in reserved areas.

5. The Committee asks the Scottish Government why, therefore, it is considered necessary or appropriate to take the power to amend the whole of subsection (1)(b) (and in particular subparagraphs (i) and (ii)), and in what ways might this power be exercised?

Section 3(3) – Regulated contracts

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Affirmative procedure

6. 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 figures specified there for the time being such other figures as they consider appropriate.

7. **The Committee asks the Scottish Government to reflect on whether, as regards any amendments to the figures in the table in section 3(2) which are limited to reflecting adjustment due to changes in the value of money over time, the negative procedure might be a more suitable level of Parliamentary scrutiny of the exercise of the power?**

Section 7(1) – Dynamic purchasing systems

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative procedure

8. Section 7(1) contains a general power for the Ministers to make provision by regulations about dynamic purchasing systems.

9. The Delegated Powers Memorandum only explains by way of the justification for this general power to make provision about dynamic purchasing systems and to modify the application of the Bill in that respect, that this is designed to ensure continued consistency with EU procurement law.

10. **The Committee asks the Scottish Government:**

- **Given the general scope of the proposed power to make any provision by regulation about such systems, for further explanation of why this general power is appropriate, and of the underlying policy intentions as to how the power could be exercised?**
- **For clarification as to how this power will ensure continued consistency with EU law?**
- **Why this Bill could not provide for how its provisions apply (or initially apply) to such systems?**
- **Given the proposed scope of this power and that it could be used to modify the Bill’s provisions in their application to such systems, whether the affirmative procedure could be a more suitable level of Parliamentary scrutiny for the exercise of this power?**

Section 10(4) – Supported businesses

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Negative procedure

11. Section 10 permits the restriction of contract opportunities to supported businesses (but not for an EU-regulated procurement).

12. The Delegated Powers Memorandum explains that this power is required “to ensure consistency with European procurement law, the relevant EU Directive and corresponding regulations should they be amended in future”. However, this power enables any modification by order of the meaning of “supported business” as defined in section 10(3). Section 38(1) would appear to enable differing meanings to be substituted for the purposes of each of sections 9(1)(a) and 10.

13. **The Committee asks the Scottish Government:**

- **Why it is appropriate to confer this power to enable any modification of the meaning of “supported business” for the purposes of section 9(1)(a) and 10, apart from a modification which is consequential on the amendment of the corresponding definition contained in regulation 7 of the 2012 Regulations?**
- **How the power could be used otherwise?**

Section 11(5)(d) – Procurement strategy (other matters)

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Negative procedure

14. Contracting authorities which expect to have significant procurement expenditure in the next financial year must prepare a procurement strategy setting out how they intend to carry out regulated procurements. Authorities must comply with their strategies, so far as reasonably practicable.

15. Section 11(5) sets out what the strategy must cover. Section 11(5)(d) provides the power by order to specify other matters, as well as those listed.

16. **The Committee asks the Scottish Government:**

- **To explain what the policy intentions are as to the types of additional matters that could be specified in an order, to be addressed in the procurement strategy?**
- **To explain why scrutiny of the exercise of this power by the negative procedure is more suitable than by the affirmative procedure?**

Section 11(6) – Procurement strategy (significant procurement expenditure)

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Affirmative procedure

17. Section 11(1) provides 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, is greater than £5 million.

18. The power in section 11(6) provides that the Ministers may by order substitute another sum for that amount.

19. In relation to section 11(6), the Committee asks the Scottish Government to reflect on whether, as regards any amendment of the figure stated in section 11(4) which is limited to reflecting adjustment due to changes in the value of money over time, the negative procedure could be a more suitable level of Parliamentary scrutiny of the exercise of the power?

Section 16 - Guidance

Power conferred on:	The Scottish Ministers
Power exercisable by:	Guidance
Parliamentary procedure:	None

20. Section 16 provides that the Ministers must issue guidance to contracting authorities on the preparation and publication of procurement strategies and annual procurement reports. Contracting authorities must have regard to any such guidance issued.

