

## SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NO 3)

### 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 15 November and 21 November for consideration at House of Lords Report Stage. Lords Report Stage commenced on 28 November.
5. On 18 November I wrote to the Llywydd to explain that this supplementary LCM would therefore cover both tranches of Government amendments tabled and has been laid within two-weeks of the tabling of the second tranche.
6. The tabled amendments can be found at: <https://bills.parliament.uk/bills/3159/publications>. 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/bills/3159/publications>

### 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 position since the publication of the supplementary LCM (Memorandum No 2) laid on 11 July**

12. I laid a supplementary LCM on 11 July. It covered the 320 government amendments tabled by the UK Government on 27 June, the majority of which made provision falling within the legislative competence of the Senedd.
13. Those amendments were considered at Lords Committee Stage which commenced on 4 July and concluded on 26 October. All government amendments were moved and agreed apart from the amendment to add

a 'new clause 1' (which aimed to define 'Procurement' and 'covered procurement').

14. UK Government tabled further amendments for consideration at House of Lords Report Stage. Lord Report Stage commenced on 28 November and the amendments were tabled on two separate dates (i.e., 15 and 21 November).
15. These tabled amendments include a new clause 1 (defining 'Procurement' and 'covered procurement') which was initially considered in the [first set of amendments](#) but not moved.
16. The amendments tabled on 15 and 21 November, 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 outlines the changes to clause numbers following the amendments made at Lords Committee Stage.
17. My previous legislative consent memoranda 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. Some of these areas have been resolved, such as the disapplication power for healthcare services and the duty to have regard to the Wales Procurement Policy Statement (WPPS) enforceable in civil proceedings, while the following are still outstanding:
  - 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 when agreement has been achieved, it is expected that the outcome of those discussions will be reflected in the Procurement Bill.
  - 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. My officials are regularly meeting with UK Cabinet Office officials to resolve this issue. Discussions have been positive, and we are hopeful for a successful outcome.
  - Commencement Powers: The Bill (as amended in Grand Committee in the House of Lords) provides for Minister of the Crown only powers.

There was an initial commitment from UK Government to Welsh Ministers having commencement powers in the Bill. Discussions are continuing between officials on the powers.

- Powers to make consequential provision. The Bill (as amended in Grand Committee in the House of Lords) 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. My officials have asked for the power to be amended to concurrent plus powers and discussions are ongoing.

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

18. The amendments outlined in paragraphs 19.1 to 19.14, and 20.1 to 20.11 tabled to the Bill by the UK Government on 15 and 21 November for consideration at Lords Report Stage, are considered to be for a purpose within the legislative competence of the Senedd and are therefore “relevant provisions” for purposes of SO 29.

#### **19. Amendments tabled on 15 November**

##### **19.1. Definition of procurement (New Clause 1 and consequential amendments to clauses 10, 11, 13, 29, 30, 54, 65, 70, 76, 77, 78, 79, 83, 84, 89, 90, 92, 102, 104, 105, 106 and 115)**

A technical amendment to define “procurement” and “covered procurement” that causes many consequential amendments in the Bill. Adding these definitions differentiates between:

- covered procurement that is the mainstay of the full regime in the Bill; and
- other procurement not covered by the full regime set out in the Bill but still attracting some specific obligations, which may include sub-threshold procurement, some international agreement procurements and other matters.
- The consequential amendments remove the existing definition of “procurement”, clarify whether procurement in a specific clause is the defined term “procurement” or “covered procurement”, remove text that is unnecessary due to the new definitions, replace “award of contracts” with the defined term “procurement” and add the new defined terms to the list of defined expressions.

#### **19.2. Definition of contracting authority (Clause 1)**

The Bill incorrectly draws in some organisations which should fall outside the scope of the procurement regime. The amendment refines the definition of “contracting authority” to ensure relevant organisations are correctly brought within or are excluded from the scope of bodies which the procurement regime ought to apply to.

#### **19.3. Utilities Contracts (Clause 5(2))**

This amendment would ensure that a private utility is only a contracting authority in respect of the utility activities for which the utility has a special or exclusive right.

#### **19.4. VAT and value of concession contracts (Clause 114)**

The Bill requires contracting authorities to include any VAT payable as part of the amount ‘payable’ on contracts when calculating the value of a contract. This does not work when considering Concessions contracts where VAT must also be included on any amount ‘receivable’ as well as the amount payable. Concession contracts involve the right to exploit works or services provided and to receive the income from that exploitation. This amendment is necessary to ensure that VAT payable on such sums must be included in the valuation calculation.

