

Supplementary Legislative Consent Memorandum

Procurement Bill

Background

1. This memorandum has been lodged by John Swinney, Deputy First Minister and Cabinet Secretary for Covid Recovery, under Rule 9B.3.1(c)(ii) of the Parliament's standing orders, and is supported by Ivan McKee, Minister for 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 is supplementary to the memorandum lodged by Kate Forbes, Cabinet Secretary for Finance and the Economy, on 25 May 2022 (LCM-S6-20) relating to the Bill as it was 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, 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 four aspects of the Bill as it would be amended by UK Government amendments lodged on 24 January 2023:

- Cross-border procurement – the Bill seeks to confer 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;
- 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 seeks to confer a concurrently exercisable power on Scottish and UK Ministers to make provision necessary for this purpose; and
- Implementation of the outcomes of trade disputes relating to procurement – amendments to the Bill would confer a concurrently exercisable power on Scottish and UK Ministers to make provision necessary for this purpose.

Reasons for seeking a Legislative Consent Motion

4. The Bill, as it would be amended by government amendments lodged on 24 January 2023, is a relevant Bill under Rule 9B.1 of the Standing Orders, as it makes provision applying to Scotland for purposes within the legislative competence of the Parliament, and alters the executive competence of the Scottish Ministers.

5. The memorandum lodged in relation to the Bill as introduced did not recommend that consent was given to the Bill. As a result of amendments lodged by the UK Government, this memorandum recommends that consent is given to some provisions of the Bill. The various aspects touching on devolved competence are outlined in the following paragraphs.

Cross-border procurement

6. The original memorandum explained that an effect of there being a different procurement regime in the rest of the UK as a result of this Bill is 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. There would also be an issue 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.

7. This is an issue which needs addressed because cross-border co-operation is important, and 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.

8. The Bill as introduced sought to confer powers at clause 103 (now clause 111) to address these issues by secondary legislation. The original memorandum in relation to these provisions as introduced expressed a concern that powers were conferred unnecessarily on UK Ministers to amend the Scottish procurement legislation. It further expressed concerns about the drafting of the powers, which appeared to be broader and deeper than required, as well as technically deficient. It finally expressed a view that whilst the conferring of delegated powers was not an unreasonable approach, it would ideally be better to deal with the issue on the face of the Bill.

9. Earlier amendments to the Bill during its passage through the House of Lords have adequately addressed our concerns relating to the scope and technical drafting of the powers.

10. Amendment 70 has the effect that the power in clause 111(3) to amend the Scottish procurement legislation to regulate the award of contracts by reserved, Welsh and Northern Irish contracting authorities under devolved Scottish procurement arrangements would be conferred solely on the Scottish Ministers.

11. This would ensure a symmetrical nature to powers, with there being an equivalent power in clause 111(1) under which UK Ministers would be able to amend UK procurement legislation for the purpose of regulating the award of contracts by devolved Scottish contracting authorities under UK procurement arrangements.

12. Clause 111(3) would transfer executive competence to Scottish Ministers to regulate matters which would not otherwise be within their competence. Conferring the power in a UK Bill such as this avoids the need for an order to be made under s63 of the Scotland Act.

13. Amendment 71 confers a new power on Scottish Ministers to be able to disapply elements of Scottish procurement legislation when a devolved Scottish authority is awarding contracts under a UK arrangement.

14. This is an equivalent power to that in clause 111(2) which would allow UK Ministers to disapply elements of UK provisions when a reserved, Welsh or Northern Irish authority is awarding contracts under a Scottish arrangement. The purpose of such provisions would be to ensure that there are no conflicting requirements placed on contracting authorities. Amendments 72 and 73 add the Procurement Reform (Scotland) Act 2014 to the definition of Scottish procurement legislation for these purposes.

15. Significant and detailed work remains ongoing between the governments to agree on the precise nature of the regulations which each party would seek to make under these powers – meaning that it would not be possible to place these arrangements on the face of the Bill on its current timetable. There is a broad agreement, however, that each party would seek to impose on the authorities of the other party only the procedural rules necessary to sensibly effect the award of a contract, and would not seek to impose broader policy-driven choices.

16. Clearly the effective governance of this situation is necessarily going to be reliant on continued goodwill and engagement between parties on this issue. The symmetrical nature of the powers here acts as a balancing factor to encourage that good faith engagement.

17. This is an area where there is a genuine shared interest in reaching agreement to the benefit of each party, and where the practical consequences of failing to reach an agreed solution would be significantly detrimental. The Scottish Government is therefore happy to recommend consent to these provisions as they would be amended above.

Scope and extent

18. The Bill 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. 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.

19. The original memorandum set out the Scottish Government's view that this approach to scope and extent is reasonable, and that it mirrors the approach taken by the Scottish Parliament to the Procurement Reform (Scotland) Act 2014. It stopped short of recommending consent to scope and extent provisions, however, on the basis of broader concerns about the Bill.

20. Given that there is now an acceptable solution on the table to deal with the very significant practical issue of cross-border procurement – to which, as set out above, a solution must be found – it would be appropriate to give consent to the scope and extent provisions in this Bill, which would allow that solution to function effectively.

Implementation of new trade agreements relating to procurement

21. The agreement of international trade arrangements is a reserved matter, however their implementation in devolved areas, such as procurement, is a devolved matter.

