

# *Procurement Bill – Impacts in Scotland*

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# The Procurement Bill 2022

- How will the UK Procurement Bill interact with the Scottish regulations?
- How will market practice change for Scottish contracting authorities?

# Current Position

- Procurement of goods, services and works by public bodies and some utilities is an area of law previously governed by EU Directives
- Directive 2014/24/EU was implemented in Scotland by The Public Contracts (Scotland) Regulations 2015
- Regulation 1(7) – “These Regulations extend to Scotland only.”
- Schedule 1 – Central Government Authorities – long list of bodies list in GPA Annex 1 including multiple UK central government departments and agencies
- No reference to devolved functions
- Primary rules in Scotland extend to all contracting authorities operating within Scotland, apparently regardless of whether carrying out devolved or reserved functions

# Current Position

- Position under Procurement Reform (Scotland) Act 2014 is distinct
- Contracting authorities are defined for the purposes of this Act as being contracting authorities whose functions:
  - are exercisable in or as regards Scotland, and
  - do not relate to reserved matters within the meaning of the Scotland Act 1998 .
- There is a Scotland-specific list in the Schedule to the Act

# Current Position

- The issue of cross-border procurements
- No specific statutory provisions
- The rule used in various other scenarios in procurement law including to decide which rules apply to "mixed" contracts (e.g. works and services contracts, utilities and public contracts) is which element forms the main subject of the contract determined by value
- Current legislation was implemented in 2015 under the concordat between the four administrations of the UK which dealing with the implementation of EU legislation

# Current Position

- Cross-border procurements – possible relevant considerations
  - the place where the bulk of the work is being carried out;
  - registered office and domicile of contracting authority / utility;
  - location of the part of the contracting authority / utility that is carrying out the procurement;
  - whether the procurement relates to a devolved function and/or is funded by a devolved government
  - the terms of any agreement between the contracting authority / utility and the relevant UK or devolved government departments.
  
- In practice, this has not been a significant issue

# Current Position

- Common Framework for Public Procurement Updated Provisional Framework Agreement (January 2022)
  - *“There was considerable flexibility within the rules for different parts of the UK to transpose Directives differently. However, Parties have not diverged significantly when transposing the Directives.”*
  - *“Each of the Parties will continue to develop and publish their own policies for procurement, and the Common Framework provides the vehicle to discuss those policies. The Parties will ensure that they give full and proper consideration to each other’s views and will endeavour to achieve consensus in areas of mutual interest without prejudice to the respective competence of each of the Parties.”*

# Procurement Bill - the proposed position

- Procurement Bill repeals Public Contracts Regulations, Utilities Contracts Regulations and Concessions Contracts Regulations, but ostensibly leaves the Scottish equivalent legislation intact
- Other than one provision relating to defence, the current Public Contracts Regulations 2015 “*do not extend to Scotland*”
- However, Clause 117 makes clear that the Procurement Bill will apply throughout the UK
- Clause 1(5) has a definition of “excluded authorities” which includes “devolved Scottish authorities”

# Procurement Bill - the proposed position

- Clause 1(6) provides that an authority is a “devolved Scottish authority” if its functions are exercisable only in or as regards Scotland, and
  - (a) none of its functions relate to reserved matters, or
  - (b) some of its functions relate to reserved matters and some do not.
- Clause 1(7) - a contracting authority that is a public undertaking or private utility is to be treated as a devolved Scottish authority for the purposes of this Act if it operates only in or as regards Scotland, and
  - (a) none of its activities relate to reserved matters, or
  - (b) some of its activities relate to reserved matters and some do not.

# What does the proposed position mean?

- This represents a change from the current position
- The Bill will regulate the procurement activities of reserved and cross-border contracting authorities operating in Scotland – at present some of these procurement activities will be subject to the Public Contracts (Scotland) Regulations 2015
- The Bill would seem to impact on cross-border procurements with assumption that the Bill will apply
- Clause 106 contains certain powers for a Minister of the Crown to make regulations in relation to matters including currently devolved procurement matters

# Market Practice / Practical Implications

- Use of cross-border frameworks and DPS?
- Approach to resolving difficulties
- Will Scottish Government adopt any approaches in the Bill?
- Market effects / impact on tendering?

# Conclusions

- This is partly to do with procurement law *per se* but is also very much about the post-Brexit allocation of competencies regarding matters which were formerly governed by EU law
- Should be seen in wider context e.g. United Kingdom Internal Market Act 2020
- In practice will lead to the Procurement Bill applying in some circumstances where Public Contracts (Scotland) Regulations 2015 would previously have applied
- The same is true of utilities and concessions spheres
- Indirect impacts on procurement practice in Scotland currently difficult to discern

# Thank you



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