

Draft Regulations laid before the Scottish Parliament under paragraph 1(6) of Part 1 of schedule 7 of the European Union (Withdrawal) Act 2018 for approval by resolution of the Scottish Parliament

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2019 No.

**EXITING THE EUROPEAN UNION
PUBLIC PROCUREMENT**

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

Made - - - - 2019

Coming into force in accordance with regulation 1

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972⁽¹⁾ and paragraph 1(1) and (3) of Part 1 of schedule 2 of the European Union (Withdrawal) Act 2018 (the Act)⁽²⁾.

PART 1

GENERAL

Citation, commencement, extent and transitional and saving provision

1.—(1) These Regulations may be cited as the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019.

(2) Except for regulations 4, 6 and 8 these Regulations come into force on exit day.

(3) Regulations 4, 6 and 8 come into force eight months after exit day.

(4) The amendments and modifications made by these Regulations are subject to the transitional and savings provisions made by the schedule.

(1) 1972 c.68. Section 2(2) was amended by the Scotland Act 1998 (c.46) (“the 1998 Act”), schedule 8, paragraph 15(3) (which was amended by section 27(4) of the Legislative and Regulatory Reform Act 2006 (c.51) (“the 2006 Act”). Section 2(2) was also amended by section 27(1)(a) of the 2006 Act and by the European Union (Amendment) Act 2008 (c.7) (“the 2008 Act”), section 3(3) and schedule, Part 1. The functions conferred upon the Minister of the Crown under section 2(2), insofar as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act. Paragraph 1A of schedule 2 was inserted by the 2006 Act, section 28, and was amended by the 2008 Act, schedule, Part 1.

(2) 2018 c.16.

PART 2

AMENDMENT OF PRIMARY LEGISLATION

The Procurement Reform (Scotland) Act 2014

2. The Procurement Reform (Scotland) Act 2014 is amended as follows—
- (a) for section 8(4) (general duties), substitute—

“(4) A relevant economic operator is an economic operator who is a national of, or is established in, the United Kingdom or Gibraltar.”
 - (b) in each of sections 8(5) (general duties), 11(1) (supported businesses), 27(1) (exclusion of economic operators on grounds of criminal activity), 28(1) (selection of tenderers), 32(1) (giving reasons to unsuccessful participants), 33(1) (request for further information), 37(1) (actionable duties), and 41(1)(c)(3) (the directive, public contracts regulations and EU-regulated procurements) for “an EU-regulated procurement” substitute “a higher value regulated procurement”,
 - (c) in section 30(1) (technical specifications), for “EU-regulated procurements” substitute “higher value regulated procurements”,
 - (d) for section 37(3) (actionable duties), substitute—

“(3) A relevant person is an economic operator who is a national of, or is established in, the United Kingdom or Gibraltar.”
 - (e) in section 41 (the directive, public contracts regulations and EU-regulated procurements) —
 - (i) for the heading substitute “Public Contracts Regulations and Higher Value Regulated Procurements”,
 - (ii) omit subsections (1)(a) and (2)(a),
 - (f) in section 42 (general interpretation)—
 - (i) for the meaning of “public contract” substitute “a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services”,
 - (ii) for the meaning of “public works contract” substitute—

“a public contract having as its object one of the following—

 - (a) the execution or the design and execution of works related to one of the activities within the meaning of schedule 2 of the Public Contracts Regulations,
 - (b) the execution or the design and execution of a work,
 - (c) the realisation, of whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work,

(except in a subsidised public works contract),”
 - (iii) at the end of sub-section (1) insert—

““work” means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function.”

(3) Section 41(1)(c) was amended by [S.S.I. 2015/446](#), regulation 1(2) and schedule 6, paragraph 2(4)(c).

PART 3
AMENDMENT OF SECONDARY LEGISLATION
CHAPTER 1
THE PUBLIC CONTRACTS (SCOTLAND) REGULATIONS 2015

Amendments commenced on exit day

- 3.—**(1) The Public Contracts (Scotland) Regulations 2015⁽⁴⁾ are amended as follows.
- (2) In regulation 2 (interpretation), in paragraph (1)—
- (a) omit the definition of the “Commission”,
 - (b) after the definition of “contracting entity” insert—
 - “covered by regulation 3(2)”, in relation to an element, a part of a contract, or procurement, means that regulation 3(2)—
 - (a) applies to that element, part or procurement, or
 - (b) would do so if Part 2 applied,”
 - (c) omit the definition of “ESPD”,
 - (d) in the definition of “GPA”, after “amended” insert “before exit day”,
 - (e) in the definition of “innovation”, omit “the Europe 2020 strategy for smart,”,
 - (f) after the definition of “public works contract” insert—
 - “the Retained Treaties” means anything which is retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018⁽⁵⁾ because of the effect which the Treaty on European Union or TFEU had immediately before exit day in giving rise to any of the rights, powers, liabilities, obligations, restrictions, remedies and procedures mentioned in that section,”
 - (g) after the definition of “selection criteria” insert—
 - “SPD” means the Single Procurement Document referred to in regulation 60(1),”
 - (h) after the definition of “TFEU” insert—
 - “the UK e-notification service” has the meaning given by regulation 52(5), and references (in whatever terms) to the submission of notices to that service are to be construed in accordance with regulation 52(6),”.
- (3) In regulation 2, omit paragraphs (2) and (3).
- (4) In regulation 3, (subject-matter and application of these regulations), for paragraph (2) substitute the following—
- “(2) This Part—
- (a) does not oblige any contracting authority to supply information the disclosure of which it considers contrary to the essential interests of the security of the United Kingdom,
 - (b) does not preclude any contracting authority from taking such measures as it considers necessary for the protection of the essential interests of the security of the United Kingdom and which are connected with the production or trade in

⁽⁴⁾ S.S.I. 2015/446, amended by S.S.I. 2016/47.

