Northern Ireland Assembly

Committee for Finance

OFFICIAL REPORT (Hansard)

Procurement Regulations 2024 and Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill: Department of Finance

6 March 2024

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Matthew O'Toole (Chairperson)
Ms Diane Forsythe (Deputy Chairperson)
Mr Phillip Brett
Miss Nicola Brogan
Mr Gerry Carroll
Mr Paul Frew
Miss Deirdre Hargey
Mr Eóin Tennyson

Witnesses:

Mr Paul Browne	Department of Finance
Mr Michael Watson	Department of Finance

The Chairperson (Mr O'Toole): I welcome Michael Watson and Paul Browne. Michael is from policy and performance division in Construction and Procurement Delivery (CPD), as is Paul. Officials, please brief us first on the Procurement Regulations 2024 and then on the Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill. We have quite a lot on the agenda today, so I may interrupt rudely, not to be rude but to try to get questions asked. In that context, please be concise. I know that these are complex areas.

Mr Michael Watson (Department of Finance): Thank you, Chair, for the opportunity to be here. The regulations have come from the Procurement Act 2023, which received Royal Assent last October. The Act sets out a legal framework for public procurement, but, in the Act, there are many provisions and powers to take certain actions in the future. The regulations are the first outworkings of the Act. In order to make the Act work and for it to be implemented, the regulations are necessary to set out further detail. They allow organisations to understand which parts of the Procurement Act will apply, because, as you said, Chair, its application can get very complicated.

The regulations are substantially the regulations that we currently have but clarified and enhanced to deal with some of the provisions of the Procurement Act. Much of the emphasis of the new Procurement Act is on transparency in public procurement, and there are a lot of good reasons for that, with certain inquiries and things that have happened over the past few years, during the pandemic and so forth. In substance, the regulations set out a range of detailed notices that are required to be published by contracting authorities across the procurement life cycle. The requirements are more detailed than those of our current regulations because the Procurement Act has a greater focus on transparency. It is about publishing a huge range of information and different notices across the procurement life cycle.

It is important to understand that the Procurement Act expanded for the first time the definition of public procurement. The current procurement regime very much focuses on the tendering element of procurement, which is about inviting and assessing tenders and awarding the contract. The Procurement Act expands both sides of that. Before we go to tender, there are an awful lot of provisions about engaging with potential suppliers and markets in order to firm up our ideas and try to get it right before we go to procurement. That now extends into contract management — very much welcomed by everybody — and there is a requirement on contracting authorities, particularly those with contracts of over £5 million, to publish key performance indicators and an annual update on them. Much of the regulations sets out the precise details of each of those notices, which is why they are so long. They go into infinite detail, such as your name, your address, who you are as a supplier and so on. Part of the underlying principle is to try to open up the process to smaller businesses by giving them more information.

One of the key features of the regulations, under the powers in the Act, is the introduction of a new central register and database, which is absolutely crucial for small businesses. That has been sought after since I have been around public procurement, which is quite an extensive period. The idea behind it is this: we will create a new register, all companies must register with it, and they will put their details in it. At the front end of all public procurement processes, there is a requirement to check suppliers' eligibility to make sure that they have not breached laws and that they have prerequisites in order. Suppliers very often have to give that information every time they tender for a procurement. The new database will allow them to store that detail so that, at the push of a button, it will, through an automated process, be sent to anybody to whom the supplier submits a tender. That means not only that they will not have to keep going through the rigmarole of producing that information but that all contracting authorities in England and Wales and here will have that information; it will be consistent for the suppliers. Suppliers have broadly welcomed that.

The rest of the regulations set out some detail on retention of provisions that are in the Utilities Contracts Regulations 2016. They are specific to the supply of electricity, heat and gas, which are provided in many cases by private-sector organisations, but those organisations must still follow procurement rules when they award certain contracts. The regulations set out a bit of detail on that.

The many schedules to the regulations set out the list of services that must be opened up to public procurement. There is a distinction in that some of the services that are opened up to public procurement are agreed as part of the negotiation of international trade agreements between the UK Government and other countries. A secondary schedule refers to "light touch services", which are services mainly in the health, education and culture sectors. Those services are not normally part of international trade agreements because they simply do not generate interest from suppliers in other countries, as suppliers have to be resident here.

