



Law Society  
of Scotland

# Procurement Bill

Law Society of Scotland – briefing for Second  
Reading

June 2022



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We previously responded to the UK Government's Green Paper: *Transforming public procurement* in March 2021<sup>1</sup>.

We now welcome the opportunity to consider and provide comment on the Procurement Bill<sup>2</sup> (the Bill) ahead of the Bill's Committee Stage in the House of Lords commencing 4 July 2022.

## General remarks

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The objective of the Bill is to reform the United Kingdom's public procurement regime following the UK's exit from the European Union.

The Bill was announced in the Queen's Speech in May 2022, and the Bill will give effect to the policies that were set out in the UK Government's Green Paper 'Transforming Public Procurement'<sup>3</sup> and the Government response to the consultation which was published in December 2021.

The reforms in the Bill are guided by the "principles of public procurement" which were presented in the Green Paper of value for money, public good, transparency, integrity, equal treatment, and non-discrimination.

The Bill seeks to streamline new procedures for public bodies and suppliers to save time and to improve commercial outcome with the benefit of delivering value for money for taxpayers.

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<sup>1</sup> [21-03-10-comp-green-paper-on-procurement.pdf \(lawscot.org.uk\)](https://www.lawscot.org.uk/21-03-10-comp-green-paper-on-procurement.pdf)

<sup>2</sup> [newbook.book \(parliament.uk\)](https://newbook.book.parliament.uk)

<sup>3</sup> [Green Paper: Transforming public procurement - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement)

The Bill introduces several sector specific features, including specific rules for defence and public procurement. Furthermore, the Bill will amend Part 2 of the Defence Reform Act 2014 (this regulates single source contracts for defence purposes).

The Bill will revoke existing statutory instruments which derive from EU directives. The revoked legislation is:

- The Public Contracts Regulations 2015
- The Defence and Security Public Contract Regulations 2011
- The Concessions Contracts Regulations 2016
- The Utilities Contracts Regulations 2016

The purpose of the Bill is two-fold, firstly by reforming the UK's public procurement regime, following the UK's exit from the EU, to create a simpler and more transparent system that better meets the country's needs, rather than being based on transposed EU directives. Furthermore, the Bill seeks to boost business by making public procurement more accessible for new entrants such as small businesses and voluntary, charitable, and social enterprises, enabling them to compete for public contracts.

In terms of the scope of the Bill from a Scottish perspective, the law relating to public procurement is a matter of devolved competence. Contracting authorities in Scotland must adhere to the Scottish specific procurement regulations and the Procurement Reform (Scotland) Act 2014 when tendering for public contracts. However, the Bill is important for Scottish suppliers who may tender for public contracts across the UK, including Scottish law firms tendering for legal services work from UK central and local government.

As procurement is a devolved matter in Scotland, the Bill will not directly affect the Regulations transposed into Scots law from the EU Directives, namely the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016, and the Concession Contracts (Scotland) Regulations 2016. Notwithstanding this, UK contracting authorities with reserved functions are subject to the "UK rules", and the Defence and Security Public Contracts Regulations 2011 are UK-wide, and it is important that the Bill does not lead to confusion in the UK for parties given that different rules will apply in the UK market.

In addition, we wish to highlight the importance of respecting the devolution settlement, whereby all matters not reserved under Schedule 5 of the Scotland Act 1998 are within the legislative competence of the Scottish Parliament. Under section 28(7) of the Scotland Act 1998, the UK Parliament has the power to make laws for Scotland. The exercise of this power is subject to "the Legislative Consent" or "Sewel" convention, being that the UK Parliament will not normally legislate on a devolved matter without the consent of the Scottish Parliament as set out in section 28(8) of the Scotland Act 1998.

## Comments on the Bill

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The Bill is divided into thirteen parts and has eleven schedules.

### Part 1 and Schedules 1, 2, 3 & 4

This Part contains the key definitions in the Bill.

We note that clause 5 reintroduces the "purpose" test for a contract to constitute a utility contract, previously contained in the 2012 Regulations but not the 2016 Regulations, under which a contract will only be a utilities contract if the goods, services, or works are mainly for the purpose of a utility activity (rather than "relate to" a utility activity). That may lead to a return to the pre-2016 view where the courts were required to consider whether or not a given good, service or work was required for the purposes of the utility activity. We offer no view on that one way or the other but would note that it will lead to a divergence with the position in Scotland.

### Part 2

This Part contains the principles and objectives of the Bill, including setting out the national procurement policy statement.

We note that clause 11(1)(c) imposes a similar level of duty to "have regard to the importance of...sharing information". This appears to mark a significant departure from the existing duty of contracting authorities to be transparent, and it is not clear why that overarching obligation has been removed. Although we are conscious of specific positive obligations elsewhere in the Bill, this may make it much easier for contracting authorities to act in a more opaque manner than at present, which is likely to make it easier in turn for them to breach more substantive duties without this being discovered.

#### **Our suggested amendments:**

Clause 11, page 8, line 38 - Leave out sub-section (d)

Similarly clause 11(1)(d) imposes a duty to "have regard to the importance of...acting...with integrity". It is not clear why it is seen as appropriate that a contracting authority should not have a duty to act with integrity, which is clearly a more substantive obligation than a duty to have regard to the importance of doing so. We therefore suggest that this duty be amended.

