

# Economy and Fair Work Committee

## SSI cover note

### 14<sup>th</sup> Meeting 2023, (Session 6), 10 May 2023

<b>Title of Instrument:</b>	<a href="#">The Public Procurement (Miscellaneous Amendments) (Scotland) Regulations 2023</a>
<b>Relevant Dates:</b>	laid 20 April 2023, coming into force 30 May 2023
<b>Reporting deadline:</b>	N/A
<b>Type of instrument:</b>	Negative

#### Parliamentary procedure

1. An instrument subject to negative procedure comes into force on the date specified in the instrument unless a motion to annul is agreed to by the Parliament.
2. Under [Rule 10.4](#) of Standing Orders, any motion to annul must be lodged within 40 days of the date the instrument was laid. Any member (whether a member of the lead committee or not) may lodge a motion. Further information on the negative procedure can be found on the [Parliament's website](#).
3. No motion to annul has been lodged.

#### Background to the regulations

4. The [Trade \(Australia and New Zealand\) Act](#) ("the Act") was passed in March 2023. The purpose of this Act was to confer the necessary powers to implement the procurement chapters of the UK's free trade agreements (FTAs) with Australia and New Zealand.
5. The Committee previously considered a [Legislative Consent Memorandum](#) for the Trade (Australia and New Zealand) Bill and [published a report on 21 November 2022](#).

6. This instrument is made under the powers conferred by [section 1\(2\)](#) of the Act and [section 5\(2\) of the Procurement Reform \(Scotland\) Act 2014](#), to implement these procurement chapters.
7. The Regulations are attached at **Annexe A** and the Policy Note is attached at **Annexe B**.

## Purpose of the regulations

8. The purpose of these regulations is to amend the Scottish public procurement regime to implement the procurement chapters of the FTAs between the UK and Australia, and the UK and New Zealand.
9. Under these regulations, suppliers from Australia and New Zealand will be entitled to the same treatment as Scottish suppliers when bidding for contracts covered by the FTAs. They will also be able to bring legal action on the same basis as Scottish suppliers.
10. Additionally, to implement the FTA with Australia, the regulations make three minor changes to the Scottish public procurement regime—
  - Authorities will be prohibited from terminating contracts for the purposes of avoiding procurement rule obligations.
  - When an authority is unable to estimate the value of a contract, that contract will be explicitly made subject to the procurement rules. Rules on how to estimate the value of a contract which is regulated by the Procurement Reform (Scotland) Act 2014, though not covered by these FTAs, will also be amended to ensure consistency.
  - Sub-central contracting authorities will no longer be able to use a Prior Information Notice, and utilities will no longer be able to use a Periodic Indicative Notice, as calls for competition instead of publishing a contract notice. These notices will still be able to be used, but a contract notice will also need to be published.
11. The UK and Welsh Governments are expected to make similar provisions.
12. The FTAs are international obligations which must be implemented. The Scottish Government does not have any substantive discretion in the matter.

## Delegated Powers and Law Reform Committee consideration

13. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 2 May 2023. [Its report raised no points.](#)

## For decision

14. **The Committee is invited to note the instrument.**

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SCOTTISH STATUTORY INSTRUMENTS

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**2023 No. 124**

**PUBLIC PROCUREMENT**

**The Public Procurement (Miscellaneous Amendments)  
(Scotland) Regulations 2023**

<i>Made</i> - - - -	<i>18th April 2023</i>
<i>Laid before the Scottish Parliament</i>	<i>20th April 2023</i>
<i>Coming into force</i> - -	<i>30th May 2023</i>

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 1(1) of the Trade (Australia and New Zealand) Act 2023<sup>(a)</sup>, section 5(2) of the Procurement Reform (Scotland) Act 2014<sup>(b)</sup> and all other powers enabling them to do so.

**PART 1**

**Introductory**

**Citation**

1. These Regulations may be cited as the Public Procurement (Miscellaneous Amendments) (Scotland) Regulations 2023.

**Commencement**

2. These Regulations come into force on 30 May 2023.

**Saving**

3.—(1) The amendments made by these Regulations do not apply to a procurement commenced before 30 May 2023.

