14 November 2018

Dear Gordon

THE PUBLIC PROCUREMENT (AMENDMENT) (EU EXIT) REGULATIONS 2019
EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, Mike Russell wrote to the Conveners of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

I attach a notification which sets out the details of an SI which the UK Government proposes to make and the reasons why I am content that Scottish devolved matters are to be included in it. Please note, we are yet to have sight of the final SI and it is not available in the public domain at this stage. We will, in accordance with the protocol, advise you when the final SI is laid and advise you as to whether the final SI is in keeping with the terms of this notification.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you within 28 days from the date of this letter.

DEREK MACKAY
NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI(s) (if known) or a title describing the policy area

The Public Procurement (Amendment) (EU Exit) Regulations 2019.

A brief explanation of law that the proposals amend

Most of this instrument will not apply to Scotland. This is because it will principally amend the Public Contracts Regulations 2015, the Concession Contracts Regulations 2016 and the Utilities Contracts Regulations 2016, which transpose European directives on procurement into the law of England, Wales and Northern Ireland. Those directives have been separately, and to some degree differently, transposed into the law of Scotland, and so the Scottish Ministers will be bringing forward a separate amending instrument in respect of the equivalent Scottish regulations.

The relevant parts of this instrument to Scotland will be those where the UK Government amends retained direct EU legislation with effect across the whole UK.

Summary of the proposals and how these correct deficiencies

The UK Government proposes to make amendments in three areas of devolved responsibility.

Firstly, to amend Commission Decisions 2006/211/EC, 2007/141/EC and 2010/192/EU. These decisions have the effect of removing contracts for certain activities in the fields of electricity generation, the supply of electricity and gas and exploration for and exploitation of oil and gas from the scope of the utilities procurement directive, on the basis that these activities are already directly exposed to competition in the UK. These decisions will constitute retained EU law after the UK’s exit from the EU. The UK Government proposes to amend them so that they exempt these activities not from the scope of the utilities procurement directive, but from the scope of the regulations which transpose them, the Utilities Contracts Regulations 2016, and the Utilities Contracts (Scotland) Regulations 2016. It also proposes to remove redundant EU references.

Secondly, to amend Regulation 2195/2002 of the European Parliament and of the Council. This Regulation establishes a “Common Procurement Vocabulary” (CPV). This consists of a series of codes designed to help economic operators (potential bidders) to identify the types of goods, works or services being advertised by contracting authorities (largely public bodies). Contracting authorities must use these codes in their contract adverts, and economic operators can search for adverts in certain categories. The UK Government intends to amend this Regulation to transfer the power to update the annexes to it, i.e. the list of codes, from the Commission to the Minister for the Cabinet Office. The list of CPV codes
is an administrative tool which benefits from the widest possible standardisation – as such, there is no practical advantage to being able to amend it separately in Scotland.

Thirdly, to revoke Commission Implementing Regulation (EU) No 2015/1986. This Regulation establishes a series of standard forms for advertising contracts and contract awards. It is important to note that the effect of revoking this regulation would not be to permit a preponderance of non-standard adverts. This is because of two other controls: the procurement regulations will still require specific information to be included in adverts and notices; and they will require those adverts and notices to be submitted electronically to a new UK e-notification system (being developed as an alternative to the Official Journal of the European Union for the purposes of advertising public contracts) – that system will only permit notices and adverts to be submitted in a particular format.

**An explanation of why the change is considered necessary**

With respect to the first series of amendments (to the Commission Decisions), these are important to ensure that it remains clear that these activities are exempt from procurement regulation after EU Exit; they will not result in any practical change to the status quo.

The amendment to Regulation 2195/2002 is necessary to ensure that there is a power to update the list of CPV codes as and when it becomes necessary to do so. Without this power, primary legislation would be needed to make what would be administrative amendments.

Commission Implementing Regulation (EU) No 2015/1986 will be revoked because it is no longer necessary – the new UK e-notification system will perform the function by ensuring that adverts and notices are in a standard format, whilst the retained regulations will govern the content of these. The standard forms, if left unamended, would contain a number of inappropriate or redundant EU references.

**Scottish Government categorisation of significance of proposals**

Category A – these proposals are all technical in nature.

**Impact on devolved areas**

Scottish Ministers could make these amendments. The impact on devolved areas is, however, limited to the three technical areas outlined in this notification. The main Scottish pieces of legislation which govern procurement: the Public Contracts (Scotland) Regulations 2015; the Utilities Contracts (Scotland) Regulations 2016; the Concession Contracts (Scotland) 2016; the Procurement Reform (Scotland) Act 2014; and the Procurement (Scotland) Regulations 2016 will not be amended by this instrument.
Summary of stakeholder engagement/consultation

There has been no specific stakeholder engagement or consultation on these specific amendments due to their very technical nature. The intent behind these amendments is simply to ensure that the retained law governing public procurement continues to function without the backdrop of EU directives and infrastructure.

A note of other impact assessments, (if available)

None, due to the very technical nature of the amendments concerned.

Summary of reasons for Scottish Ministers proposing to consent to UK Ministers legislation

The amendments in this instrument which affect Scotland currently apply at EU level and have effect across the whole of the UK. They will also have very minimal practical effect on those involved in the procurement process. It is therefore entirely sensible for these technical amendments to have effect across the whole of the UK.

Intended laying date (if known) of instruments likely to arise

We understand that the UK Government intends to lay this instrument in December.

Information about any time dependency associated with the proposal

Not applicable – these are technical amendments intended to ensure that procurement law continues to function in the event of a “no-deal” exit from the EU.

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

No, these amendments are minor and technical in nature.

Any significant financial implications?

No financial implications are anticipated as a result of these amendments, which are minor and technical in nature.