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Y Gweinidog Cyllid a Llywodraeth Leol
Minister for Finance and Local Government



Llywodraeth Cymru
Welsh Government

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

cc. Mark Isherwood
Chair, Public Accounts and Public Administration Committee

08 February 2023

Dear Huw,

Thank you for your letter and the questions put forward by your Committee relating to the Procurement Bill Supplementary Legislative Consent Memoranda (Memorandum No. 3 and Memorandum No. 4). I am pleased to provide my response, which is attached at Annex 1.

I am copying this letter to the Chair of the Public Accounts and Public Administration Committee, who has also written to me and requested that they receive a copy of my response to you.

Yours sincerely,

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

Rebecca Evans AS/MS
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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. You state in the memoranda that you continue to have concerns with the Bill which need to be resolved before you could consider recommending consent. These matters are in respect of the power to add international agreements, the definition of Welsh Contracting Authorities, commencement powers, and powers to make consequential provision. Please could you:

- a. provide an update on the degree to which each of these matters have been resolved, if at all;**
- b. indicate whether, since Memorandum No. 3 and No. 4 have been laid, discussions on each of these matters have been held at Ministerial level, or at official level;**
- c. indicate whether you have escalated any of these disagreements to a dispute under the Dispute Avoidance and Resolution Process established by the review of intergovernmental relations, and if not, why not.**

The majority of the outstanding matters of concern you mention have now been satisfactorily resolved. An amendment to the definition of a Welsh Contracting Authority has been agreed and has been tabled for consideration at Commons Committee. This will make it clear that the Welsh rules apply to such authorities if they operate or exercise functions wholly or mainly in relation to Wales. The Cabinet Office has also agreed to our request to amend the powers to make consequential provision to concurrent plus powers, which means UK Government (UKG) Ministers will require the consent of the Welsh Ministers (WMs) when exercising this power in relation to devolved areas. An amendment has been tabled for consideration at Commons Committee. Both these matters were discussed and resolved at official level and were subject to Ministerial approval. Lastly, following both official and Ministerial level discussions, the Cabinet Office has tabled an amendment to the Bill to ensure a Minister of the Crown seeks the consent of the WMs before commencing the Bill's provisions in relation to the devolved Welsh aspects of the Bill.

The matters which are still outstanding relate to international trade. The first matter is that 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 WMs when UK Government (UKG) Ministers are exercising this power in relation to devolved areas. We have been clear with UK Government that this arrangement is not acceptable.

The second matter of concern relates to trade disputes and has arisen because of an amendment tabled by the UKG on 25 January 2023. The effect of the amendment is that it creates a concurrent power for a Minister of Crown to 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) with no requirement to obtain the consent of WMs when UKG Ministers are exercising this power in relation to devolved areas. We have been clear with UK Government that this arrangement is also not acceptable.

With regards to the international trade issues, detailed discussions have been held at Ministerial level and remain ongoing at official level.

We have maintained a good working relationship with UKG on the Procurement Bill and, so far, we have been able to reach agreed solutions without needing to rely on the Dispute Avoidance and Resolution Process set out in the inter-governmental agreement. It is not anticipated that it will be necessary to resolve the outstanding matters using the Process, however, should relationships breakdown in the future, we would look to escalate through the Inter-Ministerial Standing Committee in the first instance.

2. In Memorandum No. 3 you state that the concern you had with regard to a disapplication power for healthcare services, which you referred to in previous legislative consent memoranda, had been resolved. You stated in the first memorandum that the UK Government had committed to bring forward the required amendment. However, in Memorandum No. 2 you stated that the Welsh Ministers had decided not to pursue the inclusion of the power, but were considering various options, which may include taking forward the powers required via Senedd legislation. The Minister for Health and Social Services has recently informed the Health and Social Care Committee that the Welsh Government will introduce a Health Service Procurement (Wales) Bill to make provision for a “disapplication power” for Welsh health services procurement and a “creation power” to enable the Welsh Ministers to introduce a new separate procurement regime for NHS health services in Wales. The Minister states that the Welsh Government will propose an expedited timetable for the Bill. Please could you:

a. explain why the Welsh Government has changed its position on the inclusion of the disapplication power for healthcare within the Procurement Bill, considering a commitment to bring forward the relevant amendment was secured from the UK Government;

