

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NO 6)

Procurement Bill

1. This legislative consent memorandum (LCM) is laid under Standing Order (“SO”) 29.2. SO29 prescribes that an LCM must be laid before Senedd Cymru if a UK Parliamentary Bill makes “relevant provision” (that is to say provision in relation to Wales for any purpose within the legislative competence of the Senedd, or which modifies the legislative competence of the Senedd) or if a UK Parliamentary Bill, by virtue of amendments tabled by a Minister of the Crown or published with the name of a Minister of the Crown in support, in either House, makes (or would make) relevant provision for the first time or beyond the limits of any consent previously given by 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 2022 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. On 6 December I laid a [supplementary LCM \(Memorandum No 3\)](#), following amendments tabled by the UK Government for consideration at Lords Report Stage which commenced on 28 November and ran until 30 November.
5. On 19 December I laid a [supplementary LCM \(Memorandum No 4\)](#), following non-government amendments agreed at Lords Report Stage which commenced on 28 November and ran until 30 November.
6. On 6 February 2023 I laid a [supplementary LCM \(Memorandum No 5\)](#) following amendments tabled by the UK Government for consideration at Commons Committee Stage which commenced on 31 January and ran until 21 February 2023.
7. The UK Government tabled amendments for consideration at House of Commons Report stage which began on 13 June 2023. The tabled Government amendments were all agreed. They are NC15 and amendments 19 – 59 which can be found at: https://publications.parliament.uk/pa/bills/cbill/58-03/0249/amend/procurement_rm_rep_0607.pdf
8. The clauses referred to in this supplementary LCM are as set out in the Bill as amended in Public Bill Committee published on 24 February 2023. This version of the Bill can be found at:

Policy Objective(s)

9. 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

10. The Bill is sponsored by the Cabinet Office (CO).
11. 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.
12. The Bill interacts with other legislation, namely the Social Partnership and Public Procurement (Wales) Act (SPPP Act) which received Royal Assent on 24 May 2023, the Health Service Procurement (Wales) Bill, and the Trade (Australia and New Zealand) Act 2023 which received Royal Assent on 23 March 2023. Consent was withheld to the Trade (Australia and New Zealand) Act by Welsh Government via the Legislative Consent Motion on 31 January 2023. The Act 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) Act 2023.
13. 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 supplementary LCM (Memorandum No. 5) laid on 6 February 2023

14. I laid supplementary LCM (Memorandum No. 5) on 6 February. It covered Government amendments agreed at Commons Committee Stage, the majority of which made provision falling within the legislative competence of the Senedd.
15. Memorandum No. 5 confirmed that I was content to recommend consent to the core procurement elements of the Bill which represent the majority of the Bill. However, I recommended that consent was withheld for the areas of the Bill which concern international trade.
16. Two Legislative Consent Motions on the Procurement Bill were debated and voted upon in the Senedd on 28 March. The Senedd agreed that only the provisions within motion 1 should be considered by the UK Parliament. Provisions included in motion 2 were not approved. Motion 2 contained provisions related to international agreements, namely “Treaty state suppliers”, “Trade Disputes” and related provisions within Schedule 9. The decision was communicated to the House of Lords and the House of Commons on 29 March 2023. <https://publications.parliament.uk/pa/bills/cbill/58-03/0249/WalesProcLegCon.pdf>
17. UK Government tabled further amendments for consideration at House of Commons Report Stage on 7 June. These amendments, to the extent that they make provision which falls within the legislative competence of the Senedd, are the subject of this supplementary LCM. **Annex A** contains a table which summarises the amendments.

Provisions tabled by the UK Government to the Bill for consideration at House of Commons Report stage for which consent is required

18. Of the amendments which have been tabled by the UK Government for consideration at House of Commons Report Stage, the amendments listed below 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.

Amendments tabled on 7 June 2023

18.1. Record Keeping (a new clause after clause 97 and 1 amendment to clause 97)

Amendment NC15 is a new clause which would require contracting authorities to keep records to explain decisions made for the purpose of awarding or entering into a public contract and records of communications with suppliers made before the contract is entered into, in each case, subject to time limits.

Amendment 52 is consequential on similar provision being made in amendment NC15.

18.2. Switching to Direct Award (3 amendments to clause 43)

Amendment 21 would mean that a contracting authority could not rely on clause 19(3)(d) to justify a switch to direct award. This is because the justification in 19(3)(d) is broader than 43(2)(e) which requires that a supplier must have “materially” breached a procedural requirement. 19(3)(d) would still allow contracting authorities to disregard a tender whereas clause 43(2)(e) would permit a switch to direct award as long as there has been a “material” breach.

