

## SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NO. 2)

### Procurement Bill

1. This legislative consent memorandum (LCM) is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a legislative consent memorandum 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 House of Lords on 11 May 2022 and Lords Second Reading took place on 25 May. I laid an LCM on 9 June.
3. The UK Government tabled 320 amendments on 27 June to be considered at Lords Committee Stage which commenced on 4 July and is scheduled to run until 18 July. The majority of the 320 amendments make provision which fall within the legislative competence of the Senedd, as detailed in paragraph 14 below.
4. The Bill as introduced and the relevant published amendments can be found at: [Procurement Bill \[HL\] - Parliamentary Bills - UK Parliament](#). All amendments tabled on 27 June, including the amendments set out in this supplementary LCM, can be found at: [2037 \(parliament.uk\)](#).

### Policy Objective(s)

5. 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

6. The Bill is sponsored by the Cabinet Office (CO).
7. 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.

8. 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. It is anticipated, the Trade (Australia and New Zealand) Bill, if passed, will receive Royal Assent by late 2022/early 2023. The Trade (Australia and New Zealand) Bill is to be repealed by the Procurement Bill, as are the amendments to the Government of Wales Act 2006 (GoWA) made by the Trade (Australia and New Zealand) Bill.
9. 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 position since the publication of the first Legislative Consent Memorandum**

10. I laid a Legislative Consent Memorandum (LCM) on 9 June, based on the Bill as introduced into the UK Parliament on 11 May.
11. The LCM 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. These matters are summarised below:
  - **The Power to add international agreements.** As stated in the LCM, the power to add international agreements has been included as a concurrent power. Discussions are ongoing between my officials and Cabinet Office officials on this matter.
  - The LCM stated that I am seeking an amendment to the **definition of WCAs**, with a view to ensuring that the clauses work more fairly in relation to some cross border procurements. Discussions are ongoing between my officials and Cabinet Office officials on this matter.

- **Commencement Powers.** As stated in the LCM, the Bill as introduced provides for Minister of the Crown only powers. Discussions between my officials and Cabinet Office officials are ongoing on this matter.
  - **Consequential Powers.** As stated in the LCM, the Bill as introduced provides for concurrent powers with no requirement to obtain the consent of the Welsh Ministers when the UK Government Ministers are exercising this power in relation to devolved areas. Discussions between my officials and Cabinet Office officials are ongoing on this matter.
  - **Disapplication power for healthcare services.** An amendment to the Bill prior to introduction was originally sought to include a disapplication power for the Welsh Ministers to support making regulations equivalent to the power of the UKG in relation to the changes to the procurement of healthcare services in England under the Health and Care Act 2022. However, the Welsh Ministers have since decided not to pursue the inclusion of this power in the Bill but are considering various options, which may include taking forward the powers required via Senedd legislation as this area is devolved.
  - **Duty to have regard to the Wales Procurement Policy Statement (WPPS) enforceable in civil proceedings.** The UK Government tabled an amendment on 27 June which has the effect of ensuring that a WCA's duty to have regard to the WPPS will not be enforceable in civil proceedings. This now reflects the Welsh Government's policy position.
12. On 27 June, the UK Government tabled 320 amendments in relation to the Bill, the majority of which make provision falling within the legislative competence of the Senedd. These amendments are being considered at Lords Committee stage which commenced on 4 July and is scheduled to conclude on 18 July.
  13. The UK Government amendments tabled include several amendments which were proposed for inclusion by the Welsh Government.