21. The Committee therefore asks the Scottish Government whether it is intended that this guidance will be published on issue, and if so whether this could be provided for by amendment of section 16?

Section 20(5) – Community benefit requirements in major contracts

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Affirmative procedure

22. Section 20(1) provides that certain community benefit requirements contained in the section apply where a contracting authority proposes to carry out a regulated procurement under the Bill, in relation to which the estimated value of the contract is equal to or greater than £4 million.

23. Section 20(5) provides that the Scottish Ministers may, by order, modify section 20(1), to substitute for the £4 million figure, such other figure as they consider appropriate.

24. The Committee asks the Scottish Government, in relation to the power in section 20(5), to reflect on whether, as regards any amendment of the figure stated in section 20(1) which is limited to reflecting adjustment due to

changes in the value of money over time, the negative procedure could be a more suitable level of Parliamentary scrutiny of the exercise of the power?

Section 21 - Guidance on community benefit requirements

Power conferred on: The Scottish Ministers
Power exercisable by: Guidance
Parliamentary procedure: None

25. Section 21(1) provides that the Ministers may issue guidance on the use of community benefit requirements. The guidance may cover specific matters as set out in section 21(2). Contracting authorities must have regard to any guidance issued.

26. The Committee asks the Scottish Government, in relation to the power to issue guidance in section 21, whether it is intended that this guidance will be published on issue and if so whether this could be provided for by an amendment?

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

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

27. Section 22(1) provides that Scottish Ministers may, by regulations, require a contracting authority to exclude an economic operator from a “regulated procurement” process, except for an EU-regulated procurement, if the operator or certain other persons have been convicted of an offence specified in the regulations.

28. The Committee asks the Scottish Government:

- To explain why the scope of this power could not be drawn more narrowly, for instance to reflect the list of the exclusions which are contained in regulation 23(1) and (2) of the 2012 Regulations in implement of EU procurement law (even if subject to possible amendment by regulation)?**
- To also explain why it has been considered that the negative procedure is a more appropriate level of scrutiny of the exercise of the power than the affirmative procedure, given the width of the power and the scope to specify the substantial grounds on which economic operators may be required to be excluded from a “regulated procurement” process due to the commission of an offence?**

Section 23 – Selection of tenderers

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

29. 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 a regulated procurement.

30. The Committee asks the Scottish Government for an explanation of why it has been considered that the negative procedure is a more appropriate level of scrutiny of the exercise of the power than the affirmative procedure, given the width of the powers and the scope to specify the substantial grounds on which economic operators may be either selected or excluded from a “regulated procurement” process?

Section 24 - Guidance on selection of tenderers

Power conferred on: The Scottish Ministers
Power exercisable by: Guidance
Parliamentary procedure: None

31. Section 24 enables the Ministers to issue guidance about the selection of economic operators to take part in the process relating to a regulated procurement. Contracting authorities must have regard to such guidance.

32. The Committee asks the Scottish Government:

- **For an explanation of how these powers could be used (in particular as to the matters relating to recruitment and terms of engagement of persons involved in the subject matter of a procurement that are to be taken into account in assessing the suitability of a bidder),**
- **Why it is appropriate that this power is in the form of guidance which is not laid in Parliament or subject to procedure and rather than the matters to be covered being in regulations under section 23, and**
- **Whether it is intended that this guidance will be published on issue, and if so whether this could be provided for by an amendment?**

On 12 November 2013, the Scottish Government responded to the Delegated Powers and Law Reform Committee as follows:

Section 1(2) and 3 – Contracting Authorities

Para 4 - The Committee therefore asks the Scottish Government whether the policy intention could be clarified, given that certain bodies listed in the Schedule to the Bill do have some functions which relate to reserved matters, and this seems at odds with that statement in the Delegated Powers Memorandum?