#### **Our suggested amendments:**

Clause 11, page 8, line 38 - "( ) In carrying out a procurement, a contracting authority must act, with integrity."

## Part 3 and Schedule 5, 6 (Parts 1-3), 7 & 8

This Part concerns the award of public contracts and procedures.

Chapter 1 sets out the requirements of the preliminary steps and Chapter 2 concerns the Competitive award in terms of a procurement as well as the exclusions and modifications, as well as setting out the circumstances of the award of contract by reference to dynamic markets.

Clause 22 concerns award criteria, which means criteria against which tenders may be assessed for the purpose of awarding a public contract (under clause 18 - award following competitive procedure). We consider that it may be appropriate to impose an obligation on contracting authorities to include award criteria concerning the environmental impact of the contract unless the contracting authority considers that to do so would breach the conditions set out in clause 22(2). At the very least information on a bidder's environmental credentials could be sought as part of the standard supplier registration questionnaire.

### **Our suggested amendment:**

Clause 22, page 15, line 18 “- ( ) take account of the environmental impact of the award, and ”

Chapter 3 concerns direct awards and Chapter 4 concerns frameworks. We have no comments.

Chapter 5 sets out the after award, standstill periods and notices. We note that the mandatory standstill period now begins with publication of the contract award notice and not, as under the present regulations, with the provision of a notice to the unsuccessful tenderer(s). Moreover, whilst a longer standstill period can be provided, this can apparently only be done in the contract award notice and not by notice to a bidder. This will affect the existing flexibility of a contracting authority to unilaterally agree to a standstill extension.

Chapter 6 concerns the general provisions about award and procedures. We welcome the creation of a central debarment list as providing greater transparency and predictability. That said, we await sight of the proposed regulations under clause 61 providing for appeals, and we would anticipate that this would be on a full merits review basis rather than a judicial review standard.

## Part 4

Part 4 of the Bill sets out the management of public contracts, including the terms implied into public contracts, notices about payments and performance along with sub-contracting, modifying contracts and terminating public contracts.

We welcome the greater clarity that clause 69(3) would provide in respect of what constitutes a substantial modification. The wording of the present regulation (which does not define a "substantial modification" but rather provides for certain modifications that "must be considered substantial") lacks clarity as to whether or not the list that follows is exhaustive.

## Part 5

Part 5 of the Bill concerns conflicts of interest, including the duty to identify and the duty to mitigate. We have no comments.

## Part 6

Part 6 of the Bill concerns below-threshold contracts. We have no comments.

## Part 7 & Schedule 9

Part 7 of the Bill concerns the implementation of international obligations, including Treaty state suppliers: non-discrimination (clause 82) and Treaty state suppliers: non-discrimination in Scotland (clause 83).

Clause 83 provides a power for a Minister of the Crown or the Scottish Ministers to make regulations for the purpose of ensuring that treaty state suppliers are not discriminated against in the carrying out of devolved procurements. We note that under Schedule 5, paragraph 7(1) of the Scotland Act 1998, international relations are a reserved matter. However, paragraph 7(2) makes clear that observing and implementing international obligations are not reserved matters. Removing the provision under clause 83(1) for a Minister of the Crown to make such regulations ensures compliance with the provisions of the Scotland Act.

### **Our suggested amendment:**

Clause 83, page 54, line 3 - Leave out "A Minister of the Crown or"

## Part 8

Part 8 of the Bill sets out the Information and Notices General Provisions. We have no comments.

## Part 9

Part 9 of the Bill sets out the remedies for breach of statutory duty, including the interim remedies (clause 91), and the pre-contractual remedies (clause 92) and post-contractual remedies (clause 93).

Clause 90 provides that the automatic suspension will only apply where proceedings are commenced before the end of any applicable standstill period. We refer to our comments above in respect of standstill

periods, and in particular note that this will prevent the extension of standstill by agreement between the parties. The effect of this will be to force more challengers to bring court proceedings simply in order to protect their position and prevent the award of the contract pending the receipt of further information, at significant expense to both parties. We would recommend that the present approach, under which the standstill takes effect provided the contract has not yet been entered into, be adopted by this Bill.

We welcome the conferral of jurisdiction in respect of UK-wide procurements on the Court of Session under clause 89. Consideration may be given to further clarity on when a procurement will be subject to that jurisdiction (or the jurisdiction of the courts of England and Wales, or of Northern Ireland) under the Bill.

## **Part 10**

Part 10 of the Bill sets out the procurement oversight, including procurement investigations (clause 96), recommendations following procurement investigations (clause 97) and guidance following procurement investigations (clause 98). We have no comments.

## **Part 11**

Part 11 of the Bill concerns appropriate authorities and cross-border procurement.

In respect of clause 103, we note that the Government has lodged amendments for consideration at Committee Stage. The Scottish Government has prepared a Legislative Consent Memorandum<sup>4</sup> on the Bill in which the Scottish Government highlights a number of concerns with this clause. We will consider the Bill in light of these amendments in due course.

## **Part 12 & Schedules 10 & 11**

Part 12 of the Bill concerns amendments and repeals. We have no comments.

## **Part 13**

Part 13 of the Bill concerns general provisions. We have no comments.

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<sup>4</sup> [legislative consent memorandum \(parliament.scot\)](https://www.parliament.scot/legislative-consent-memorandum)



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