**Provisions tabled by the UK Government to the Bill for consideration at Lords Committee stage for which consent is required**

14. The following amendments to the Bill tabled by the UK Government for consideration at Lords Committee stage are within the legislative competence of the Senedd:

## **14.1 Part 1 – Key Definitions**

- 14.1.1 New clause 1 (Procurement and covered procurement) is a new clause which replaces definitions for Procurement and Covered procurement in a number of places throughout the Bill. The amendments define more clearly what the terms "Procurement" and "Covered Procurement" mean. The amendment also includes a definition of a "Centralised Procurement Authority".
- 14.1.2 New clause 1 includes definitions which are applied and have relevance in the interpretation and application of the subsequent clauses of the Bill, a number of which are "relevant provisions" for the purposes of SO29. Consent is therefore required in respect of new clause 1 to the extent that the definitions in this clause are utilised in clauses of the Bill in respect of which consent is required.
- 14.1.3 The amendments to clause 5 (Utilities Contracts) and clause 8 (Light Touch Contracts) are minor and provide clarity for defining these types of contracts.
- 14.1.4 Consent is required in relation to provisions contained in clauses 5 and 8. These provisions confer relevant functions on contracting authorities which are devolved Welsh authorities.

## **14.2 Part 2 – Principles and Objectives**

- 14.2.1 The amendments to clause 10 (Procurement only in accordance with this Act), clause 11 (Procurement Objectives) and Clause 13 (The Wales procurement policy statement) provide greater clarity.
- 14.2.2 Consent is required in relation to provisions contained in clauses 10,11 and 13. These provisions confer functions on DWAs and are therefore "relevant provisions" for the purposes of SO29.

## **14.3 Part 3 – Award of Public Contracts and Procedures**

### **Chapter 1 – Preliminary Steps**

- 14.3.1 The amendments to clause 15 (Preliminary market engagement) provide greater clarity.

- 14.3.2 The amendment to clause 16 (Preliminary market engagement notices) has the effect of putting a duty on CAs who carry out preliminary market engagement to publish a preliminary market engagement notice before publishing the tender notice. However, if the CA did not publish a preliminary market engagement notice, they must provide reasons for this in the tender notice.
- 14.3.3 Consent is required in relation to provisions contained in clauses 15 and 16. These provisions confer functions on DWAs and are therefore “relevant provisions” for the purposes of SO29.

## **Chapter 2 – Competitive Award**

- 14.3.4 The amendments to clauses 19, 20, 22, 23, 25 to 29, 31 to 33, and 39 are all minor and make the clauses easier to read.
- 14.3.5 The amendment of changing the word ‘must’ to ‘may’ in clause 18 (Award of public contracts following a competitive procedure) has the effect of offering flexibility for CAs to take a pragmatic approach, particularly if a breach is so minor that it would not put any tender at a disadvantage. In terms of the removal of references to 'materially' breaches, this is deemed acceptable because a breach is a breach, irrespective of its impact. All other amendments are minor and provide clarity.
- 14.3.6 In the main, the proposed amendments to clause 24 (Technical Specifications) – are minor and providing clarity. The additional text included as subsection (A1) broadens the scope of the clause and provides clarity on what the section applies to. Clause 24 has been moved to after clause 53 (General provision about award and procedures).
- 14.3.7 There is an amendment to clause 30 (Excluding suppliers for improper behaviour) which results from the amended definition of "procurement" at new clause 1. The new wording in clause 30 is intended to make it clear that the exclusion is only applicable during the pre-tendering, tendering and contract award stages.
- 14.3.8 The subsections which have been added to clause 34 (Competitive award by reference to dynamic markets) provide additional clarity in relation to dynamic markets. All other amendments to this clause are minor and providing clarity.

14.3.9 In the main, the proposed amendments to clause 35 (Dynamic markets: establishment) are minor and provide clarity. A subsection has been added, which provides the definition of what constitutes a "utilities dynamic market".

14.3.10 The subsections 1A, 1B and 1C which have been added to clause 36 (Dynamic markets: membership) provide additional clarity in relation to membership of dynamic markets.

14.3.11 Consent is required in relation to provisions contained in clauses 18 to 20, clauses 22 to 36 and clause 39. These provisions confer functions on DWAs and are therefore "relevant provisions" for the purposes of SO29.