On reflection the Delegated Powers Memorandum could have been clearer on this point. The Bill correctly describes those bodies to whom the provisions will apply by providing a definition of “contracting authority”. These are bodies, office-holders and persons listed in the schedule. In addition, they are contracting authorities as defined in the Public Contracts (Scotland) Regulations 2012 whose functions are exercisable in or as regards Scotland and which do not relate to reserved matters or to matters which are for other devolved administrations.

Para 6 - The Committee asks the Scottish Government why, therefore, it is considered necessary or appropriate to take the power to amend the whole of subsection (1)(b) (and in particular subparagraphs (i) and (ii)), and in what ways might this power be exercised?

The Scottish Government require the flexibility to amend subsection (1)(b) because there may be a need to exempt bodies which are not listed in the schedule, but are nonetheless covered by the Public Contracts (Scotland) Regulations. Also, should there be a need to adjust the schedule to take a body out, there will still be a requirement to make sure they are not caught under the wider provision. For example, the Government may decide at some future point that it would not wish to include a body within the scope of the Bill that is covered by the 2012 Regulations. This would necessitate an amendment to section 1(b).

Section 3(3) – Regulated contracts

Para 8 - The Committee asks the Scottish Government to reflect on whether, as regards any amendments to the figures in the table in section 3(2) which are limited to reflecting adjustment due to changes in the value of money over time, the negative procedure might be a more suitable level of Parliamentary scrutiny of the exercise of the power?

While some amendments to the threshold might simply reflect changes in the value of money, it is conceivable that more substantial amendment may be required. For example, if in the light of experience the thresholds come to be regarded as either too high or too low. The Scottish Government does not intend to amend the thresholds frequently or as a matter of routine (e.g. it does not expect them to be amended on an annual basis). However, the EU thresholds are likely to be reviewed within the next 3-4 years and the Scottish Government may wish to amend the thresholds in the Bill to reflect any significant changes at an EU

level. In light of that the Scottish Government believes that the affirmative procedure is more appropriate for the exercise of this power.

Section 7(1) – Dynamic purchasing systems

Para 11 - The Committee asks the Scottish Government:

- **Given the general scope of the proposed power to make any provision by regulation about such systems, for further explanation of why this general power is appropriate, and of the underlying policy intentions as to how the power could be exercised?**
- **For clarification as to how this power will ensure continued consistency with EU law?**
- **Why this Bill could not provide for how its provisions apply (or initially apply) to such systems?**
- **Given the proposed scope of this power and that it could be used to modify the Bill's provisions in their application to such systems, whether the affirmative procedure could be a more suitable level of Parliamentary scrutiny for the exercise of this power?**

The Government's intention is that key parts of the Bill will apply to the establishment of a dynamic purchasing system in a similar way as they apply to a framework agreement. (As it stands, contracts made under a dynamic purchasing system will be treated like any other public contract for the purposes of the provisions of the Bill.) However, the concept of Dynamic Purchasing Systems is one which is central to the new EU public procurement Directive, yet it is a concept which will be almost entirely new to public bodies and business. This is because it was first introduced in the current Directive (2004/18/EC), but in a way which made it wholly impractical for users. As a result there are very few instances of such systems being used. The new EU directive addresses the issue which made Dynamic Purchasing Systems impractical (under the current Directive purchasers are required to run a new OJEU competition each time a contract is awarded, which defeats the object of the system). When the new Directive is transposed, the Scottish Government expects that the new procedure will be widely adopted. How it is used and what issues it might throw up for businesses and the public sector will only become fully apparent once a body of experience of their use develops. The Scottish Government wants to provide, therefore, a degree of flexibility in the Bill's application to the establishment and operation of Dynamic Purchasing Systems to enable us to take account of that experience. The Scottish Government proposed the negative procedure as the exercise of this power would relate to the administrative detail of a type of procurement procedure.

