Department for International Trade

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Gareth Thomas MP
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Dear Gareth,

Trade (Australia and New Zealand) Bill

Thank for your constructive discussion during Tuesday's Committee debate of the Trade (Australia and New Zealand) Bill. You raised a number of questions on the Bill and the free trade agreements between the United Kingdom-Australia and the United Kingdom-New Zealand that I committed to write on.

Scope of power
You raised a concern regarding the power which would enable changes under the Bill to be made to United Kingdom procurement regulations with general effect.

Let me reassure you, and the other members of the Committee, that the reason for the scope of this power is to benefit suppliers and contracting authorities. By ensuring the changes to domestic law required under the Agreements can be made with general effect, the United Kingdom procurement framework can remain uniform and coherent. Without this power, parallel procurement systems would be required for procurements covered by the Agreements and those that were not. That may result in different or conflicting procurement procedures which UK suppliers and contracting authorities would need to navigate.

By framing the power in this way, the United Kingdom can implement its obligations in the Agreements in a way that is consistent with our other international procurement obligations.

Contracts with unknown value
You voiced concerns that the changes proposed under the provisions that deal with contracts of unknown value could cause issues for British suppliers, suggesting they would create much greater competition for contracts.

The current British procurement regulations require authorities to estimate the value of each procurement. The procurement will be covered under a trade agreement if the value exceeds the thresholds and meets the other criteria specified in that agreement. The regulations do not provide that where an estimate cannot be made it is assumed to be covered.

Nonetheless, in practice, this rarely occurs as estimates can usually be made. The changes to the rules in this space simply ensure that international agreements cannot be avoided where an estimate cannot be made by a contracting authority.

The changes would therefore only represent a change in practice in limited circumstances. It would not open the procurements to significantly more competitors.

Interaction with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the World Trade Organization's Agreement on Government Procurement

The Committee also discussed the interaction between the commitments made under the Agreements and those made under the World Trade Organization's Agreement on Government Procurement. In addition, the Committee discussed the United Kingdom's ongoing negotiations to accede to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and how any procurement commitments set out in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership may interact with our Agreements with Australia and New Zealand

The Agreement on Government Procurement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership are plurilateral agreements between twenty-one and eleven parties respectively, including in each case Australia and New Zealand. As recognised in Committee, the Agreement on Government Procurement in particular establishes a global baseline for international procurement. Nonetheless, neither prevents its members from entering into bilateral free trade agreements to sit alongside the Agreement on Government Procurement and Comprehensive and Progressive Agreement on Trans-Pacific Partnership while at the same time going further in terms of the procurement commitments between members.

These Agreements with Australia and New Zealand do just that, going beyond both the Agreement on Government Procurement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership baselines. This includes strengthening procurement commitments towards transparency and small and medium enterprise participation, making it simpler and more desirable for businesses to participate in procurements. Although the texts of the Agreements with Australia and New Zealand are sometimes laid out differently to the way they are in the Agreement on Government Procurement, they in no way dilute or reduce the global baseline established by the Agreement on Government Procurement.

There was also suggestion in Committee that it would be difficult for suppliers in the United Kingdom to navigate the Agreements with Australia and New Zealand, as well as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership in the future. I would like to reassure the Committee that when bidding for United Kingdom procurements, the only system that British suppliers need to concern themselves with is United Kingdom's procurement regulations.

Indeed, the International Trade Select Committee's report on the United Kingdom-Australia Free Trade Agreement reflected evidence from Anne Petterd, Partner at law firm Baker McKenzie, that dismisses the idea that suppliers are guided by the texts of international agreements. She instead noted that, at least in instances where they are seeking remedial action, a greater concern is for how recourse can be obtained under Australian local law.

Domestic review rights under the Australian procurement chapter
The Committee also considered the evidence raised by Professor Sánchez-Graells regarding domestic review procedures in its evidence session of Tuesday 11th October. The Government respectfully disagrees with the analysis presented at that session that a provision in the government procurement chapter of the UK-Australia free trade agreement 'allows for the exclusion of legal remedies completely on the basis of public interest'.

The public interest exclusion only applies to temporary measures put in place to ensure aggrieved suppliers may continue to participate in a procurement. By way of illustration, a British supplier tendering for construction contracts on an Australian airport may challenge a decision not to select it for the second phase of the procurement process on unfair treatment grounds. The Australian authorities may then decide not to suspend the procurement process pending resolution of that challenge on the basis the public interest is in favour of swift delivery of the project.

However, that does not prohibit the British supplier continuing their challenge for unfair treatment or claiming compensation. Indeed, the supplier may also challenge whether swift delivery of the project is sufficient public interest not to suspend the procurement process. Accordingly, in no way is the 'innovative British supplier' excluded from access to justice, and one can be reassured that they would still have access to domestic review procedures.

The Government also respectfully disagrees with the suggestion in the witness evidence that this public interest exclusion is not similarly reflected in the Agreement on Government Procurement or the United Kingdom-New Zealand free trade agreement. The Government acknowledges that the specific position of the exclusion differs between these agreements and is closer to the approach adopted in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Nonetheless, the Government do not consider this alters the legal effect or gives rise to legal uncertainty. For the benefit of the Committee, the relevant provisions from each of the Agreements, the Agreement on Government Procurement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership are set out in an annex to this letter.

Procurement discussions at meetings of the Interministerial Group for Trade
On the question of when procurement was discussed at the Interministerial Group for Trade. I can confirm that procurement was specifically mentioned in the following sessions:

- 5th July 2022,
- 21st July 2020, and
- 22nd April 2020.

I am placing a copy of this letter in the Libraries of both Houses.

Yours ever,

Sir James Duddridge KCMG MP
Minister for International Trade

Annex A – Comparison of 'public interest exclusion' in domestic review procedures

The 'public interest exclusion' is underlined.

UK-Australia FTA – Article 16.19	CPTPP – Article 15.19	GPA – Article XVIII	UK-New Zealand FTA – Article 16.20
7. Each Party shall adopt or maintain procedures that provide for: (a) prompt interim measures to preserve the supplier's opportunity to participate in the procurement; and (b) corrective action that may include compensation under paragraph 5. <u>The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether those measures should be applied</u>. Just cause for not acting shall be provided in writing.	6. Each Party shall adopt or maintain procedures that provide for: (a) prompt interim measures, pending the resolution of a complaint, to preserve the supplier's opportunity to participate in the procurement and to ensure that the procuring entities of the Party comply with its measures implementing this Chapter; and (b) corrective action that may include compensation under paragraph 4. <u>The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether those measures should be applied</u>. Just cause for not acting shall be provided in writing.	7. Each Party shall adopt or maintain procedures that provide for: a. rapid interim measures to preserve the supplier's opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement process. <u>The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied</u>. Just cause for not acting shall be provided in writing; and b. where a review body has determined that there has been a breach or a failure as referred to in paragraph 1, corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.	7. Each Party shall adopt or maintain procedures that provide for: (a) rapid interim measures to preserve the supplier's opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement process. <u>The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied</u>. Just cause for not acting shall be provided in writing; and (b) where a review body has determined that there has been a breach or a failure as referred to in paragraph 1, corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.