PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

PROCUREMENT BILL [*LORDS*]

Eighth Sitting

Thursday 9 February 2023

(Afternoon)

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Monday 13 February 2023

The Committee consisted of the following Members:

Chairs: Clive Efford, † David Mundell

† Bhatti, Saqib *(Meriden)* (Con)
† Blackman, Kirsty *(Aberdeen North)* (SNP)
† Burghart, Alex *(Parliamentary Secretary, Cabinet Office)*
Clarke-Smith, Brendan *(Bassetlaw)* (Con)
† Duguid, David *(Banff and Buchan)* (Con)
† Eshalomi, Florence *(Vauxhall)* (Lab/Co-op)
† Evans, Chris *(Islwyn)* (Lab/Co-op)
Fletcher, Nick *(Don Valley)* (Con)
† French, Mr Louie *(Old Bexley and Sidcup)* (Con)
† Gibson, Peter *(Darlington)* (Con)
† Greenwood, Lilian *(Nottingham South)* (Lab)
Jones, Gerald *(Merthyr Tydfil and Rhymney)* (Lab)
† Marson, Julie *(Hertford and Stortford)* (Con)
† Randall, Tom *(Gedling)* (Con)
Russell-Moyle, Lloyd *(Brighton, Kemptown)* (Lab/Co-op)
Tracey, Craig *(North Warwickshire)* (Con)
Whitley, Mick *(Birkenhead)* (Lab)

Sarah Thatcher, Huw Yardley, Christopher Watson, *Committee Clerks*

† attended the Committee

Public Bill Committee

Thursday 9 February 2023

(Afternoon)

[David Mundell *in the Chair*]

Procurement Bill [*Lords*]

2 pm

Clause 107

Welsh Ministers: restrictions on the exercise of powers

The Parliamentary Secretary, Cabinet Office (Alex Burghart): I beg to move amendment 66, in clause 107, page 70, line 3, leave out "only" and insert "wholly or mainly".

This amendment would mean that a public undertaking or private utility that operates "wholly or mainly in relation to Wales" will be treated as a devolved Welsh authority.

The Chair: With this it will be convenient to discuss the following:

Government amendment 67.

Clause stand part.

Clause 108 stand part.

Government amendment 68.

Clauses 109 and 110 stand part.

Government amendments 70 to 73.

Clause 111 stand part.

Alex Burghart: It is a pleasure to open this afternoon's proceedings with this substantial grouping. I will begin with amendments 66 and 67. The Bill provides Welsh Ministers with various powers, and clause 107 sets out the parameters for their exercise by specifying the bodies that Welsh Ministers may regulate. Welsh Ministers may exercise powers under the Bill only in relation to devolved Welsh authorities and procurements covered

"under a devolved Welsh procurement arrangement."

The Bill adopts the definition of a "devolved Welsh authority" found in section 157A of the Government of Wales Act 2006 and extends it, for the purposes of the Bill, to include certain public undertakings and private utilities, and other contracting authorities that ought reasonably to be regulated by Welsh Ministers for pragmatic reasons.

As the Bill was introduced, we recognised that the competence was ill-defined with respect to Welsh contracting authorities, and that it would have the effect of requiring devolved contracting authorities that operate principally in Wales but have some operations in England to follow two sets of rules. We have been working closely with the Welsh Government to include a pragmatic approach to the definition in the Bill. As such, we have agreed with the Welsh Government to include in their competence, for the purposes of the Bill, any contracting authority that is a private entity or utility that operates

"wholly or mainly in relation to Wales"

and whose activities

"do not relate to reserved matters".

For example, Welsh Water, a not-for-profit private company providing water services in Wales, would fall into that category.

Finally, we have also agreed to extend Welsh Ministers' competence in relation to a contracting authority that is not a devolved body for the purposes of the 2006 Act, but the functions of which are exercisable "wholly or mainly" in Wales and, wholly or mainly,

"do not relate to reserved matters".

I am pleased to introduce the amendments and recognise that this is a pragmatic solution for many public bodies who operate, for example, in Herefordshire and across the border in Powys.

Turning to amendment 68, clause 109, which we will cover in a moment, establishes that

"A Minister of the Crown may exercise a power under this Act for the purpose of regulating a contracting authority that is a devolved Welsh authority only in relation"

to certain areas. The Welsh Government raised concerns that, as drafted, clause 121 would give an appropriate authority—in this instance defined as a Minister of the Crown—the power to

"by regulations make supplementary, incidental or consequential provision in connection with any provision of this Act."

The provision set out in clause 121 is used to amend other legislation, where necessary, to ensure the functioning of the Bill, and it is right that Welsh Ministers should be able to agree to any subsequent amendment to legislation within their competence. I am pleased to change this so that any power for Ministers of the Crown to make consequential provision requires consent. That respects the devolved competence of procurement and makes practical sense for the Bill. I thank Welsh Government officials and Ministers for working closely to agree these important amendments.

As we have discussed, clause 107 sets out the parameters for the exercise of powers provided to Welsh Ministers by specifying the bodies that they may regulate. The Bill provides a Northern Ireland Department with various powers, and clause 108 sets out the parameters for their exercise by specifying the bodies that a Northern Ireland Department may regulate. A Northern Ireland Department may exercise powers under the Bill only in relation to "transferred Northern Ireland authorities", as defined in the Bill, and any

"procurement under a transferred Northern Ireland procurement arrangement."

For example, the Northern Ireland Department sets up a framework for services that could be used by UK or Welsh contracting authorities.

The starting point of the competence of Northern Ireland Departments is that conferred on them by the Northern Ireland Act 1998, which is that they are competent in respect of a public authority whose functions are exercisable only

"in or as regards Northern Ireland"

and are wholly or mainly transferred functions—that is, neither reserved nor excepted.

