

Economy and Fair Work Committee

12th Meeting, 2021 (Session 6), Wednesday 24 November 2021

Subordinate Legislation

Overview of instrument

1. The Committee has been designated as lead for consideration of the following negative instrument:

[The Public Procurement \(Agreement on Government Procurement\) \(Thresholds etc.\) \(Amendment\) \(Scotland\) Regulations 2021](#)

2. The instrument and policy note are attached.

Purpose of the Regulations

3. The purpose of these regulations is threefold; firstly, they fulfil a legislative requirement to update the reviewable financial thresholds for Scotland's public procurement procedures for the award of contracts for goods, works and services subject to thresholds set by the World Trade Organisation Agreement on Government Procurement (GPA). This is to ensure that the reviewable financial regulations are aligned with those specified by the GPA, which public bodies in Scotland are subject to as part of the UK's GPA membership.
4. Secondly, the regulations change the calculation of the estimated value of these procurements in relation to VAT to allow Scottish public bodies to comply with the terms of the UK's membership of the GPA. Reviewable financial thresholds had previously been calculated using EU methodology.
5. Thirdly, the regulations remedy the erroneous addition of 'Regional Development Scotland' to Schedule 1 of the Public Contracts (Scotland) Regulations 2015 by the Public Procurement (Agreement on Government Procurement) (Amendment) (No. 2) Regulations 2021. Its original addition was due to an administrative error in UK legislation and this is the earliest legislative opportunity to remedy the situation.

Delegated Powers and Law Reform Committee consideration

6. The DPLR Committee (DPLRC) considered this instrument at its meeting on 16 November. In [its report](#), the DPLRC draws the instrument to the attention of the Parliament on the general reporting ground of two errors (a wrong reference and incorrect threshold). The DPLRC welcomes the Scottish Government's acknowledgement of these errors and notes an amending instrument will be laid shortly.

For Decision

7. The Committee is invited to note the instrument, subject to the amending instrument being lodged by the Scottish Government.

**Clerk to the Committee
19 November 2021**

SCOTTISH STATUTORY INSTRUMENTS

2021 No. 378

PUBLIC PROCUREMENT

The Public Procurement (Agreement on Government Procurement) (Thresholds etc.) (Amendment) (Scotland) Regulations 2021

<i>Made</i>	- - - -	<i>27th October 2021</i>
<i>Laid before the Scottish Parliament</i>		<i>29th October 2021</i>
<i>Coming into force</i>	- -	<i>1st January 2022</i>

The Scottish Ministers make the following Regulations in exercise of the powers conferred by regulations 5A(4) and 83A(2) of the Public Contracts (Scotland) Regulations 2015(a), regulation 15A(4) and 108A(2) of the Utilities Contracts (Scotland) Regulations 2016(b), regulations 8A(4) and 60ZA(2) of the Concession Contracts (Scotland) Regulations 2016(c) and sections 1(1) and 4(1) of the Trade Act 2021(d) and all other powers enabling them to do so.

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Public Procurement (Agreement on Government Procurement) (Thresholds etc.) (Amendment) (Scotland) Regulations 2021.

(2) These Regulations come into force on 1 January 2022.

(3) These Regulations extend to Scotland only.

Interpretation

2. In these Regulations—

“the 2015 Regulations” means the Public Contracts (Scotland) Regulations 2015;

“the Concession Regulations” means the Concession Contracts (Scotland) Regulations 2016; and

“the Utilities Regulations” means the Utilities Contracts (Scotland) Regulations 2016.

Amendment of the Public Contracts (Scotland) Regulations 2015

3.—(1) The 2015 Regulations(e) are amended as follows.

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- (a) S.S.I. 2015/446. Regulations 5A and 83A were inserted by regulation 4(6) and (57) of the Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468) (“the 2020 Regulations”).
- (b) S.S.I. 2016/49. Regulations 15A and 108A were inserted by regulation 6(7) and (59) of the 2020 Regulations.
- (c) S.S.I. 2016/65. Regulations 8A and 60ZA were inserted by regulation 8(6) and (31) of the 2020 Regulations.
- (d) 2021 c. 10.
- (e) S.S.I. 2015/446 as amended by regulation 4(5) and (6) of the 2020 Regulations and regulation 5(3) and Schedule 2 of the Public Procurement (Agreement on Government Procurement) (Amendment) (No. 2) Regulations 2021 (S.I. 2021/872).

