

Legislative Consent Memorandum

Procurement Bill

Background

1. This memorandum has been lodged by Kate Forbes, Cabinet Secretary for Finance and the Economy under Rule 9.B.3.1(a) of the Parliament's standing orders, and is supported by Ivan McKee, Minister for Business, Trade, Tourism and Enterprise. The Procurement Bill was introduced in the House of Lords on 11 May 2022. The Bill can be found at: <https://bills.parliament.uk/bills/3159>

This memorandum relates to the Bill as introduced.

Content of the Procurement Bill

2. The UK Government describes the purpose of the Bill as being to reform the United Kingdom's public procurement regime following its exit from the European Union (EU), to create a simpler and more transparent system not based on transposed EU Directives. The Bill will for the most part only apply in Scotland to the procurement activities of reserved bodies.

Provisions which relate to Scotland

3. The legislative consent process is engaged by three aspects of the Bill:
- Scope and extent – the Bill is drafted so that it will regulate the procurement activities of reserved bodies in Scotland.
 - Implementation of new trade agreements relating to procurement – the Bill confers a concurrently exercisable power on Scottish and UK Ministers to make provision necessary for this purpose.
 - Cross-border procurement – the Bill confers powers on Scottish and UK Ministers to make regulations to cater for the continued ability for contracting authorities in Scotland to access framework agreements awarded under the rules of the UK, and vice-versa, and for contracting authorities to continue to procure jointly where this makes sense.

Reasons for considering legislative consent

4. These three aspects of the Bill are described in turn in the following paragraphs.

Scope and extent

5. Public procurement is currently principally governed in Scotland by the Public Contracts (Scotland) Regulations 2015 (S.S.I. 2015/446); the Utilities Contracts (Scotland) Regulations 2016 (S.S.I. 2016/49) and the Concession Contracts (Scotland) Regulations 2016 (S.S.I. 2016/65) (“the Scottish Regulations”), and in the rest of the UK by the Public Contracts Regulations 2015 (S.I. 2015/102); the Utilities Contracts Regulations 2016 (S.I. 2016/274) and the Concession Contracts Regulations 2016 (S.I. 2016/273) (“the UK Regulations”). The Scottish Regulations extend to all contracting authorities operating within Scotland, whether devolved bodies or reserved. The UK Regulations largely do not extend to Scotland.

6. This Bill, by contrast, will extend to Scotland and regulate the procurement activity of contracting authorities and utilities – but specifically excluding “devolved Scottish authorities”, defined as being those whose functions are exercisable only in or as regards Scotland, and which do not have functions which relate wholly to reserved matters.

7. The effect of this would be that the only bodies in Scotland whose procurement activities are regulated by the Bill would be cross-border bodies and those whose functions are wholly reserved. The Scottish Government and its agencies, local authorities, universities and colleges and registered social landlords would all continue to be regulated by Scottish procurement legislation.

8. In order to ensure that contracting authorities in Scotland that are subject to the Bill are not covered by two different sets of procurement legislation, the Bill also partially revokes the Scottish Regulations insofar as they apply to contracting authorities covered by the Bill. These are the Public Contracts (Scotland) Regulations 2015 (S.S.I. 2015/446); the Utilities Contracts (Scotland) Regulations 2016 (S.S.I. 2016/49) and the Concession Contracts (Scotland) Regulations 2016 (S.S.I. 2016/65), as mentioned at paragraph 5.

9. Such an approach to scope and extent engages the legislative consent process because it seeks to legislate for procurements undertaken in Scotland, which is within the competence of the Scottish Parliament.

10. The UK Government argues that this brings clarity for contracting authorities about which regime each authority is subject to, and that it avoids any cost and complexity that would be incurred if contracting authorities were subject to different legislative regimes for different procurements. The Scottish Government accepts that there is an argument to be made for this position, but is of the view that scope and extent is so fundamental to the Bill that the decision on whether or not to consent to these clauses should be informed by the acceptability of the rest of the Bill.

Implementation of new trade agreements relating to procurement

11. Procurement legislation needs to ensure that suppliers from countries with which there is a relevant international agreement are treated equally. In both the

Scottish Regulations and this UK Bill, this is achieved by an explicit requirement on contracting authorities to treat suppliers from states with which there is a relevant agreement (a list of which is contained in Schedules to the Regulations and Bill) the same as suppliers from the UK.

12. As the UK makes new international agreements which are relevant to procurement, these need to be reflected in procurement legislation. The UK Bill confers a power on UK Ministers to add these agreements to the list in its Schedule (or remove or amend references to existing agreements). To the extent that these will require rule changes beyond the core equal treatment obligations, this would still require primary legislation.

13. In relation to Scotland, however, the Bill confers, in clause 83, a power on both UK Ministers and the Scottish Ministers to “make provision for the purpose of ensuring that treaty state suppliers are not discriminated against in the carrying out of devolved procurements”. This power is drafted as a Henry VIII power, meaning that it may be used to modify primary legislation.