In addition, we have agreed with the Northern Irish Government to include within their competence, for the purposes of the Bill, any public or private utility that operates only in, or as regards, Northern Ireland and whose activities do not relate to reserved matters. For

example, Northern Ireland Water Ltd, a company providing water services in Northern Ireland, would fall within that category.

Clause 109 sets out certain restrictions on how a Minister of the Crown may exercise powers created by the Bill, taking into account that public procurement is largely a devolved matter in Wales and Northern Ireland and that, as such, certain functions fall within the regulatory ambit of Welsh Ministers or a Northern Ireland Department. The clause sets out how, where two bodies can both exercise powers, those concurrent powers are to be exercised.

The clause establishes that a Minister of the Crown may exercise a power under the Bill for the purpose of regulating a devolved Welsh authority only in relation to procurement under a reserved procurement arrangement or transferred Northern Ireland procurement arrangement. In respect of Wales, this means that if a Welsh devolved authority uses a framework or dynamic market established by a reserved body such as the Crown Commercial Service, it must do so in accordance with reserved rules. That means, for example, that they must have regard to any national procurement policy statement issued by a Minister of the Crown, rather than a policy statement issued by Welsh Ministers.

That restriction, however, does not extend to clause 66 on electronic invoicing or to clause 106 on the issuing of guidance following a procurement investigation. Instead, these powers, and the powers in clause 121 on consequential provision, can be exercised in respect of devolved Welsh procurement only with the consent of Welsh Ministers. No such consent is required if the regulations or guidance relate to a devolved Welsh authority's participation in a reserved or a Northern Ireland procurement arrangement.

Clause 109 also establishes that a Minister of the Crown may exercise a power under the Bill for the purpose of regulating a transferred Northern Ireland authority only with the consent of a Northern Ireland Department, unless the regulations relate to procurement under a reserved or a devolved Welsh procurement arrangement authority. As in the Welsh example, this means that, if a transferred Northern Ireland authority procures via a reserved framework or dynamic market, for example, it must follow regulations made by a Minister of the Crown. Similarly to the position on devolved Welsh procurement, a Minister of the Crown may not publish guidance under clause 106 that would regulate a Northern Ireland Department without consent, unless the guidance relates to reserved procurement or devolved Welsh procurement.

Finally, clause 109 provides that the restrictions on the powers of a Minister of the Crown in respect of devolved Welsh procurement and transferred Northern Ireland procurement do not apply in relation to certain named powers, including the powers to update schedule 9 to the Bill to ensure the application of new or amended free trade agreements and to ensure their implementation in respect of devolved Scottish procurement, and the power to make provision to allow the UK to respond to trade disputes.

Clause 110 defines the different types of "procurement arrangement" referred to in the Bill. The term is used primarily in clause 111, which provides powers to ensure that all UK bodies, devolved and reserved, can continue to work with one another and across the UK's internal borders when undertaking procurements under one another's procurement arrangements.

I turn to amendments 70 to 73. As the Committee is aware, procurement is a devolved matter, and Scotland already has its own procurement rules. Hon. Members may not be aware that Scottish devolved bodies are presently able to access commercial deals set up in the rest of the UK, and vice versa. Therefore, to enable devolved Scottish bodies to continue to use commercial tools such as frameworks established under the new regime, and to provide access for reserved contracting authorities to Scottish frameworks, the Scottish procurement regulations will need to be amended. As the Bill is drafted, a Minister of the Crown, as well as Scottish Ministers, can amend Scottish regulations for that purpose.

For context, having the power for a Minister of the Crown to amend Scottish regulation was a contingency power, should we be unable to agree with the Scottish Government on how the Bill would be implemented. I am pleased to say that we have an agreement in principle on how to proceed, subject to the normal parliamentary arrangements in both Parliaments, and there is therefore no requirement for the UK Government to be able to amend the Scottish procurement regulations. We are therefore amending the Bill to remove that power for Ministers of the Crown.

At the same time, the UK Government will lay regulations to ensure that devolved Scottish contracting authorities can access frameworks and other commercial tools established under the new regime. When that happens, it will be necessary for Scottish Ministers to disapply their regulations, as they have agreed to do. We propose amending clause 111 to ensure that they can do so and expanding it slightly to ensure that the power covers all Scottish procurement rules.

Clause 111 therefore sets out a series of regulation-making powers that will be used to ensure that procurement bodies across the UK can continue to work with one another and across the UK's internal borders when undertaking procurements. First, the clause provides powers for a Minister of the Crown to regulate procurements by devolved Scottish authorities under purchasing arrangements set up by reserved authorities or by devolved Welsh or Northern Ireland authorities. That will ensure that devolved Scottish authorities can make use of frameworks and dynamic markets established by other UK authorities, benefit from procurements undertaken by centralised procurement authorities, and jointly procure with other UK authorities acting as the lead authority. In those circumstances, devolved Scottish authorities will be required to follow certain rules in the Bill, details of which will be set out in secondary legislation.

The clause also provides powers for a Minister of the Crown to disapply the Bill's provisions for reserved authorities, devolved Welsh authorities and devolved Northern Ireland authorities when they are procuring under purchasing arrangements established by devolved Scottish authorities. That will allow those authorities to benefit from arrangements put in place under the Scottish regulations and to undertake joint procurement with devolved Scottish authorities acting as the lead authority.

The clause also creates new powers giving Scottish Ministers the competence to amend Scottish procurement legislation to apply it to reserved authorities subject to the Bill when procuring under purchasing arrangements established by devolved Scottish authorities. Scottish Ministers are also given a power to disapply devolved

[Alex Burghart]

procurement regulations where a devolved Scottish contracting authority procures using commercial tools set up under the Bill. That arrangement was reached after lengthy consultation with the Scottish Government, and I am delighted to say that they are pleased with the results.

