

The Welsh Government's Legislative Consent Memoranda on the Procurement Bill

March 2023



1. Background

The UK Government's Procurement Bill

1. In December 2020, the UK Government proposed reform to procurement legislation following the end of the transition period of the UK's exit from the European Union (EU). In its Green Paper, *Transforming public procurement*, the UK Government set out its goal to:

*'[...] speed up and simplify our procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery.'*¹

2. In August 2021, Rebecca Evans MS, the Minister for Finance and Local Government (the Minister) announced she had accepted an offer from the UK Government to use the forthcoming legislation to "reform the basic processes underpinning procurement" in Wales.²

The Welsh Government's Legislative Consent Memorandum (Memorandum No. 3, 4 and 5)

3. Standing Orders 29.1 and 29.2 provide that a legislative consent memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.

4. On 9 June 2022, the Minister laid before the Senedd a Legislative Consent Memorandum (LCM) (Memorandum No. 1) in respect of the Bill.³

5. The Business Committee agreed that the Legislation, Justice and Constitution Committee and the Public Accounts and Public Administration Committee should report on Memorandum

¹ UK Government, [Green Paper: Transforming public procurement](#), December 2020, paragraph 1

² Welsh Government, [Written Statement: The Way Forward for Procurement Reform in Wales](#), 18 August 2021

³ Welsh Government, [Legislative Consent Memorandum: Procurement Bill](#), June 2022

No. 1 by 6 October 2022.⁴ This reporting date was later moved to 10 November,⁵ and then to 24 November 2022.⁶ The Committee reported on LCMS 1 & 2 on 22 November 2022.

6. On the 6 December 2022, the Minister laid before the Senedd Supplementary Legislative Consent Memorandum (Memorandum No. 3) and on the 19 December 2022 laid the Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 4).

7. The Legislation, Justice and Constitution Committee wrote to the Minister on 26 January 2023 to clarify matters raised in those memoranda.⁷ We also wrote to the Minister on 30 January 2023 with a number of queries.⁸

8. The Minister responded to the letter from the Legislation, Justice and Constitution Committee on 8 February 2023⁹ and the letter from us on 6 February 2023.¹⁰

9. On the 7 February 2023 the Welsh Government laid Supplementary Legislative Consent Memorandum (Memorandum No. 5). The Business Committee agreed that the Legislation, Justice and Constitution Committee and the Public Accounts and Public Administration Committee should report on Supplementary Memorandums 3, 4 and 5 by 23 March 2023.

Provisions for which the Senedd's consent is required

10. Within Memorandum No. 3, Memorandum No. 4, and Memorandum No. 5, the Minister states that amendments in respect of the following clauses of and Schedules to the Bill, as they appear in the version as brought from the House of Lords¹¹, make provision for a purpose within the legislative competence of the Senedd:

⁴ Business Committee, Timetable for consideration: Legislative Consent Memorandum on the Procurement Bill, June 2022

⁵ Business Committee, Revised timetable for consideration: Legislative Consent Memorandum on the Procurement Bill, June 2022

⁶ Business Committee, Revised timetable for consideration: Legislative Consent Memorandum on the Procurement Bill, September 2022

⁷ Letter from the Legislation, Constitution and Justice Committee to the Minister for Finance and Local Government, 26 January 2023

⁸ Letter from the Public Accounts and Public Administration Committee to the Minister for Finance and Local Government, 30 January 2023

⁹ Letter from the Minister for Local Government and Finance to the Chair of the Legislation, Constitution and Justice Committee, 8 February 2023

¹⁰ Letter from the Minister for Local Government and Finance to the Chair of the Public Accounts and Public Administration Committee, 6 February 2023

¹¹ Memorandum No. 5, paragraph 15

- clause 1 (Procurement and covered procurement – new clause) and consequential amendments to clauses which the Minister identified within the first Memorandum to make provision for a purpose within the legislative competence of the Senedd;
- clause 2 (Contracting authorities);
- clause 6 (Utilities contracts);
- clause 10 (Mixed procurement: special regime contracts);
- clause 12 (Procurement objectives);
- clause 13 (The national procurement policy statement);
- clause 19 (Award of public contracts following a competitive tendering procedure);
- clause 21 (Tender notices and associated tender documents);
- clause 22 (Conditions of participation);
- clause 32 (Reserving contracts to supported employment providers);
- clause 35 (Dynamic markets: establishment);
- clause 36 (Dynamic markets: membership);
- clause 40 (Qualifying utilities dynamic market notices: no duty to publish a tender notice – new clause);
- clause 46 (Frameworks);
- clause 51 (Standstill periods on the award of contracts);
- clause 52 (Key performance indicators);
- clause 53 (Contract details notices and publication of contracts);
- clause 54 (Time limits);
- clause 56 (Technical specifications);
- clause 62 (Debarment list);
- clause 63 (Debarment list: application for removal);