UK Government only committed to the disapplication power within the Procurement Bill. Ministers recognised that both powers were required to effect change and therefore there remained a need to legislate in Wales. Given this need to legislate, Welsh Ministers decided bringing forward a Bill that included both the disapplication and creation powers together provided the necessary legislation and gave greater coherence and accessibility to the legislation.

b. confirm whether the Welsh Government has assessed the impact of its decision on the accessibility of Welsh procurement law, and if an assessment has been undertaken, please set out the outcome of that assessment. For these purposes, it would appear to us that a Welsh contracting authority may have to consider the Procurement Bill and subordinate legislation to be made under it, the Health Service Procurement (Wales) Bill, the Social Partnership and Public Procurement (Wales) Bill and the Well-being of Future Generations (Wales) Act 2015;

The Welsh Government regularly assesses the accessibility implications of legislative proposals. This is a normal part of the Office of the Legislative Counsel’s remit and it is also taken into account when deciding whether the UK Parliament or Government should legislate on Wales’s behalf.

We do not consider it would be more accessible to use a single Act for the various provisions that relate to procurement.

The Social Partnership and Public Procurement (SPPP) Bill's provisions on procurement are essentially about social partnership and are a more accessible fit in an Act about social partnership (rather than in a Bill that is about public procurement procedures). This is designed to dovetail with the Well-being of Future Generation Act 2015, which sets out the wider organisational principles for public bodies in Wales. The social partnership principles involved are connected to the provisions about sustainable development, hence the need to refer to the 2015 Act.

The Health Services Procurement (Wales) (HSPW) Bill is a temporary legislative vehicle as its provisions are designed to amend existing legislation, specifically:

- the UK Procurement Act (by inserting a Welsh “disapplication power” immediately after a corresponding English disapplication power), and
- the NHS (Wales) Act 2006 (by inserting a “creation power”).

This is the most accessible approach because:

- once the HSPW Act has amended the UK Procurement Act and NHS (Wales) Act 2006, users will just read the two amended Acts - there will be no need to refer to the HSPW Act, its “work having been done”;
- the UK Procurement Act is the logical home for the disapplication power because it makes clear that health services are treated differently (and it will sit next to the corresponding English disapplication power);
- the NHS (Wales) Act 2006 is the logical home for the creation power, as the principal Act in Wales on health services (and similarly the corresponding English creation power is to be inserted into the equivalent piece of legislation applying in England, the National Health Service Act 2006).

c. confirm whether the Welsh Government had considered broadening the scope of the Health Service Procurement (Wales) Bill to include wider provisions relating to the processes underpinning procurement law in Wales, which would largely mirror those in the UK Government’s Procurement Bill, and seek provisions within the legislative competence of the Senedd to be removed from the Procurement Bill;

The Health Services Procurement (Wales) Bill (HSPWB) was conceived in response to the Department of Health and Social Care’s Health and Care Act 2022, which provides a legislative basis for establishing the Provider Selection Regime (PSR) that will govern the arrangement of healthcare services in England. The PSR will remove a limited range of healthcare services from the requirement to undertake a full procurement process. The HSPWB will establish a bespoke procurement regime for healthcare services in Wales which mirrors that provided for under the Health and Care Act, thereby creating an appropriate and effective framework for the procurement of healthcare services on a level playing field in England and Wales.

The aim of the PSR is to encourage flexibility and move away from the expectation of competition in some circumstances. The HSPWB will only apply to certain healthcare

services and means that contracts for those services would not need to be procured in accordance with the Procurement Act.