Florence Eshalomi (Vauxhall) (Lab/Co-op): I thank the Minister for outlining the discussions with Scottish and Welsh colleagues. As he said, clauses 107 to 110 set out the devolutionary roles and responsibilities of the Welsh, Northern Irish and UK Ministers. Although Wales and Northern Ireland have opted to be part of this procurement system, they will still keep the appropriate regulatory powers within the Bill.

I will not repeat the excellent speech from my Front-Bench colleague, my hon. Friend the Member for Islwyn, on clause 14—it is fair to say that he has had more exposure to Welsh procurement than I have. However, we Labour Members are very proud of our colleagues in Wales and their strong record on procurement.

We are pleased that the Welsh and Northern Irish Governments are adopting the Bill. As my hon. Friend mentioned on clause 14, this is about respect for devolution and for the will of the people of Wales and Northern Ireland. These clauses are about enshrining that respect into law, ensuring that all authorities under the Bill discharge their powers in the right and appropriate manner, and giving everyone involved the flexibility to set the system that their people want. As such, and following the Minister's remarks, we do not find the clauses disagreeable and will not oppose them.

Lastly, amendments 66 to 68 and 70 to 73 make minor tweaks to the balance of this part of the Bill. Again, we feel that the amendments are fine and are not disagreeable, so we will not oppose them.

Amendment 66 agreed to.

Amendment made: 67, in clause 107, page 70, line 12, leave out paragraph (b)—*(Alex Burghart.)*

This amendment would mean that a contracting authority whose functions are exercisable "wholly or mainly in relation to Wales" will be treated as a devolved Welsh authority regardless of the subject-matter of a particular procurement.

Alex Burghart: I beg to move amendment 113, in clause 107, page 70, line 14, after "section" insert "and section 123 (commencement)".

This amendment is consequential on Amendment 115.

The Chair: With this it will be convenient to discuss Government amendments 114 and 115.

Alex Burghart: Amendment 115, on commencement powers, will amend clause 123 and require consequential amendments to clause 107. The amendment will make the commencement of devolved Welsh aspects of the Bill subject to the consent of the Welsh Ministers, and allow UK Ministers to amend the Act resulting from the Bill so that it no longer applies in respect of devolved Welsh procurement and could be commenced without consent in respect of procurement in England and Northern Ireland, and all reserved procurement, including that in Wales.

Amendments 113 and 114 are consequential amendments that amend clause 107, which we have discussed already.

2.15 pm

Clause 123, on commencement, currently establishes that a Minister of the Crown may exercise a power under this Act for the purpose of making regulations for the commencement of the regime. As we have discussed, the Welsh Government have decided to join the UK's Bill. We are delighted by that, because we genuinely see a benefit in creating a streamlined regime for businesses that supply public services in England, Wales and Northern Ireland.

As previously drafted, a Minister of the Crown would have sole control over commencing the whole regime, including that of devolved Welsh authorities, which we know are under Welsh devolved competence and in respect of which we have extended Welsh Ministers' competence beyond that set out in the Government of Wales Act 2006. To rectify that, amendment 115 requires that a Minister of the Crown obtains consent from Welsh Ministers prior to making commencement regulations in respect of devolved Welsh procurement. I fully anticipate, due to our collaborative and close working, that this will be granted.

I am also responsible, however, for making sure that the new procurement regime is implemented effectively elsewhere, including for reserved bodies. I have therefore included a mechanism whereby, in the unlikely event that consent to commence the regime is not received from Welsh Ministers—for example, if it is unduly delayed—the regime can still be commenced in England and Northern Ireland and for reserved bodies in Wales. Reserved bodies are those that spend reserved funding, such as the Driver and Vehicle Licensing Agency, which operates in Swansea but is part of the Department for Transport. Although it is very unlikely that we will need to use the power, we want to be certain that our bodies are protected from uncertainty surrounding the commencement of the regime.

I was pleased to receive a letter from Rebecca Evans, a Minister in the Welsh Government, who noted that the Welsh Government are committed to commencement on the same day in Wales and England, and gave assurances that consent will not be unreasonably withheld to delay commencement. We have worked well with the Welsh Government throughout the process and we fully intend to enter the new arrangements in lockstep with them. We are delighted that they feel the same way.

We are happy to make this amendment and we trust that Welsh Ministers will be pleased with the outcome. I emphasise that procurement is a special case for this kind of consent mechanism; the Bill is complex, and the devolved and reserved position is intertwined within its provisions, so it should not be taken as a default precedent for future legislation. My officials will continue to work closely with officials from the Welsh Government in rolling out this important regime.

Florence Eshalomi: It is reassuring to hear the Minister's additional update from the Welsh Government and that they support the arrangements. The amendments mandate the consent of Welsh Ministers while making procurement, and allow for the exclusion of Welsh procurement from the provisions of the Act. In essence, they mean that Welsh Ministers have to consent to the Act, but that UK Ministers can exclude Welsh procurement from the regime. In practice, I assume that the proposals will

ensure that Wales consents to the Act but that, should it not, a UK Minister can remove it from the system and then commence the Act without the consent of Welsh Ministers.

This is a sensible amendment that underlines the respect for the Welsh Government, and we are right to expect that from the Bill. As the Minister outlined, it is good that there is support. We are content with the amendments and will not oppose them.

Amendment 113 agreed to.

Clause 107, as amended, ordered to stand part of the Bill.

Clause 108 ordered to stand part of the Bill.

Clause 109

MINISTER OF THE CROWN: RESTRICTIONS ON THE EXERCISE OF POWERS

Amendments made: 68, in clause 109, page 71, line 12, after "section 66" insert "or section 121".

This amendment would mean that a Minister of the Crown could not make consequential provision for the purpose of regulating a devolved Welsh authority without the consent of Welsh Ministers.

Amendment 69, in clause 109, page 71, line 32, at end insert—

"(ba) section (Trade disputes) (trade disputes);".—*(Alex Burghart.)*

This amendment would allow a Minister of the Crown to exercise the trade dispute power under NC11 in relation to devolved Welsh authorities and transferred Northern Ireland authorities.

