

POLICY NOTE

The Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019

SSI 2019/114

The above instrument was made in exercise of the powers conferred by paragraph 1(1) and (3) of Schedule 2 and paragraph 21(b) of Schedule 7 to the European Union (Withdrawal) Act 2018. The instrument is subject to affirmative procedure.

Purpose of the instrument

This instrument amends the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019, laid in draft on 29 January 2019. It provides an alternative ‘fix’ to deficiencies in retained EU legislation relating to the treatment of the UK’s international obligations in the field of public procurement.

Policy Objectives

1. This instrument is drafted to ensure that procurement legislation in Scotland is compatible with the UK’s international agreements. This approach is at the request of the UK Government, which will lay a similar second instrument with effect in England, Wales and Northern Ireland, and is to provide sufficient time for the Trade Bill, or another primary legislative vehicle which would enable the UK’s new obligations to be implemented, to receive Royal Assent.

Explanation of the law being amended by the regulations

2. This instrument amends the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 (“the first SSI”) before that instrument comes into force.
3. The first SSI principally amends the Public Contracts (Scotland) Regulations 2015; the Utilities Contracts (Scotland) Regulations 2016; and the Concession Contracts (Scotland) Regulations 2016.
4. These regulations implement the requirements of Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors; and Directive 2014/23/EU on the award of concession contracts, respectively. They also implement the requirements of Directive 89/665/EEC and Directive 92/13/EEC, as amended, on remedies and review procedures for public procurement and on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.
5. These EU procurement Directives govern the procedures for the award of contracts worth more than specified financial thresholds, subject to certain exclusions from their scope. The legal framework is based on the principles of transparency, non-discrimination, equal treatment and proportionality. The EU is a member of the World Trade Organisation’s Government Procurement Agreement (“the GPA”), and is party to a number of international agreements with countries outside the EU that

contain procurement provisions. The EU procurement Directives reflect the obligations arising from these agreements, as well as the EEA Agreement.

Reasons for and effect of the proposed change or changes on retained EU law

Effect of the proposed changes: The GPA

6. Because the EU is a signatory to the GPA, the procurement Directives require contracting authorities to afford equal treatment to bidders from other countries which are also signatories to the GPA. This is currently reflected in domestic legislation. The first SSI would remove this requirement eight months after a 'no-deal' exit from the EU.
7. That approach mirrored the approach being taken by the UK Government in its equivalent first SI applicable to England, Wales and Northern Ireland, which was laid on 13 December 2018. The UK Government asked that the Scottish regulations took that approach in anticipation of the UK's accession to the GPA on or shortly after exit, and in order to support the UK's swift accession to the GPA. Whilst it guarantees that bidders from countries which are party to the GPA will be able to bid for public contracts in the UK on an equal footing with bidders from the UK, if the UK were to fail to accede to the GPA, however, bidders from the UK would not, as a matter of international law, be guaranteed reciprocal treatment when bidding for public contracts in other countries which are party to the GPA.
8. That approach was predicated on the progress made by the UK in applying to accede to the GPA, and a planning assumption that once the UK acceded to the GPA, powers contained in clause 1 of the Trade Bill could be used to implement the UK's separate accession within that eight month period.
9. The amendments proposed by this SSI would extend that eight month period to 18 months.

Effect of the proposed changes: other international agreements

10. The first SSI would remove immediately on exit from the EU the duty on contracting authorities in Scotland, which currently exists in domestic legislation, to afford equal treatment to bidders from countries which are signatories to other relevant international agreements with which the EU has an agreement covering public procurement.
11. That approach also mirrored the approach being taken by the UK Government in its equivalent draft first SI applicable to England, Wales and Northern Ireland.
12. The UK Government is in the process of attempting to negotiate the 'roll-over' of the EU's international agreements so that they continue to apply to the UK after exit from the EU. The approach in the first SSI was predicated on a planning assumption that as the UK negotiated these agreements, powers contained in clause 2 of the Trade Bill could be used to implement these new agreements.

