

2023 No. 484

PUBLIC PROCUREMENT

**The Public Procurement (International Trade Agreements)
(Amendment) Regulations 2023**

<i>Made</i>	- - - -	<i>27th April 2023</i>
<i>Laid before Parliament</i>		<i>4th May 2023</i>
<i>Coming into force</i>		<i>25th May 2023</i>

The Minister for the Cabinet Office makes these Regulations in exercise of the powers conferred by sections 1(1) and (2), and 2(1)(b), (c) and (d) of the Trade (Australia and New Zealand) Act 2023(a).

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Public Procurement (International Trade Agreements) (Amendment) Regulations 2023.

(2) These Regulations come into force on 25th May 2023.

(3) The amendments made by these Regulations have the same extent as the provisions to which they relate.

(4) The following regulations do not apply to contracting authorities that are devolved Welsh authorities—

- (a) regulation 2(2) and (5) to (25);
- (b) regulation 4(2), (5), (6), (7)(a), (b) and (8) to (22).

(5) For the purposes of paragraph (4)(a), “contracting authorities” has the meaning given by regulation 2(1) of the Public Contracts Regulations 2015(b).

(6) For the purposes of paragraph (4)(b), “contracting authorities” has the meaning given by regulation 4 of the Utilities Contracts Regulations 2016(c).

(7) In this regulation, “devolved Welsh authority” has the meaning given by section 157A of the Government of Wales Act 2006(d).

(a) 2023 c. 9. Section 1(1)(a) gives the appropriate authority power to make appropriate provision for the purposes of implementing the “government procurement Chapters of the UK-Australia and UK-New Zealand FTAs” (defined in section 1(4), with section 1(5)). The minister is the “appropriate authority” for these purposes under section 3 of the Act.

(b) S.I. 2015/102, relevant amending instruments are S.I. 2016/275, S.I. 2020/1319, S.I. 2021/787, S.I. 2021/872, S.I. 2021/1221, S.I. 2023/58 and S.I. 2022/766.

(c) S.I. 2016/274, relevant amending instruments are S.I. 2020/1319, S.I. 2021/573, S.I. 2021/787, S.I. 2021/1221 and S.I. 2022/766.

(d) 2006 c. 32; section 157A was inserted by section 4(1) of the Wales Act 2017 (c. 4) and subsequently amended by paragraph 2(19) of Schedule 1 to the Senedd and Elections (Wales) Act 2020 (anaw 1) and section 45(3) of the Fisheries Act 2020 (c. 22).

Amendments to the Public Contracts Regulations 2015

- 2.—(1) The Public Contracts Regulations 2015 are amended as follows.
- (2) In regulation 2 (definitions), in paragraph (1)—
- (a) omit the definition of “invitation to confirm interest”;
 - (b) in the definition of “procurement document”, omit “the prior information notice where it is used as a means of calling for competition.”.
- (3) In regulation 6 (methods for calculating the estimated value of procurement)—
- (a) in paragraph (14), for “paragraph (15)” substitute “paragraphs (15) and (15A)”;
 - (b) after paragraph (15), insert—

“(15A) Where a contracting authority that is not a devolved Welsh authority is unable to estimate in accordance with this regulation the value of one or more lots into which a proposed work, proposed acquisition of similar supplies or proposed provision of services has been divided, the aggregate value of the lots awarded in reliance on paragraph (14) shall not exceed 20 per cent of the aggregate value of all the lots that can be so estimated.”;
 - (c) after paragraph (19), insert—

“(20) If a contracting authority that is not a devolved Welsh authority is unable to estimate the value of a procurement in accordance with this regulation, the estimated value of the procurement inclusive of VAT is deemed to be equal to the relevant threshold amount in regulation 5 (threshold amounts).”.
- (4) In regulation 18 (principles of procurement), after paragraph (3), insert—

“(4) Contracting authorities that are not devolved Welsh authorities shall not terminate public contracts in a manner that circumvents their obligations under Parts 2 and 3.”.
- (5) In regulation 22 (rules applicable to communication)—
- (a) in paragraph (14)(a), omit “or from the date when the invitation to confirm interest is sent”;
 - (b) in paragraph (15)(b), omit “or the invitation to confirm interest”.
- (6) In regulation 26 (choice of procedures)—
- (a) in paragraph (8), for “Subject to paragraph (9), the” substitute “The”;
 - (b) omit paragraphs (9) and (10).
- (7) In regulation 27 (open procedure), in paragraph (4), omit “which was not itself used as a means for calling for competition”.
- (8) In regulation 28 (restricted procedure)—
- (a) in paragraph (2), omit sub-paragraph (b) and the preceding “, or”;
 - (b) in paragraph (6), omit “which was not itself used as a means of calling for competition”.
- (9) In regulation 29 (competitive procedure with negotiation)—
- (a) in paragraph (4), omit sub-paragraph (b) and the preceding “, or”;
 - (b) in paragraph (6), omit “which was not itself used as a means of calling for competition”;
 - (c) in paragraph (15), omit “or in the invitation to confirm interest”;
 - (d) in paragraph (19), omit “, in the invitation to confirm interest”;
 - (e) in paragraph (20), omit “, the invitation to confirm interest”.
- (10) In regulation 33 (framework agreements), in paragraph (5), omit “or the invitation to confirm interest”.
- (11) In regulation 34 (dynamic purchasing systems)—
- (a) in paragraph (9), omit sub-paragraph (b) and the preceding “, or”;
 - (b) in paragraph (23), omit “or in the invitation to confirm interest”.

