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Llywodraeth Cymru
Welsh Government

Mark Isherwood
Chair, Public Accounts and Public Administration Committee

Huw Irranca-Davies
Chair, Legislation, Justice and Constitution Committee

1 September 2022

Dear Mark and Huw,

Thank you for your letter and the questions put forward by your respective Committees relating to the Procurement Bill Legislative Consent Memoranda (LCM). I am pleased to provide my response, which is attached at Annex 1.

I look forward to discussing the LCM at the Public Accounts and Public Administration Committee on 21 September.

Yours sincerely,

A handwritten signature in black ink that reads "Rebecca Evans". The signature is written in a cursive style.

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Minister for Finance and Local Government

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Annex 1

1. **What consideration did the Welsh Government give to using the time it has identified for the Social Partnership and Public Procurement (Wales) Bill to bring forward a wider procurement Bill that covered the scope of both the UK Procurement Bill and the Social Partnership and Public Procurement (Wales) Bill?**

The scope, policy and legal instructions for the Social Partnership and Public Procurement (Wales) Bill (“SPPP Bill”) were already well developed when the Welsh Ministers were presented with the option of joining the UK Government’s (“UKG”) Procurement Bill, and consultation on the SPPP Bill had already taken place.

Incorporating the Procurement Bill into the SPPP Bill would have required changing the scope of the SPPP Bill as it would have predominantly become a Procurement Bill, shifting the focus of the Bill away from Social Partnerships. Also, the Bills are aiming to achieve different things – the Procurement Bill focuses on the processes underpinning procurement, whilst the SPPP Bill will focus on ensuring socially responsible outcomes are achieved from our procurement.

There would also have been significant delays to laying the SPPP Bill in the Senedd due to another consultation process. This would have led to the Welsh Government implementing procurement legislation later than the UKG, which would have resulted in:

- Confusion, inconsistency, and uncertainty for Welsh contracting authorities (WCAs) and suppliers, especially those who conduct business across the borders. This would have negatively impacted upon SMEs, who are better able to optimise efficiency and reduce costs when there is consistency.
- The Wales market becoming an unattractive business prospect if Welsh procedures are different to those in England. Given that Welsh public sector spend represents less than 5% of the UK’s total, it is crucial that Wales remains attractive to suppliers.
- Discontent and frustration amongst Welsh public sector stakeholders, who desire the certainty and stability that a single, consistent procurement regime can offer.

2. **We have been advised by the Counsel General that neither resourcing nor capacity are issues in bringing forward Welsh Bills. Given the significant number of provisions in devolved areas within the Bill and the expertise available to the Welsh Government on procurement issues, why wasn’t resource put into developing a wider, more coherent Welsh Government Procurement Bill?**

As stated in my response to question one, there were important practical reasons for joining with the UKG’s Procurement Bill, not least ensuring consistency and stability for both buyers and suppliers, and particularly our Welsh SMEs.

This is also consistent with our principles on recommending consent to UK Bills, insofar as the interconnected nature of the relevant Welsh and English administrative systems mean that it is most effective and appropriate for provision for both to be taken forward at the same time in the same legislative instrument.

3. Given that this is such an important area of public policy, why is it considered appropriate to take a legislative approach which prevents elected Members of the Senedd from undertaking detailed legislative scrutiny on the subject matter of the Bill, including through engagement with Welsh stakeholders?

After the UKG published their *Transforming Public Procurement* Green Paper, the Welsh Government ran a series of stakeholder engagement events which identified that stakeholders in Wales were largely content with the proposals in the Green Paper. Further stakeholder engagement has been undertaken on a range of specific Bill-related areas, including proposals in relation to below-threshold transparency, and the Wales Procurement Policy Statement.

The legislative consent process will ensure that scrutiny can be undertaken by the Senedd which will help to ensure UK Government stand by the assurances they made when we agreed to Welsh contracting authorities being included in the Bill. Furthermore, the substance of the Bill's enactment will be specified in bilingual secondary legislation and guidance that will be developed by Welsh Government as the Bill continues its legislative journey. The Welsh Ministers have equivalent powers in significant areas of the Bill so there will be a substantial level of secondary legislation which will be subject to detailed legislative scrutiny in the Senedd, as well as wider engagement and consultation with stakeholders across Wales.

4. How accessible will the new procurement regime be when it is split over two Bills?

The purpose of the two Bills is different. The Procurement Bill focuses on the processes underpinning procurement, whilst the Social Partnership and Public Procurement (Wales) Bill aims to ensure socially responsible outcomes are achieved from our procurement. The new procurement regime will be accessible to suppliers as tenders are designed to cover the requirements of both Bills when required. The enhanced transparency measures should also ensure that suppliers have better visibility of tender opportunities, procurement data, etc. than they do currently.

