

## POLICY NOTE

### THE PUBLIC PROCUREMENT ETC. (SCOTLAND) (AMENDMENT) (EU EXIT) AMENDMENT (NO. 2) REGULATIONS 2019

#### SSI 2019/414

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 of the European Union (Withdrawal) Act 2018. The instrument is subject to negative procedure.

**Purpose of the instrument.** This instrument ensures that if the UK leaves the European Union, the financial thresholds from which public procurement legislation applies will not change on Exit Day.

#### Policy Objectives

1. Public procurement legislation applies to contracts worth at least the values set out in various financial thresholds. These thresholds are updated every two years by the European Commission. This instrument ensures that if the UK leaves the EU during the two year period from 1 January 2020 to 31 December 2021, those thresholds will be up-to-date at Exit Day.

#### 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'), which was made under the European Union (Withdrawal) Act 2018 in preparation for a possible 'no-deal' Exit on 29 March 2019.
3. The first SSI in turn amends various other instruments which constitute retained EU law. Four of those other amended instruments are relevant to this instrument: the Public Contracts (Scotland) Regulations 2015; the Utilities Contracts (Scotland) Regulations 2016; the Concession Contracts (Scotland) Regulations 2016; and the Utilities Contracts (Scotland) Regulations 2012.
4. Duties under those four instruments apply to contracting entities carrying out procurement exercises where the value of the contract in question exceeds certain financial thresholds. At present, those threshold values apply by way of a combination of ambulatory references to the European Procurement Directives (in relation to changeable thresholds) and listing in Euros (in relation to static thresholds).
5. Every two years, as required by the Directives, the European Commission carries out a calculation to update the changeable thresholds in the Directives according to a set methodology derived from the EU's membership of the World Trade Organisation's Government Procurement Agreement ('the GPA'). It also carries out a second exercise to set the equivalent values of both the changeable and static thresholds in EU currencies other than the Euro.
6. The first SSI would delete the ambulatory references and values in Euros in domestic legislation and replace them with the values in sterling according to the conversion

rates given by the European Commission for the two year period to 31<sup>st</sup> December 2019.

7. The European Commission has now carried out the review of thresholds and equivalent values for the two year period beginning on 1 January 2020. The updates to the changeable thresholds in the Public Procurement Directive (2014/24/EU), which is implemented by the Public Contracts (Scotland) Regulations 2015, are set out in Commission Delegated Regulation (EU) 2019/1828. The updates to the changeable thresholds in the Utilities Procurement Directive (2014/25/EU), which is implemented by the Utilities Contracts (Scotland) Regulations 2016, are set out in Commission Delegated Regulation (EU) 2019/1829. The updates to the changeable thresholds in the Concessions Procurement Directive (2014/23/EU), which is implemented by the Concession Contracts (Scotland) Regulations 2016, are set out in Commission Delegated Regulation (EU) 2019/1827. The sterling equivalent of both the updated changeable thresholds and the static thresholds is set out in Communication from the Commission C/2019/7697.
8. This SSI amends the first SSI before it takes effect, so as to delete the sterling values which apply until 31 December 2019, and replace them with the sterling values which apply from 1 January 2020.
9. Regulation 2(2)(a) of this instrument amends the threshold from which a public works contract is subject to the Public Contracts (Scotland) Regulations 2015. In the first SSI, this value was £4,551,413, and was equivalent to €5,548,000. Commission Delegated Regulation 2019/1828 amends this to €5,350,000, while Commission Communication C/2019/7697 gives a sterling equivalence to this new value of £4,733,252.
10. Regulation 2(2)(b) of this instrument amends the threshold from which a public supply contract or a public service contract to be awarded by a central government authority, or a design contest organised by such an authority, is subject to the Public Contracts (Scotland) Regulations 2015. In the first SSI, this value was £118,133, and was equivalent to €144,000. Commission Delegated Regulation 2019/1828 amends this to €139,000, while Commission Communication C/2019/7697 gives a sterling equivalence to this new value of £122,976.
11. Regulation 2(2)(c) of this instrument amends the threshold from which a public supply contract or a public service contract to be awarded by a sub-central contracting authority, or a design contest organised by such an authority, is subject to the Public Contracts (Scotland) Regulations 2015. In the first SSI, this value was £181,302, and was equivalent to €221,000. Commission Delegated Regulation 2019/1828 amends this to €214,000, while Commission Communication C/2019/7697 gives a sterling equivalence to this new value of £189,330.
12. Regulation 2(2)(d) of this instrument amends the threshold from which a public service contract for a service listed in Schedule 3 to the Public Contracts (Scotland) Regulations 2015 is subject to the so-called 'light-touch' regime set out in those regulations. This is a static threshold, equivalent to €750,000. In the first SSI, this value was £615,278. Commission Communication C/2019/7697 gives an updated sterling equivalence of £663,540.