⁽⁵⁾ 2018 c.16.

arms, munitions and war material, provided that such measures do not adversely affect the conditions of competition regarding products which are not intended for specifically military purposes.

(3) The arms, munitions and war material to which paragraph (2)(b) applies are those included in the 1958 List.

(4) Any measures which, if they had been taken immediately before exit day, would have been covered by Article 346 of TFEU shall be regarded as measures covered by paragraph (2)(b).

(5) In this regulation, “the 1958 List” means the list of arms, munitions and war material adopted by the Council of the European Economic Community in its decision 255/58 of 15 April 1958 as that list is to be treated for the purpose of Part 2 of the Public Contracts Regulations 2015(6).”.

(5) In regulation 4 (mixed procurement)—

(a) in paragraph (1), for “Article 346 of the TFEU” substitute “regulation 3(2)”,

(b) in paragraph (2)—

(i) for “Utilities Directive” substitute “Utilities Contracts (Scotland) Regulations 2016(7)”,

(ii) for “Art 5 and 6 of the Utilities Directive” substitute “regulations 5 and 6 of those Regulations”.

(6) In regulation 5 (thresholds)—

(a) in paragraph (1)—

(i) in sub-paragraph (a), for “the amount specified in Article 4(a) of the Directive” substitute “£4,551,413”,

(ii) in sub-paragraph (b), for “the amount specified in Article 4(b) of the Directive” substitute “£118,133”,

(iii) in sub-paragraph (c), for “the amount specified in Article 4(c) of the Directive” substitute “£181,302”,

(iv) in sub-paragraph (d), for “the amount specified in Article 4(d) of the Directive” substitute “£615,278”,

(b) in paragraph (3)(a)(i) for “80,000 euros” substitute “£65,630”,

(c) in paragraph (3)(a)(ii) “1 million euros” substitute “£820,370”,

(d) omit paragraph (5).

(7) After regulation 5 insert—

“Review and amendment of certain thresholds

5A.—(1) Every two years the Scottish Ministers must review the thresholds specified in regulation 5(1)(a), (b) and (c) (“the reviewable thresholds”) to verify whether they correspond with the thresholds established for those purposes in the GPA.

(2) The Scottish Ministers must do so by calculating the sterling value of each of the reviewable thresholds on the basis of the average daily value of sterling in terms of the special drawing rights mentioned in the GPA over a period of 24 months ending with 31st August.

(6) S.I. 2015/102, amended by S.I.s 2016/275 and 696; there are other amendments that are not relevant to this instrument.

(7) S.S.I. 2016/49.

- (3) The Scottish Ministers must make that calculation using the applicable conversion rates in the monthly International Financial Statistics published from time to time by the International Monetary Fund.
- (4) If the sterling value of a reviewable threshold so calculated differs from the sum for the time being set by regulation 5(1) in respect of that threshold, the Scottish Ministers must make regulations amending regulation 5(1) so as to substitute for that sum the sum equal to that value.
- (5) Such regulations—
- (a) must be made and laid before the Scottish Parliament before 1 November following the end of the 24 month period covered by the review, and
 - (b) must provide for the substitution to come into force on the following 1 January.
- (6) The first review under this regulation must relate to the 24 month period ending with 31 August 2019.”.
- (8) In regulation 7 (exclusions: utilities)—
- (a) in paragraph (a) for “Articles 8 to 14 of the Utilities Directive” substitute “regulations 8 to 14 of the Utilities Contracts (Scotland) Regulations 2016,
 - (b) in paragraph (b)—
 - (i) for “Utilities Directive” substitute “Utilities Contracts (Scotland) Regulations 2016,
 - (ii) for sub-paragraph (i) substitute—
 - “(i) under regulation 17 (exclusion: contracts awarded for the purpose of resale of lease to third parties), 22 (exclusion: contracts awarded for the purchase of water and for the supply of energy or of fuels for the production of energy) or 32 (activities directly exposed to competition), or”
 - (iii) in paragraph (ii), for “Article” substitute “regulation”,
 - (iv) for “that Directive” substitute “those Regulations”.
 - (c) in paragraph (c)—
 - (i) for “paragraph (b) of Article 13(2) of the Utilities Directive as amended from time to time” substitute “regulation 13(2) of the Utilities Contracts (Scotland) Regulations 2016”,
 - (ii) in sub-paragraph (ii) for “paragraph (d) of Article 21 of the Utilities Directive” substitute “paragraph (1)(e) of regulation 20 of the Utilities Contracts (Scotland) Regulations 2016”.
- (9) In regulation 8 (exclusions: concessions)—
- (a) in paragraph (1)—
 - (i) for “works or services concessions” substitute “a works concession contract or a services concession contract”,
 - (ii) for sub-paragraph (a) substitute—
 - “(a) is subject to the application of the Concession Contracts (Scotland) Regulations 2016(8),”,
 - (iii) in sub-paragraph (b) for “that Directive” substitute “those Regulations”,
 - (b) for paragraph (2) substitute “(2) In this regulation “works concession contract” and “services concession contract” have the meaning given in regulation 3 (meaning of “concession contract”) of the Concession Contracts (Scotland) Regulations 2016.”.