#### **19.5. Procurement investigations (Clause 99)**

Clause 99 allows Welsh Ministers to undertake investigations of Welsh contracting authorities’ compliance with the provisions of the Bill and requires Welsh contracting authorities to have regard to statutory guidance provided following these investigations. This would apply the Senedd Commission in its capacity as a contracting authority. To resolve the constitutional impropriety of the Senedd Commission being subject to oversight by the Welsh Government, this amendment includes the Senedd Commission as a contracting authority which is not subject to procurement investigations.

#### **19.6. Exclusion grounds relating to insolvency and bankruptcy (Schedule 7)**

This amendment simplifies the exclusion grounds for suppliers which are insolvent or bankrupt. When reviewed, it became apparent that the ground relating to suppliers who are unable to pay their debts was unnecessary and would not work effectively for overseas suppliers and

certain non-company entities. The other exclusion grounds for suppliers which are in insolvency situations are sufficient to cover the risk in this area.

#### **19.7. Amendments to Schedules 6 and 7 to the Bill**

Schedule 6 – An amendment to paragraph 4 would ensure that additional relevant Scots common law offences are contained in the mandatory exclusion ground in paragraph 4. Amendments to ensure clarity that the offence of theft is covered under the mandatory exclusion ground in paragraphs 6 and 7 and an amendment to ensure that the new mandatory exclusion ground inserted in Committee (conspiracy to defraud) is reflected in paragraph 43(3).

Schedule 7 – These amendments would ensure that the discretionary exclusion ground in paragraph 13(4) (publishing of adverse information) is reflected in paragraph 16(3) and (4), so far as that ground is triggered by the publishing of information in relation to a breach of contract by a supplier.

#### **19.8. Sufficient information to prepare tenders (Clause 20)**

This amendment requires contracting authorities to provide sufficient information (in the tender notice or associated tender documents) to enable suppliers to prepare tenders, this must be provided prior to the tendering period starting. This closes a potential loophole which could allow the tendering period to start without this information having been provided.

#### **19.9. Definition of an educational institution (Clauses 63, 64, 65, 68, 79(2)(a), 114, 115)**

Maintained schools, academies, sixth form colleges and other educational establishments should be exempt from the rules in the Bill relating to sub-threshold contracts. As currently drafted, the Bill does not achieve this as it does not accurately identify all the types of contracting authorities which are to be carved out. These amendments ensure that these bodies do not face disproportionate administrative burdens.

#### **19.10. Thresholds for frameworks (Schedule 1)**

This amendment ensures that references in the financial thresholds tabled in Schedule 1 of the Bill include references to frameworks for the future award of contracts for goods, services or works.

#### **19.11. Exempted Contracts (Schedule 2)**

The changes made to paragraph 1 of Schedule 2 will mean that the amended paragraph 1(1) will read: “A contract is an exempted contract if it is (a) a contract of a kind listed in this Schedule, or (b) a framework for the future award of contracts only of a kind listed in this Schedule”. The effect of this amendment will be to ensure that a framework for the future award of contracts only of a kind listed in Schedule 2 is also an exempted contract.

#### **19.12. Mixed Procurement (Clause 9)**

These amendments provide legal clarity on the applicable obligations in situations where a mixed procurement contains two or more elements covered by the “special regimes” that apply to concessions, defence, light-touch and utilities contracts. As currently drafted, clause 9 only envisages the possibility of mixed regime contracts comprising an element covered by the full regime and an element covered by the special regime. Although we expect the occasions where mixed contracts involving multiple special regime elements will be rare, the absence of legal clarity is undesirable and potentially incompatible with our international agreement obligations, this amendment therefore resolves that.

#### **19.13. Dynamic markets: establishment (Clause 34)**

This amendment would ensure that documents establishing or modifying a dynamic market are not subject to any requirements applicable to contracts under the Bill, whether or not those contracts are public contracts as defined in clause 2.