Amendment 22 would mean that a contracting authority would have to apply the clause 19 rules on abnormally low tenders before relying on that fact to switch to direct award.

Amendment 23 would reflect the fact that some procedural requirements will be in associated tender documents rather than in the tender notice alone.

18.3. Key Performance Indicators (2 amendments to clause 52)

Amendment 24 is consequential on amendment 25 and would remove the requirement to publish key performance indicators before entering into a public contract.

Amendment 25 is linked to amendment 24 and would require key performance indicators to be published, but not necessarily before the contract is entered into - further provision about publication would be made in regulations under clause 95.

18.4. Rights to suppliers (amendment to clause 62)

Amendment 38 is consequential on the new clauses 63 and 65 inserted at Committee which provided additional rights to suppliers placed on the debarment list.

18.5. National Security – context specific national security debarments

Under the Bill as drafted, national security is a discretionary exclusion ground, meaning that a contracting authority may exclude a supplier, at their discretion, should they believe that supplier is a threat to national security, although this is subject to a requirement that they notify a Minister of the Crown of their intention to exclude a supplier on this ground and the Minister agrees that the supplier should be excluded.

Amendment 57 would add a new mandatory exclusion ground to Schedule 6 which would allow a Minister of the Crown, following an investigation under clause 60 by an appropriate authority (which could include Welsh Ministers), to put a supplier on the debarment list on a mandatory basis for national security

reasons but only for specific types of defined works, services or goods. For example, a supplier might be put on the debarment list for contracts providing surveillance equipment but another part of their business may provide services related to biotechnology and they would therefore be permitted to bid for contracts involving biotechnology. Similarly, the entry may also, or as an alternative, stipulate that the supplier is excluded from contracts relating to certain locations or sites.

The new mandatory exclusion ground cannot be relied on by contracting authorities to themselves determine that it applies and to exclude suppliers from their procurements on this basis. It is only after an investigation of an appropriate authority and a decision of a Minister of the Crown to put a supplier on the debarment list that a supplier becomes an excluded supplier.

The effect of the amendments will be to remove discretion from contracting authorities regarding exclusions where a supplier poses a threat for particular contracts thereby reducing the risk of a supplier being allowed to participate in a procurement when they should not be.

The following amendments are either consequential on amendment 57 or related to it:

Amendments 28, 32, 36, 37, 39 to 45, 47, 48 to 51 and 58

- Amendment 28 would make an amendment to clause 57 as a consequence of amendment 57.
- Amendment 32 would make an amendment to clause 59 which would require a contracting authority to notify the appropriate authority if it excludes a supplier on the basis of a supplier being on the debarment list by virtue of the new ground to be inserted by amendment 57.
- Amendment 36 would make an amendment to clause 61 which would ensure that the investigation reports specify the description of contracts in respect of which a supplier is to be an excluded supplier by virtue of the ground added by amendment 57 and clarify that the report can be prepared and published before an entry is made.
- Amendment 37 would make an amendment to clause 62 which would ensure that the debarment list can specify the description of contracts in respect of which a supplier is an excluded supplier by virtue of the ground to be added by amendment 57.
- Amendment 39 would make a further amendment to clause 62 which would ensure that a Minister of the Crown could remove certain descriptions of contracts from the entry of a supplier that is an excludable supplier by virtue of the ground to be added by amendment 57 without removing the entire entry.
- Amendments 40 and 41 make further amendments to clause 62 as a consequence of amendments 37 and 39.

- Amendment 42 would amend clause 62 to ensure consistent references to “removal or revision of entries” (in line with the other Government amendments to this clause).
- Amendment 43 would make a further amendment to clause 62 which would require a Minister of the Crown to remove a description of contracts from a debarment list if the Minister is satisfied that the ground to be added by amendment 57 does not apply in relation to them.
- Amendments 44 and 45 make amendments to clauses 62 and 64 which are consequential on amendments 39 and 43.
- Amendment 47 would make an amendment to clause 65 which would permit suppliers to challenge their being made an excluded supplier in relation to particular contracts by virtue of the ground to be added by amendment 57 (instead of having to challenge the whole entry).
- Amendments 48, 49 and 50 would make further consequential amendments to clause 65.
- Amendment 51 would make an amendment to clause 79 which would mean that, as with the existing national security exclusion ground in paragraph 14 of Schedule 7, a relevant contracting authority would need to notify a Minister of the Crown before terminating a contract in reliance on the new exclusion ground to be added by amendment 57.
- Amendment 58 would make an amendment to para 43 of Schedule 6 as a consequence of amendment 57.

