

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NO 4)

Procurement Bill

1. This legislative consent memorandum (LCM) is laid under Standing Order (“SO”) 29.2. SO29 prescribes that an LCM must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.
2. The Procurement Bill (“the Bill”) was introduced in the UK Parliament, House of Lords, on 11 May 2022 and I [laid an LCM on 9 June based on the Bill as introduced](#).
3. On 11 July I laid a [supplementary LCM \(Memorandum No 2\)](#), following amendments tabled by the UK Government for consideration at Lords Committee Stage which commenced on 4 July and ran until 26 October.
4. UK Government tabled further amendments on 28 November and 30 November for consideration at House of Lords Report Stage. Lords Report Stage concluded on the 30 November. On 6 December I laid a [supplementary LCM \(Memorandum No 3\)](#) in respect of these amendments.
5. Non-government amendments were also considered during Lords Report Stage on 28 and 30 November and six of these amendments were agreed, five of which are the subject of this supplementary LCM. The amendments can be found at: [2549 \(parliament.uk\)](#) and [2568 \(parliament.uk\)](#)
6. The clauses referred to in this supplementary LCM are as set out in the Bill as amended at Grand Committee and published on 26 October. This version of the Bill can be found at: <https://bills.parliament.uk/publications/48269/documents/2396>

Policy Objective(s)

7. The stated policy objectives of the UK Government for the Bill are:
 - to speed up and simplify public procurement processes
 - to place value for money at their heart
 - to create greater opportunities for small businesses and social enterprises to innovate public service delivery.

Summary of the Bill

8. The Bill is sponsored by the Cabinet Office (CO).
9. The purpose of the Bill is to introduce revised legislation for the processes and procedures governing public procurement. It will be a revision of the current procurement law regime (including the repeal of the Public Contract Regulations 2015) which are derived from EU Directives.
10. The Bill interacts with other legislation namely the Social Partnership and Public Procurement (Wales) Bill (SPPP Bill) which was introduced to the Senedd on 7 June, and the Trade (Australia and New Zealand) Bill which was introduced into the UK Parliament (House of Lords) on 11 May. The Trade (Australia and New Zealand) Bill is to be repealed by the Procurement Bill, as are the amendments to the Government of Wales Act 2006 (GoWA) made by the Trade (Australia and New Zealand) Bill.
11. The procurement landscape is quite complex when referring to public bodies. Therefore, the following references have been used in this document to provide clarity:
 - ‘Contracting authorities’ (CAs) - all public bodies subject to the Bill;
 - ‘Devolved Welsh Authorities (DWAs) - as defined by section 157A of the Government of Wales Act 2006 (“GoWA”); and
 - ‘Welsh Contracting Authorities’ (WCAs) - the contracting authorities in Wales which are subject to the Bill and in relation to whom relevant powers and duties conferred upon the Welsh Ministers under the Bill apply (these are referred to as “devolved Welsh authorities” in the Bill itself).

Update on the assessment of provisions in the Bill in relation to which an LCM is required to be laid

12. **Clause 12 (The National Procurement Policy Statement (NPPS))**

The duty to have regard to the NPPS will apply to contracting authorities which are WCAs in relation to procurement under certain kinds of reserved procurement arrangement.

This means that the provisions of this clause are for a purpose within the legislative competence of the Senedd to the extent that it confers functions on contracting authorities which are WCAs and are therefore “relevant provisions” for the purposes of SO 29. An LCM is therefore required for this clause.

13. **Clause 50 (Contract details notices and publication of contracts); clause 72 (Publication of modifications); clause 80 (Regulated below threshold contracts: procedure)**

The provisions of clauses 50, 72 and 80 will apply in relation to a contract awarded as part of a procurement by a WCAs if the contract is awarded under a reserved procurement arrangement.

This means that the provisions of these clauses are for a purpose within the legislative competence of the Senedd to the extent that it confers functions on contracting authorities which are WCAs and are therefore “relevant provisions” for the purposes of SO 29. An LCM is therefore required for these clauses.

Update on position since the publication of the supplementary LCM (Memorandum No 3) laid on 6 December

14. There is no change since my previous LCM whereby I confirmed that, whilst I was content to begin the legislative consent process in the Senedd, there were a number of key matters of concern which needed to be resolved before I could consider recommending consent.