- clause 64 (Debarment decisions: appeals);¹²
- clause 65 (Timeline for removal of suppliers – new clause);¹³
- clause 66 (Electronic invoicing: implied term);
- clause 67 (Implied payment terms in public contracts);
- clause 68 (Payments compliance notices);
- clause 69 (Information about payments under public contracts);
- clause 72 (Implied payment terms in sub-contracts);
- clause 74 (Contract change notices);
- clause 76 (Publication of modifications);
- clause 82 (Conflicts assessments);
- clause 83(2)(a) (Regulated below-threshold contracts);
- clause 84 (Regulated below threshold contracts: procedure);
- clause 85 (Regulated below-threshold contracts: duty to consider small and medium-sized enterprises – new clause);
- clause 86 (Regulated below-threshold contracts: notices);
- clause 91 (Pipeline notices);
- clause 93 (Notices, documents and information: regulations and online system);
- clause 94 (Electronic communications);
- clause 95 (Information relating to a procurement);
- clause 97 (Duties under this Act enforceable in civil proceedings);

¹² Amendments to this clause were subsequently withdrawn

¹³ In a letter a letter to the Public Accounts and Public Administration Committee, the Minister stated that this clause was likely to be removed.

- clause 104 (Procurement investigations);
- clause 107 (Welsh Ministers: restrictions on the exercise of powers);
- clause 109 (Minister of the Crown: restrictions on the exercise of powers);
- clause 118 (Regulations);
- clause 119 (Interpretation);
- clause 120 (Index of defined expressions);
- clause 123 (Commencement);
- Schedule 1 (Threshold amounts);
- Schedule 2 (Exempted contracts);
- Schedule 4 (Utility activities);
- Schedule 6 (Mandatory exclusion grounds);
- Schedule 7 (Discretionary exclusion grounds);
- Schedule 11 (Repeals and revocations).

11. In each case, in so far as the provisions apply to, or are exercisable in relation to devolved Welsh authorities, consent of the Senedd is required as the clauses and Schedules make provision in respect of purposes within the legislative competence of the Senedd.

12. Although the view of the Welsh Government, is that the amendments to clause 64 (Debarment decisions: appeals) tabled by the UK Government would require Senedd consent, the amendments referred to in Memorandum No. 5 were withdrawn.

13. In relation to clause 107 (Welsh Ministers: restrictions on the exercise of powers), the Minister states, at paragraph 17 of Memorandum No. 5:

“The amendments to clause 107 (see 18.16) are not within the legislative competence of the Senedd to the extent that they make provision for the purpose of regulating contracting authorities which operate or whose functions are exercisable otherwise than in relation to Wales. However, the provision made by the amendments does relate to devolved matters in so far as it only applies in relation to contracting authorities whose activities are wholly or

mainly activities that do not relate to reserved matters or whose functions are wholly or mainly functions that do not relate to reserved matters. This does not alter the conclusion in the legislative consent memorandum laid on 9 June 2022 that this clause contains provision which is within the legislative competence of the Senedd and is therefore relevant provision for the purposes of SO 29."

Requirement for Consent – Memorandum No. 4

14. It is unclear how certain clauses within the Bill, which were omitted from Memorandum No. 1, would be within the legislative competence of the Senedd. As a result, the Chair of the Legislation, Justice and Constitution Committee wrote to the Minister to ask for clarification. The Minister's response was:

"There will be instances where the duty to have regard to the National Procurement Policy Statement (now clause 13(10) in the version of the Bill brought from the Lords) and clause 80 which relates to regulated below threshold contracts (now clause 84 in the version of the Bill as brought from the Lords) will apply to Welsh contracting authorities. For example, where a Welsh local authority collaborates with an English local authority on a procurement, and the English local authority is the lead authority. For this reason, we believe these clauses are within the legislative competence of the Senedd."

15. In light of this additional information we agree with the Welsh Government's reasoning for seeking Senedd consent on clauses 13 (The national procurement policy statement) and clause 84 (Regulated below-threshold contracts: procedure).

Reasons for making these provisions for Wales in the Procurement Bill

16. In explaining the reasons for making these provisions for Wales under the Bill, Memorandum No. 5 at paragraph 19 states that:

"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."