18.6. National security - Duty to keep under review

Amendment 34 would require a Minister of the Crown to keep under review whether particular suppliers or sub-contractors should be investigated under clause 60 (investigation of supplier: exclusion grounds), having regard to the fact that contracting authorities may be unknowingly awarding public contracts to suppliers or sub-contractors that could be excludable suppliers by virtue of paragraph 14 of Schedule 7 (threat to national security).

18.7. Other amendments relating to exclusions and debarment

- Amendments 26 and 27 would amend clause 57 to make it clear that a contracting authority must be satisfied that circumstances giving rise to the application of the exclusion are not continuing - that is, it is no defence to say they have never ceased and therefore cannot re-occur.
- Amendments 29 and 30 would make amendments to clause 58 as a consequence of amendments 26 and 27.

- Amendment 31 would make an amendment to clause 59 which would clarify that a contracting authority would only have to notify the appropriate authority if it excludes a supplier on the basis of its own judgement (rather than the debarment list).
- Where Welsh Ministers have conducted an investigation under clause 60 they may refer the case to a Minister of the Crown for the Minister to consider whether an entry to the debarment list should be added in respect of a supplier. Amendment 33 would make an amendment to clause 60 to clarify that investigations are for the purpose of considering whether an entry to the debarment list could be added in respect of a supplier. This is needed to make it clear that investigations are not required for any other purposes.
- Amendment 35 would clarify that investigations under clause 60 are for the purpose of considering whether a supplier could be put on the debarment list, rather than potentially being connected to an application under clause 64.
- Amendment 46 would make an amendment to clause 64 which would require a Minister of the Crown, after considering an application from a supplier for the removal or revision of an entry made on the debarment list, to notify the supplier of the Minister's decision and give reasons for the decision.
- Amendment 55 would make an amendment to clause 112 which would ensure that a Minister of the Crown can conduct debarment investigations and put suppliers on the debarment list for the purpose of regulating Welsh Contracting Authorities and transferred Northern Ireland authorities. This amendment resolves an issue identified in the Bill relating to the debarment regime and how it will successfully operate across England, Wales and Northern Ireland. The amendment does not affect Welsh Ministers ability to conduct debarment investigations for the purpose of regulating Welsh Contracting Authorities. It should be noted that amendment 53 would amend clause 110 to create a reciprocal power for Welsh Ministers to conduct debarment investigations for the purpose of regulating contracting authorities which are not Welsh Contracting Authorities. Together these amendments will ensure that there is a joined-up debarment regime which recognises that debarment investigations can lead to a decision to put the supplier's name on the debarment list which will have an impact on all contracting authorities.

Reasons for making these provisions for Wales in the Procurement Bill

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

Financial implications

20. 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 2022.

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

Conclusion

22. 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 Welsh Government's policy objectives have been included and I consider these provisions would provide a simplified, transparent procurement regime in Wales.
23. Aside from these amendments, the Bill has already been debated and voted upon in the Senedd. I consider the proposed amendments in this supplementary LCM to be reasonable. I therefore recommend consent to these amendments.

Rebecca Evans MS
Minister for Finance and Local Government
21 June 2023

Annex A – Amendment Summary

Amendment	Clause / Schedule number	Clause description
Record Keeping	New clause	Record Keeping
	Clause 97	Information relating to a procurement
Switching to Direct Award	Clause 43	Switching to Direct Award
Key Performance Indicators	Clause 52	Key performance indicators
Rights to suppliers	Clause 62	Debarment List
National Security – context specific national security debarments	Clauses 57, 59, 61, 62, 64, 65, 79 and Schedule 6	57 – Meaning of excluded and excludable supplier 59 – Notification of exclusion of supplier 61 – Investigations under section 60: reports 62 - Debarment List 64 – Debarment list: application for removal 65 – Debarment decisions: appeals 79 - Terminating public contracts: national security Schedule 6 - Mandatory exclusion grounds
National Security – Duty to keep under review	Clause 60	Investigations of supplier: exclusion grounds
Other amendments relating to	Clauses 57 – 60, 64 and 112	57 – Meaning of excluded and excludable supplier 58 – Considering whether a supplier is excluded or excludable

Amendment	Clause / Schedule number	Clause description
exclusions and debarment		59 – Notification of exclusion of supplier 60 - Investigations of supplier: exclusion grounds 64 – Debarment list: application for removal 112 – Minister of the Crown: restrictions on the exercise of powers