

SL(6)356 – The Public Procurement (International Trade Agreements) (Amendment) (Wales) Regulations 2023

Background and Purpose

These Regulations amend various United Kingdom public procurement regulations for the purpose of implementing the procurement chapters of two Free Trade Agreements entered into by the United Kingdom, one with Australia (the “UK-Australia FTA”) and the other with New Zealand.

The Regulations also make the following general amendments to public procurement regulations to ensure compliance with commitments made in the UK-Australia FTA:

- the introduction of a rule that, where the value of a procurement cannot be estimated, the procurement is to be treated as having been valued at the relevant threshold for that type of procurement (including special provision for situations in which the value of one or more lots cannot be estimated);
- the removal of the possibility of using a prior information notice or periodic indicative notice as the call for competition; and
- a prohibition on contracting authorities and utilities from terminating contracts in a manner that circumvents obligations in the UK-Australia FTA.

The Regulations also make provision for transitional arrangements.

The Regulations apply in relation to devolved Welsh authorities and come into force on 26 May 2023.

Procedure

Negative.

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.

Technical Scrutiny

The following 3 points are identified for reporting under Standing Order 21.2 in respect of this instrument.



1. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

Regulations 2(7) and (8)(b) of the subject Regulations seek to omit the following text from regulations 27(4) and 28(6) of the Public Contracts Regulations 2015 respectively:

*“which was not itself used as a means **for** calling for competition” [emphasis added].*

However, the relevant text in each of regulations 27(4) and 28(6) to be omitted appears to be:

*“which was not itself used as a means **of** calling for competition”.*

2. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

Regulations 4(11)(b)(ii), (15)(a)(ii), (18)(c)(ii), (20)(b) and (22)(b) omit regulations 52(23)(b), 65(2)(b), 73(5)(b), 91(1)(b) and 105A(3)(b) respectively from the Utilities Contracts Regulations 2016.

In each case, the omitted provision comprises a sub-paragraph followed by a conjunction (“or” or “and”). However, the regulations do not provide for those conjunctions to be omitted along with the relevant sub-paragraph.

3. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.

Regulation 5(2) specifies the circumstances in which a procurement is deemed to have commenced for the purposes of the transitional provision in regulation 5(1).

However, the regulation does not clarify whether the specific circumstances listed in sub-paragraphs (a)-(c) of paragraph (2) are intended to operate cumulatively, or as alternatives, in order for the transitional provision in paragraph (1) to have effect.

Merits Scrutiny

The following point is identified for reporting under Standing Order 21.3 in respect of this instrument.

4. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

These Regulations amend, and come into force on the day after, equivalent regulations being made by the UK Government. The Explanatory Memorandum to these Regulations notes that,

“This is so as to ensure that the changes being made by the UK Government regulations for contracting authorities which are not devolved Welsh authorities and those being made by the Welsh Ministers in relation to devolved Welsh authorities, together result



in a co-ordinated set of amendments to the existing underpinning procurement legislation.”

Welsh Government response

A Welsh Government response to the technical reporting points is required.

Legal Advisers

Legislation, Justice and Constitution Committee

17 May 2023



Senedd Cymru

Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Welsh Parliament

Legislation, Justice and Constitution Committee