17. The rationale provided in Memorandum No. 1, in paragraphs 117 and 118, was that in the Welsh Government's view, "opting to pursue this procurement reform legislation on an England and Wales basis is pragmatic". That view was repeated in Memorandum No. 2.

18. Memorandum No. 5, at paragraph 23, concludes that:

"I consider the majority of the proposed amendments to be reasonable. Now that the majority of issues of concern have been resolved, I recommend consent to the core procurement elements of the Bill, which represent the majority of the Bill. However, I recommend that consent is withheld for the areas of the Bill which concern international trade, for the reasons outlined in paragraph 15."

19. The remaining outstanding matters, as set out in paragraph 15 of Memorandum No. 5 are:

"The power to add international agreements to the list in Schedule 9 to the Bill has been included as a concurrent power, with no requirement to obtain the consent of Welsh Ministers when UKG Ministers are exercising this power in relation to devolved areas, which is unacceptable to the Welsh Ministers. Similar provisions are also contained in the Trade (Australia and New Zealand) Bill. Detailed discussions are ongoing at official level, and it is expected that the outcome of those discussions will be reflected in the Procurement Bill."

A new matter of concern has arisen as a result of one of the amendments tabled by the UKG on 25 January (see paragraph 18.12 below for further information). It relates to trade disputes whereby a MoC can make regulations to deal with the procurement consequences of a trade dispute under a treaty implemented by way of Schedule 9 (other than the Trade and Cooperation Agreement with the EU, which is dealt with under existing

legislation). This power is therefore a concurrent power, with no requirement to obtain the consent of Welsh Ministers when UKG Ministers are exercising this power in relation to devolved areas, which is unacceptable to the Welsh Ministers."

20. The Legislative Consent Motion for the Trade (Australia and New Zealand) Bill was not agreed in Plenary on 31 January 2023.

2. Supplementary Legislative Consent Memoranda No. 3, No. 4 and No. 5

21. Within Supplementary Legislative Consent Memorandum No. 3 and Memorandum No. 5, the Minister asserts her 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."¹⁴

22. The Minister considers the proposed amendments subject to Memorandum No. 3 "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".¹⁵

23. Within Memorandum No. 5 the Minister states that she considers the "majority" of the proposed amendments subject to that memorandum to be reasonable.¹⁶

24. At the time of laying Memorandum No. 3 and No. 4, the Minister considered it was not appropriate to recommend consent to the Bill until the matters of concern referred to in those memoranda had been resolved.

25. However, within Memorandum No. 5 the Minister states:

"Now that the majority of issues of concern have been resolved, I recommend consent to the core procurement elements of the Bill, which represent the

¹⁴ Welsh Government, Memorandum No. 3, paragraph 24; Memorandum No. 5, paragraph 22

¹⁵ Welsh Government, Memorandum No. 3, paragraph 25

¹⁶ Welsh Government, Memorandum No. 5, paragraph 23

majority of the Bill. However, I recommend that consent is withheld for the areas of the Bill which concern international trade, for the reasons outlined in paragraph 15 [as referenced in paragraph 25 of this report]."¹⁷

3. Committee consideration

26. At our meeting on 26 January 2023, we considered the Supplementary Legislative Consent Memoranda (Memorandum No. 3 and Memorandum No. 4) in respect of the UK Government's Procurement Bill.

27. We also considered a letter from the Chair of the Legislation, Justice and Constitution Committee to the Minister for Finance and Local Government on the 26 January 2023 seeking clarity on a number of matters referred to in the memoranda. We wrote to the Minister supporting the request for clarity on the matters raised by the Legislation, Justice and Constitution Committee and fully endorsed the letter.

28. In our letter we also asked the Minister for clarification on an additional point in relation to Memorandum No. 4. We noted that the Minister had identified the duty on the Secretary of State to publish a timeline 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 modern slavery, genocide, or crimes against humanity). She stated that as government is not defined, it is not limited to the UK Government, and that she thought that this would mean the timeline would also cover the removal of suppliers from the Welsh Government's procurement supply chain.

29. We asked for clarification on the involvement, if any, the Welsh Government will have in developing the timeline that must be laid before the UK Parliament by the Secretary of State; and the impact this might have upon Welsh Businesses and the Welsh Government's procurement supply, including details of the practical implications of the removals of suppliers.

30. In responding to our query, the Minister explained that the amendment included in Memorandum No. 4, and referred to in our letter, was likely to be removed by the UK Government during the committee stage. As a result, her officials did not need to consider the implications of this amendment any further.

31. We considered Memorandum No. 5 at our meeting on 2 March 2023.

¹⁷ Memorandum No. 5, paragraph 23

4. Our View

32. Memorandum No. 5 gives rise to some issues which the Committee feels need to be addressed and clarified, which are set out below.