Non-government amendments agreed at Lords Report stage for which consent is required

15. There were six non-governmental amendments agreed during Lords Report Stage on 28 and 30 November. Five of these make provision which fall within the legislative competence of the Senedd and are the subject of this supplementary LCM.
16. Annex A contains a table which outlines the changes to clause numbers following the amendments made at Lords Committee Stage.
17. The non-governmental amendments outlined in paragraphs 18 to 22 which were agreed during Lords Report stage on 28 and 30 November are considered to be for a purpose within the legislative competence of the Senedd and are therefore “relevant provisions” for the purposes of SO 29.
18. **Amendment 3 - Contracting Authorities** (Clause 10 (As an amendment to Amendment 2))
- 18.1 Amendment 3 has the effect of including the NHS in the definition of a public authority for the purposes of the Act. The amendment does not include a definition of the term “NHS” and there is no existing reference to the term “NHS” in clause 114 (interpretation). In the absence of any limitation to NHS bodies in

England, the inclusion of “the NHS” in the definition of a public authority would apply to NHS bodies in Wales.

19. Amendments 46 and 47 – the National Procurement Policy Statement (NPPS)

19.1 Amendment 46 amends clause 12(3) and has the effect of requiring a Minister of the Crown to consider a set of principles before publishing the national procurement policy statement.

19.2 Amendment 47 inserts a new subsection after Clause 12(3) which has the effect of requiring that the priorities listed in the amendment are among the strategic priorities in relation to procurement included in the National Procurement Policy Statement.

20. Amendment 91 – Schedule 7 – Discretionary exclusion grounds

20.1 Amendment 91 adds a further discretionary exclusion ground to Schedule 7.

20.2 This discretionary exclusion ground will apply to a supplier if a decision maker determines that the supplier or a connected person has been, or is, involved in forced organ harvesting or unethical activities relating to human tissue, including where they are involved in providing a service or goods relating to such activities.

20.3 This would enable a contracting authority to decide that a supplier is an “excludable supplier” if it considers that this ground applies to the supplier or an associated person.

21. Amendment 94: Timeline for removal of suppliers (new clause after clause 61)

21.1 The effect of this new clause is to place a duty on the Secretary of State to publish a timeline within 6 months, for the removal of physical technology or surveillance equipment from the Government’s procurement supply chain where the Secretary of State is satisfied there is established evidence that a provider has been involved in— (a) modern slavery, (b) genocide, or (c) crimes against humanity.

21.2 As the term “the Government” is not limited to the UK Government, it is considered that the duty placed on the Secretary of State to publish a timeline also applies to the removal of suppliers from the Welsh Government’s procurement supply chain.

22. One other non-government amendment was agreed. Amendment 173 removes clause 111 and replaces it with a new clause headed “Application of this Act to procurement by NHS England”. As this only applies to England, it is not considered to be with the legislative competence of the Senedd and an LCM is therefore not required in relation to this amendment.

Reasons for making these provisions for Wales in the Procurement Bill

23. As the amendments detailed within this supplementary LCM fall within the legislative competence of the Senedd and all relate to the provisions set out in previous LCMs, the rationale for making these provisions in the Bill continue to apply.

Financial implications

24. I set out the potential financial implications associated with the reform of public procurement in Wales that are likely to be borne by the Welsh Government and the wider Welsh Public Sector in my original LCM laid on 9 June.

25. The proposed amendments will not levy any additional financial implications on Welsh Government or the wider Welsh Public Sector.

Conclusion

26. I consider that it is not appropriate to recommend consent until the outstanding matters of concern as referred to in paragraph 14 and LCM No. 3 have been resolved. My officials will continue to work with the UK Government to resolve these matters.

Rebecca Evans MS
Minister for Finance and Local Government
[x] December 2022

Annex A – Comparison table between versions of the Procurement Bill

Bill as introduced to the House of Lords on 11 May 2022:

<https://bills.parliament.uk/publications/46439/documents/1777>

Bill as amended in House of Lords Grand Committee on 26 October 2022:

<https://bills.parliament.uk/publications/48269/documents/2396>

Clause number on introduction	Clause description	Clause as amended in Grand Committee
<i>PART 1 KEY DEFINITIONS</i>		
1	Contracting authorities	1
2	Public contracts	2
3	Valuation of contracts	3
4	Mixed procurement: above and below threshold	4
5	Utilities contracts	5
6	Defence and security contracts	6
7	Concession contracts	7
8	Light touch contracts	8
9	Mixed procurement: special regime contracts	9
<i>PART 2 PRINCIPLES AND OBJECTIVES</i>		
10	Procurement only in accordance with this Act	10
11	Procurement objectives	11
12	The national procurement policy statement	12
13	The Wales procurement policy statement	13
<i>PART 3 AWARD OF PUBLIC CONTRACTS AND PROCEDURES</i>		
<i>CHAPTER 1 PRELIMINARY STEPS</i>		
14	Planned procurement notices	14
15	Preliminary market engagement	15
16	Preliminary market engagement notices	16
17	Duty to consider lots	17
<i>CHAPTER 2 COMPETITIVE AWARD</i>		
<i>Terms of a procurement</i>		
18	Award of public contracts following a competitive procedure	18

Clause number on introduction	Clause description	Clause as amended in Grand Committee
	Amended clause title: <i>Award of public contracts following a competitive tendering procedure</i>	
19	Competitive tendering procedures	19
20	Tender notices and associated tender documents	20
21	Conditions of participation	21
22	Award criteria	22
23	Refining award criteria	23
24	Technical specifications Amended clause: <i>This clause has been moved to Chapter 6 'General provision about award and procedures', under a new sub-section "Technical specifications"</i>	53
25	Sub-contracting specifications	24
<i>Exclusions and modifications</i>		
26	Excluding suppliers from a competitive award	25
27	Excluding suppliers from a competitive tendering procedure Amended clause title: <i>Excluding suppliers from a competitive flexible procedure</i>	26
28	Excluding suppliers by reference to sub-contractors	27
29	Excluding a supplier that is a threat to national security	28
30	Excluding suppliers for improper behaviour	29
31	Modifying a section 18 procurement	30
<i>Reserving contracts to certain suppliers</i>		
32	Reserving contracts to supported employment providers	31
33	Reserving contracts to public service mutuals	32
<i>Awarding contracts by reference to dynamic markets</i>		
34	Competitive award by reference to dynamic markets	33
35	Dynamic markets: establishment	34
36	Dynamic markets: membership	35
37	Dynamic markets: removing members from the market	36

Clause number on introduction	Clause description	Clause as amended in Grand Committee
38	Dynamic markets: fees	37
39	Dynamic market notices	38
CHAPTER 3 DIRECT AWARD		
40	Direct award in special cases	39
41	Direct award to protect life, etc	40
42	Switching to direct award	41
43	Transparency notices	42
CHAPTER 4 AWARD UNDER FRAMEWORKS		
44	Frameworks	43
45	Frameworks: maximum term	44
46	Frameworks: implied terms	45
47	Open frameworks	46
CHAPTER 5 AFTER AWARD, STANDSTILL PERIODS AND NOTICES		
48	Contract award notices and assessment summaries	47
49	Standstill periods on the award of contracts	48
50	Key performance indicators	49
51	Contract details notices and publication of contracts	50
CHAPTER 6 GENERAL PROVISION ABOUT AWARD AND PROCEDURES		
<i>Time limits and termination</i>		
52	Time limits	51
53	Procurement termination notices	52
<i>Technical Specifications</i>		
24	Technical specifications Amended clause: This clause has been moved to Chapter 6 'General provision about award and procedures', under a new sub-section "Technical specifications"	53
<i>Excluding suppliers</i>		
54	Meaning of excluded and excludable supplier	54
55	Considering whether a supplier is excluded or excludable	55
<i>Debarment</i>		

Clause number on introduction	Clause description	Clause as amended in Grand Committee
56	Notification of exclusion of supplier	56
57	Investigations of supplier: exclusion grounds	57
58	Investigations under section 57: reports	58
59	Debarment list	59
60	Debarment list: application for removal	60
61	Debarment decisions: appeals	61
PART 4 MANAGEMENT OF PUBLIC CONTRACTS		
<i>Terms implied into public contracts</i>		
62	Electronic invoicing: implied term	62
63	Implied payment terms in public contracts	63
<i>Notices about payments and performance</i>		
64	Payments compliance notices	64
65	Information about payments under public contracts	65
66	Assessment of contract performance	66
<i>Sub-contracting</i>		
67	Sub-contracting: directions	67
68	Implied payment terms in sub-contracts	68
<i>Modifying public contracts</i>		
69	Modifying a public contract	69
70	Contract change notices and publication of modifications Amended clause title: <i>Contract change notices</i>	70
71	Voluntary standstill period on the modification of contracts	71
N/A	New clause in Amended Bill: <i>Publication of modifications</i>	72
<i>Terminating public contracts</i>		
72	Implied right to terminate public contracts	73
N/A	New clause in Amended Bill: <i>Terminating public contracts: national security</i>	74