#### **19.14. Transport (Schedule 4, para 4)**

This amendment would clarify that networks which are to be made available to the general public fall within this utility activity. A network is no longer defined. As currently drafted, the description of utility transport services in the Bill (i.e., rail, tram, bus, or other means) does not fully cover all utility transport providers, meaning they may in some instances be subject to more burdensome, mainstream provisions in the Bill when carrying out utility transport activities, rather than the more flexible utility provisions. This amendment to paragraph 4 of Schedule 4 to the Bill therefore clarifies the scope to ensure they have the flexible provisions intended.

## **20. Amendments tabled on 21 November**

### **20.1. Taking account of ‘small and medium sized enterprises’ (SMEs) (Clauses 11 and 92)**

The Bill as drafted does not explicitly require contracting authorities to take account of SMEs in the procurement process. The amendment to clause 11 would require a contracting authority, in carrying out a covered procurement, to have regard to the particular barriers to participation in public procurement that small and medium-sized enterprises may have, and whether they can be removed or reduced. A consequential amendment is also made to clause 92 which would mean that the duty to have regard to barriers facing SMEs inserted by the amendment to Clause 11 is not enforceable under Part 9.

### **20.2. Definition of SMEs and power to amend this definition (Clauses 113 and 114)**

Amendments to clause 114 (interpretation) will add a definition of “small and medium sized enterprises” (SMEs) and confer a power on an “appropriate authority” to make regulations changing the definition, including the power to amend this clause. This means that the Welsh Ministers will have equivalent powers to make regulations changing the definition in so far as it applies to the duties of Welsh contracting authorities under the amended clause 11 and the new clause after clause 80 (see below)

An amendment to clause 113 (regulations) will require the making of such regulations by the Welsh Ministers to be subject to the affirmative procedure in the Senedd.

### **20.3. Regulated below-threshold contracts: duty to consider small and medium-sized enterprises (New clause after clause 80)**

This new Clause would require a contracting authority, before inviting the submission of tenders for a regulated below-threshold contract (other than under a framework), to have regard to the particular barriers to competing for a contract that SMEs may have and remove or reduce them where possible. A consequential amendment is made to clause 100(3) which would mean that the duty in the new clause may not be the subject of a “section 100 recommendation” which are recommendations following a procurement investigation.

### **20.4. Procurers cannot require audited accounts from bidders except where they are already required under the Companies Act (Clauses 21, 35 and 43)**

These amendments remove an administrative barrier for new SMEs participating in procurements by ensuring contracting authorities can



only ask for audited accounts to test financial standing if businesses are already required to provide them under the Companies Act 2006. This will apply in procurements, the establishment of dynamic markets and the award of contracts under frameworks (and has necessitated a technical amendment to split clause 43 into two clauses).

**20.5. Procurers cannot require insurance relating to the performance of the contract to be in place prior to award (Clauses 21, 35 and 43)**

These amendments would avoid potentially wasted costs for SMEs by making explicit that contracting authorities must not require insurance levels relating to the performance of the contract to be in place prior to award. They will be able to accept confirmation from suppliers that required insurance levels will be in place if they are successful. This will apply in procurements, the establishment of dynamic markets and the award of contracts under frameworks (and has necessitated a technical amendment to split clause 43 into two clauses).

**20.6. Thresholds – Key performance indicators (Clause 49)**

Before entering into a public contract valued at more than £2 million, a contracting authority must set and publish at least three key performance indicators in respect of the contract. This amendment raises the threshold from £2 million to £5 million, thereby reducing the administrative burden on contracting authorities in publishing the data and on suppliers in agreeing the data for publication.

**20.7. Amendments relating to utilities:**

**• Standstill period for direct awards (Clause 48).**

This amendment will remove the requirement for a mandatory standstill period in relation to contracts awarded under clause 39 or 41 (direct award and switching to direct award) by a private utility, meaning that a private utility would not have to wait until the expiry of a standstill period before directly awarding a contract.

A voluntary standstill period may still be used to protect the procurement from post-contractual claims, but in some circumstances the risk of delaying the contract by having a standstill may be greater and this amendment allows private utilities to make a risk-based decision.

**• Qualifying utilities dynamic market notices: no duty to publish a tender notice (new clause after Clause 38)**

This amendment would remove a burden requiring utilities to publish tender notices for individual procurements run under utilities dynamic markets. Where the notice advertising the utilities dynamic market meets

certain criteria, tender notices will only be required to be provided to suppliers that are on the dynamic market (or an appropriate part of it).