(2) For the purposes of paragraph (1)—

- (a) a procurement commences when the person carrying out the procurement, or a person acting on that person's behalf—
  - (i) publishes an advertisement seeking expressions of interest or offers in relation to the contract to be awarded at the conclusion of the procurement,
  - (ii) contacts another person to seek an expression of interest or offer in relation to the contract, or
  - (iii) responds to an unsolicited expression of interest or offer in relation to the contract,

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(a) 2023 c. 9.  
(b) 2014 asp 12.

- (b) nothing done in the course of holding a design contest is to be regarded as commencing a procurement in relation to the subject matter of the contest.
- (3) In this regulation—
  - “contract” includes—
    - (a) framework agreement (as defined by any of the Regulations amended by Part 2), and references to a contract’s award include conclusion of a framework agreement,
    - (b) dynamic purchasing system (as defined by any of the Regulations amended by Part 2), and references to a contract’s award include the establishment of a dynamic purchasing system,
  - “design contest” means any process treated as a design contest by any of the Regulations amended by Part 2,
  - “procurement” means the process leading to the award of a contract.

## PART 2

### Amendments

#### Public Contracts (Scotland) Regulations 2015

- 4.—(1) The Public Contracts (Scotland) Regulations 2015(a) are amended as follows.
- (2) In regulation 2 (interpretation), in paragraph (1), in the definition of “procurement document”, omit “where it is used as a means of calling for competition”.
- (3) In regulation 5 (thresholds)—
  - (a) in paragraph (3)(b) for “regulation 6” substitute “regulation 6(1)(a)”,
  - (b) after paragraph (3) insert—
    - “(3A) For the avoidance of doubt, in determining for the purpose of paragraph (3)(b) the estimated aggregate value of all the lots, no account is to be taken of a lot if its estimated value is taken to be a certain amount by virtue of regulation 6(1)(b) (rather than being an amount calculated in accordance with regulation 6(1)(a)).”.
- (4) In regulation 6 (methods for calculating the estimated value)—
  - (a) in paragraph (1)—
    - (i) the words from “calculate” to the end become sub-paragraph (a),
    - (ii) in that sub-paragraph, after “calculate” insert “in accordance with the following paragraphs”,
    - (iii) at the end of that sub-paragraph insert—
      - “; or
      - (b) if it is not possible to calculate the estimated value of a contract, take its estimated value to be equal to the relevant threshold mentioned in regulation 5”,
  - (b) the regulation’s heading becomes “Estimating value”.
- (5) In regulation 27 (choice of procedures)—
  - (a) for paragraph (2) substitute—
    - “(2) A call for competition must be made by means of a contract notice in accordance with regulation 50 (contract notices).”,
  - (b) omit paragraph (8).
- (6) In regulation 28 (open procedure), in paragraph (4) omit from “which was” to “procedures”.

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(a) S.S.I. 2015/446 as amended by S.S.I. 2020/468, S.S.I. 2021/378, S.I. 2021/787 and S.I. 2022/766.