Clause number on introduction	Clause description	Clause as amended in Grand Committee
73	Contract termination notices	75
<i>PART 5 CONFLICTS OF INTEREST</i>		
74	Conflicts of interest: duty to identify	76
75	Conflicts of interest: duty to mitigate	77
76	Conflicts assessments	78
<i>PART 6 BELOW-THRESHOLD CONTRACTS</i>		
77	Regulated below-threshold contracts	79
78	Regulated below-threshold contracts: procedure	80
79	Regulated below-threshold contracts: notices	81
80	Regulated below-threshold contracts: implied payment terms	82
<i>PART 7 IMPLEMENTATION OF INTERNATIONAL OBLIGATIONS</i>		
81	Treaty state suppliers	83
82	Treaty state suppliers: non-discrimination	84
83	Treaty state suppliers: non-discrimination in Scotland	85
<i>PART 8 INFORMATION AND NOTICES: GENERAL PROVISION</i>		
84	Pipeline notices	86
85	General exemptions from duties to publish or disclose information	87
86	Notices, documents and information: regulations	88
87	Electronic communications	89
88	Information relating to a procurement	90
N/A	<i>New clause in Amended Bill: Data protection</i>	<i>91</i>
<i>PART 9 REMEDIES FOR BREACH OF STATUTORY DUTY</i>		
89	Duties under this Act enforceable in civil proceedings	92
90	Automatic suspension of the entry into or modification of contracts	93
91	Interim remedies	94

Clause number on introduction	Clause description	Clause as amended in Grand Committee
92	Pre-contractual remedies	95
93	Post-contractual remedies	96
94	Post-contractual remedies: set aside conditions	97
95	Time limits on claims	98
<i>PART 10 PROCUREMENT OVERSIGHT</i>		
96	Procurement investigations	99
97	Recommendations following procurement investigations	100
98	Guidance following procurement investigations	101
<i>PART 11 APPROPRIATE AUTHORITIES AND CROSS-BORDER PROCUREMENT</i>		
99	Welsh Ministers: restrictions on the exercise of powers	102
100	Northern Ireland department: restrictions on the exercise of powers	103
101	Minister of the Crown: restrictions on the exercise of powers	104
102	Definitions relating to procurement arrangements	105
103	Powers relating to procurement arrangements	106
<i>PART 12 AMENDMENTS AND REPEALS</i>		
104	Disapplication of duty in section 17 of the Local Government Act 1988	107
105	Single source defence contracts	108
106	Concurrent powers and the Government of Wales Act 2006	109
107	Repeals etc	110
<i>PART 13 GENERAL</i>		
108	Power to disapply this Act in relation to procurement by NHS in England	111
109	Power to amend this Act in relation to private utilities	112
110	Regulations	113
111	Interpretation	114
112	Index of defined expressions	115

Clause number on introduction	Clause description	Clause as amended in Grand Committee
113	Power to make consequential, etc, provision	116
114	Extent	117
115	Commencement	118
116	Short title	119
SCHEDULES		
Schedule 1	Threshold amounts	Schedule 1
Schedule 2	Exempted contracts	Schedule 2
Schedule 3	Estimating the value of a contract	Schedule 3
Schedule 4	Utility activities	Schedule 4
Schedule 5	Direct award justifications	Schedule 5
Schedule 6	Mandatory exclusion grounds	Schedule 6
	Part 1 Offences	Part 1 Offences
	Part 2 Other mandatory exclusion grounds	Part 2 Other mandatory exclusion grounds
	Part 3 General	Part 3 General
Schedule 7	Discretionary exclusion grounds	Schedule 7
Schedule 8	Permitted contract modifications	Schedule 8
Schedule 9	Treaty state suppliers (specified international agreements)	Schedule 9
Schedule 10	Single source defence contracts	Schedule 10
Schedule 11	Repeals and revocations	Schedule 11