

## EXPLANATORY MEMORANDUM TO

### THE PUBLIC PROCUREMENT (AGREEMENT ON GOVERNMENT PROCUREMENT) (AMENDMENT) REGULATIONS 2021

2021 No. 573

#### 1. Introduction

- 1.1 This explanatory memorandum has been prepared by Cabinet Office and is laid before Parliament by Command of Her Majesty.

#### 2. Purpose of the instrument

- 2.1 This instrument will give effect in domestic regulations to the United Kingdom's (UK) legal obligations under the Agreement on Government Procurement (GPA). Implementing our independent membership into domestic law will ensure that UK businesses will have continued access to government procurement markets estimated as worth over £1.3 trillion per annum, following the UK's exit from the EU.

#### 3. Matters of special interest to Parliament

##### *Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

##### *Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.2 The territorial application of this instrument varies between provisions
- 3.3 Part 2 of this instrument amends the Public Contracts Regulations 2015 (PCR), the Concession Contracts Regulations 2016 (CCR) and the Utilities Contracts Regulations 2016 (UCR). These provisions extend to England, Wales and Northern Ireland. Part 3 of this instrument amends the Public Contracts (Scotland) Regulations 2015 (PCR Scotland), the Concession Contracts (Scotland) Regulations 2016 (CCR Scotland) and the Utilities Contracts (Scotland) Regulations 2016 (UCR Scotland). The Scottish Parliament gave its approval on 10 December 2020 to those amendments.
- 3.4 The powers under which this instrument is made cover the entire UK (see section 1 Trade Act 2021) and the territorial application of this instrument is not limited either by the Act or by the instrument.

#### 4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the whole of the United Kingdom.
- 4.2 The territorial application of this instrument is set out in Section 3 under "Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)".

#### 5. European Convention on Human Rights

- 5.1 The Minister for the Cabinet Office has made the following statement regarding Human Rights:

“In my view the provisions of the Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021 are compatible with the Convention Rights.”

## **6. Legislative Context**

- 6.1 This instrument will amend the PCR, the UCR and the CCR which apply to England, Wales and Northern Ireland. This instrument will also amend the PCR Scotland, the CCR Scotland and the UCR Scotland which apply to Scotland.
- 6.2 This instrument is made under section 1 (implementation of the Agreement on Government Procurement) of the Trade Act 2021. This power allows an appropriate authority (including a Minister of the Crown and devolved authorities) to implement the GPA.
- 6.3 The GPA is a plurilateral agreement within the World Trade Organisation framework between many of the major international economies, including the US, Canada, the EU and Japan. Prior to leaving the EU, the UK participated in the GPA as an EU Member State. The UK acceded to the GPA as of 1 January 2021 in its own right, i.e. from the end of the Implementation Period.
- 6.4 The UK currently gives effect to its GPA obligations in domestic public procurement regulations. These include the PCR, the CCR and the UCR (which implement EU Directives 2014/24/EU, 2014/23/EU, and 2014/25/EU respectively) and Scottish procurement regulations, namely the PCR Scotland, the CCR Scotland and the UCR Scotland.
- 6.5 In the PCR and UCR and the Scottish equivalent regulations, contracting authorities and utilities are placed under an obligation to accord to the works, services, supplies and economic operators of the signatories to the GPA treatment that is no less favourable than the treatment accorded to the work, supplies, services and economic operators of the EU.
- 6.6 The PCR, UCR, CCR and Scottish equivalent regulations also place an express duty on contracting authorities and utilities to comply with any obligations contained in those regulations in respect of economic operators from GPA parties.
- 6.7 Section 1 of the Trade Act 2021 permits an appropriate authority (including a Minister of the Crown and devolved authorities) to make regulations to implement the UK’s requirements of the GPA as an independent member. In broad terms, the following amendments to the current domestic public procurement regulations are being made:
  - amendment of the ‘definitions’, and inclusion of a schedule listing parties to the GPA, to ensure it is clear that the UK has acceded to the GPA in its own right and to provide clarity on the other members of the GPA;
  - updating the obligations of UK contracting authorities in respect of international agreements by which the EU is bound (other than the GPA);
  - inclusion of the obligations owed by UK contracting authorities under the Annexes to the UK’s Appendix 1 to the GPA (to accord no less favourable treatment to the works, supplies, services and economic operators of any GPA party), rather than under the Annexes to the EU’s Appendix 1 to the GPA; and

- extending the duty owed by UK contracting authorities to economic operators from the UK or Gibraltar to comply with provisions of the public procurement regulations, to economic operators from GPA parties.