### **Chapter 3 – Direct Award**

14.3.12 The amendment to clause 42 (Switching to direct award) provides greater clarity.

14.3.13 Consent is required in relation to provisions contained in clause 42. Clause 42 confers functions on DWAs and is therefore a "relevant provision" for the purposes of SO29.

### **Chapter 4 – Award under Frameworks**

14.3.14 The proposed subsections (3A to 3H) to be included at clause 44 (Frameworks) clarify that conditions of participation should be a proportionate means of ensuring suppliers have the legal, technical and financial capacity to perform the contract.

14.3.15 The proposed amendments to clauses 45 (Frameworks: maximum term) and 46 (Frameworks: implied terms) provide greater clarity.

14.3.16 The addition of subsection 2A in clause 47 (Open Frameworks) serves to clarify that, where a call off process under a framework agreement starts before the framework expiry date, but the award of the call off contract is later than the framework expiry date, then a CA can still award that call off despite the framework being expired because the call off process commenced before the framework expiry date.

14.3.17 Consent is required in relation to provisions contained in clauses 44 to 47. These provisions confer functions on DWAs and are therefore "relevant provisions" for the purposes of SO29.

## **Chapter 5 – After award, standstill periods and notices**

14.3.18 The proposed amendments to clause 48 (Contract award notices and assessment summaries), clause 49 (Standstill periods on the award of contracts) and clause 51 (Contract details notices and publication of contracts) provide greater clarity.

14.3.19 Consent is required in relation to provisions contained in clauses 48, 49 and 51. These provisions confer functions on DWAs and are therefore “relevant provisions” for the purposes of SO29.

## **Chapter 6 – General provision about award and procedures**

14.3.20 There is a minor change to the wording in clause 52 (Time limits) to achieve consistency throughout the Bill. There is also a minor amendment to include information on the minimum time period for dynamic markets, which provides clarity.

14.3.21 The amendments to clause 54 (Meaning of excluded and excludable supplier) reflect amendments in terminology that are made elsewhere in the Bill.

14.3.22 The amendments to clause 55 (Considering whether a supplier is excluded or excludable) provide greater clarity.

14.3.23 The effect of the amendment at clause 56 (Notification of exclusion of supplier) is that CAs must notify suppliers of exclusion where they have rejected an application to join, or removed a supplier from, membership of a dynamic market on the basis that the supplier is an excluded supplier or excludable supplier. The amendment also updates certain definitions.

14.3.24 There is a minor wording change to clause 59 (Debarment list) to reflect how the Northern Ireland administration should be referred to for the purposes of this clause.

14.3.25 Consent is required in relation to provisions contained in clause 52, clauses 54 to 56 and clause 59.

14.3.26 Clauses 52, 54, 55 and 56 confer functions on DWAs and clause 59 confers functions on a Minister of the Crown which are exercisable in relation to DWAs.

14.3.27 These provisions are therefore “relevant provisions” for the purposes of SO29.

#### 14.4 **Part 4 – Management of Public Contracts**

- 14.4.1 The amendment to clause 63 (Implied payment terms in public contracts) clarifies that an invoice is regarded as being received by a CA only if the invoice is delivered to the address specified by the CA in the contract. This will help to ensure that the correct people/departments within CAs receive the invoice so that prompt payment can be implemented.
- 14.4.2 The amendment to clause 64 (Payments compliance notices) disappplies the requirements of clause 64 to Transferred Northern Ireland Authorities. As such the power to make regulations under this clause is restricted to Welsh Ministers and a Minister of the Crown. This has no effect on WCAs or Welsh Ministers’ powers.
- 14.4.3 The amendment to clause 65 (Information about payments under public contracts) clarifies that an ‘appropriate authority’, in this instance, is a Minister of the Crown or the Welsh Ministers. The amendment clarifies that the section does not apply to public contracts awarded by Northern Ireland authorities (unless it is a reserved or devolved Welsh procurement arrangement or is awarded as part of a procurement under a transferred Northern Ireland procurement arrangement).
- 14.4.4 The amendment to clauses 66 (Assessment of contract performance), 68 (Implied payment terms in sub-contracts), and 69 (Modifying a public contract), provide greater clarity.
- 14.4.5 Clause 70 (Contract change notices and publication of modifications) has been changed so that the information on publication of modifications has been moved to a new clause after clause 71. There has been an amendment to clause 70 which provides Welsh Ministers with the power to make regulations to amend this section for the purpose of changing the percentage thresholds (which determines when a Contract Change Notice needs to be published). Most other amendments are minor drafting amendments save for additional text which clarifies that a Contract Change Notice will need to be issued if the modification is a permitted modification (novation or assignment or corporate restructuring).