- (7) In regulation 29 (restricted procedure)—
- (a) omit paragraph (3)(b) and the “or” immediately preceding it,
  - (b) in paragraph (7), omit from “which was” to “competition”.
- (8) In regulation 30 (competitive procedure with negotiation)—
- (a) omit paragraph (5)(b) and the “or” immediately preceding it,
  - (b) in paragraph (7), omit from “which was” to “competition”.
- (9) In regulation 35 (dynamic purchasing systems)—
- (a) omit paragraph (8)(b) and the “or” immediately preceding it,
  - (b) in paragraph (22), omit from “or” to the end of the paragraph.
- (10) In regulation 37 (electronic catalogues), in paragraph (5)(a), omit from “or” to “competition”.
- (11) In regulation 46 (variants), in paragraph (2), omit from “or,” to “interest,”.
- (12) In regulation 49 (prior information notices)—
- (a) omit paragraphs (6) and (7),
  - (b) in paragraph (8), for “Subject to paragraph (9), the” substitute “The”,
  - (c) omit paragraph (9).
- (13) In regulation 51 (contract award notices), omit paragraph (3).
- (14) In regulation 55 (invitations to candidates)—
- (a) omit paragraph (3),
  - (b) in paragraph (4), for “to (3)” substitute “and (2)”,
  - (c) omit paragraph (6).
- (15) In regulation 73 (termination of contracts), after paragraph (3) insert—
- “(4) A contracting authority must not terminate a public contract in a manner that circumvents the obligations under these Regulations.”.
- (16) In regulation 75 (publication of notices), omit paragraph (1)(b) and the “or” immediately preceding it.
- (17) In regulation 76 (principles of awarding contracts), in paragraph (4), omit “or prior information notice”.
- (18) In schedule 4A (international trade agreements), after the last entry (for Iceland, the Principality of Liechtenstein and the Kingdom of Norway), insert—
- “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.”.

### **Utilities Contracts (Scotland) Regulations 2016**

- 5.**—(1) The Utilities Contracts (Scotland) Regulations 2016(a) are amended as follows.
- (2) In regulation 2 (interpretation), in paragraph (1)—
- (a) omit the definition of “invitation to confirm interest”,
  - (b) in the definition of “periodic indicative notice”, omit from “, or where” to “notices)”.
- (3) In regulation 15 (thresholds)—
- (a) in paragraph (2)(b), for “regulation 16” substitute “regulation 16(1)(a)”,

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(a) S.S.I. 2016/49 as amended by S.S.I. 2020/468, S.S.I. 2021/378, S.I. 2021/787 and S.I. 2022/766.

- (b) after paragraph (2) insert—
- “(2A) For the avoidance of doubt, in determining for the purpose of paragraph (2)(b) the estimated aggregate value of all the lots, no account is to be taken of any lot if its estimated value is taken to be a certain amount by virtue of regulation 16(1)(b) (rather than being an amount calculated in accordance with regulation 16(1)(a)).”.
- (4) In regulation 16 (methods for calculating the estimated value)—
- (a) in paragraph (1)—
- (i) the words from “calculate” to the end become sub-paragraph (a),
- (ii) in that sub-paragraph, after “calculate” insert “in accordance with the following paragraphs”,
- (iii) at the end of that sub-paragraph insert—
- “; or
- (b) if it is not possible to calculate the estimated value of a contract, take its estimated value to be equal to the relevant threshold mentioned in regulation 15”.
- (b) the regulation’s heading becomes “Estimating value”.
- (5) In regulation 38 (rules applicable to communication)—
- (a) in paragraph (14)(a), omit from “or” to “sent”,
- (b) in paragraph (16), omit “or the invitation to confirm interest”.
- (6) In regulation 42 (choice of procedures)—
- (a) omit paragraph (5)(a),
- (b) omit paragraph (6).
- (7) In regulation 43 (open procedure), in paragraph (4)—
- (a) omit from “which was” to “procedures”,
- (b) for sub-paragraph (a) substitute—
- “(a) the periodic indicative notice included (in addition to the information required by regulation 65(2)) the information set out in section II of Part A of Annex VI to the Utilities Contracts Directive, read subject to the following modifications—
- (i) in paragraph 7, the reference to the third and fourth sub-paragraph of Article 73(1) is to be read as a reference to regulation 71(4) and (5) of these Regulations;
- (ii) in paragraph 21, the reference to Article 82 is to be read as a reference to regulation 80 of these Regulations; and”.
- (8) In regulation 44 (restricted procedure), omit paragraph (3)(b) and the “or” immediately preceding it.
- (9) In regulation 45 (negotiated procedure with prior call for competition), omit paragraph (3)(b) and the “or” immediately preceding it.
- (10) In regulation 46 (competitive dialogue), omit paragraph (3)(b) and the “or” immediately preceding it.
- (11) In regulation 47 (innovation partnership), in paragraph (20), omit “, the invitation to confirm interest”.
- (12) In regulation 50 (dynamic purchasing systems)—
- (a) omit paragraph (8)(a)(ii) and the “or” immediately preceding it,
- (b) omit paragraph (21)(b).
- (13) In regulation 51 (electronic auctions), omit paragraph (4)(b).
- (14) In regulation 52 (electronic catalogues), omit paragraph (5)(a)(ii).
- (15) In regulation 61 (communication of technical specifications), omit paragraph (1)(b) and the “or” immediately preceding it.