The regulations refer to the disapplication of section 17 of the Local Government Act 1988. We did not need to apply that here because the power to make that provision is already in our Local Government (Northern Ireland) Act 2014. There is a provision that prevents local authorities from considering in the procurement process matters that are non-commercial. That stops them implementing many policies that we try to pursue in public procurement. In our exercise, working with the Cabinet Office, we discovered that we already have the power, but we need to bring something forward just to disapply it in the Act.

There are also some definitions in the regulations, because there is a distinction between a central government body and a local government body when it comes to the application of procurement rules and different thresholds. Those are set out in a wee bit of detail towards the end of the regulations.

I will just add that the regulations were consulted on publicly last August. There were a number of responses from Northern Ireland stakeholders in the public and private sectors. They were very positive; there was no real requirement for significant reform or refinement of the regulations.

That is probably a very quick overview of the regulations, but I am happy to address any questions about the Act as well, as that is where they come from.

The Chairperson (Mr O'Toole): That might be useful. We will take questions from members on this first, and we will go on to the procurement bit of the trade agreement; that is to say, we are talking about the procurement bit of it, and it would not be fair to get into the many other implications of the trade agreement, which Michael and Paul should not be liable for answering on. First, we are effectively being asked to approve regulations under Westminster legislation. The procurement

regulations are transferred here. Is it a transferred power to make those regulations or is it fully devolved?

Mr Watson: It is transferred responsibility. However, when we worked through the provisions of the Procurement Act, the question arose of what powers we would require for Northern Ireland in that. In the absence of any direction, we asked the Cabinet Office to draft it on the basis of concurrent-plus.

The Chairperson (Mr O'Toole): Sorry. What does concurrent-plus mean? You are going to have to explain what that means.

Mr Watson: I will try to explain it. It basically means that we can still do our own regulations, if we wish, or we can ask Westminster to do it for us, if we consent to do it. When the regulations were being drafted last year, we needed to be included in that set, because October is looming, and there is a six-month lead-in. These regulations will be laid in Parliament next week. If we had to bring forward our own regulations, it would be very resource intensive, and it would have to be a copy out of these regulations, because we have to implement the Act's provisions. There may be some options around some policy matters.

The Chairperson (Mr O'Toole): If it was not implemented, would it make it theoretically harder for a business from here to bid for business in GB, for example? What would be the outworking of us not being in line?

Mr Watson: I should clarify that the Act would require us to lay out a copy of those regulations ourselves.

The Chairperson (Mr O'Toole): We do not have much choice.

Mr Watson: We do not have much choice.

The Chairperson (Mr O'Toole): If we do not lay the regulations, we are in breach of an Act that has already passed and received Royal Assent.

Mr Watson: Yes.

The Chairperson (Mr O'Toole): OK.

Your consultation suggests that business is broadly content.

Mr Watson: Yes. One of the advantages is that businesses bidding for work in England and Wales will sit in exactly the same process and get the advantage of the central database and the registration system. The procurement process will look the same. A lot of our businesses tender for work in those other jurisdictions.

The Chairperson (Mr O'Toole): The last time I took evidence from you, at the previous Committee, there was a potential issue about procurement legislation coming from Westminster post Brexit, which was about having a thumb on the scale in favour of local suppliers. There was a concern that it could discriminate against suppliers from here who bid for a contract with Derby City Council or Liverpool City Council. Has that been resolved?

Mr Watson: It was not a piece of legislation; it was a policy that the Cabinet Office published shortly after we exited the EU to say that procurement opportunities could be restricted to the county area. It was believed not to be discriminatory because it did not discriminate on a national basis but on a local basis. The latest from the Cabinet Office is that it was not really used, because it was not very beneficial for local councils either. For the sake of a boundary line, you could exclude one of your suppliers because they fell a hundred yards on the other side.

The Chairperson (Mr O'Toole): Like a lot of Brexit concepts, it is not as good as it seems.

Ms Forsythe: Thank you, Michael, for the briefing. Obviously, with the tight budget situation that we are in, procurement is critical. It is critical at any time, but, when we look at public spending and how much is going through the system, we see how much waste due to inefficiencies and problems in the

procurement system is reported. It is my understanding, from reading the detail, that the regulations bring together a lot of different, older pieces into one to potentially simplify the process. Will that help to reduce the problems that we have with procurement and, effectively, save us money?

