

EXPLANATORY MEMORANDUM TO
THE PUBLIC PROCUREMENT (INTERNATIONAL TRADE AGREEMENTS)
(AMENDMENT) REGULATIONS 2023

2023 No. 484

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument will give effect in domestic law to the United Kingdom's (UK) public procurement obligations under its Free Trade Agreements with, on the one hand, Australia and, on the other, New Zealand (ANZ FTAs). It requires UK contracting authorities to give effect to those obligations when carrying out their procurements.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and territorial application

4.1 The extent of this instrument is England, Wales and Northern Ireland.

4.2 The territorial application of this instrument is England, Wales and Northern Ireland, with the exception of regulations 2(2) and (5) to (25) and regulation 4(2), (5), (6) and (8) to (22), which do not apply to contracting authorities that are devolved Welsh authorities (but see paragraph 6.3 below).

5. European Convention on Human Rights

5.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative context

6.1 Public procurement in England, Wales and Northern Ireland, and reserved procurement in Scotland, is governed by the rules in the Public Contracts Regulations 2015 (PCRs), the Concession Contracts Regulations 2016 (CCRs) and the Utilities Contracts Regulations 2016 (UCRs). Each of these instruments has a schedule listing international agreements that contain public procurement obligations to which UK contracting authorities are subject. The purpose of this amending instrument is twofold: first to add the ANZ FTAs to those schedules, and second to make minor changes to all three sets of regulations to bring UK domestic law into line with commitments made under the UK-Australia FTA (as set out in paragraph 7.3 below).

6.2 These changes will apply to all procurements that are subject to the UK's domestic regime, not just those covered by the FTA with Australia. Failure to extend the same terms to other members of the World Trade Organisation Agreement on Government Procurement (GPA) would put the UK in breach of its obligations under that

agreement. The amending provisions to implement the changes specified in the three areas above must, therefore, have general effect rather than being specifically for Australian suppliers.

- 6.3 Welsh Ministers are bringing forward their own instrument to amend the PCRs, CCRs and UCRs as they apply to devolved Welsh authorities.
- 6.4 Scottish Ministers also intend to bring forward their own instrument under the powers granted by the Trade (Australia and New Zealand) Act 2023 to make similarly required amendments to the various sets of Scottish procurement regulations.

7. Policy background

What is being done and why?

- 7.1 Government procurement is a key chapter in many FTAs and consists of rules, standards and commitments, as well as a schedule detailing the market access that is covered by the relevant FTA in terms of entities and the types of goods, works and services that those entities procure above the relevant threshold. Since the UK has left the EU, securing guaranteed access to new foreign procurement markets through these FTAs provides significant opportunities to UK suppliers who will be able to compete for lucrative contracts abroad on a level playing field.
- 7.2 The UK-Australia FTA was signed in December 2021 and the UK-NZ FTA in February 2022. Implementation of the government procurement chapters of these FTAs requires the amendment of UK procurement regulations. Such domestic implementation needs to be in place before the formal entry into force of the FTAs in order to ensure that the UK is not in breach of the agreements. While the intention is for this domestic amending instrument to come into force before the FTAs enter into force, suppliers from Australia and New Zealand will not actually benefit from the agreements until the FTAs have themselves fully entered in force.
- 7.3 The minor amendments to the regulations concern the following three areas:
 - a) **Unknown contract value:** regulation 6 of the PCRs (methods for calculating the estimated value of procurement), regulation 9 of the CCRs (threshold amounts and methods for calculating the estimated value of concession contracts) and regulation 17 of the UCRs (methods for calculating the estimated value of the procurement) are being amended to ensure that, where the value of a contract cannot be estimated, the procurement is deemed to have a value equivalent to the relevant threshold amount (unless otherwise excluded). If the contract is made up of lots and the value of one or more of those lots cannot be estimated, the exemptions in regulations 6(14) PCRs and 17(14) UCRs are available only up to a maximum of 20 per cent of the aggregate value of those lots that can be estimated;
 - b) **Prior information notice/periodic indicative notice:** regulations 26 (choice of procedures), 48 (prior information notices) and 54 (invitations to candidates) of the PCRs are being amended to remove the option for sub-central contracting authorities to use notices of planned procurement as a call for competition. Equivalent amendments are made to regulations 44 (choice of procedure), 67 (periodic indicative notices) and 74 (invitations to candidates) of the UCRs to effect the same change in respect of periodic

indicative notices. A number of consequential amendments have been made to both sets of regulations as a result;

- c) **Termination of awarded contracts in order to avoid obligations under our international agreements:** regulation 18 (principles of procurement) of the PCRs, regulation 36 (principles of procurement) of the UCRs and regulation 8 (principle of equal treatment, non-discrimination and transparency) of the CCRs are being amended to ensure that contracting authorities cannot terminate a public contract to avoid international procurement obligations.

8. European Union withdrawal and future relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018 or European Union (Future Relationship) Act 2020.

9. Consolidation

- 9.1 The law on public procurement in England, Wales and Northern Ireland is about to undergo significant reform. The Procurement Bill completed its passage through the House of Lords in December 2022 and is now progressing through the House of Commons. This Bill will replace the existing sets of procurement regulations amended by this instrument (as well as the Defence and Security Public Contracts Regulations 2011, which are not being amended by this instrument) with a new regime that, among other things, gives effect to the UK's international procurement obligations, including those contained in the ANZ FTAs.

10. Consultation outcome

- 10.1 There has been no consultation on this instrument. The changes made are intended to provide legal effect to procurement obligations in the ANZ FTAs that have already been thoroughly scrutinised by Parliament as part of the Constitutional Reform and Governance Act 2010 process, as well as during the passage of the Trade (Australia and New Zealand) Act 2023. Ahead of negotiations in respect to the ANZ FTAs, engagement with key stakeholders from businesses, industry associations, non-governmental organisations and public sector bodies was held in respect of the government procurement chapters.
- 10.2 Consultations on the content of this instrument have been carried out with the devolved administrations throughout the drafting process in accordance with the commitment made during the passage of the Trade (Australia and New Zealand) Act 2023.

11. Guidance

- 11.1 A Procurement Policy Note will be published and issued to practitioners to notify them of the changes ahead of them coming into effect and explain how they work in practice.

12. Impact

- 12.1 There is no significant impact on business, charities or voluntary bodies.
- 12.2 There is no significant impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because the changes it brings about are minor technical amendments. Therefore, any impact is expected to be low and 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 businesses.

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 Joshua Howey at the Cabinet Office, Telephone: 07871987768 or email: joshua.howey2@cabinetoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Edward Green, Deputy Director for International and Reform Team, at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister Burghart at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.