- (16) In regulation 63 (division of contracts into lots)—
- (a) in paragraph (2), omit “, in the invitation to confirm interest,”,
  - (b) in paragraph (3), omit “to confirm interest,”,
  - (c) in paragraph (5)(a), omit “to confirm interest,”.
- (17) In regulation 65 (periodic indicative notices)—
- (a) omit paragraphs (6) and (7),
  - (b) in paragraph (8), for “Subject to paragraph (9), the” substitute “The”,
  - (c) omit paragraph (9).
- (18) In regulation 68 (contract award notices), omit paragraph (3).
- (19) In regulation 71 (electronic availability of procurement documents)—
- (a) in paragraph (1), omit “or the date on which an invitation to confirm interest was sent”,
  - (b) in paragraph (4), omit “or the invitation to confirm interest”,
  - (c) omit paragraph (5)(b).
- (20) In regulation 72 (invitations to candidates)—
- (a) omit paragraph (3),
  - (b) in paragraph (4), for “to (3)” substitute “and (2)”,
  - (c) omit paragraph (6).
- (21) In regulation 87 (termination of contracts), after paragraph (3) insert—
- “(4) A utility must not terminate a contract in a manner that circumvents the obligations under these Regulations.”.
- (22) In regulation 89 (publication of contracts), omit paragraph (1)(b).
- (23) In regulation 90 (principles of awarding contracts), in paragraph (5), omit “or periodic indicative notice”.
- (24) In regulation 100A (duty owed to economic operators from GPA parties), omit paragraph (3)(b).
- (25) In schedule 2A (international trade agreements), after the last entry (for Iceland, the Principality of Liechtenstein and the Kingdom of Norway), insert—
- “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.”.

### **Concession Contracts (Scotland) Regulations 2016**

- 6.**—(1) The Concession Contracts (Scotland) Regulations 2016(a) are amended as follows.
- (2) In regulation 8 (thresholds and methods for calculating the estimated value of the concession contract), after paragraph (1) insert—
- “(1A) The contracting entity must—
- (a) calculate in accordance with the following paragraphs the estimated value of a concession contract; or
  - (b) if it is not possible to calculate the estimated value of a contract, take its estimated value to be equal to the threshold mentioned in paragraph (1).”.

(3) In regulation 47 (termination of concession contract), after paragraph (3) insert—

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(a) S.S.I. 2016/65 as amended by S.S.I. 2020/468, S.S.I. 2021/378 and S.I. 2021/787.

“(4) A contracting entity must not terminate a concession contract in a manner that circumvents the obligations under these Regulations.”.

(4) In schedule 5 (international trade agreements), after the last entry (for the Principality of Liechtenstein and the Kingdom of Norway), insert—

“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.”.

### **Procurement (Scotland) Regulations 2016**

7.—(1) The Procurement (Scotland) Regulations 2016(a) are amended as follows.

(2) In regulation 3 (methods for calculating the estimated value for regulated contracts)—

(a) in paragraph (1)—

(i) the words from “calculate” to the end become sub-paragraph (a),

(ii) in that sub-paragraph, after “calculate” insert “in accordance with the following paragraphs”,

(iii) at the end of that sub-paragraph, insert—

“; or

(b) if it is not possible to calculate the estimated value of a contract, take its estimated value to be equal to the relevant threshold in section 3(2) of the Act”,

(b) the regulation’s heading becomes “Determining estimated value”.

*TOM ARTHUR*

Authorised to sign by the Scottish Ministers

St Andrew’s House,  
Edinburgh  
18th April 2023

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(a) S.S.I. 2016/145.