There are benefits of joining UKG's Procurement Bill including ensuring that there will be continuity for suppliers and cross-border businesses. It's unlikely Ministers would be able to completely replicate the cross-border provisions in a Senedd Bill as taking forward our own Bill would likely affect our ability to use the central platform and could lead to different procurement processes to England. The joint approach also means that these reforms can be enacted in Wales sooner than would otherwise have been possible.

d. indicate whether you believe legislating on procurement law via three bills introduced in different legislatures in close succession to each other follows a logical approach to legislating; and whether you will undertake an internal review of the approach taken to inform future practice.

The Social Partnership and Public Procurement Bill is currently being considered by the Senedd. This Bill provides a policy and outcome framework to improve public services in Wales, through social partnership working, promoting fair work and socially responsible public procurement. The UK Government is proposing to introduce a new procurement regime through its Procurement Bill that will make provision for the process of procuring generic 'goods, services and works'. The provisions in the Health Services Procurement (Wales) Bill are different in that they relate to the operational process of procuring health services in Wales and the Bill has been brought forward in response to procurement reforms being progressed for health services in England by the Department of Health and Social Services under their proposed Provider Selection Regime. Careful consideration will be given to ensure implementation plans understand the wider context.

I do not consider an internal review would be appropriate or beneficial, as my officials have worked with colleagues across the organisation to ensure there is maximum alignment as each of these three Bills has developed. I am confident that the approach taken provides certainty and clarity for buyers and suppliers across Wales and will establish an effective and efficient regime for procurement that maximises opportunities to deliver social, environmental, economic and cultural outcomes for Wales.

3. Clause 50 of the Bill (Contract details notices and publication of contracts), as referenced in both memoranda, includes a regulation-making power for the Welsh Ministers subject to the negative procedure. However, by virtue of an amendment, the corresponding power to Ministers of the Crown is subject to the affirmative procedure. Please could you provide an overview of any discussions you are having to seek to amend the power for the Welsh Ministers to also be subject to the affirmative procedure.

This clause is now clause 53 in the version of the Bill as brought from the Lords.

There is no regulation making power for the Welsh Ministers under this clause and therefore no question arises as to the applicable procedure.

- 4. Clause 88 of the Bill (Notices, documents and information: regulations and online system), as referenced in Memorandum No. 3, provides that a Minister of the Crown must make arrangements to establish and operate an online system for the purpose of publishing notices, documents and other information under the Bill. There are Welsh online systems which may have some of the same functionality. Please could you clarify how these systems may interact, or whether the new system to be established by a Minister of the Crown will replace any existing systems, and could you indicate if you are seeking amendments to provide the Welsh Ministers with an equivalent power.**

Sell2Wales will be used to publish procurement lifecycle notices produced by Welsh Contracting Authorities under the secondary legislation that will come into effect in Wales as a result of the Bill. Sell2Wales will then 'push' the relevant procurement lifecycle notices into the new UK online system established by the Minister of the Crown. This is the same way as Sell2Wales notice data is currently pushed into the UKGs existing Find a Tender Service. This will enable Wales to meet transparency requirements set out in the Bill and ensure compliance with obligations under international trade agreements which require all UK's procurements above certain thresholds to be advertised in a single place. The new UK online system will not replace the need for existing Welsh platforms which will be updated to support the new procurement lifecycle notices. Officials are working to ensure that the systems integrate as seamlessly as possible.

The Bill provides Welsh Ministers with an equivalent power to determine the "form and content of notices, documents or other information to be published". The approach that has been outlined enables Wales to collect additional procurement lifecycle notice information within Sell2Wales. We will not therefore be seeking an amendment to provide Welsh Ministers with an equivalent power to make arrangements to establish and operate an online system for the purpose of publishing notices, documents and other information under the Bill.

- 5. You consider clause 12 and 80 of the Bill to be within the legislative competence of the Senedd. However, these provisions do not apply to devolved Welsh procurement arrangements. Additionally, devolved Welsh authorities (within the meaning of section 157A of the Government of Wales Act 2006) are not required to have regard to the national procurement policy statement under clause 12 and are not subject to clause 80, except in relation to procurement under a reserved procurement arrangement. Please could you clarify why you believe these clauses require consent.**

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.