Cabinet Secretary for Finance, Economy and Fair Work
Derek Mackay MSP

T: 0300 244 4000
E: scottish.ministers@gov.scot

Scottish Government
Riaghaltas na h-Alba
gov.scot

Gordon Lindhurst MSP
Convener
Economy, Energy and Fair Work Committee
The Scottish Parliament
Edinburgh
EH99 1SP

19 February 2019

Dear Gordon

Thank you for your letter of 30 January 2019, seeking clarification on some matters relating to the draft Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019.

I am happy to provide comment in response to your four questions as follows:

> ***Do paragraphs 21-25 of the policy note mean that economic operators from EU countries will be treated exactly the same as any others from outside the UK?***

This is an area of some nuance. It is certainly true to say that the draft instrument would have the effect of removing any 'preferential' treatment which economic operators from member States of the European Union currently receive compared to economic operators from other countries by simple virtue of the fact that they are from member States of the European Union.

The draft instrument is also, however, predicated on the assumption that the UK will accede to the World Trade Organisation's Government Procurement Agreement (the GPA) in its own right. The UK is not currently a party to the GPA, but is bound by it through its membership of the EU, which is a party. The UK's application has been approved in principle, and I understand that in the event of a 'no-deal' exit from the EU, the UK Government expects to accede to the GPA shortly after exit day. With that in mind, this draft instrument would leave in domestic regulations for a time-limited period the requirement on contracting authorities to afford equal treatment to economic operators from parties to the GPA which stems from the EU's membership. It also clarifies that for this purpose, all member States of the European Union are to be considered as parties to the GPA.

This has the effect of meaning that for this time-limited period, in procurements which are or would be covered by the GPA, economic operators from member States of the EU would be treated in the same way as economic operators from other parties to the GPA, and would be owed a legal duty of equal treatment and non-discrimination not afforded to economic operators from countries which are not party to the GPA.

At the end of that time-limited period, those rights would fall-away, and if no further legislation is forthcoming, all economic operators from other countries, regardless of their GPA status, would be treated in the same way. Should the UK successfully accede to the GPA, then the UK's independent accession would need to be implemented within that time-limited period.

This draft instrument sets that period of time at eight months from exit day. This was at the request of the UK Government, and was built around a planning assumption that powers set out in clause 1 of the Trade Bill would be available within that period to implement the UK's accession to the GPA.

The draft Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019, laid on 7 February 2019, would extend that time-limited period to 18 months from exit day. This is as a result of a revised request from the UK Government, and is based on an assessment that it is no longer safe to assume that the powers in the Trade Bill will be available within the original eight month period. The extension of this period to 18 months is intended to allow either for the Trade Bill to receive Royal Assent, or for an alternative primary legislative vehicle to do so if necessary.

The draft Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019 would also extend the right to equal treatment to economic operators from countries with which the EU currently has a relevant agreement covering public procurement for that period of 18 months. Again, this is at the request of the UK Government, and is as a result of its assessment of the passage of the Trade Bill. The UK Government is in the process of trying to negotiate the 'roll-over' of the EU's international agreements, but without the powers in clause 2 of the Trade Bill there would be no legislative provision to implement these in domestic law.

> ***Will contracting authorities be able to prefer operators on a geographic basis at a local level – e.g. would a local authority be able to restrict contracts to economic operators within their local authority area?***

No, this would not be possible for regulated procurements. The powers relied on in the European Union (Withdrawal) Act 2018 in order to make this instrument only allow for the correction of deficiencies arising from the UK's exit from the EU. The deficiency in this instance is the continued extension of the duty of equal treatment to economic operators from other countries with which the UK has no reciprocal arrangements. To allow contracting authorities to actively discriminate in favour of certain economic operators would go significantly beyond the deficiency-correcting power in that Act.

Furthermore, for the reasons set out above, the instrument would guarantee, for procurements which are or would be covered by the GPA, rights of equal treatment for a time-limited period to economic operators from countries which are party to the GPA, in anticipation of the UK's expected accession to the GPA (at which point this would be a requirement of international law). It would also guarantee rights of equal treatment to economic operators from countries with which the EU has a relevant agreement for that time limited period.

If the UK failed to accede to the GPA, or to negotiate the 'roll-over' of those agreements, then these requirements would fall away, but economic operators from across the UK and Gibraltar would still be owed equal treatment, and so it would not be possible to limit contract opportunities to bidders based in a particular local authority area, for example.