- 14.4.6 The amendments to clause 71 (Voluntary standstill period on the modification of contracts) clarify that any standstill period provided for in a contract change notice (CCN) is voluntary. The amendment also confirms that a voluntary standstill period may not be less than eight working days, beginning with the CCN published date.
- 14.4.7 New clause after clause 71 (Publication of Modifications) has been moved from clause 70. It clarifies that a copy of the contract as modified or the modification must be published and that this requirement does not apply to WCAs. All other minor amendments provide clarity.
- 14.4.8 The amendment to clause 72 (Implied right to terminate public contracts) provides detail on the steps a CA should take to terminate a contract where it becomes apparent that the supplier is using a sub-contractor who would be considered an excluded or excludable supplier.
- 14.4.9 Furthermore, a new clause has been included after clause 72 (Terminating public contracts: national security). It has the effect of putting a duty on CAs to notify a Minister of the Crown if applying the exclusion ground 'threat to national security' when considering terminating a contract. A Minister of the Crown will need to agree the ground has been met before termination of the contract can be carried out. The decision is with a Minister of the Crown as it pertains to national security which is a reserved matter.
- 14.4.10 The effect of the amendment to clause 73 (Contract termination notices) is to remove the duty on private utilities to publish a contract termination notice. The amendment proposes that 'contracts for the supply of user choice services' under clause 40 (and as set out in its associated schedule 5) are removed from the requirements of this section.
- 14.4.11 Consent is required in relation to provisions contained in clauses 63 to 73. These provisions confer functions on DWAs and are therefore "relevant provisions" for the purposes of SO29.
- 14.4.12 Consent is also required in relation to the new clause which is to be included following clause 72 (Terminating public contracts: national security). This clause confers functions on DWAs and is therefore a "relevant provision" for the purposes of SO29.

#### **14.5 Part 5 - Conflicts of Interest**

14.5.1 The amendments to clause 74 (Conflicts of interest: duty to identify), clause 75 (Conflicts of interest: duty to mitigate), and clause 76 (Conflicts assessments) seek to align language with the rest of the Bill and do not change the substance of the clauses.

14.5.2 Consent is required in relation to provisions contained in clauses 74 to 76. These provisions confer functions on DWAs and are therefore “relevant provisions” for the purposes of SO29.

#### **14.6 Part 6 - Below-Threshold Contracts**

14.6.1 The amendments to clause 77 (Regulated below-threshold contracts) and clause 80 (Regulated below-threshold contracts: implied payment terms) provide greater clarity and do not change the substance of the clauses.

14.6.2 The amendment to clause 79 (Regulated below-threshold contracts: notices) clarifies that Ministers for the Crown and Welsh Ministers may amend this section for the purposes of amending financial thresholds for this section. The effect of the change in wording is to remove Northern Ireland from this power.

14.6.3 Consent is required in relation to provisions contained in clauses 77, 79 and 80. These provisions confer functions on DWAs and are therefore “relevant provisions” for the purposes of SO29.

#### **14.7 Part 7 - Implementation of International Obligations**

14.7.1 The amendments to Clause 81 (Treaty state suppliers) and Clause 82 (Treaty state suppliers: non-discrimination) provide greater clarity and seek to align language with the rest of the Bill.