5. What degree of involvement have you and your officials had in shaping and drafting clauses of the UK Procurement Bill? Did you as Minister require sign off of individual clauses?

My officials have, and continue to, work closely with their counterparts in the Cabinet Office on the development of the Procurement Bill to ensure it aligns to Welsh policy objectives and legislation. They meet frequently and will continue to interrogate any additional Government amendments to clauses as the Bill moves through scrutiny in UK Parliament.

I have called out areas where the Bill's proposed clauses did not align to our Welsh policy objectives. Different provision has therefore been included in the Bill for contracting authorities in Wales to reflect those specific policy objectives.

6. What consultation was undertaken with Welsh stakeholders to inform the drafting process?

The UK Cabinet Office published their Green Paper, *'Transforming Public Procurement'* in December 2020. During the Green Paper consultation period, Welsh Government ran a series of stakeholder engagement events to seek their views on how procurement legislation could be reformed to benefit Wales, and to gauge their appetite for the proposals in the Green Paper.

This included targeted engagement sessions with the Welsh private sector, including Industry Wales, the construction industry, and legal firms, to understand the impact of the Green Paper proposals on Welsh businesses.

These stakeholder sessions were followed up with a survey which resulted in the majority of Welsh stakeholders saying they were content with the direction of the reforms proposed in the UK Government's Green Paper.

7. What role has the provisional common framework for public procurement had in the development of the Bill?

A Working Group has already been established under the provisional common framework for public procurement. Monthly meetings are held and attended by the four Administrations and the development of the Bill is a standing item on the agenda.

8. The UK Government is of the view that clauses 114 and 116 require the Senedd's consent. Could you outline how you have concluded that clauses 114 and 116 do not require the Senedd's consent?

Clauses 114 and 116 are technical provisions which are concerned with how the Bill works rather than substantive provisions, and as a matter of practice we do not generally include non-operative clauses within Legislative Consent Memoranda.

9. Clauses 50, 62, 63, 65, 79 and 80 contain Henry VIII powers for the Welsh Ministers, subject to the negative procedure. What role did you play in choosing these procedures and do you believe that the negative procedure is appropriate for these powers?

My officials have considered the powers and the associated procedures as part of their review of the draft clauses provided by UKG and provided feedback as appropriate. Some concerns have been raised on the procedures for some of these clauses in the Delegated Powers and Regulatory Reform Committee's Report.

Discussions between my officials and their counterparts in the Cabinet Office are still ongoing in relation to the response to the Delegated Powers and Regulatory Reform Committee.

10. Please can you provide a narrative on the concurrent powers in the Bill and how the approach adopted by the Welsh Government complies with its guidance on this issue?

Welsh Ministers have secured standalone, equivalent regulation making powers for the vast majority of powers in the Bill.

There is a concurrent plus power in the Bill, as introduced, in relation to section 62 (electronic invoicing). The Counsel General and I agreed that there is strong rationale for this position. A concurrent plus power was deemed appropriate, primarily to provide consistency to basic e-invoicing standards and syntaxes across the UK nations to avoid confusion and additional costs for suppliers. In line with the guidance, my officials have ensured that both the executive and legislative competence of the Senedd are protected as this is a concurrent plus power and a carve out has been included within section 106 of the Bill.

The other powers currently in the Bill listed as concurrent are subject to ongoing discussions with UKG as noted at paragraph 119 of the Legislative Consent Memorandum.

The Bill is still working its way through the legislative process and there may be further concurrent powers as a result of potential amendments made. My officials are monitoring potential amendments and their impact on Wales.

11. What analysis have you undertaken of how each clause of the Bill differs from or replicates the current legislative position and can the Committees see this analysis?

There are significant differences in approach between the current legislative position and the clauses within the Bill proposed. For example, it combines aspects of the Public Contracts Regulations 2015 (PCR), Utilities Contracts Regulations 2016 (UCR), Concession Contracts Regulations 2016 (CCR) and the Defence and Security Public Contracts Regulations 2011 (DSPCR) into one piece of legislation. As such, it is not appropriate for officials to perform a clause-by-clause analysis of the Bill against current regulations.

My officials have therefore taken a holistic approach in reviewing the Bill and have only reviewed specific clauses against the existing legislation where appropriate.