- (2) In regulation 5 (thresholds), in paragraph (1)—
- (a) for “not including value added tax” substitute “inclusive of value added tax, where appropriate”,
 - (b) in sub-paragraph (a), for “£4,733,252” substitute “£5,336,937”,
 - (c) in sub-paragraph (b), for “£122,976” substitute “£138,760”,
 - (d) in sub-paragraph (c), for “£189,330” substitute “£213,477”.
- (3) In regulation 6 (methods for calculating the estimated value) in paragraph (1), for “not including value added tax” substitute “inclusive of value added tax, where appropriate”.
- (4) In regulation 14 (specific situations: contracts subsidised by a contracting authority) in paragraph (1)—
- (a) in sub-paragraph (a), for “net of value added tax” substitute “inclusive of value added tax, where appropriate”,
 - (b) in sub-paragraph (b), for “net of value added tax” substitute “inclusive of value added tax, where appropriate”.
- (5) In Part 2 of Schedule 2 omit “Regional Development Scotland”.

Amendment of the Utilities Contracts (Scotland) Regulations 2016

- 4.**—(1) The Utilities Regulations(a) are amended as follows.
- (2) In regulation 15 (thresholds), in paragraph (1)—
- (a) for “not including VAT” substitute “inclusive of VAT, where appropriate”,
 - (b) in sub-paragraph (a), for “£378,660” substitute “£462,955”,
 - (c) in sub-paragraph (b), for “£4,733,252” substitute “£5,336,937”.
- (3) In regulation 16 (methods for calculating the estimated value), in paragraph (1) for “not including VAT” substitute “inclusive of VAT, where appropriate”.
- (4) In regulation 91 (scope of chapter), in heads (a) and (b) in each place it occurs, for “net of VAT” substitute “inclusive of VAT, where appropriate”.

Amendment of the Concession Contracts (Scotland) Regulations 2016

- 5.** In regulation 8 (thresholds and methods for calculating the estimated value of the concession contract) of the Concession Regulations(b)—
- (a) in paragraph (1)—
 - (i) for “£4,733,252” substitute “£5,336,937”,
 - (ii) for “not including value added tax” substitute “inclusive of value added tax, where appropriate”,
 - (b) in paragraph (3) for “net of value added tax” substitute “inclusive of value added tax, where appropriate”.

Transitional provision and saving where public contract procurement procedures commenced before 1 January 2022

- 6.**—(1) In this Regulation—
- (a) “the Procurement Regulations” means the following and, in relation to any procedure, means whichever of the following applies to that procedure—
 - (i) the 2015 Regulations,

(a) S.S.I. 2016/49 as amended by regulation 6(6) and (7) of the 2020 Regulations.
(b) S.S.I. 2016/65 as amended by regulation 8(5) and (6) of the 2020 Regulations.

- (ii) the Utilities Regulations,
 - (iii) the Concession Regulations,
 - (b) the following have the same meaning as in the Procurement Regulations—
 - (i) concession contract,
 - (ii) contract,
 - (iii) contracting authority,
 - (iv) design contest
 - (v) dynamic purchasing system
 - (vi) economic operator,
 - (vii) framework agreement
 - (viii) public contract,
 - (ix) utility,
 - (c) “procedure” means all processes undertaken by the contracting authority in accordance with the Procurement Regulations, with the intention of awarding a contract, concession contract or public contract but does not include procedures taken for the purposes of modifying a contract, concession contract or public contract.
- (2) Nothing in these Regulations affects any procedure or design contest that commenced under the Procurement Regulations before 1 January 2022.
- (3) For that purpose, a procedure or design contest has been commenced before 1 January 2022 if, before that date—
- (a) a notice has been sent to the Official Journal or submitted for publication on the UK e-notification service in accordance with the Procurement Regulations, in order to—
 - (i) invite offers or requests to be selected to tender for or to negotiate in respect of a proposed contract, concession contract, public contract, framework agreement or dynamic purchasing system, or
 - (ii) advertise an intention to carry out a design contest,
 - (b) the contracting authority or utility has had published any form of advertisement seeking offers or expressions of interest in a proposed contract, concession contract, public contract, framework agreement or dynamic purchasing system, or
 - (c) the contracting authority or utility has contacted any economic operator in order to—
 - (i) seek expressions of interest or offers in respect of a proposed contract, concession contract, public contract, framework agreement or dynamic purchasing system, or
 - (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed contract, concession contract, public contract, framework agreement or dynamic purchasing system.