Clause 109, as amended, ordered to stand part of the Bill.

Clause 110 ordered to stand part of the Bill.

Clause 111

POWERS RELATING TO PROCUREMENT ARRANGEMENTS

Amendments made: 70, in clause 111, page 73, line 4, leave out—

"A Minister of the Crown or".

This amendment would remove the power of a Minister of the Crown to amend Scottish procurement legislation to apply it to procurement under devolved Scottish procurement arrangements by contracting authorities.

Amendment 71, in clause 111, page 73, line 5, leave out from "of" to end of line 7 and insert—

"(a) applying it in relation to procurement carried out by contracting authorities under devolved Scottish procurement arrangements;

(a) disapplying it in relation to procurement carried out by devolved Scottish authorities under—

(i) reserved procurement arrangements,

(ii) devolved Welsh procurement arrangements, or

(iii) transferred Northern Ireland procurement arrangements."

This amendment would give the Scottish Ministers power to amend Scottish procurement legislation to disapply that legislation where procurement by devolved Scottish authorities may be regulated by provision made by a Minister of the Crown under subsection (1).

Amendment 72, in clause 111, page 73, line 8, at end insert—

"(za) the Procurement Reform (Scotland) Act 2014 (asp 12),".

This amendment would extend the definition of "Scottish procurement legislation" to include the Procurement Reform (Scotland) Act 2014.

Amendment 73, in clause 111, page 73, line 13, leave out "those regulations" and insert "that legislation".—*(Alex Burghart.)*

This amendment is consequential on Amendment 72.

Clause 111, as amended, ordered to stand part of the Bill.

Clause 112

DISAPPLICATION OF DUTY IN SECTION 17 OF THE LOCAL GOVERNMENT ACT 1988

Question proposed, That the clause stand part of the Bill.

Alex Burghart: The clause ensures that authorities to which section 17 of the Local Government Act 1988 applies are not prevented by that section from complying with their obligations under the Procurement Bill. It also enables a Minister of the Crown or Welsh Ministers to make regulations to disapply, when required, a duty under section 17 of the Act.

The clause ensures that authorities covered by the 1988 Act can take advantage of domestic procurement policies. As stated in the other place, we intend to use clause 112 for the first time, once enacted, to make regulations so that local authorities may take advantage of the policy of December 2020 so that below-threshold procurements may be reserved to UK suppliers only, or to UK small and medium-sized enterprises or voluntary, community and social enterprises in a particular region or county of the UK.

As section 17 of the Act precludes local authorities from awarding public supply or works contracts by supplier location, tabling regulations under the clause will ensure that local authorities can take advantage of that permitted flexibility, already available to central Government Departments, in respect of lower value contracts.

Florence Eshalomi: The clause interacts with section 17 of the Local Government Act, which placed a duty on certain authorities not to consider non-commercial elements when awarding or managing certain contracts. The amendment to the section is necessary for the new procurement regime, in particular given the move from most economically advantageous tender to most advantageous tender. The clause will also give Ministers the power to disapply the Act via regulations. That could be used, to give an example from the explanatory notes, to allow relevant authorities to reserve below-threshold procurements by location and/or small and medium business size status. We support and welcome the measures and will not oppose clause stand part.

Question put and agreed to.

Clause 112 accordingly ordered to stand part of the Bill.

Clause 113

SINGLE SOURCE DEFENCE CONTRACTS

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss that schedule 10 be the Tenth schedule to the Bill.

Alex Burghart: The clause introduces schedule 10, which amends the Defence Reform Act 2014 to enable reforms to the Single Source Contract Regulations 2014. The regulations continue to work well to deliver their objectives of ensuring value for money for the taxpayer and a fair price for industry. However, delivering the defence and security industrial strategy and building on experience since 2014 means some reforms are needed. They will ensure that the single source procurement regime can continue to deliver in traditional defence contracts and be applied effectively across the breadth of single source defence work in the future.

In paragraph 2(2) and 2(4) of schedule 10, we are taking a power to clarify that some cross-Government single source contracts with a substantial defence element will come under the Defence Reform Act regime. That will provide assurance on value for money on a greater proportion of single source defence expenditure.

We are increasing the flexibility of the regime by taking a power in paragraphs 3(2) and 3(8) of schedule 10 to enable contracts to be considered in distinct components with different profit rates being applied to different parts of a contract, where that makes sense. Further flexibility in the regime will be provided by a power in paragraph 3(3) to specify circumstances under which a fair price for all or part of a contract can be demonstrated in ways other than by reference to the pricing formula in the Defence Reform Act. Circumstances for using such an approach will be set out in regulations and will include, for example when an item has previously been sold in an open market or where a price is regulated by another regime.

We are simplifying the contract negotiation process by amendments in paragraph 9(3)(a) of schedule 10, which will ensure that the contract better reflects the financial risks involved, and in paragraph 8(3)(e), by taking a power that will clarify how the incentive adjustment should be applied. We are also removing two steps from the current six-step profit setting process. The amendment in paragraph 9(3)(b) will abolish the funding adjustment for the Single Source Regulations Office or SSRO. The same paragraph will also remove the adjustment that ensures that profit can be taken on a contract only once. That issue is dealt with through allowable costs by virtue of paragraph 12(3) of schedule 10.

We are simplifying some reporting requirements by way of amendments in paragraph 13 of schedule 10 to reflect concerns expressed by suppliers and to make compliance with the regulations more straightforward. We are making better use of the expertise of the SSRO by way of the amendments in paragraphs 18 and 19 by enhancing its power to issue guidance, and clarifying and expanding the range of issues on which it can adjudicate. That will empower the SSRO to play a greater role in speeding up the contract negotiation process.