12. Have you undertaken a Wales-specific impact assessment of the Bill as introduced?

As this is a UK Government Bill, there is no requirement for Welsh Government to undertake a Wales-specific impact assessment. Rather, it is the responsibility of the

lead UKG department (in this instance, the Cabinet Office) to undertake an impact assessment and consider the relative costs and benefits associated with the proposed legislative changes, and if there are any additional impacts in Wales. The impact assessment can be accessed via the UK Parliament website (<https://bills.parliament.uk/bills/3159/publications>).

My officials have reviewed the relevant UK Government impact assessments of the Bill as introduced, and I am satisfied that no adverse issues have been identified from a Welsh policy perspective. My officials continue to work closely with the Cabinet office on the development of the Bill and will consider the impact on Wales of any amendments taken forward as well as addressing any Bill-related matters as identified in the LCM.

Impact assessments will be undertaken on the secondary legislation that will be developed by Welsh Government, and these will be made available as they are created.

- 13. The Memorandum notes “There are likely to be a number of costs associated with the reform of public procurement in Wales although the exact details are still to be confirmed”. Please can you commit to share details of these costs with the Committees once they have been confirmed?**

Yes, I commit to sharing the details of these costs when they have been confirmed.

- 14. Could you provide an update on the discussions with the UK Government with regard to amendments being tabled to the Bill to address the concerns you set out in paragraph 119 of the Memorandum?**

Discussions with the UK Government are continuing regarding the concerns set out in paragraph 119 of the Memorandum.

We have reached a mutually agreeable position regarding the issues surrounding the “disapplication power for healthcare services”. This power has not been included in the Bill and options are being considered for taking it forward through Senedd legislation.

The concern surrounding a Welsh Contracting Authority’s duty to have regard to the Wales Procurement Policy Statement being “enforceable in civil proceedings” is also being addressed and there is a Government amendment being proposed at Lords Committee stage to address this.

Officials continue to work with UK Government counterparts on the remainder of the concerns listed in paragraph 119. I also received a letter from Minister Rees-Mogg on 12 August saying that he has noted my concerns and has asked his officials to continue working collaboratively with mine throughout the summer and September to resolve the remaining concerns whilst the Bill is going through the parliamentary process. We will therefore continue to pursue resolutions to these outstanding matters and will feedback to the committees as further progress is made.

15. Have you engaged the new intergovernmental relations arrangements to resolve matters of concern?

No, we have not engaged the new intergovernmental relations arrangements. Any matters of concern have been, and continue to be, dealt with via correspondence and meetings between officials and/or Ministers.

16. Will you introduce your own legislation to cover matters of concern that you cannot resolve?

Given what the matters of concern are, it would not be possible to introduce our own legislation to resolve them. For example, the matter regarding the definition of devolved Welsh authorities needs to be dealt with in the Procurement Bill itself as, whether or not Wales was part of this Bill, there would need to be an effective and mutually acceptable definition so as to ensure clarity as to which side of the line a contracting authority would fall.

17. Will you commit to not using an intergovernmental agreement with the UK Government as a mechanism for resolving your concerns?

I will commit to not using an intergovernmental agreement with the UKG as a mechanism for resolving our concerns. However, I will keep this under review as discussions continue and the Bill's passage progresses.

18. What involvement will you and your officials have throughout the scrutiny and amending process in Westminster?

The Welsh Government has already proposed several amendments which have been included in the Government amendments currently being debated in the House of Lords. My officials are continuing to work closely with their counterparts in the UK Government to ensure any further Government amendments fully reflect the Welsh Ministers' policy priorities.

19. What regulations do you foresee as being necessary to implement the reforms under the Bill and under which powers (and procedures) in the Bill? Will those regulations brought forward by the Welsh Ministers be consistent with any taken forward by UK Government Ministers?

Welsh Ministers have secured standalone, equivalent regulation-making powers to UK Government Ministers for the majority of relevant powers throughout the Bill. Hence, Welsh Ministers will need to develop and implement secondary legislation in relation to devolved areas. This includes regulations covering key areas that will need to be in place for the new regime to become operative, such as those relating to the Light Touch Regime, financial thresholds for below-threshold contracts, and procurement notices.

Clause 110(10) of the Procurement Bill lists the regulation making powers in this legislation that are exercisable by Welsh Ministers and are subject to the affirmative

procedure. Regulations made under any other section (not listed in clause 110(10)) will be subject to the negative procedure.

My officials are currently developing a project plan which will inform the approach to the development and implementation of the secondary legislation in Wales. Officials will continue to work closely with UK government on the development of the secondary legislation to ensure consistency and coherence in the implementation of the provisions of the Bill, where appropriate. A pragmatic approach will be adopted to ensure that the Bill meets the requirements of Welsh Contracting Authorities and suppliers.