22. The Bill as introduced conferred, in clause 83 (now clause 90), 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”.

23. The original memorandum set out concerns which were two-fold. The primary concern was that it was a power exercisable concurrently by UK and Scottish Ministers, with no requirement on the UK Ministers to secure the consent of the Scottish Ministers before exercising it in relation to devolved matters. This was exacerbated by a secondary concern over the breadth of the power. Whereas the equivalent power in relation to the rest of the UK was a power to update the list of relevant trade agreements in the Schedule to the Bill, in relation to Scotland, it was a Henry VIII power allowing provision to be made to ensure non-discrimination. This power obviously had the potential to be interpreted significantly more broadly.

24. Amendments 59 and 60 address concerns about the scope and breadth of the power. The amendments link the powers considerably closer to the equivalent powers in relation to the rest of the UK and introduce a test of whether a measure is necessary in order to implement an agreement. The Scottish Government welcomes these amendments, which substantially address the points raised in relation to scope and breadth of the power.

25. The Scottish Government cannot recommend consent to this clause, however, as it remains a power capable of being exercised by UK Ministers in relation to devolved matters without a requirement to secure the consent of Scottish Ministers. This is unacceptable. Either there should be a statutory requirement to secure such consent, or the power should be conferred solely on the Scottish Ministers in relation to devolved matters.

Implementation of the outcomes of trade disputes relating to procurement

26. Amendments NC11 and 83 seek to insert a new clause into the Bill which would allow for the implementation of the outcome of trade disputes relating to procurement. Similar powers exist in the Trade Act 2021 in relation to the WTO Agreement on Government Procurement (the GPA).

27. In relation to Scotland, this new clause would provide that UK or Scottish Ministers could make provision by regulations to deal with the procurement consequences of a dispute in relation to the international agreements listed in Schedule 9 of the Bill (other than the Trade and Cooperation Agreement with the EU, for which powers exist already).

28. The Scottish Government agrees that this would be a sensible power to be delegated to Ministers. However, as drafted the power would be exercisable concurrently by either UK or Scottish Ministers, with no obligation on UK Ministers to secure the consent of Scottish Ministers before exercising it in relation to devolved matters. This is unacceptable. Either there should be a statutory requirement to secure such consent, or the power should be conferred solely on the Scottish Ministers in relation to devolved matters.

29. The Scottish Government cannot therefore recommend consent to this clause.

Consultation

30. 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.

31. The Economy and Fair Work Committee's report on the original LCM set out its view that the Scottish Parliament should have the opportunity to scrutinise the exercise of legislative powers within devolved competence.

Financial implications

32. There are no direct financial implications associated with the decision to consent to the trade power-related elements of the Bill or not. If those provisions of the Bill are not given consent and are consequently omitted from the Bill, alternative legislative arrangements, either in the Scottish or UK Parliament, will need to be made in due course.

33. Should consent be withheld from the provisions relating to cross-border procurement, and those provisions are omitted, then there would be a significant

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

financial risk associated with the loss of Scottish contracting authorities' ability to use framework agreements awarded elsewhere in the UK, and vice-versa. It may be possible to partially mitigate this through expedited primary legislation in the Scottish Parliament, but it would be far preferable to address the issues relating to cross-border procurement in collaboration with the UK Government.

Conclusion

34. This Bill will alter the public procurement regime in the rest of the UK. It is not the choice of the Scottish Government to follow suit, but it is important to be pragmatic about the implications this will have for devolved Scottish bodies.

35. Failure to reach agreement over cross-border procurement arrangements would risk a significantly detrimental impact on devolved bodies who both use and provide UK-wide frameworks and other procurement arrangements.

36. The UK Government amendments to the cross-border procurement provisions in the Bill (some already agreed, some lodged on 24 January) are the product of significant engagement between the Scottish and UK Governments and provide a workable and practical solution which preserves the role of the Scottish Parliament in scrutinising regulations which amend the Scottish procurement legislation.

37. It is therefore the view of the Scottish Government that clause 111, as it would be amended by amendments 70-73, and associated provisions relating to cross-border procurement, as well as provisions relating to the overall scope and extent of the Bill should be consented to.

38. However, provisions relating to the power to implement trade agreements (clause 90, as it would be amended by amendments 59 and 60), and the outcome of trade disputes (amendments NC11 and 83), should not be consented to. These place powers in the hands of UK Ministers to legislate in devolved matters without a requirement to secure the consent of Scottish Ministers.

Draft Legislative Consent Motion

39. The draft motion, which will be lodged by the Minister for Business, Trade, Tourism and Enterprise, is:

“That the Parliament agrees that the relevant provisions in clause 111 and related provisions concerning cross-border procurement, as amended by Government amendments lodged on 24 January 2023, of the Procurement Bill, introduced in the House of Lords on 11 May 2022, and in clauses 2 and 122 of the Procurement Bill, and related provisions concerning scope and extent, so far as these matters fall within the legislative competence of the Scottish Parliament and alter the executive competence of Scottish Ministers, should be considered by the UK Parliament.”

Scottish Government
February 2023

This Supplementary Legislative Consent Memorandum relates to the Procurement Bill (UK legislation) and was lodged with the Scottish Parliament on 3 February 2023

Procurement Bill – Supplementary Legislative Consent Memorandum

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