14.7.2 Consent is required in relation to provisions contained in clauses 81 and 82.

14.7.3 Clause 81 confers a power on an “appropriate authority” (which includes Welsh Ministers) to make regulations amending the list of international agreements in Schedule 9. These powers are exercisable in relation to DWAs. Clause 82 confers functions on DWAs.

14.7.4 These provisions are therefore “relevant provisions” for the purposes of SO29.

#### 14.8 **Part 8 – Information and Notices: General Provision**

14.8.1 The amendment to clause 84 (Pipeline notices) clarifies that 'an appropriate authority' refers to a Minister of the Crown, Welsh Ministers, and a transferred Northern Ireland Authority.

14.8.2 The amendment to clause 87 (Electronic communications) provides greater clarity.

14.8.3 A new clause has been included after clause 88 (Data protection), which seeks to give assurances that the Data Protection Act is not breached in any way by this legislation.

14.8.4 Consent is required in relation to provisions contained in clauses 84 and 87. These provisions confer functions on DWAs and are therefore “relevant provisions” for the purposes of SO29.

14.8.5 Consent is also required in relation to the new clause (Data protection) which is to be inserted after clause 88. This clause makes provision which is ancillary to the substantive provisions in the Bill for which consent is required and is therefore a “relevant provision” for the purposes of SO29.

#### 14.9 **Part 9 - Remedies for breach of statutory duty**

14.9.1 The effect of the amendments to clause 89 (Duties under this Act enforceable in civil proceedings) are to bring the Bill in line with the Welsh Government policy position that a WCA's duty to have regard to the WPPS will not be enforceable in civil proceedings.

14.9.2 The amendments to clause 90 (Automatic suspension of the entry into or modification of contracts) and 91 (Interim remedies) are mainly drafting amendments which provide greater clarity.

14.9.3 The amendment to clause 95 (Time limits on claims) clarifies the different time limits on claims dependent on whether it is a specified set-side proceeding or any other proceeding.

14.9.4 Consent is required in relation to provisions contained in clauses 89 to 91 and clause 95. These provisions relate to the

enforcement of the duty of DWAs to comply with Parts 1 to 5, 7 and 8 and are therefore “relevant provisions” for the purposes of SO29.

#### 14.10 **Part 10 - Procurement Oversight**

14.10.1 The amendments to clause 96 (Procurement investigations) and clause 98 (Guidance following procurement investigations) are minor and provide clarity on terminology and what the clause covers.

14.10.2 Consent is required in relation to provisions contained in clauses 96 and 98. These provisions confer powers on the Welsh Ministers in relation to DWAs and confer functions on DWAs. They are therefore “relevant provisions” for the purposes of SO29.

#### 14.11 **Part 11 - Appropriate Authorities and Cross-Border Procurement**

14.11.1 There are amendments to clause 99 (Welsh Ministers: restrictions on the exercise of powers), clause 101 (Ministers of the Crown: restrictions on exercise of powers), clause 102 (Definitions relating to procurement arrangements) and clause 103 (powers relating to procurement arrangements) which provide greater clarity and align the terminology on the meaning of procurement to provide consistency throughout the Bill.

14.11.2 There are also amendments to clause 101 which have the effect of making the power to publish guidance under clause 98 (guidance following procurement investigation), one which could be exercised on a concurrent plus basis, i.e. by Welsh Ministers alone or by UK Government but only with the consent of Welsh Ministers in relation to devolved areas.

14.11.3 Consent is required in relation to provisions contained in clauses 99, 101, 102 and 103.

14.11.4 Clause 99 makes provision in relation to the exercise of the powers of Welsh Ministers in relation to DWAs.

14.11.5 Clause 101 makes provision in relation to the exercise of the powers of a Minister of the Crown in relation to DWAs.

14.11.6 Clause 102 makes provision in relation to “devolved Welsh procurement arrangements” (as defined in clause 102(2)).