(12) In regulation 35 (electronic auctions), in paragraph (7), omit “or in the invitation to confirm interest”.

(13) In regulation 36 (electronic catalogues), in paragraph (5)(a), omit “or in the invitation to confirm interest”.

(14) In regulation 45 (variants), in paragraph (2), omit “or in the invitation to confirm interest”.

(15) In regulation 46 (division of contracts into lots), in each of paragraphs (3), (4) and (6), omit “or in the invitation to confirm interest”.

(16) In regulation 48 (prior information notices), omit paragraphs (5), (6) and (8).

(17) In regulation 50 (contract award notices), omit paragraph (3).

(18) In regulation 53 (electronic availability of procurement documents)—

(a) in paragraph (1), omit “or the date on which an invitation to confirm interest is sent”;

(b) in each of paragraphs (2), (3) and (4), omit “or the invitation to confirm interest”.

(19) In regulation 54 (invitations to candidates)—

(a) omit paragraph (2);

(b) in paragraph (3), for “paragraphs (1) and (2)” substitute “paragraph (1)”;

(c) in paragraph (4), in sub-paragraph (e), omit “in the invitation to confirm interest.”;

(d) omit paragraph (6).

(20) In regulation 56 (general principles in awarding contracts etc), in paragraph (1)(a), omit “or the invitation to confirm interest”.

(21) In regulation 58 (selection criteria), in paragraph (19), omit “or in the invitation to confirm interest”.

(22) In regulation 65 (reduction of the number of otherwise qualified candidates to be invited to participate), in paragraph (2), omit “or in the invitation to confirm interest”.

(23) In regulation 75 (publication of notices), in paragraph (1), omit sub-paragraph (b) and the preceding “; or”.

(24) In regulation 76 (principles of awarding contracts), in paragraph (3), omit “or prior information notice”.

(25) In regulation 110 (publication of contract award opportunities on Contracts Finder), omit paragraph (7).

(26) In Schedule 4A (international trade agreements), after the last entry (for Iceland, the Principality of Liechtenstein and the Kingdom of Norway), insert—

“For contracting authorities that are not devolved Welsh authorities:

Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia, signed at London on 16th December 2021 and Adelaide on 17th December 2021.

Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand, signed at London on 28th February 2022.”.

Amendment to the Concession Contracts Regulations 2016

3.—(1) The Concession Contracts Regulations 2016(a) are amended as follows.

(2) In regulation 8 (principle of equal treatment, non-discrimination and transparency), after paragraph (4), insert—

“(5) Contracting authorities and utilities that are not devolved Welsh authorities shall not terminate concession contracts in a manner that circumvents their obligations under these Regulations.”.

(a) S.I. 2016/273, relevant amending instruments are S.I. 2020/1319, S.I. 2021/787, S.I. 2021/1221 and S.I. 2022/766.

(3) In regulation 9 (threshold amounts and methods for calculating the estimated value of concession contracts), after paragraph (9), insert—

“(9A) If a contracting authority or a utility that is not a devolved Welsh authority is unable to estimate the value of a concession contract in accordance with this regulation, the estimated value of the concession contract inclusive of value added tax is deemed to be equal to the threshold amount in paragraph (1).”.

(4) In Schedule 4 (international trade agreements), after the last entry (for Iceland, the Principality of Liechtenstein and the Kingdom of Norway), insert—

“For contracting authorities and utilities that are not devolved Welsh authorities:

Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia, signed at London on 16th December 2021 and Adelaide on 17th December 2021.”.

Amendment to the Utilities Contracts Regulations 2016

4.—(1) The Utilities Contracts Regulations 2016 are amended as follows.

(2) In regulation 2 (definitions), in paragraph (1)—

- (a) omit the definition of “invitation to confirm interest”;
- (b) in the definition of “periodic indicative notice”, omit “, or where relevant, 91(1)(b)”;
- (c) in the definition of “procurement document”, omit “, the periodic indicative notice”.