Mr Watson: It gives us the opportunity to do procurement in a different way. There were four sets of regulations, of which 95% were substantially the same, because there is only so much that you can do with the procurement process. You have to invite a tender and assess it. The advantage that comes from the Act is that there are currently seven recognised types of procurement procedure and that comes down to two, which is basically an open procedure in which anybody can submit a bid. It is a flexible procedure that the contracting authority can adapt to get the best outcome. Very often, we are accused of applying exactly the same commercial model, whether we are buying concrete or a social service, and that does not work in reality. The Act gives us the room and opportunity to think differently, to bring forward different commercial models, to try to get a better commercial outcome in the contract and to cut the focus off the process. We are fixated with compliance and process detail, but sometimes we finish with a contract that commercially is not the best at delivering value for money or public services.

Ms Forsythe: I welcome your points on transparency as well. If you publish the spend and how the contract is getting on, it quickly makes everyone aware, including us as a scrutiny Committee and project managers, if money is perhaps being lost. It gives us the chance to interact and intervene. Is that your view?

Mr Watson: One of the objectives behind the enhanced transparency was for suppliers, but it was also for civil society to understand. We have large contracts, and we set key performance indicators when we awarded the contract. Then we have a duty annually to at least go back publicly and make available how that contractor has performed, how the contract is performing and how much money has been spent in that.

Part of the Act would require contracting authorities to publish payment notices. If you pay more than £10,000 in one go, you would have to publish that and say, "I have paid this £10,000". We have carved out of that in Northern Ireland because we could not see the benefit of it. Our contracts tend to be smaller, so, with any payments below £10,000, nobody would know that they have been paid. The Audit Office report last year suggested that we need to come up with a better system to understand spend, and we hope to progress that through that mechanism.

Ms Forsythe: That is great. Thank you very much.

Mr Frew: I will be brief. Do you reckon that the register will cut down the costs of the tendering process for companies, and have you done any work on how much that would reduce costs by? That is my first question. The second question is: with regard to transparency, will that then lessen the risk of court challenge?

Mr Watson: On the first question, I think that it will bring huge benefit to suppliers. I cannot put a cost on it because every supplier's bid costs are different, but it will — suppliers have been demanding this for many years — cut an awful lot of duplication, not just duplication of the paperwork but the effort of trying to actually draw that paperwork into a tender will be removed. I have no doubt that there will be huge benefits from that, and we hope to expand that database a bit further to take some account of information in relation to policy, not just the stuff that is in the Act at the minute.

Sorry, remind me of the second question.

Mr Frew: It was about court challenge.

Mr Watson: It will not reduce court challenge, because there is a right to access to justice, but the Act has refined the areas of court challenge. There is a bit of a grey area at the minute with when exactly a supplier can take a court challenge. You cannot challenge a contracting authority until it has committed an offence, which is basically at the point of contract award. The new Act has broken it down into four areas to say that, once the supplier believes that we have committed an offence, they have 30 days to bring that. It kind of structures it into a pre-tender phase, in case we have done something in there, the tendering phase and the contract award. The Cabinet Office is doing further work with the courts in England to try to refine the challenge process down into a more reasonable period of, perhaps, 30 days to try to hear it and to try to shift it around. Obviously, we will watch very

closely the outworkings of that project in England, and then, when we see the findings, we will try to present them here as well and maybe take some more action.

Mr Frew: The other aspect is the utility aspects of the Bill with regard to electricity. Do we know yet how this will affect, if at all, the running of the I-SEM — the integrated single electricity market — and the players within that? You are talking about the SEM committee and SONI — the System Operator for Northern Ireland — and even how it will affect the Utility Regulator and its operational work.

Mr Watson: It just means that if those organisations are classified within the regulations and they fall into certain criteria, then, when they go to contract for goods, works or services, they have to comply with the procurement rules, the same as we do. That is all that this will do.

Mr Frew: So it does not affect the day-to-day running of the single electricity market as such when you buy units of electricity?

Mr Watson: No, it will not impact on the regulator's work. There is economic interest from suppliers in other countries in relation to gas, electricity, utilities, transport, railways — all sorts of things — so it is usually that those utility markets are part of the international trade agreements, and that is why we have to apply public procurement to them. Some countries are different. In some it is publicly owned, and in others it is privately owned; there is a mix. The best way to do it is to set a definition for that authority, and when it ventures into a contract for specific works in relation to that, it has to open that up to suppliers from other countries.

Mr Carroll: Michael, thanks. I have two questions. I think that this updates or clarifies procurement breaches, if I have read it correctly.

Mr Watson: Yes.

Mr Carroll: Is it an increase in penalties, or does it make it simpler, or what is the lay?