Clause 123 of the Bill (Commencement)

33. It is unclear whether amendment to clause 123 (Commencement) achieves the Minister's policy intent. It does not appear that the Welsh Government has undertaken an assessment of the potential financial implications of not giving consent to a Minister of the Crown to commence provisions in the Bill given the statement in the financial implications section of Memorandum No. 5.

34. It is therefore unclear what the financial implications would be for the Welsh Government, or the wider public sector in Wales, of not providing consent for the UK Government's commencement of the Bill's provisions in relation to Welsh contracting authorities. The financial implications of a possible subsequent removal of provisions in relation to Welsh contracting authorities from the Bill are similarly unclear, as are any steps the Welsh Government may be required to take to introduce its own primary legislation to replace them.

35. Within the specific remit of the Public Accounts and Public Administration Committee, we note that if Wales does not give consent to the UK Government to commence the Bill's provisions in relation to Welsh contracting authorities, and Wales is carved out from the Act, the financial implications will be greater than currently provided for in the financial assessment, both in relation to the lost opportunity cost involved in developing the present Bill and the additional cost of any alternate Welsh legislation.

Recommendation 1. We recommend that the Minister for Finance and Local Government give further and more detailed consideration to the potential financial implications of not giving consent to a Minister of the Crown to commence provisions in the Bill given the insufficient detail contained in the financial section of Memorandum No. 5.

Level of detail provided in the memoranda

36. We are concerned that the level of detail in Memorandum No. 5 is lacking as to the effect of amendments made to the Bill. We noted in our report on Legislative Consent Memoranda 1 & 2 that Memorandum No. 2 included several references that amendments are "minor and provide greater clarity".

37. We believe that in some cases this is an overly simplistic summary of the amendments. There are some summaries within Memorandum No. 5 that do not set out how and why the new memorandum differs from the previous memorandum. For example:

- i. Clause 68: amendment of the clause is described as a “minor technical amendment”. The amendment is substantive as it exempts concession contracts from the scope of a payments compliance notice, although it is acknowledged that the amendment does result in consistency with other provisions in the Bill concerning concession contracts.
- ii. Schedule 7: there is no explanation of the effect of inserting a definition of “event”.

Conclusion 1. We support the conclusion of the Legislation, Justice and Constitution Committee in their report on Memorandum No.5 that emphasises to the Minister – and all the Welsh Ministers – the importance of providing sufficient detail to Members of the Senedd within legislative consent memoranda. We believe this is especially important where timescales for Senedd scrutiny are compressed, so as not to add to the democratic deficiencies caused by UK Bills making provision for Wales in devolved areas and the associated consent process.

Limited Opportunity for Senedd Scrutiny

38. We highlighted serious concerns in our previous report on Legislative Consent Memoranda 1 & 2 about the limited opportunities for detailed scrutiny within the legislative consent process. We shared the views of the Legislation, Justice and Constitution Committee and disagreed with the Minister's suggestion that the legislative consent process is equal to that of the detailed legislative scrutiny of a Senedd Bill. We reiterate that consideration of a Senedd Bill includes wide consultation on its general principles followed by line-by-line scrutiny in a committee and on the floor of the Senedd, together with the ability to comprehensively amend the Bill as appropriate, elements which are completely absent from the legislative consent process.

Conclusion 2. We remain concerned that including extensive provisions for Wales in a UK Bill also gives very limited opportunities for Senedd scrutiny of those provisions. We acknowledge that amendments have been made to the Bill, as a result of the House of Lords Delegated Powers and Regulatory Reform (DPRR) Committee, to ensure that the vast majority of the Welsh Ministers' regulation-making powers under it will be subject to the affirmative procedure rather than the negative procedure, but the Bill itself has been subject to very limited detailed scrutiny via the legislative consent process.

Conclusion 3. We are disappointed by the short timeframe provided to Senedd Committees to consider and report on Legislative Consent Memorandums 3, 4, & 5, which provide no opportunity to raise concerns or seek clarification on issues with the Minister prior to us reporting. These timescales have not enabled sufficient or detailed scrutiny by any of the Senedd Committees.

39. We share the disappointment of the Legislation, Justice and Constitution Committee with the Minister's rejection of that Committee's suggestion for the Welsh Government to undertake an internal review of its approach to legislating on procurement law, to inform future practice.

40. Mabon ap Gwynfor MS wishes to record his view that he is opposed to the Legislative Consent Memoranda in relation to the UK Procurement Bill.