Chris Evans (Islwyn) (Lab/Co-op): I thank the Minister for his explanation of the clause, which is related to the Defence Reform Act 2014, which created the Single Source Regulations Office. I have only a question or two about the clause: is there any effect on that office? How does he envisage the regulations he mentioned developing over time? He has already said the regulations will be laid in due course, but can he give the Committee any idea of what they will look like in the new regime proposed in the clause?

Alex Burghart: With reference to the SSCR, where we procure in the absence of competition it remains vital that we strike the right balance between, on the one hand, paying contractors fair prices for the goods and services we buy and, on the other, providing assurance that the taxpayer is getting value for money. Experience from before 2014 showed that a non-legislative approach was insufficient to achieve that balance. The amendment in schedule 10 will apply only to contracts that are substantially for defence purposes. The criteria for including a contract will be set out in secondary legislation. To the hon. Gentleman's point, that is necessary because it is not generally possible to price the defence elements of such contracts separately in primary legislation, so we need the flexibility in secondary legislation.

Chris Evans: I hear what the Minister says about regulations. Will that have any effect on the profit margins set by the SSRO?

Alex Burghart: That will depend on what the regulations were, which is for discussion at a future point.

Question put and agreed to.

Clause 113 accordingly ordered to stand part of the Bill.

Schedule 10 agreed to.

Clause 114

CONCURRENT POWERS AND THE GOVERNMENT OF WALES ACT 2006

Question proposed, That the clause stand part of the Bill.

Alex Burghart: The clause makes it clear that certain restrictions on the legislative competence of the Senedd do not apply in relation to powers granted to Welsh Ministers under the Bill. That ensures that Welsh Ministers can exercise the legislative powers granted to them under the Bill, and amendments to the Government of Wales Act 2006 are not uncommon in Westminster legislation that grants powers to Welsh Ministers.

Florence Eshalomi: As the Minister said, the clause contains provisions about the Welsh Government and actions that they can and cannot take on procurement. The clause makes a short and technical amendment that removes the prohibitions on the Senedd to legislate on qualified devolved functions in this area. We see no reason to oppose the removal of the prohibition, so we are happy for the clause to stand part.

Question put and agreed to.

Clause 114 accordingly ordered to stand part of the Bill.

Clause 115

REPEALS ETC

Question proposed, That the clause stand part of the Bill.

2.30 pm

The Chair: With this it will be convenient to discuss that schedule 11 be the Eleventh schedule to the Bill.

Alex Burghart: The clause and schedule 11 between them set out the legislation that will be repealed, revoked and disapplied once the Bill comes into effect. That includes the Public Contracts Regulations 2015, the Concession Contracts Regulations 2016, the Utilities Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011, which make up the existing procurement regime for England and Wales, and for Northern Ireland.

Florence Eshalomi: The clause repeals a number of pieces of primary and secondary legislation, as outlined in schedule 11. In practice, the clause and schedule will repeal the current procurement system under the likes of the Public Contracts Regulations 2015.

It is a little unusual that, under schedule 11, we will repeal part of a Bill that is matching this Bill stage for stage in its passage through this House. In fact, I believe that the Trade (Australia and New Zealand) Bill had its Second Reading in the other place just hours before we had Second Reading of this Bill. I know from the Minister's references that he is fond of boxing, and I wonder which one of those two titanic pieces of legislation will win the bout against the rigmarole of getting a Bill through Parliament? We need to get the Bill through, but perhaps the trade Bill will be one of the fastest enacted pieces of legislation to pass through the House. Labour Members understand why the measure is necessary, however, to ensure that there are no gaps should this Bill take longer to pass through Parliament.

We also understand why we cannot have two procurement systems in place at the same time. As previously stated, we feel that the Bill is a step forward in addressing some of the issues in our procurement system that were introduced by the likes of the public contracts regulations. Many provisions that are part of those regulations have been brought into the Bill, and others have been improved on. We feel that the Bill could have gone further in many ways, and we will continue to argue for amendments in those areas for the rest of our proceedings in Committee and on Report, but we share the view that it will bring benefits to our procurement system as a whole. We will therefore not oppose the repeals alongside the enactment of the Bill.

Question put and agreed to.

Clause 115 accordingly ordered to stand part of the Bill.

Schedule 11 agreed to.

Clause 116 disagreed to.

Clause 117

POWER TO AMEND THIS ACT IN RELATION TO PRIVATE UTILITIES

Question proposed, That the clause stand part of the Bill.

Alex Burghart: The clause provides a power for an appropriate authority to make regulations to reduce the regulation of private utilities under the Bill. That power may be used, for example, to disapply particular provisions or to modify them to reduce the regulatory burden, such as to reduce financial costs or administrative burdens.

In the UK, regulators such as Ofgem and Ofwat have promoted competition in many utility markets and provided a proxy for competition, with protection of consumers' interests at its heart where that is not feasible. That oversight of private utilities justifies minimising the regulatory burden on them to avoid passing costs to customers.

As the Bill provides in clauses 89 and 97 that contracting authorities owe a duty to "treaty state suppliers"—that is, suppliers entitled to the benefit of international trade agreements—to comply with a substantial part of the Bill, the power can be exercised to make amendments only where they do not put the UK in breach of its obligations to those suppliers. The Bill already includes a number of measures that reduce the regulatory burden for private utilities, such as the transparency requirements being pared back to the minimum required by international trade agreements.

Parliament and interested parties will have ample opportunity to scrutinise any amendments proposed to be made under the power, as clause 117 requires consultation prior to making regulations. Parliament will rightly be able to scrutinise the regulations under the affirmative procedure.

Florence Eshalomi: The clause pertains to the ability to reduce regulations in relation to private utilities. It is important that the Bill does not create regulatory burdens where they are not necessary. The clause gives powers to ensure that the Bill can be amended to disapply parts of it in relation to private utilities.