(3) In regulation 17 (methods for calculating the estimated value of the procurement)—

- (a) in paragraph (14), for “paragraph (15)” substitute “paragraphs (15) and (15A)”;
- (b) after paragraph (15), insert—

“(15A) Where a utility that is not a devolved Welsh authority is unable to estimate in accordance with this regulation the value of one or more lots into which a proposed work, proposed acquisition of similar supplies or proposed provision of services has been divided, the aggregate value of the lots awarded in reliance on paragraph (14) shall not exceed 20 per cent of the aggregate value of all the lots that can be so estimated.”;

- (c) after paragraph (19), insert—

“(20) If a utility that is not a devolved Welsh authority is unable to estimate the value of a procurement in accordance with this regulation, the estimated value of the procurement inclusive of VAT is deemed to be equal to the relevant threshold amount in regulation 16 (threshold amounts).”.

(4) In regulation 36 (principles of procurement), after paragraph (3), insert—

“(4) Utilities that are not devolved Welsh authorities shall not terminate contracts in a manner that circumvents their obligations under these Regulations.”.

(5) In regulation 40 (rules applicable to communication)—

- (a) in paragraph (14), in sub-paragraph (a), omit “or from the date on which the invitation to confirm interest is sent”;
- (b) in paragraph (15), in sub-paragraph (b), omit “or the invitation to confirm interest”.

(6) In regulation 44 (choice of procedures)—

- (i) in paragraph (4), omit sub-paragraph (a);
- (ii) omit paragraph (5).

(7) In regulation 45 (open procedure)—

- (a) in paragraph (2), for “paragraphs (4) to (6)” substitute “paragraphs (4A) to (6)”;
- (b) omit paragraph (4);
- (c) before paragraph (5) insert—

“(4A) Where utilities that are not devolved Welsh authorities have published a periodic indicative notice, the minimum time limit for receipt of tenders, as laid down in paragraph (2), may be shortened to 15 days, provided that all of the following conditions are fulfilled—

- (a) the periodic indicative notice included all the information required by regulation 67(2);
- (b) the periodic indicative notice included, insofar as it was available at the time the notice was published, the information set out in section 2 of Part A of Annex 6 to the Utilities Contracts Directive, but as if—
 - (i) in paragraph 7, “the third and fourth subparagraph of Article 73(1)” were a reference to regulation 73(4) and (5) of these Regulations; and
 - (ii) in paragraph 21—
 - (aa) “Article 82” were a reference to regulation 82 of these Regulations; and
 - (bb) the words “in the invitation to confirm interest referred to in point (b) of Article 67(2) or” were omitted; and
- (c) the periodic indicative notice was submitted for publication between 35 days and 12 months before the date on which the contract notice was submitted.”.

(8) In regulation 46 (restricted procedure), in paragraph (2), omit sub-paragraph (b) and the preceding “; or”.

(9) In regulation 47 (negotiated procedure with prior call for competition), in paragraph (2), omit sub-paragraph (b) and the preceding “; or”.

(10) In regulation 48 (competitive dialogue), in paragraph (2), omit sub-paragraph (b) and the preceding “; or”.

(11) In regulation 52 (dynamic purchasing systems)—

- (a) in paragraph (9), omit sub-paragraph (b) and the preceding “; or”;
- (b) in paragraph (23)—
 - (i) after sub-paragraph (a), insert “or”;
 - (ii) omit sub-paragraph (b).

(12) In regulation 53 (electronic auctions), in paragraph (7), omit “, in the invitation to confirm interest”.

(13) In regulation 54 (electronic catalogues), in paragraph (5)(a), omit “in the invitation to confirm interest.”.

(14) In regulation 63 (communication of technical specifications), in paragraph (1), omit sub-paragraph (b) and the preceding “; or”.

(15) In regulation 65 (division of contract into lots)—

- (a) in paragraph (2)—
 - (i) after sub-paragraph (a), insert “or”;
 - (ii) omit sub-paragraph (b);
- (b) in both paragraphs (3)(b) and (5)(b), omit “to confirm interest.”.

(16) In regulation 67 (periodic indicative notices), omit paragraphs (5), (6) and (8).

(17) In regulation 70 (contract award notices), omit paragraph (3).

(18) In regulation 73 (electronic availability of procurement documents)—

- (a) in paragraph (1), omit “or the date on which an invitation to confirm interest is sent”;
- (b) in paragraph (4), omit “or the invitation to confirm interest”;
- (c) in paragraph (5)—
 - (i) after sub-paragraph (a), insert “or”;
 - (ii) omit sub-paragraph (b).

