

ECONOMY AND FAIR WORK COMMITTEE

**22nd Meeting, 2022 (Session 6), Wednesday 5
October 2022**

Legislative Consent Memorandum – Procurement Bill

Note by the Clerk

Introduction

1. The [Procurement Bill](#) is a UK Government Bill introduced in the House of Lords on 11 May 2022.
2. The Sewel Convention is the convention that the UK Parliament will not normally legislate on matters devolved to the Scottish Parliament without its consent. [Chapter 9B of the Parliament's Standing Orders](#) sets out the rules and procedures for seeking legislative consent under the convention.
3. The Procurement Bill falls under Rule 9B.1.1 of the Standing Orders, as it will make provision in areas devolved to the Scottish Parliament and alter the executive competence of the Scottish Ministers.
4. The Bill is currently at committee stage in the first house. Following this stage, it will return to the floor of the House of Commons for the report stage.
5. For any views of the Parliament to be considered at Westminster, it must conclude its considerations before the last amending stage (report stage in the second house). However, best practice is for the Committee to report ahead of the last amending stage in the first house where possible. At the time of writing this has not yet been scheduled.
6. Ivan McKee, Minister for Business, Trade, Tourism and Enterprise and Scottish Government officials will attend the meeting to give evidence on the LCM.

Legislative Consent Process

Legislative Consent Memorandum

7. When a Bill that will make provision in areas devolved to the Scottish Parliament and alter the executive competence of the Scottish Ministers, the Scottish

Government will normally prepare a Legislative Consent Memorandum (LCM). This explains how the Bill will affect Scotland and why, for example the Bill may:

- change the law on a “devolved matter” (an area of policy which the UK Parliament has devolved to the Scottish Parliament); or
- alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).

8. The Economy and Fair Work Committee has been designated by the Parliamentary Bureau as lead committee to consider the Procurement Bill LCM and report its views to the Parliament.

9. The Scottish Government’s Legislative Consent Memorandum can be found at **Annexe A**.

Legislative Consent Motion

10. If the Scottish Government recommends in its LCM that consent be given, it will normally be decided by a motion taken in the Chamber known as a Legislative Consent Motion. This motion is usually drafted by the Scottish Government. If, however, the Scottish Government does not recommend consent be given, a debate on the LCM may be scheduled in the Chamber.

11. In this case, the Scottish Government has noted in its LCM that it does not intend to lodge a Legislative Consent Motion for the Bill as introduced, recommending that legislative consent should not be given on this occasion. Further information on the Scottish Government’s reasons for this is detailed below and in the LCM itself.

12. The Scottish Government has noted in its LCM that it will continue to engage with the UK Government to seek a constructive and co-operative approach to finding a more acceptable solution.

Procurement Bill

13. This is an extremely complex Bill with 116 clauses and 11 Schedules.

14. According to the explanatory notes, the purpose of the Bill is 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”.¹

15. The Bill includes non-discrimination and equal treatment principles along with four key objectives as follows—

- value for money;
- public good;
- transparency; and

¹ <https://bills.parliament.uk/bills/3159/publications#collapse-publication-explanatory-notes>

- integrity.

16. With this Bill, the UK Government aims to speed up and simplify public procurement processes, to place value for money at their heart, and to create greater opportunities for small businesses and social enterprises to innovate public service delivery.

17. The Bill applies to all contracting authorities in England, Wales and Northern Ireland. It only applies to contracting authorities in Scotland which are cross-border bodies or deal solely with reserved matters.

18. The Bill covers—

- public contracts: the award of contracts by most central government departments, their arms-length bodies and the wider public sector including local government, health authorities and schools;
- utilities contracts: the award of contracts by utilities operating in the water, energy and transport sectors;
- concession contracts: contracts for the supply of works or services where at least part of the consideration for that supply is a right for the supplier to exploit the works or services; and
- defence and security contracts.

Scrutiny by other Scottish Parliament Committees

Delegated Powers and Law Reform Committee

19. The Delegated Powers and Law Reform Committee considered the LCM on 6 September and agreed to [write to the Minister for the Cabinet Office and Paymaster General](#). The Committee has not yet received a response. shortly.

Scottish Government Legislative Consent Memorandum

20. A legislative consent memorandum was lodged by Kate Forbes MSP, Cabinet Secretary for the Finance and the Economy, supported by Ivan McKee MSP, Minister for Business, Trade, Tourism and Enterprise, on 25 May 2022.

21. The Scottish Government does not recommend consent to the Bill as introduced. It agrees that whilst there is an argument that the Bill's approach to scope and extent with regards to the regulation of reserved bodies is reasonable, it has significant concerns around the context of the Bill as a whole.

22. The LCM notes that the drafting of powers is “far too broad” and confers unnecessary powers on UK Ministers to further legislate in areas of devolved competence without the consent of the Scottish Parliament. The LCM argues that—

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.

23. The Scottish Government intends to continue to engage with the UK Government to find a more appropriate solution.

24. As the Scottish Government is not recommending the Parliament give its consent, a draft legislative consent motion is not included with the LCM.

Decisions

25. After considering today's evidence from the Minister, Members are invited to—

- **consider what views to include in the Committee report; and**
- **to agree to consider a draft report on the LCM in private at a future meeting.**

**Economy and Fair Work Committee Clerks
30 September 2022**

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 3 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 viceversa. 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 4 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 Bill². 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 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.

² [Transforming Public Procurement - Government response to consultation - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/transforming-public-procurement)

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