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations amend Scottish public procurement regulations for the purpose of implementing two trade agreements entered into by the United Kingdom, one with Australia and the other with New Zealand. The amendments have broadly four effects.

In this note, references to the “contracts Regulations” are to:

- the Public Contracts (Scotland) Regulations 2015
- the Utilities Contracts (Scotland) Regulations 2016
- the Concession Contracts (Scotland) Regulations 2016

First, references to the trade agreements with Australia and New Zealand are added to the contracts Regulations so that certain rules apply to procurements covered by those agreements.

Second, a rule is added to the contracts Regulations stating that contracts to which they apply cannot be terminated in a way that would circumvent the requirements of those Regulations.

Third, provision is added to the contracts Regulations so that they will apply to procurements where the estimated value of the procurement cannot be calculated. Whether or not those Regulations apply to a procurement is determined, in part, by whether the estimated value of the procurement exceeds a particular amount. The contracts Regulations lay down methodologies for calculating a procurement’s estimated value. The effect of the new rule added to each of the contracts Regulations is that, in cases where it is not possible to calculate a value using the methodology laid down, the estimated value is to be deemed to be equal to the threshold that causes the Regulations in question to apply to the procurement.

A similar amendment is made to the Procurement (Scotland) Regulations 2016, which deal with estimating the value of a procurement in order to determine whether the Procurement Reform (Scotland) Act 2014 applies to it.

Fourth, the ways in which a person carrying out a procurement can issue a call for competition are reduced by:

- the removal from the Public Contracts (Scotland) Regulations 2015 of the possibility of using a prior information notice as a call for competition
- the removal from the Utilities Contracts (Scotland) Regulations 2016 of the possibility of using a periodic indicative notice as a call for competition

The changes made by these Regulations do not affect any procurements that were already underway before they came into force.

## **POLICY NOTE**

### **THE PUBLIC PROCUREMENT (MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2023**

#### **SSI 2023/124**

The above instrument was made in exercise of the powers conferred by section 1(2) of the Trade (Australia and New Zealand) Act 2023 and section 5(2) of the Procurement Reform (Scotland) Act 2014. The instrument is subject to negative procedure.

<p>This instrument makes amendments to Scottish public procurement regulations for the purpose of implementing the procurement chapters of the free trade agreements between the UK and Australia and the UK and New Zealand.</p>
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#### **Policy Objectives**

This instrument implements the public procurement chapters of the UK's free trade agreements (FTAs) with Australia and New Zealand.

Suppliers from Australia and New Zealand will be entitled to the same treatment as Scottish suppliers when bidding for contracts which are covered by these FTAs. They will also be able to bring legal action on the same basis as Scottish suppliers.

In addition, there need to be three minor changes to the public procurement rules in Scotland to implement the FTA with Australia.

First, authorities will be prohibited from terminating contracts for the purposes of avoiding procurement rule obligations.

Second, when an authority is unable to estimate the value of a contract that contract will be explicitly made subject to the procurement rules. Rules on how to estimate the value of a contract which is regulated by the Procurement Reform (Scotland) Act 2014, though not covered by these FTAs, will also be amended to ensure consistency.

Third, sub-central contracting authorities will no longer be able to use a Prior Information Notice, and utilities will no longer be able to use a Periodic Indicative Notice, as calls for competition instead of publishing a contract notice. These notices will still be able to be used, but a contract notice will also need to be published.

The UK and Welsh Governments are expected to make similar provisions.

#### **Consultation**

There has been no consultation on this instrument as this is an international obligation which must be implemented. The Scottish Government does not have any substantive discretion in the matter.

## **Impact Assessments**

Impact assessments have not been carried out in relation to this instrument, as any impacts are brought about by the FTAs concluded by the UK Government, rather than this instrument which merely implements some technical provisions of those FTAs.

The procurement rule changes described in this policy note are nonetheless expected to have minimal impact on public purchasers and businesses.

## **Financial Effects**

The Minister for Community Wealth and Public Finance confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government  
Scottish Procurement and Property Directorate

*April 2023*