13. Regulation 2(2)(e) of this instrument amends the maximum value of a supplies or services lot which, as part of a larger work, and in certain circumstances, is exempt from the Public Contracts (Scotland) Regulations 2015. This is a static threshold, equivalent to €80,000. In the first SSI, this value was £65,630. Commission Communication C/2019/7697 gives an updated sterling equivalence of £70,778.
14. Regulation 2(2)(f) of this instrument amends the maximum value of a works lot which, as part of a larger work, and in certain circumstances, is exempt from the Public Contracts (Scotland) Regulations 2015. This is a static threshold, equivalent to €1,000,000. In the first SSI, this value was £820,370. Commission Communication C/2019/7697 gives an updated sterling equivalence of £884,720.
15. Regulation 2(2)(g) of this instrument amends the threshold from which a contracting authority is bound by the Public Contracts (Scotland) Regulations 2015 to keep copies of all concluded public supply contracts and public service contracts for at least the duration of the contract. This is a static threshold, equivalent to €1,000,000. In the first SSI, this value was £820,370. Commission Communication C/2019/7697 gives an updated sterling equivalence of £884,720.
16. Regulation 2(2)(h) of this instrument amends the threshold from which a contracting authority is bound by the Public Contracts (Scotland) Regulations 2015 to keep copies of all concluded public works contracts for at least the duration of the contract. This is a static threshold, equivalent to €10,000,000. In the first SSI, this value was £8,203,700. Commission Communication C/2019/7697 does not give a sterling equivalence, and so the value used here, £8,847,200, is ten times the equivalence given for €1,000,000.
17. Regulation 2(3)(a) of this instrument amends the threshold from which a supply or service contract, or design contest, is subject to the Utilities Contracts (Scotland) Regulations 2016. In the first SSI, this value was £363,424, and was equivalent to €443,000. Commission Delegated Regulation 2019/1829 amends this to €428,000, while Commission Communication C/2019/7697 gives a sterling equivalence to this new value of £378,660.
18. Regulation 2(3)(b) of this instrument amends the threshold from which a works contract is subject to the Utilities Contracts (Scotland) Regulations 2016. In the first SSI, this value was £4,551,413, and was equivalent to €5,548,000. Commission Delegated Regulation 2019/1829 amends this to €5,350,000, while Commission Communication C/2019/7697 gives a sterling equivalence to this new value of £4,733,252.
19. Regulation 2(3)(c) of this instrument amends the threshold from which a public service contract for a service listed in Schedule 2 to the Utilities Contracts (Scotland) Regulations 2016 is subject to the so-called 'light-touch' regime set out in those regulations. This is a static threshold, equivalent to €1,000,000. In the first SSI, this value was £820,370. Commission Communication C/2019/7697 gives an updated sterling equivalence of £884,720.

20. Regulation 2(3)(d) of this instrument amends the maximum value of a supplies or services lot which, as part of a larger requirement, and in certain circumstances, is exempt from the Utilities Contracts (Scotland) Regulations 2016. This is a static threshold, equivalent to €80,000. In the first SSI, this value was £65,630. Commission Communication C/2019/7697 gives an updated sterling equivalence of £70,778.
21. Regulation 2(3)(e) of this instrument amends the maximum value of a works lot which, as part of a larger requirement, and in certain circumstances, is exempt from the Utilities Contracts (Scotland) Regulations 2016. This is a static threshold, equivalent to €1,000,000. In the first SSI, this value was £820,370. Commission Communication C/2019/7697 gives an updated sterling equivalence of £884,720.
22. Regulation 2(3)(f) of this instrument amends the threshold from which a contracting authority is bound by the Utilities Contracts (Scotland) Regulations 2016 to keep copies of all concluded supply contracts and service contracts for at least the duration of the contract. This is a static threshold, equivalent to €1,000,000. In the first SSI, this value was £820,370. Commission Communication C/2019/7697 gives an updated sterling equivalence of £884,720.
23. Regulation 2(3)(g) of this instrument amends the threshold from which a contracting authority is bound by the Utilities Contracts (Scotland) Regulations 2016 to keep copies of all concluded public works contracts for at least the duration of the contract. This is a static threshold, equivalent to €10,000,000. In the first SSI, this value was £8,203,700. Commission Communication C/2019/7697 does not give a sterling equivalence, and so the value used here, £8,847,200, is ten times the equivalence given for €1,000,000.
24. Regulation 2(4) of this instrument amends the threshold from which a concession contract is subject to the Concession Contracts (Scotland) Regulations 2016. In the first SSI, this value was £4,551,413, and was equivalent to €5,548,000. Commission Delegated Regulation 2019/1827 amends this to €5,350,000, while Commission Communication C/2019/7697 gives a sterling equivalence to this new value of £4,733,252.
25. Regulation 2(5)(a) of this instrument amends the threshold from which a utility which is relying on certain exemptions set out in the Utilities Contracts (Scotland) Regulations 2012 must publish a contract award notice to that effect. This is a static threshold, equivalent to €5,000,000. In the first SSI, this value was £4,101,850. Commission Communication C/2019/7697 does not give a sterling equivalence, and so the value used here, £4,423,600, is five times the equivalence given for €1,000,000.
26. Regulation 2(5)(b) of this instrument amends the minimum threshold from which a utility which is relying on certain exemptions set out in the Utilities Contracts (Scotland) Regulations 2012, in relation to a supply contract or services contract, must retain certain information for at least four years after the contract has been awarded. This is a static threshold, equivalent to €400,000. In the first SSI, this value was £328,150. Commission Communication C/2019/7697 does not give a sterling equivalence, and so the value used here, £353,890, is five times the equivalence given for €80,000.