IVAN McKEE

Authorised to sign by the Scottish Ministers

St Andrew’s House,
Edinburgh
27th October 2021

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the thresholds that apply in the field of public procurement that are specified in the Public Contracts (Scotland) Regulations 2015 (S.S.I. 2015/446) (“the 2015 Regulations”), the Utilities Contracts (Scotland) Regulations 2016 (S.S.I. 2016/49) and the Concession Contracts (Scotland) Regulations 2016 (S.S.I. 2016/65) respectively in accordance with the obligations of the United Kingdom under the Agreement on Government Procurement (“the GPA”) and as required by each Regulation which is amended. The Regulations change the calculation of the estimated value of a procurement based on the total amount payable, from a calculation exclusive of value added tax to one inclusive of value added tax where applicable, in order to fully comply with the GPA. The Regulations also remove “Regional Development Scotland” from Part 2 of Schedule 2 of the 2015 Regulations.

POLICY NOTE

THE PUBLIC PROCUREMENT (AGREEMENT ON GOVERNMENT PROCUREMENT) (THRESHOLDS ETC.) (AMENDMENT) (SCOTLAND) REGULATIONS 2021

SSI 2021/378

The above instrument was made using the powers in regulations 5A(4) and 83A(2) of the Public Contracts (Scotland) Regulations 2015; regulations 15A(4) and 108A(2) of the Utilities Contracts (Scotland) Regulations 2016; regulations 8A(4) and 60ZA(2) of the Concession Contracts (Scotland) Regulations 2016; and sections 1(1) and 4(1) of the Trade Act 2021. The instrument is subject to negative procedure.

Purpose of the instrument

- to fulfil a legislative requirement to update the reviewable financial thresholds for Scotland's public procurement procedures for the award of contracts for goods, works and services which are subject to thresholds set by the World Trade Organisation Agreement on Government Procurement (GPA).
- to change the calculation of the estimated value of these procurements in relation to VAT in order for Scottish public bodies to comply with the terms of the UK's membership of the GPA
- remove an erroneous entry from the Public Contracts (Scotland) Regulations 2015.

Policy Objectives

1. The instrument amends the reviewable financial thresholds of the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016. This is to ensure that the reviewable financial regulations are aligned with those specified by the GPA, which public bodies in Scotland are subject to as part of the UK's GPA membership.
2. The reviewable financial thresholds had previously been calculated using EU methodology. The EU has an agreement with the United States where it unilaterally deducts 13% from the GPA threshold in order to resolve a dispute concerning VAT. This agreement allows the EU to maintain its internal policy of requiring the calculation of the estimated value of a procurement to be exclusive of VAT. The UK is no longer party to this agreement and must now use the standard GPA methodology. This means that the Scottish Ministers must update the reviewable financial thresholds without a 13% deduction and must make amendments to reflect that the calculation of the estimated value of a procurement must include all forms of payment, including VAT. The instrument amends the Public Contracts (Scotland) Regulations 2015; the Utilities Contracts (Scotland) Regulations 2016; the Concession Contracts (Scotland) Regulations 2016 to reflect this in order for the UK to comply with its GPA obligations.
3. The instrument removes the listing of 'Regional Development Scotland' from Schedule 1 of the Public Contracts (Scotland) Regulations 2015. This is to remedy its erroneous addition as part of the Public Procurement (Agreement on Government Procurement) (Amendment) (No. 2) Regulations 2021 (SI 2021/872).