Several exceptions for private utilities already exist throughout the Bill: for example, on the policy statements, the publication of certain information and assessing contract performance. Of course, that does not mean that private utilities do not go unregulated. It is important that groups such as Ofgem regulate the gas and electricity market, but it would be burdensome to have several different frameworks of regulation applying to bodies where they are not needed. That can end up duplicating regulation and creating unnecessary bureaucracy, and simplifying frameworks is one of the main reasons that the Bill is before us.

We believe that our private utilities should be regulated, particularly at a time when we see so many people up and down the country feeling the pain of skyrocketing energy bills this winter, but it must be done via the appropriate channels. For that reason, we are minded not to oppose the clause. However, I hope the Minister can briefly justify when the clause will be necessary and say that the powers will not be used overzealously.

In its report on the Bill, the Delegated Powers and Regulatory Reform Committee said:

"The Committee considered that there was inadequate justification for taking a power to make regulations for the deregulation of private utilities under the Bill. They considered that Ministers should explain more fully the proposed use of the power and unless the Government can fully justify it, the breadth of the power should be narrowed."

[Florence Eshalomi]

In their response, the Government said:

"The power is limited by our international obligations. This means that we must retain some regulation of private utilities in order to comply with our trade agreements such as notice requirements and rules on conditions for participation and award criteria."

How does that limitation play out in practice? What parts of regulation will be hard-locked into the system by it, and what parts will be open to amendment by the clause? In addition, does a mechanism exist to reapply regulation where it has been disapplied by the clause? It seems wrong for it to be the case that we could disapply bits of the Bill quickly but, should we realise that it was a mistake or maybe want to disapply the provisions only temporarily, the bar to reapply an existing regulation under the Bill would be a lot higher. Can the Minister inform me how that can be done, and what can be done in those cases?

As I mentioned, we are minded not to oppose the clause, but I would be grateful if the Minister could address some of those points.

Alex Burghart: Under the Bill, we have already reduced the regulatory burden for all types of contracting authorities, not just private utilities. Because the four sets of regulations will be streamlined into a single regime, it will be clearer for public authorities, which may currently need to use two or three of these sets of regulations, what rules they need to follow. All contracting authorities will benefit from a simpler, more flexible and commercial system that better meets our country's needs while remaining compliant with our international obligations. We think it is right to go further for private utilities, as they operate in markets that are regulated in other ways—for example, by regulators such as Ofgem—and are more competitive and commercial.

As the hon. Member for Vauxhall said, the UK is party to trade agreements—for example, the UK-Switzerland trade agreement and the UK-EU trade and co-operation agreement—that require us to ensure that private utilities allow suppliers from those countries to participate in procurements covered by the relevant agreement. Under those agreements, suppliers from those countries have access to procurements by private utilities operating in sectors such as gas and heat, electricity, water, transport services and ports and airports. It is right that we are deregulating utilities, because they operate in different markets and we must have a pragmatic approach.

Question put and agreed to.

Clause 117 accordingly ordered to stand part of the Bill.

Clause 118

Regulations

Amendments made: 75, in clause 118, page 75, line 21, at end insert—

"(da) section 52 (key performance indicators);".

This amendment would apply the affirmative procedure to an exercise of powers by a Minister of the Crown under clause 52.

Amendment 76, in clause 118, page 75, line 23, leave out paragraph (f).

This amendment is consequential on the Government's intention to replace the power in clause 64 with the substantive provision in NC15.

Amendment 77, in clause 118, page 75, line 29, at end insert—

"(la) section (Trade disputes) (trade disputes);".

This amendment would apply the affirmative procedure to an exercise of powers by a Minister of the Crown under the new trade disputes clause in NC11.

Amendment 114, in clause 118, page 75, line 39, at end insert—

"(ua) section 123(6) (exclusion of devolved Welsh authorities);".

This amendment would subject the power added by Amendment 115 to the affirmative procedure.

Amendment 78, in clause 118, page 76, line 21, at end insert—

"(ca) section 52 (key performance indicators);".

This amendment would apply the affirmative procedure to an exercise of powers by the Welsh Ministers under clause 52.

Amendment 79, in clause 118, page 76, line 26, at end insert—

"(ha) section (Trade disputes) (trade disputes);".

This amendment would apply the affirmative procedure to an exercise of powers by the Welsh Ministers under the new trade disputes clause in NC11.

Amendment 80, in clause 118, page 76, line 47, at end insert—

"(ca) section 52 (key performance indicators);".

This amendment would apply the affirmative procedure to an exercise of powers by a Northern Ireland department under clause 52.

Amendment 81, in clause 118, page 77, line 1, at end insert—

"(da) section (Trade disputes) (trade disputes);".

This amendment would apply the affirmative procedure to an exercise of powers by a Northern Ireland department under the new trade disputes clause in NC11.

Amendment 82, in clause 118, page 77, line 15, leave out from "under" to end of line 16 and insert "any of the following provisions".

This amendment is preliminary to Amendment 83.

Amendment 83, in clause 118, page 77, line 18, at end insert—

"(a) section 90 (treaty state suppliers: non-discrimination);

(b) section (Trade disputes) (trade disputes);

(c) section 111 (powers relating to procurement arrangements)."—*(Alex Burghart.)*

This amendment would apply the affirmative procedure to an exercise of powers by Scottish Ministers under the new trade disputes clause in NC11.

Question proposed, That the clause, as amended, stand part of the Bill.

Alex Burghart: Clause 118 sets out the relevant procedures associated with the making of regulations under the Bill. They must be exercised by statutory instrument or equivalent powers in relation to Scotland and Northern Ireland.

Where a power is exercised by a Minister of the Crown, the powers listed in subsection (4) are subject to the affirmative procedure, those made under clause 42 are subject to the made affirmative procedure and, with the exception of commencement regulations, the rest are subject to the negative procedure.