Mr Watson: The Act cannot address penalties, because that is taken care of in the court system. One of the distinctions between what we have here and the court in England and Wales, which is the same court, is that, when you launch a writ here, you just lodge a fee of £265 to take the challenge. However, in England, you must quantify the potential damages that you are seeking, which means that the cost of the writ could rise to in excess of £10,000 just to get it through the door of the court. We could not do that in the Act, because that would have interfered too much with the court structure and the justice system. What it does, however, is that it sets a test. Very often, when a challenge is first raised, a decision is made on whether to set aside the decision in the first place. The Act itself sets some criteria around how a test should be conducted by the court in judging set-aside. It concerns things like public interest in the public services and so forth, which the previous legislation did not have. So there are some clear rules around it.

Mr Carroll: Just to clarify, there is no lifting the cap or increasing or setting out what a fine could or should be? That is done through the courts?

Mr Watson: Yes.

Mr Carroll: OK. I read through it in detail, but it is quite hefty. Is there anything about state aid? There is EU corporate and procurement law, which is, for the most part, quite stringent in not allowing interference in the market. Is there anything in this legislation around making interference in market affairs, so to speak, easier? I could not find that in the Act.

Mr Watson: Not on the procurement side. There is a different piece of legislation, which is more to do with the Department for the Economy, about how state aid is treated and how it gives suppliers an advantage in certain circumstances. There are rules, but they do not drop into the procurement territory as I understand it at the moment.

There was one provision in the previous procurement legislation that was in respect of subsidies that were given by government to bodies to do certain works. It was mainly to do with the construction sector, and it meant that if money was transferred to a body — it was really designed around PFI and PPP — it had to comply with the procurement rules. That has been taken out, because it was viewed

that it was almost an anti-avoidance measure rather than being proactive and letting government get on with its business. That is the only thing that has been removed from the procurement side.

The Chairperson (Mr O'Toole): Thank you. That is everything on the regulations, Michael and Paul.

We will move on to the Bill, the Trade — *[Laughter.]*

Mr Watson: It takes me a while to get it right, too. It is the Trade (Comprehensive and Progressive Agreement for Trans-Pacific Partnership) Bill. It is quite a mouthful.

The Chairperson (Mr O'Toole): I have read a fair bit about it. Just to speed things up, members, you do not need to read out the entire title of the trade agreement: that will save us about 20 minutes. Go ahead.

Mr Watson: I am always anxious to get the letters right and to get the C, Ps and Ts in the right place.

It is actually quite a minor issue. The Trade Bill is working its way through Parliament. It is nearly finished. It addresses intellectual property rights and technical barriers to trade, but that is not our concern in the procurement field. We are down to one clause that affects transferred responsibility in respect of procurement. That clause is simply to exclude from the coverage of the regulations any contracts or procurement processes that are “wholly or mainly funded” by international financial institutions.

I have never come across one. As part of the negotiation of the trade agreement, the UK Government have, obviously, agreed that if a procurement contract of that nature ever came up, the whole suite of the current regulations — not including the new Act or the 2024 regulations but the current ones that are in play at the moment — would not apply, except that any principles in regards to transparency, fairness and access by suppliers to that opportunity from other countries would be maintained.

The Chairperson (Mr O'Toole): Just so members can understand it correctly, is this about getting a legislative consent motion (LCM) for one particular bit of the Bill that enables UK accession to this trade agreement, and the only bit for which legislative consent is being asked is one clause, which removes one type of procurement from the provisions of the Bill — the trade agreement — and that is where the funder of the procurement is an international financial institution? Would that be like the European Bank for Reconstruction and Development or that kind of thing?

Mr Paul Browne (Department of Finance): There is one other element where you must publish, post-award, the award value of a contract, rather than the range from the lowest to the highest of the bids. However, that is a requirement that we already meet. That is a standard process for us.

The Chairperson (Mr O'Toole): Just so that members understand: there are many issues and concerns, ranging from the post-Brexit landscape to other ethical issues that people have with this trade agreement, but that is not really what you are talking about here or what the LCM is about.

Are there any procurements in recent times, of which you are aware, that are like that in Northern Ireland?

Mr Watson: No.

The Chairperson (Mr O'Toole): Would it have to be a financial organisation? For example, the Special EU Programmes Body would not be covered by it. I know that it is a grant-awarding body, but it might theoretically do it.

Mr Watson: It is not an international financial institution, compared with the European Bank, which is different.