The Procurement Reform (Scotland) Act 2014 also imposes a duty of equal treatment in respect of lower value public contracts which are not subject to the GPA regime (the Act applies to goods and services contracts worth at least £50,000 and to works contracts worth at least £2 million). The duty of equal treatment in the Act is currently owed to economic operators from the EU and the EEA. This draft instrument would amend the Act so that this duty would be owed only to economic operators from the UK and Gibraltar.

The sustainable procurement duty contained in the Procurement Reform (Scotland) Act 2014 would remain unchanged. This duty requires a contracting authority, before carrying out a regulated procurement of any value, to consider how in conducting the procurement exercise it can improve the economic, social and environmental wellbeing of its area, and to act with a view to securing such improvements. It also requires contracting authorities to consider how they can facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses, and promote innovation in the competition.

> ***Could you provide some further explanation around paragraph 13 of the policy note, which states that the instrument gives Ministers "the power to treat the list of international agreements in the field of environmental, social and labour law set out in the annexes to the EU Directives as though certain international agreements were removed and others that are not covered were listed." Can the Government provide examples of how this will work in practice?***

This is a simple power to update the list of international agreements in the field of environmental, social and labour law which is currently in Annex X to the Public Procurement Directive and which will constitute retained EU law. Regulation 3(18) of this draft instrument contains this power – it would insert two conditions into regulation 19 of the Public Contracts (Scotland) Regulations 2015 which limit the circumstances in which the power can be used. These two circumstances are either to add a new agreement to the list when the UK has ratified an international agreement which is not listed, or to remove an agreement from the list when the UK ceases to ratify an international agreement which is on the list.

> ***Although recognising that the issue of the living wage is not mentioned in the instrument or policy note, it would be helpful if the Government could set out whether the post-Brexit procurement regime will change current rules and practice around whether contracting authorities can mandate payment of the living wage in public contracts.***

This draft instrument would not affect the current restrictions on contracting authorities requiring the payment of a living wage, which is higher than the national minimum wage, in public contracts. Those restrictions arise in significant part from the Posting of Workers Directive and subsequent case law. The European Union (Withdrawal) Act 2018 will have the effect of bringing that Directive into retained EU law. As it relates to employment law, however, the future of this retained EU law is a matter which is reserved to the UK Government. I understand that there have been indications at official level that the UK Government is considering its next steps in respect of the status of this Directive in domestic law, but that no decisions have yet been reached.
Finally, I note that the Delegated Powers and Law Reform Committee considered that the lead Committee may wish to seek clarification on contracting authorities being no longer required to exclude companies convicted of fraud affecting the European Communities' financial interests. The EU Directives set out certain circumstances in which a bidder must be excluded from competitions (the mandatory grounds for exclusion) and other circumstances in which a contracting authority may exclude a bidder from competition (the discretionary grounds for exclusion). These grounds are transposed into domestic procurement legislation.

One of the mandatory grounds for exclusion set out in the Directives is where the bidder has been convicted of "fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests". This very specifically refers only to fraud which has affected EU budgets or funding – it neither requires nor permits the exclusion of bidders convicted of any other type of fraud. In the event that the UK exits the EU in a 'no-deal' scenario, such a specific reference to fraud affecting EU budgets or funding only would seem to be an inappropriate EU reference as set out in Section 8(2)(g) of the European Union (Withdrawal) Act 2018, and so this draft instrument would delete it as a mandatory ground for exclusion. The same approach is taken by the equivalent instrument laid by the UK Government affecting procurement legislation in England, Wales and Northern Ireland.

Whilst it is true, therefore, to say that contracting authorities would no longer be required to exclude bidders with a conviction for fraud affecting the European Communities' financial interests, such a conviction would arguably constitute grave professional misconduct which renders the bidder's integrity questionable. This is a discretionary ground for exclusion, and so it would still be open to contracting authorities to exclude bidders on this basis.

I understand the DPLRC's concerns in this area, but the powers in the European Union (Withdrawal) Act 2018 are limited to correcting deficiencies which arise from the UK's exit from the EU. If we were to take the approach of amending this mandatory ground for exclusion so that it referred instead to any conviction for fraud, for example, this would go beyond a simple correction of a deficiency and have the effect of broadening considerably the scope of the existing legislation, and would likely go beyond the powers contained in that Act. This is perhaps an example of an area where we might want to look at wider reform of the regulatory landscape after the UK exits the EU – but such an exercise is only likely to be fruitful once we know for certain the terms on which we are exiting from the EU, and any restrictions that may place on our ability to make such reform.

Yours

DEREK MACKAY