14. Although the agreement of international trade arrangements is a reserved matter, their implementation in devolved areas, such as procurement, is a devolved matter.

15. Whilst the Scottish Ministers agree that there is a practical need for a power to update the list in the Schedules to the Scottish Regulations, this appears to be a significantly broader power than is necessary. This is particularly the case given that it is drafted as a concurrently exercisable power – meaning that the UK Ministers could use this power without further consent being required.

16. The UK Government explains in its Delegated Powers Memorandum that the reason the power is drafted as a Henry VIII power, despite a recognition that this aspect of procurement is predominantly regulated through a series of Regulations which implement the EU Procurement Directives, is that it views it as likely that at some point in the future the Scottish Parliament will need to pass primary legislation in this field. It argues that this aspect ensures that this power can continue to be used to ensure the full implementation of the UK’s procurement obligations. The Scottish Ministers’ view is that should the Scottish Parliament elect to amend procurement Regulations by primary legislation in the future, then that would be the appropriate moment for the Scottish Parliament to consider whether a Henry VIII power should be delegated to the Scottish Ministers.

Cross-border procurement

17. In relation to cross-border procurement, two issues arise. The first is that because the Bill will change the procurement procedures applicable in the rest of the UK, it will mean that framework agreements and similar arrangements awarded under the new UK rules will not be compatible with the rules in Scotland, and that contracting authorities subject to the Scottish Regulations would not lawfully be able to award a contract under a framework put in place under the UK rules, or vice-versa. This is an issue which needs addressed because buyers in Scotland do use frameworks awarded elsewhere in the rest of the UK where this is a sensible and

efficient approach to the market, just as buyers elsewhere in the UK use framework agreements awarded in Scotland.

18. The second issue is in relation to how to determine which set of rules apply when a procurement exercise is carried out jointly by contracting authorities from Scotland and elsewhere in the UK.

19. The Bill confers powers at clause 103 to deal with these issues by secondary legislation, rather than addressing them on the face of the Bill. This is not necessarily an unreasonable approach, but there are a number of significant concerns arising from the drafting of these powers:

- It confers powers on UK Ministers to amend the Scottish procurement legislation. There is no reason for the UK Ministers to hold this power, which entails real and significant policy choices, over which the Scottish Parliament would have a legitimate expectation of scrutiny;
- The drafting of the powers conferred on UK Ministers appears to be broader than the explicit intent behind it, and therefore presents a risk of being used for wider regulation;
- The drafting of the powers appears to be deeper than needed as it refers to the award of “contracts”, rather than to the award of “public contracts” – the latter being a defined term which relates only to contracts worth at least the financial thresholds and not otherwise excluded from regulation; and
- Some of the drafting appears to be technically deficient, such as the references in associated clause 102 to contracting authorities being designated as the lead authority in a procurement exercise being carried out jointly by authorities from different jurisdictions. This concept is not defined or explained in the Bill.

Consultation

20. There has been no specific consultation on the clauses which are the subject of this memorandum. The UK Government consulted generally on the principles of its Bill¹. Scottish stakeholders have confirmed to the Scottish Government the importance of a continued ability to carry out cross-border procurement.

Financial implications

21. There are no direct financial implications associated with the decision to consent to this Bill or not. Should consent be withheld and the UK Government cannot be persuaded to bring forward more acceptable proposals, then there would

¹<https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement/outcome/transforming-public-procurement-government-response-to-consultation>

be a financial risk associated with the loss of Scottish contracting authorities' ability to use framework agreements awarded elsewhere in the UK. Whilst preferable to address this co-operatively with the UK Government, it would nonetheless be possible for the Scottish Parliament to legislate separately to address this issue.

Conclusion

22. The Scottish Ministers do not recommend consent to this Bill as introduced. Whilst there is an argument that the Bill's approach to scope and extent (i.e. that reserved bodies should be subject to UK rather than Scottish regulation) is reasonable, and that it mirrors the approach taken by the Scottish Parliament to the Procurement Reform (Scotland) Act 2014, that has to be seen in the context of the Bill as a whole, and the significant concerns which need to be resolved in order for this to be acceptable.

23. The issues of implementation of international agreements relating to procurement and of cross-border procurement are ones which do need to be addressed, and could very reasonably be addressed in a UK Bill with the consent of the Scottish Parliament.

24. But the approach taken in the Bill to the drafting of powers to address these issues is far too broad and confers powers unnecessarily on the UK Ministers to further legislate in this area of devolved competence without the consent of the Scottish Ministers or Scottish Parliament.

25. The approach taken to the drafting of powers relating to cross-border procurement is particularly problematic. Arguably this is an area where the technical fix which is needed to the legislation should more appropriately be made on the face of the Bill, without the need for further delegated powers.

26. The Scottish Government intends to continue to seek a constructive and co-operative approach to finding a more acceptable solution with the UK Government.

Scottish Government
May 2022

This Legislative Consent Memorandum relates to the Procurement Bill (UK legislation) and was lodged with the Scottish Parliament on 25 May 2022

Procurement Bill – Legislative Consent Memorandum

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