## **7. Policy background**

### *What is being done and why?*

- 7.1 Previously the UK participated in the GPA by virtue of its EU membership. Now the UK has ceased to be a member of the EU, the UK has acceded to the GPA as an independent member to ensure that the UK should continue to reap the benefits of guaranteed access to international public procurement markets of GPA parties. As a result, the UK's domestic public procurement legislation must be amended to reflect the obligations by which the UK, and its contracting authorities, are correspondingly bound under the GPA.
- 7.2 Without the amendments made by this instrument, the UK would be in breach of its obligations under the GPA. This would leave the UK open to legal challenge from another GPA party. If a challenge were brought against the UK to the WTO there is a high chance that it would be successful which could result in penalties against the UK, retaliatory measures from international partners, claims for financial compensation and reputational damage.
- 7.3 The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 and the Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 ("the EU Exit SIs") made under the European Union (Withdrawal) Act 2018 preserves the UK's existing procurement obligations in respect of economic operators from parties who were signatories to the GPA on IP completion day for 12 months from the end of the Implementation Period. These provisions were included in the EU Exit SIs as it became apparent that the power to make this instrument would not be available in time for the instrument to be made by 1 January 2021. It does not mitigate the risk entirely, so as to render this instrument unnecessary, as the protections offered by the EU Exit SIs fall away after 12 months at which point the UK would immediately be in breach of all its procurement obligations under the GPA.
- 7.4 The amendments made by these Regulations are "steady state amendments", as that term is defined in the EU Exit SIs. As such, in accordance with the transitional provisions in the EU Exit SIs, these amendments do not affect any procedure (as that term is defined in the Schedules to the EU Exit SIs) launched before but not yet finalised by IP completion day.

## **8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act 2018 but relates to the withdrawal of the United Kingdom from the European Union because it is a required change to reflect that the UK is now an independent member of the GPA.

## **9. Consolidation**

- 9.1 There are no current plans to consolidate the legislation amended by this instrument.

## **10. Consultation outcome**

- 10.1 There has been no consultation on this instrument. The changes made are intended to provide legal effect to the UK's accession to the GPA as an independent member and maintain the current legislative and policy framework that already extends to GPA parties through the UK's membership as part of the EU. Moreover, section 28(3)(b) of the Small Business, Enterprise and Employment Act 2015 is clear that there is no need to consult for procurement SIs.
- 10.2 Regular discussions on the content of this instrument have been held with the devolved administrations throughout the drafting process in accordance with the Intergovernmental Agreement.

## **11. Guidance**

- 11.1 Guidance will be available for stakeholders by the time this instrument comes into force. It will remind UK contracting authorities of the international obligations which result from the UK's participation in the GPA.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the framework and principles underlying the regulations being amended have not been substantially amended. Modifications contained in this instrument have been made to ensure the regulations function effectively. Therefore, any impact is expected to be low and are below the threshold required to carry out a full impact assessment.

## **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small business.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The impact on small businesses arising from this instrument is expected to be low.

## **14. Monitoring & review**

- 14.1 As this instrument is amending provisions in connection with procurement only, the duty to review in section 28 of the Small Business, Enterprise and Employment Act 2015 does not apply and no review clause is required.

## **15. Contact**

- 15.1 Julie Bremner at the Cabinet Office, telephone: 07771 957746 or email: [julie.bremner@cabinetoffice.gov.uk](mailto:julie.bremner@cabinetoffice.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Edward Green, Deputy Director for the International and Reform Team, at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister Lopez at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.