27. Regulation 2(5)(c) of this instrument amends the maximum threshold up to which a utility which is relying on certain exemptions set out in the Utilities Contracts (Scotland) Regulations 2012, in relation to a supply contract or services contract, must retain certain information for at least four years after the contract has been awarded. This is a static threshold, equivalent to €5,000,000. In the first SSI, this value was £4,101,850. Commission Communication C/2019/7697 does not give a sterling equivalence, and so the value used here, £4,423,600, is five times the equivalence given for €1,000,000.

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

28. The need for these amendments arises from the fact that the first SSI was made in preparation for a potential ‘no-deal’ departure from the EU on 29 March 2019. The first SSI, which takes effect on Exit Day, inserts into domestic legislation the sterling values as they were on that date.
29. If the UK remains a member state of the EU on 1 January 2020, or is in a transition period and still subject to EU law, then the thresholds which apply by virtue of EU law will change on that date. If the UK subsequently leaves the EU, or exits a transition period, then without the amendments contained in this instrument, the first SSI will insert out-of-date threshold values into domestic legislation.
30. The changeable thresholds are derived from the EU’s membership of the GPA, and the obligation in the European Procurement Directives on the European Commission to update those thresholds every two years is derived from that agreement. The UK’s independent accession to the GPA after EU Exit has already been agreed, and so a failure to update the thresholds in the first SSI would mean that domestic legislation in Scotland would not be compliant with the UK’s obligations arising from the GPA.
31. There is no international obligation which requires the static threshold values to be updated, but there would be practical problems associated with a failure to do so. Whilst the values are static in Euros, the European Commission publishes the effective value in other EU currencies every two years. A failure to update the values in the first SSI would therefore still result in those updated thresholds being replaced by out-of-date values. For example, the threshold from which a public contract for certain social and other specific services is subject to the ‘light-touch’ regime set out in the Public Contracts (Scotland) Regulations 2015 is a static €750,000. For the two year period to 31 December 2019, the European Commission determined that the sterling equivalent is £615,278. From 1 January 2020, that becomes £663,540. A failure to make the amendment contained in regulation 2(2)(d) of this instrument would therefore mean that in the event of a ‘no-deal’ exit on 31 January 2020, the effective threshold would be £615,278 on 31 December 2019, £663,540 for the month of January, and £615,278 again from 1 February 2020. This has clear and obvious potential to cause significant confusion for both buyers and suppliers.
32. Whilst most of the amendments contained in this instrument will affect procurement exercises being conducted under the provisions of current retained EU legislation (in the form of the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016, and the Concession Contracts (Scotland) Regulations

2016), the amendments contained in regulation 2(5) will affect procurement exercises conducted subject to the provisions of the Utilities Contracts (Scotland) Regulations 2012. Those regulations were revoked by Utilities Contracts (Scotland) Regulations 2016, though subject to transitional provision and saving specified in regulation 111 of that instrument in relation to competitions which were ongoing. Competitions carried out under these regulations can occasionally take several years to complete, and it is possible that a competition commenced prior to 18 April 2016, when the 2012 regulations were revoked, is still ongoing. Unlike all of the other thresholds amended by this instrument, the thresholds amended by regulation 2(5) are relevant at the moment of contract award (i.e. the end of the procurement procedure) rather than at the moment of commencing the procurement procedure, thus giving rise to the need to update them.

### **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 (No. 2) Regulations 2019 do no more than is appropriate. This is the case because the instrument 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 (No. 2) Regulations 2019 do 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 (No. 2) 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**

Low – this instrument is technical in nature and reflects the calculation of updated threshold values to reflect currency fluctuations. The calculation of these updated thresholds was carried out by the European Commission according to defined methodology.

**Further information**

**Consultation**

We consider that the instrument contains provisions which are to come into force before exit day and, and therefore under paragraph 4 of schedule 2 to the EU (Withdrawal) Act 2018, we have consulted with the Secretary of State before making the instrument.

**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 reflect the biennial update to threshold values to reflect currency fluctuations which has taken place since the first SSI was made.

**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

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