13. The amendments proposed by this SSI would delay the removal of these duties by eighteen months, thereby extending the duties of equal treatment and non-discrimination to bidders from other countries with which the EU has a relevant agreement for that period. Whilst this guarantees that bidders from countries which have such an agreement with the EU will be able to bid for public contracts in the UK on an equal footing with bidders from the UK, as with the GPA, were the UK to fail to negotiate the 'roll-over' of these agreements within that period, then bidders from the UK would not, as a matter of international law, be guaranteed reciprocal treatment when bidding for public contracts in those countries.

Reasons for the proposed changes

14. These changes are made following the request of the UK Government, and are consistent with changes we have now been advised that the UK Government will make shortly to the procurement legislation applicable in England, Wales and Northern Ireland.
15. This is because in the current political climate, it is no longer safe to assume that the Trade Bill will receive Royal Assent in sufficient time for the powers contained in clause 1 and clause 2 to be exercised in order to implement the UK's new agreements. This means that both the UK and Scottish regulations risk being in breach of the UK's international obligations in respect of public procurement after exit from the EU.
16. In order for the UK's accession to the GPA, and for the 'roll-over' of the EU's trade agreements, to be ratified, the provisions arising from these agreements must be implemented in domestic legislation. There is also an obligation on the Scottish Ministers to ensure that Scottish legislation is compatible with the UK's international obligations.
17. The approach set out in this SSI, of extending the obligations arising from existing EU agreements for 18 months is, in effect, a contingency measure which allows for domestic legislation to comply in practice with the UK's international obligations (as the UK's obligations under these agreements should in theory be the same as the EU's).
18. The 18 month period is designed to allow sufficient time either for the passage of the Trade Bill, or alternatively for new primary legislation addressing this issue to be brought forward, as the UK's own obligations will still need to be implemented within this 18 month period using powers derived from the Trade Bill or other primary legislation.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

The Cabinet Secretary for Finance, Economy and Fair Work has made the following statement “In my view the Public Procurement etc. (Scotland) (Amendment) (EU Exit) (Amendment) Regulations 2019 does no more than is appropriate. This is the case because it does no more than prevent, remedy or mitigate deficiencies in retained EU law arising from the withdrawal of the UK from the EU which are discussed in the policy note”.

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Cabinet Secretary for Finance, Economy and Fair Work has made the following statement “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These reasons are set out in the policy note”.

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Cabinet Secretary for Finance, Economy and Fair Work has made the following statement “In my view the Public Procurement etc. (Scotland) (Amendment) (EU Exit) (Amendment) Regulations 2019 does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Cabinet Secretary for Finance, Economy and Fair Work has made the following statement “In my view the Public Procurement etc. (Scotland) (Amendment) (EU Exit) (Amendment) Regulations 2019 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010”.

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

This heading is not applicable

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

This heading is not applicable

An indication of how the regulations should be categorised in relation to the significance of the change proposed

High – this instrument amends the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019, which are categorised as high.

Statement setting out the Scottish Ministers’ reasons for their choice of procedure

This SSI is laid subject to affirmative procedure as it amends the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019, which are subject to affirmative procedure.

Further information

Consultation

There has been no public consultation on how to rectify the deficiencies arising from withdrawal. The changes made are intended to maintain the current legislative and policy framework in so far as this is possible after exit and are within the extent permitted by the European Union (Withdrawal) Act 2018 to correct deficiencies.

Discussions on the content of this instrument have been held with the UK Government and the other devolved administrations. The amendments to legislation set out in this instrument are consistent with amendments which the UK Government is proposing to make to its equivalent legislation.

Impact Assessments

Full impact assessments have not been prepared for this instrument because the framework and principles underlying the legislation have not been substantially amended. Modifications contained in this instrument have been made to ensure the legislation functions effectively, once the UK withdraws from the EU.

Financial Effects

The Cabinet Secretary for Finance, Economy and Fair Work confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Scottish Procurement and Commercial Directorate

7 February 2019