14.11.7 Clause 103 make provision in relation to the exercise of the powers of a Minister of the Crown in relation to the award of contracts under devolved Welsh procurement arrangements.

14.11.8 These are therefore “relevant provisions” for the purposes of SO29.

#### 14.12 **Part 13 – General**

14.12.1 The amendment to clause 111 (Interpretation) provides greater clarity.

14.12.2 The effect of the amendment to clause 112 (Index of defined expressions) is to ensure that the referencing to other parts of the Bill is correct in the clause.

14.12.3 Consent is required in relation to provisions contained in clauses 111 to 112.

14.12.4 Clauses 111 and 112 contain provision which is ancillary to the substantive provisions in the Bill for which consent is required.

14.12.5 These are therefore “relevant provisions” for the purposes of SO29.

#### 14.13 **Schedules**

14.13.1 The amendment to the Vertical arrangements exemption (a contract between a CA(s) and a controlled person(s)) in Schedule 2 (Exempted contracts) has the effect of clarifying that contracts awarded by one or more CAs exercising joint control over a person is permitted. The definition of what defines control is clarified in relation to CAs acting jointly. The amendment now states that references to a CA do not include references to a public undertaking or a private utility. This is also included in the amendment to Horizontal arrangements (a contract between CAs).

14.13.2 The amendment to the Employment exemption clarifies which Acts apply to contracts awarded by a transferred Northern Ireland CA and contracts awarded by all other CAs.

- 14.13.3 The amendment to Schedule 5 (Direct award justifications) reflects the fact that clause 41 confers a power on a Minister of the Crown to make regulations, if considered “necessary”, to provide that specified public contracts may be awarded under section 40 as if a direct award justification applies (“necessary” meaning necessary to protect human, animal or plant life or health or to protect public order or safety). As such, the amendment reflects the fact that direct award in these circumstances is already provided for within the Bill.
- 14.13.4 The amendments to Schedule 6 (Mandatory Exclusion grounds) have been made to provide more clarity and to address some minor typographical and/or legislative context that falls within the mandatory exclusion grounds. The amendments provide more definitions to provide further clarity around sub-clause 38 regarding 'notifiable tax arrangements'.
- 14.13.5 The amendments to Schedule 7 (Discretionary exclusion grounds) and Schedule 8 (Permitted contract modifications) are minor and provide greater clarity.
- 14.13.6 Consent is required in relation to provisions contained in Schedules 2, 5, 6 ,7 and 8.
- 14.13.7 The schedules contain provisions which are ancillary to the substantive provisions of the Bill for which consent is required.
- 14.13.8 The schedules are therefore “relevant provisions” for the purposes of SO29.

### **UK Government view on the need for consent**

15. The amendments relate to provisions covered in the LCM laid on 9 June for which the UK Government’s view was that the Bill engages the legislative consent motion process. Please see paragraphs 110 to 116 of the LCM laid on 9 June for further information.

### **Reasons for making these provisions for Wales in the Procurement Bill**

16. As the amendments detailed within this LCM fall within the legislative competence of the Senedd and all relate to the provisions set out in my LCM laid on 9 June, the rationale for making these provisions in the Bill, as set out in paragraphs 117 and 118 of that LCM, continue to apply.

## **Financial implications**

17. 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.
18. The proposed amendments will not levy any additional financial implications on Welsh Government or the wider Welsh Public Sector.

## **Conclusion**

19. It is my view that it is appropriate to deal with these provisions in this UK Bill, as the Bill is the most effective way for these provisions to come into force. My officials have worked closely with officials in Cabinet Office to ensure that Welsh Government's policy objectives have been included and I consider that these provisions would provide a simplified, transparent procurement regime in Wales.
20. Although I consider the proposed amendments to be reasonable, both in the sense that they appear to make improvements to the Bill as introduced and do not give rise to any fresh areas of concern for me, I also consider that it is not appropriate to recommend consent until the outstanding matters of concern as outlined in paragraph 11 above 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**  
**11 July 2022**