Where powers are exercised by Welsh Ministers, those set out in clause 118(10) are subject to the affirmative procedure and all other powers are subject to the negative procedure. Similarly, where powers are exercised by a Northern Ireland Department, those set out in subsection (12) are subject to the affirmative procedure, and all others to the negative. Regulations made by Scottish Ministers

under clauses 90 and 111 are subject to the affirmative procedure applicable in proceedings of the Scottish Parliament.

Florence Eshalomi: Clause 118 outlines the powers and restrictions related to regulations that can be passed under the Bill. We all understand the point of secondary legislation. We do not oppose its use in this Bill, nor do we oppose the clause. However, we share the concern of the Delegated Powers and Regulatory Reform Committee about the scale of the use of delegated powers. Its report states:

"This report identifies multiple failures in the Memorandum to adequately explain and justify very broad delegations of power which enable implementation of significant policy change by delegated legislation. This would give us cause for concern at any time but is particularly disappointing as it comes so soon after the publication of our report, Democracy Denied? The urgent need to rebalance power between Parliament and the Executive, in November 2021, and of revised guidance for departments on the role and requirements of this Committee."

The DPRRC's concern was shared by Chris Smith, e-procurement and procurement consultant at CA Procurement Consulting Ltd. In his written evidence to this Committee, he said:

"The latest version of the Bill relies heavily on secondary legislation, which has not yet been published, and I am concerned that the level of compliance of Contracting Authorities with transparency regulations and policies will not be improved by this Bill as it is currently worded.

Currently, there remains a significant gap in transparency and the data captured in the existing online systems that not only undermine accountability and scrutiny of the use of public funds but also means that the government cannot rely on obtaining accurate data from these systems, for example, on SME participation. The same goes for the private sector."

I think it is fair to say that I have made my feelings clear to the Minister throughout the Committee's proceedings about the use of secondary legislation. I will not go through all those points again—I am sure he can refer back to them—but I still have concerns about how heavily the Bill relies on secondary legislation.

It is not that we object to the use of secondary legislation, nor do object strongly to an instance of its use throughout the Bill. At the end of the day, it is an option that the Government can use to legislate. However, as the Minister knows, it was well within the Government's gift to set out more information in the Bill so that we could scrutinise further what some of the powers will mean in practice. They could have either set out the scope of what regulations should do, or scrapped the need for regulations entirely and spelled out the provisions in the Bill. Instead, we have had hypothetical debates—some powers may be granted, and some may not; they may transform our procurement system, or they may go unused. It is a bit frustrating to produce legislation in that way.

2.45 pm

The purpose of the Bill is to ensure transparency and that processes are followed accurately. As the Minister knows—I come back to my favourite saying—the purpose of the Bill is to help us shine a light on our procurement system and give people confidence in how their money is spent. If everything is pushed through in secondary legislation, that is an issue. In effect, we are running out of batteries.

We may be flagging, but I hope that the Minister still has juice in his batteries. We do not object to the clause, and we are happy for it to stand part of the Bill, but I refer him back to our concerns about the use of secondary legislation and the wider ramifications of the Bill's putting so much faith in it.

The Chair: I look forward to hearing about the Minister's batteries.

Alex Burghart: Well, Mr Mundell, I reassure the Committee that my batteries are, if not at 100%, still perfectly green; I have many Duracell hours left in me.

We have consulted with the DPRRC. The hon. Lady will know from earlier discussions that we require a very high degree of flexibility in a lot of areas of the Bill, and that requires secondary legislation, but she can rest assured that a lot of the secondary legislation will see public consultation before it is formulated. She will also have heard me refer to the affirmative procedure, which we intend to use for a lot of the secondary legislation. That means that it will be considered in Parliament, which will give it a good level of public scrutiny. I hope that she will take that as reassurance.

Question put and agreed to.

Clause 118, as amended, accordingly ordered to stand part of the Bill.

Clause 119

INTERPRETATION

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss clause 120 stand part.

Alex Burghart: Clause 119 defines words and phrases of general application in the Bill that are not listed elsewhere—for example, "appropriate authority" is defined as a Minister of the Crown, Welsh Minister or Northern Ireland Department. Importantly, the clause also sets out the definition of "small and medium-sized enterprises", and provides that an appropriate authority may amend by legislation the definition of an SME. The clause includes some concepts of wider application in the Bill, setting out, for example, that value of money thresholds are inclusive of VAT.

Clause 120 sets out where in the Bill the definitions of certain concepts of wider application can be found.

Florence Eshalomi: Clauses 119 and 120 relate to interpretation and definitions. Clause 119 defines terms, such as SME, that are common in the Bill but are not defined in individual clauses where they are mentioned; clause 120 contains a useful index of defined terms and where their definition appears in the Bill. We believe that the clauses are necessary and useful for navigating the many different terms that appear in the Bill, and we do not intend to oppose them.

Question put and agreed to.

Clause 119 accordingly ordered to stand part of the Bill.

Clause 120 ordered to stand part of the Bill.

Clause 121

POWER TO MAKE CONSEQUENTIAL, ETC, PROVISION

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Clauses 122 and 123 stand part.

Government amendment 84.

Clause 124 stand part.

Alex Burghart: Clause 121 provides a power to make regulations that make supplementary, incidental or consequential provision. It is a standard clause that means that the Government can make regulations that ensure that the Procurement Act—as it will be—works effectively with the rest of the statute book. It includes the power to amend primary legislation.

Clause 122 explains the extent of the Bill—that is to say, the jurisdictions in which it will form part of the law. The Bill's provisions extend to each of the jurisdictions of the UK. The majority of provisions apply to all procurement by contracting authorities in England, Wales and Northern Ireland, including matters that we agree are within the scope of devolved competence. The Bill also extends to Scotland and applies, in limited respects, to procurement by devolved Scottish contracting authorities.