- (19) In regulation 74 (invitations to candidates)—
- (a) omit paragraph (2);
 - (b) in paragraph (3), for “paragraphs (1) and (2)” substitute “paragraph (1)”; and
 - (c) omit paragraph (6).
- (20) In regulation 91 (publication of notices), in paragraph (1)—
- (a) after sub-paragraph (a) insert “or”;
 - (b) omit sub-paragraph (b).
- (21) In regulation 92 (principles of awarding contracts), in paragraph (3), omit “, periodic indicative notice”.
- (22) In regulation 105A (duty owed to economic operators from GPA parties), in paragraph (3)—
- (a) after sub-paragraph (a) insert “or”;
 - (b) omit sub-paragraph (b).
- (23) In Schedule 3 (international trade agreements), after the last entry (for Iceland, the Principality of Liechtenstein and the Kingdom of Norway), insert—
- “For utilities that are not devolved Welsh authorities:
- Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia, signed at London on 16th December 2021 and Adelaide on 17th December 2021.
- Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand, signed at London on 28th February 2022.”.

Transitional provisions

- 5.**—(1) Nothing in these Regulations affects any procurement commenced before these Regulations come into force.
- (2) For the purposes of paragraph (1), a procurement is commenced before these Regulations come into force if, before that date, in accordance with the applicable Procurement Regulations—
- (a) a notice has been submitted to the UK e-notification service in order to—
 - (i) invite offers or requests to be selected to tender for or to negotiate in respect of a proposed contract, framework agreement or dynamic purchasing system; or
 - (ii) publicise an intention to hold a design contest;
 - (b) the contracting authority or utility has had published any form of advertisement seeking offers or expressions of interest in a proposed contract, framework agreement or dynamic purchasing system; or
 - (c) the contracting authority or utility has contacted any economic operator in order to—
 - (i) seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system; or
 - (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed contract, framework agreement or dynamic purchasing system.
- (3) For the purposes of this regulation, a procurement covers the whole of the procedures which, in accordance with the applicable Procurement Regulations, stem from that commencement.
- (4) Procedures taken for the purpose of modifying a contract or framework agreement are not to be regarded, for the purposes of paragraph (3), as stemming from the commencement of the procurement from which the award of that contract or framework agreement had itself stemmed.
- (5) A procedure commenced as described in paragraph (2)(a)(i), (b) or (c) is not to be regarded, for the purposes of paragraph (3), as stemming from the commencement of any design contest that had previously been held in relation to the subject-matter of the procurement.

- (6) In this regulation—
- (a) “Procurement Regulations” means the following and, in relation to any procedure, means whichever of the following applies to that procedure—
 - (i) the Public Contracts Regulations 2015;
 - (ii) the Concession Contracts Regulations 2016;
 - (iii) the Utilities Contracts Regulations 2016;
 - (b) the following have the same meaning as in the applicable Procurement Regulations—
 - (i) contracting authority;
 - (ii) design contest;
 - (iii) dynamic purchasing system;
 - (iv) economic operator;
 - (v) framework agreement;
 - (vi) procurement;
 - (vii) UK e-notification service;
 - (viii) utility.

27th April 2023

Alex Burghart
Parliamentary Secretary
Cabinet Office

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make amendments to various United Kingdom public procurement regulations for the purpose of implementing two free trade agreements entered into by the United Kingdom (“the FTAs”), one with Australia (“the UK-Australia FTA”) and the other with New Zealand.

The amendments made by these Regulations do not apply to devolved Welsh authorities. Welsh Ministers are making a separate statutory instrument to implement the FTAs as they apply to those authorities.

The amendments made by these Regulations implement the FTAs generally, as well as making three sets of amendments of general application under section 1(2) of the Trade (Australia and New Zealand) Act 2023. These amendments of general application are required to ensure compliance with commitments made in the UK-Australia FTA.

The first and second amendments of general application are made to the Public Contracts Regulations 2015, the Concession Contracts Regulations 2016 and the Utilities Contracts Regulations 2016. The first introduces the rule that, where the value of a procurement cannot be estimated, the procurement is to be treated as having been valued at the relevant threshold for that type of procurement. In the case of the Public Contract Regulations 2015 and the Utilities Contracts Regulations 2016, special provision is made for the situation in which the value of one or more lots cannot be estimated.

The second amendment of general application prohibits contracting authorities and utilities from terminating contracts in a manner that circumvents obligations in the UK-Australia FTA.

The third amendment of general application is made to the Public Contracts Regulations 2015 and the Utilities Contracts Regulations 2016 only and removes the possibility of using a prior information notice or periodic indicative notice as the call for competition. A number of consequential amendments have been made to both sets of regulations as a result.

These Regulations also make provision for transitional arrangements, in exercise of the power conferred by section 2(1)(d) of the Trade (Australia and New Zealand) Act 2023.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private or voluntary sector is foreseen.

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