**20.8. Conflicts of Interest – small amend to wording (Clause 78 (4))**

Clause 78(4) as amended in Committee exists to help contracting authorities consider apparent bias as both this and actual bias exist as possible grounds for judicial review. This amendment maintains the importance of considering the perception of others in relation to conflicts. However, it avoids authorities having to address all circumstances it is aware of which a reasonable person “might” consider a conflict. Instead, they need only address the circumstances that the authority considers are “likely” to cause a reasonable person to consider there to be a conflict.

**20.9. Amendments in response to the Delegated Powers and Regulatory Reform Committee (DPRRC):**

**• Financial threshold powers – affirmative procedure for the regulations made under Clauses 50, 65, 70, 81, and 86)**

The DPRRC objected to using the negative procedure to amend thresholds in six clauses (51, 65, 70, 78, 79 and 84 of the Bill as introduced – now clauses 50, 65, 70, 80, 81 and 86) to implement above-inflation increases. These amendments ensure that the affirmative procedure is used at every use rather than only where regulations would make an above-inflation increase to thresholds.

The amendments do not change the procedure applied to regulations under clause 80 (in the Bill as amended in Committee), as this clause relates to GPA thresholds and maintaining the position is consistent with the approach taken to GPA thresholds elsewhere in the Bill.

**• Exemption for utility activities exposed to competition (Clauses 5 and 113, schedules 4 and 11)**

Following concern from the DPRRC, this amendment removes the power in paragraph 7 of Schedule 4 to make regulations to determine how an exemption determination is to be made to exempt utility activities exposed to competition. This is replaced with a more transparent procedure whereby the power is instead for an appropriate authority to exempt such utility activities only by secondary legislation, using the affirmative procedure. The test to be met as to whether utility activities can be exempted will remain as originally set out at paragraph 7(2) of Schedule 4 (this test is now set out in clause 5); that is, there must be fair and effective competition in the relevant utility market and entry to that market must be unrestricted.

Schedule 4 is now divided into two parts; part 1 defines utility activities which will be subject to the Bill, and part 2 sets out activities which are not utility activities and therefore exempt from the Bill. These reflect the exemptions that were previously included at paragraph 8 of schedule 4, which has now been removed.

Clause 5 confers a power on “an appropriate authority” to make regulation amending Part 2. This means that Welsh Ministers have an equivalent power to make regulations. There are consequential amendments to clause 113 to provide that the affirmative procedure applies to the making of regulations under clause 5.

There are also amendments to schedule 11 (repeals and revocations) which would ensure that Commission Decisions in relation to existing exemptions are not repealed as they need to be retained for Scottish devolved authorities.

A new paragraph has been added to Schedule 2 (32A) which would ensure that exemptions to the scope of utilities contracts under Part 2 of Schedule 4 apply to exempt those contracts from the Bill where entered into by public authorities.

**• Power to exempt public passenger transport services (Schedule 2 paragraph 17)**

The Bill currently contains a power to exempt “public passenger transport services” of a kind to be specified in regulations. The DPRRC objected to this power and required the Government to fully justify or amend it to include detailed criteria to be used when determining any exemption. This amendment removes the power entirely and makes clear in the Bill the services to be exempt by reference to the meaning given by section 136(11) of the Railways Act 1993.

**• Power to exempt concession contracts for air service (Schedule 2, paragraph 34)**

The Bill currently contains a power to exempt concession contracts for air services provided by a “qualifying air carrier” to be specified in regulations. The DPRRC objected to this power and required the Government to fully justify or amend it. This amendment more clearly describes the exemption without the need for regulations.

**20.10. Transparency - duty on the Minister for the Cabinet Office to provide a freely accessible, central digital platform (Clause 88)**

To further improve transparency in public procurement, this amendment creates a duty on the Minister for the Cabinet Office to provide a freely accessible, central digital platform.

**20.11. Information relating to procurement (Clause 90)**

This amendment would remove an unnecessary power to establish and operate an online system, since it can be done using common law powers.

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

21. 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**

22. 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.
23. The proposed amendments will not levy any additional financial implications on Welsh Government or the wider Welsh Public Sector.

### **Conclusion**

24. 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.
25. 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 17 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**  
**6 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>

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Schedule 10	Single source defence contracts	Schedule 10
Schedule 11	Repeals and revocations	Schedule 11