Clause 123 is a standard clause setting out when the Bill's provisions will have effect as law. Some provisions will commence when the Bill is passed and some will commence upon regulations being made by a Minister of the Crown. As we have discussed, however, and following agreement with the Welsh Government, that power can be exercised in relation to devolved Welsh procurements only with the consent of the Welsh Ministers.

We have committed to provide six months' notice of the new regime coming into force from when the Bill is passed. We expect that to be spring 2024 at the earliest. The existing legislation will apply until the new regime goes live, and it will also continue to apply to procurements started under the old rules. Frameworks, dynamic purchasing systems and qualification systems let under the old rules can remain live for their planned lifespan.

Clause 124 is mainly for citation purposes, and does not necessarily cover all aspects of the Bill. Once the Bill receives Royal Assent, it will be cited as the Procurement Act 2022. Amendment 84 will remove the amendment made in the other place in respect of the financial privilege of the House of Commons.

Florence Eshalomi: Amendment 84 is a privilege amendment. It is added to Bills by convention to avoid the violation of the privilege that the House of Commons rightly enjoys over the ability to charge people and public funds. The amendment is a quirk of our constitution for Bills beginning in the Lords, and we are, of course, happy to affirm the privilege of this House.

Clauses 121 to 124 are standard parts of Bills in this House. Although there can sometimes be contention about when Bills should commence, it is welcome that, on this occasion, there is no such controversy and the Bill will commence on the day it passes. Of course, we do not object to that, or to the other provisions of the clauses. We are happy for them to stand part of the Bill.

Alex Burghart: I am grateful to the hon. Lady for supporting the clauses. As we are nearing the end of our debate today, I will come back on a couple of points that the hon. Lady made so that we have covered everything off.

Before the lunch break, the hon. Lady kindly supported the clauses in part 9 of the Bill. As mentioned, if suppliers are breaching contractual terms, that will be a matter to be resolved pursuant to those contractual terms. The contracting authority will actively monitor compliance of these types of matters under its usual contract management and monitoring procedures, which will be strengthened by the Bill. I hope that adequately answers the hon. Lady's question such that there is no longer any need to confirm in writing.

Similarly, in the closing stages of Tuesday's sittings, the hon. Lady asked whether contracts already entered into following a procurement process will be terminated automatically if a contractor subsequently becomes an excluded supplier. Termination of contracts is often covered by contractual terms, but clause 77 gives contracting authorities an implied right to terminate a contract should a contractor become an excluded or excludable supplier. Although it is not automatic, authorities are able to terminate in the circumstances set out in clause 77.

Given the range and variety of contracts that contracting authorities will enter into, they need to be able to consider individual circumstances and the fulfilment of contract deliverables. Automatic termination of contracts when a supplier becomes excluded or excludable takes no account of other contractual obligations and would have serious implications for the delivery of the essential goods, services and works on which the public rely.

There is no need to mandate automatic termination. Contracting authorities should be trusted to exercise discretion appropriately, including in relation to national security. As with excluding a supplier prior to contract award under the national security ground, a contracting authority will be required to seek approval from a Minister to terminate a contract on this ground. I hope that gives the further detail the hon. Lady was looking for.

Kirsty Blackman (Aberdeen North) (SNP): If I can crave your indulgence, Mr Mundell, I will not be present at the Committee's next sitting, so I want to say thank you very much to the Clerks, to *Hansard* and, in particular, to two staff members, Josh Simmonds-Upton and Sarah Callaghan, who have been excellent in providing me with valuable support.

The Chair: Thank you for putting that on the record.

Question put and agreed to.

Clause 121 accordingly ordered to stand part of the Bill.

Clause 122 ordered to stand part of the Bill.

Clause 123

COMMENCEMENT

Amendment made: 115, in clause 123, page 81, line 14, leave out subsection (3) and insert—

"(3) A Minister of the Crown may not make specified regulations under subsection (2) without the consent of the Welsh Ministers.

(4) In this section, "specified regulations" means regulations to bring into force provisions regulating procurement by a devolved Welsh authority other than procurement under—

(a) a reserved procurement arrangement, or

(b) a transferred Northern Ireland procurement arrangement,

but 'specified regulations' does not include regulations to bring into force provisions in Part 7 (implementation of international obligations).

(5) In this section, 'devolved Welsh authority' has the meaning given in section 157A of the Government of Wales Act 2006.

(6) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purpose of ensuring that—

(a) Parts 1 to 6 and 8 to 13, or particular provisions in those Parts, so far as not already brought into force under subsection (2) do not regulate procurement by a devolved Welsh authority other than procurement under—

(i) a reserved procurement arrangement, or

(ii) a transferred Northern Ireland procurement arrangement;

(b) existing legislation continues to regulate procurement by devolved Welsh authorities and procurement under devolved Welsh procurement arrangements.

(7) Regulations under subsection (6) may modify this Act.

(8) In this section—

"existing legislation" means any enactment, other than this Act or regulations made under this Act, that is passed or made before section 11 (covered procurement only in accordance with this Act) comes into force;

a reference to a provision regulating procurement includes a reference to a provision conferring a function exercisable in relation to procurement."—*(Alex Burghart.)*

This amendment would make commencement of devolved Welsh aspects of the Bill subject to the consent of the Welsh Ministers, and would allow UK Ministers to amend the Act resulting from this Bill so that the Act no longer applies in respect of devolved Welsh procurement and could be commenced without consent.

Clause 123, as amended, ordered to stand part of the Bill.

Clause 124

SHORT TITLE

Amendment made: 84, in clause 124, page 81, line 18, leave out subsection (2).—*(Alex Burghart.)*

This amendment would remove the technical amendment made by the House of Lords in respect of the financial privileges of the House of Commons.

Clause 124, as amended, ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. —*(Julie Marson.)*

2.57 pm

Adjourned till Tuesday 21 February at twenty-five minutes past Nine o'clock.

Written evidence reported to the House

PB 25 Women's Resource Centre
PB 26 Anthony Collins Solicitors LLP