Explanation of the law being amended by the Regulations

4. The UK was subject to a package of procurement directives as an EU member state (2014/24/EU, 2014/23/EU, and 2014/25/EU), which provided the legal framework for the regulation of public procurement by public authorities and utilities for the award of public contracts over specified financial thresholds to suppliers of works, goods and services. These directives were implemented by the Scottish Ministers through the Public Contracts (Scotland) Regulations 2015; the Utilities Contracts (Scotland) Regulations 2016; the Concession Contracts (Scotland) Regulations 2016.
5. The relevant provisions of EU law continued to apply until IP completion day, 11pm on 31 December 2021, as a result of the European Union (Withdrawal) Act 2018 and as amended by the European Union (Withdrawal Agreement) Act 2019.
6. The UK was a member of the GPA by virtue of its status as an EU Member State until IP completion day. The GPA is a plurilateral agreement within the World Trade Organisation framework, which includes the USA, Canada, the EU and Japan as signatories. The European Commission reviewed and revalued the thresholds (for example, for public works contracts, public supply contracts and public service contracts awarded by central government authorities) on a biennial basis in accordance with the EU's obligations under the GPA.
7. On IP completion day, the procurement regulations which implemented the EU directives and as amended by the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020, became retained EU law.
8. The UK became an independent member of the GPA on 1 January 2021, implemented by the Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021, which came into force on 11 June 2021. The Public Procurement (Agreement on Government Procurement) (Amendment) (No. 2) Regulations 2021, which came into force on 16 August 2021, made further amendments to Scottish procurement legislation related to GPA accession.
9. This instrument amends the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016 to provide for the biennial review and revision of their reviewable financial thresholds as required under the GPA.
10. The reviewable financial thresholds were last updated in October 2019 and came into effect in Scotland on 1 January 2020. Scottish Ministers must review the financial thresholds every 24 months using the powers in: regulation 5A of the Public Contracts (Scotland) Regulations 2015; regulation 15A of the Utilities Contracts (Scotland) Regulations 2016; and regulation 8A of the Concession Contracts (Scotland) Regulations 2016. The first review must relate to the 24 month period ending 31 August 2021, the resulting changes reflected in regulations made and laid before 1 November 2021 and coming into force on 1 January 2022. This must be done by calculating the average daily value of sterling, relative to the special drawing rights value specified by the GPA, over the 24 month period from 1 September 2019 to 31 August 2021.

11. This instrument amends the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016. It changes the calculation of the estimated value of a contract so that the total is no longer excluding VAT but is inclusive of all applicable VAT. The GPA requires the total value of a contract to include all forms of remuneration and makes no reference to a deduction for VAT.
12. The instrument remedies the erroneous addition of ‘Regional Development Scotland’ to Schedule 1 of the Public Contracts (Scotland) Regulations 2015 by the Public Procurement (Agreement on Government Procurement) (Amendment) (No. 2) Regulations 2021. This reflects the fact that ‘Regional Development Scotland’ has never been a public body and that there are no known plans for such a public body to exist. Its original addition was due to an administrative error in UK legislation and this is the earliest legislative opportunity to remedy the situation.
13. Section 1(1)(a) of the Trade Act 2021 allows an appropriate authority (which includes the Scottish Ministers), to make such provision as the authority considers appropriate for the purpose of implementing the GPA. The powers in section 4(1)(c) allow for incidental, supplementary or consequential provision. The Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016 provide one coherent set of rules for contracting authorities, entities and economic operators on the basis of the GPA thresholds. It would be impractical and create legal uncertainty to identify different thresholds and different methods of calculating contract values, depending on whether the procurement came within the scope of GPA coverage, which varies between parties. The reviewable financial thresholds amended by this instrument therefore apply to all procurement regulated by the three sets of procurement regulations. The thresholds for small lots and light touch regime services are not reviewable financial thresholds and these remain the same.

Consultation

14. There has been no public consultation as the changes made are minor and technical, maintaining the current legislative and policy framework while ensuring the UK meets international obligations in relation to the GPA. Regular discussions on the content of this instrument have been held with the UK Government throughout the drafting process. Where appropriate, the amendments to legislation set out in this instrument are consistent with amendments which the UK Government is making to its equivalent legislation.

Impact Assessments

15. Impact assessments have not been prepared for this instrument because the framework and principles underlying the Regulations have not been substantially amended. Modifications contained in this instrument have been minor and technical, made to ensure the Regulations comply with the UK’s international obligations in relation to the GPA.

Financial Effects

16. The Minister for Business, Trade, Enterprise and Tourism confirms that no BRIA is necessary, as the instrument has no financial effects on the Scottish Government, local government or on business.