The Chairperson (Mr O'Toole): It would have to be like the European Bank for Reconstruction and Development. OK, so it would have to be a financial institution. The World Bank and the IMF would be. There are none that you are aware of. OK.

Mr Watson: I have never come across one.

The Chairperson (Mr O'Toole): So this is asking for legislative consent to update procurement rules, because that is devolved here — transferred, more accurately, not devolved — to tweak or change the rules for a theoretical procurement that has never happened, as far as you are aware, in Northern Ireland.

Mr Watson: Yes, although it will change the current public contracts regulations, which cover England, Wales and ourselves. We have never come across one, but that is not to say that the other areas have not. They will have to change those regulations anyway to be able to accede. I believe that the powers are there. If we do not consent, they will do it anyway.

The Chairperson (Mr O'Toole): They will do it anyway. Is the Minister or Department minded to give legislative consent? Does the Department have a view more broadly on the procurement consequences or impacts of the Bill more generally, not just the narrow issue of the LCM?

Mr Watson: We would not be well placed to comment on the other aspects of international —.

The Chairperson (Mr O'Toole): You would not be.

Mr Watson: We would not be. What I understand —.

The Chairperson (Mr O'Toole): I am talking about procurement bits, not about whether it adds to GDP.

Mr Watson: The other parts of the Bill relate to intellectual property and barriers to trade. We would not be over the detail of that. It is really just about procurement processes. Simply, if we are asked to procure a contract that is funded by one of those institutions, we still tender, but we just do not apply the detailed procedural rules.

The Minister is seeking Executive agreement to lay the legislative consent motion. Then, we will come back to the Committee on that. It is just that the timescale that we have been given on this is so tight. I believe that, since we provided the briefing last week, the Bill has received its Third Reading in the Commons. It is almost concluded. The latest that we have from the Department for Business and Trade in England is that it may not make Royal Assent before the Easter recess, but it will certainly have it shortly after that.

The Chairperson (Mr O'Toole): Bear in mind that the Sewel convention, which was introduced by the British Government, has been completely trashed and this is, effectively, them asking for consent for something that they are going to do anyway on this narrow thing. The idea that they really care what we think has, obviously, been completely disproven. I am not making these comments as Chair of the Finance Committee; I am making political comments. The idea that they give two hoots has been utterly disproven over the past decade, but I would not ask officials to comment on that.

I will bring in Paul Frew and then anybody else who wants to come in.

Mr Watson: I will just clarify on that one that the other Administrations have had that since November 2023. It is just that we could not go anywhere with it until three weeks ago.

The Chairperson (Mr O'Toole): OK.

Mr Frew: I do not want to set off the Chair. This is high-level stuff, which will not really affect us, because it does not come deep down and dirty into our cycle of procurement. It is very low-impact and is more technical than anything. Is there any sort of positive impact on Northern Ireland and its Government and businesses? Are there any negatives?

Mr Watson: Again, I am not best placed to comment on the positives of the trade, but I know that, in the letter that we received, an example was cited of a local company that exports guitars to one of those nations, and that it would help that company because it would allow it to do so without trade barriers and tariffs on that, but, outside of that, I have not seen anything. The Department for the Economy would be more concerned about the exporting side of things. We just stick, unfortunately, to the procurement processes. As a procurement body, we stick to the rules to do that.

Mr Frew: Can you remind us how many countries are involved?

Mr Watson: There are quite a few.

The Committee Clerk: There are 11.

The Chairperson (Mr O'Toole): There are 11 signatories, until the UK —.

Mr Watson: Yes.

Mr Frew: They are mostly Pacific countries, are they not?

Mr Watson: Some of the countries border the Pacific. I think that Canada is one.

Mr Browne: Australia, New Zealand and Chile.

Mr Watson: There are quite a few. Other trade agreements with Australia and New Zealand were put through in 2023. There are different facets of trade agreements. There are many of them in the pipeline.

The Chairperson (Mr O'Toole): It does not make up for the 4% a year of lost economic activity from erecting trade barriers with the EU, but luckily we are — talking politically — sheltered from some of that. I think that the two countries where there is additional trade access are Brunei and Malaysia, so if the Sultan of Brunei likes Veda bread and Tayto, we may be quids in. I am not asking you to comment on that, because it is not really within your bailiwick.

Are members content? Is everyone happy? Are there any other questions on those regs? Thank you very much. We will wait for the LCM and discuss it then. Thank you for coming to see us, guys. That was really useful.