Section 10(4) – Supported businesses

Para 14 - The Committee asks the Scottish Government:

- **Why it is appropriate to confer this power to enable any modification of the meaning of "supported business" for the purposes of section 9(1)(a) and 10, apart from a modification which is consequential on the**

amendment of the corresponding definition contained in regulation 7 of the 2012 Regulations?

- **How the power could be used otherwise?**

The new EU Directive is expected to amend the definition of “supported business” to extend it to cover other groups of disadvantaged persons as well as disabled people. This change has not been universally welcomed and, at this stage, it is not entirely clear how “disadvantaged” in the new Directive will be interpreted. It would be logical for the definition in the Bill to mirror that in the Directive. Scottish Ministers wish “supported business” in the Bill to have a single meaning derived from section 10. In practice, the Scottish Government would expect to use the power to amend the definition of ‘supported business’ to reflect amendments to the definition in the regulations to be made under the new Directive.

On further reflection the Scottish Government notes that such a change could be effected by consequential amendment when transposing the new Directive. Accordingly, the power does not need to be retained for this purpose, and the Scottish Government proposes to delete subsection (4) by amendment.

Section 11(5)(d) – Procurement strategy (other matters)

Para 17 - The Committee asks the Scottish Government:

- **To explain what the policy intentions are as to the types of additional matters that could be specified in an order, to be addressed in the procurement strategy?**
- **To explain why scrutiny of the exercise of this power by the negative procedure is more suitable than by the affirmative procedure?**

There are a number of additional matters that might be appropriate to cover, for example, the authority’s approach to the procurement of food and drink. It is not entirely possible to predict what matters might be of sufficiently high priority to merit inclusion in strategies in future. The Scottish Government believe the negative procedure is appropriate as the power relates to the detailed content of the procurement strategies.

Section 11(6) – Procurement strategy (significant procurement expenditure)

Para 20 - In relation to section 11(6), the Committee asks the Scottish Government to reflect on whether, as regards any amendment of the figure stated in section 11(4) which is limited to reflecting adjustment due to changes in the value of money over time, the negative procedure could be a more suitable level of Parliamentary scrutiny of the exercise of the power?

The Scottish Government does not intend to amend the thresholds frequently or as a matter of routine (e.g. it does not expect them to be amended on an annual basis). In fact the changes might be more substantive than simple adjustments relating to changes in the value of money over time. Experience of application of the requirements on procurement strategies might mean that more substantive changes are required. Given that substantive changes to the threshold could have

significant consequences, the Scottish Government believes it is appropriate for exercise of the power to be subject to the affirmative procedure.

Section 16 – Guidance

Para 22 - The Committee therefore asks the Scottish Government whether it is intended that this guidance will be published on issue, and if so whether this could be provided for by amendment of section 16?

Yes it is intended for publication. The Scottish Government do not believe that an amendment is required, however, as “issue” is the standard term in this context used across the statute book which also implies publication, for example in the Police and Fire Reform (Scotland) Act 2012, at section 17(6).

Section 20(5) – Community benefit requirements in major contracts

Para 25 - The Committee asks the Scottish Government, in relation to the power in section 20(5), to reflect on whether, as regards any amendment of the figure stated in section 20(1) which is limited to reflecting adjustment due to changes in the value of money over time, the negative procedure could be a more suitable level of Parliamentary scrutiny of the exercise of the power?

The Scottish Government considers that changes might be more substantive than simple adjustments relating to changes in the value of money over time. Experience of application of the requirements on community benefits might mean that more substantive changes are required. It is not anticipated that the thresholds will need to be amended frequently. However, given that substantive changes to the threshold could have significant consequences, the Scottish Government believes it is appropriate for exercise of the power to be subject to the affirmative procedure.

Section 21 - Guidance on community benefit requirements

Para 27 - The Committee asks the Scottish Government, in relation to the power to issue guidance in section 21, whether it is intended that this guidance will be published on issue and if so whether this could be provided for by an amendment?

Please see the response to paragraph 22 above.

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

Para 29 - The Committee asks the Scottish Government:

- **To explain why the scope of this power could not be drawn more narrowly, for instance to reflect the list of the exclusions which are contained in regulation 23(1) and (2) of the 2012 Regulations in**

implement of EU procurement law (even if subject to possible amendment by regulation)?

- **To also explain why it has been considered that the negative procedure is a more appropriate level of scrutiny of the exercise of the power than the affirmative procedure, given the width of the power and the scope to specify the substantial grounds on which economic operators may be required to be excluded from a “regulated procurement” process due to the commission of an offence?**

While it would be logical for the Bill to mirror the Regulations, the Scottish Government may need the flexibility to adopt a different approach. The list of exclusions under the new Directive will not be identical to the list in the current Directive and what is appropriate for higher value contracts may not be appropriate for lower value. For example, when the Scottish Government comes to transpose the new Directive, the Scottish Government will have to decide which types of offence must result in mandatory exclusion. The provisions on mandatory exclusion create substantial risk for public bodies as it is they that bear the responsibility for ensuring that anyone who has committed one of those offences is not awarded a contract or allowed to bid. If, following consultation on the new directive, there is a substantial increase in the numbers and types of offences which result in mandatory exclusion, there might in future be a need to take a different approach for the lower value contracts that are regulated by the Bill. As this relates to matters of detail and conduct, the Scottish Government believe that the negative procedure would be the appropriate one.

Section 23 – Selection of tenderers

Para 31 - The Committee asks the Scottish Government for an explanation of why it has been considered that the negative procedure is a more appropriate level of scrutiny of the exercise of the power than the affirmative procedure, given the width of the powers and the scope to specify the substantial grounds on which economic operators may be either selected or excluded from a “regulated procurement” process?

Contracting authorities, including the Scottish Government are bound by the fundamental EU Treaty principles which include equal treatment, non-discrimination and proportionality. This means that the Scottish Government could not use this power in a way that was unfair to certain categories of bidder or which was disproportionate. Given the constraints imposed by the overarching framework of EU law and that the selection of tenderers is an administrative matter, the Scottish Government believes that negative procedure is appropriate.

Section 24 - Guidance on selection of tenderers

Para 33 - The Committee asks the Scottish Government:

- **For an explanation of how these powers could be used (in particular as to the matters relating to recruitment and terms of engagement of persons involved in the subject matter of a procurement that are to be taken into account in assessing the suitability of a bidder),**

- **Why it is appropriate that this power is in the form of guidance which is not laid in Parliament or subject to procedure and rather than the matters to be covered being in regulations under section 23, and**
- **Whether it is intended that this guidance will be published on issue, and if so whether this could be provided for by an amendment?**

The guidance will, in particular, be used to address the way that public bodies use pre-qualification questionnaires (PQQs) and the way that public bodies should address workforce matters in particular procurement exercises. For example, the Scottish Government will use the guidance on PQQs to promote the adoption of a standard core set of questions. The way that the public sector asks similar PQQ questions in differing ways is widely regarded as being one of the most inefficient aspects of the existing procurement system. On workforce matters, the Scottish Government would intend to use the guidelines to promote scrutiny of a company's approach to its workforce in circumstances where this is likely to be relevant to its ability to perform the contract and/or the quality of service it is offering.

The reason the Scottish Government are seeking the power to issue guidance rather than relying on the regulations provided for in section 23 is that public bodies require a significant degree of flexibility in their approach to these issues. The form that PQQs must take and the way that workforce matters are assessed and scored will vary from procurement to procurement. Also, overarching EU law on these issues is likely to evolve over time (there have been a number of landmark ECJ cases on these issues over the years) and the Scottish Government also requires the flexibility to adapt and vary the guidance to reflect any changes to the legal framework and to any new developments in best practice on these issues.

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