

## UK MINISTERS ACTING IN DEVOLVED AREAS

### 82 - The Public Procurement (Amendment Etc.) (EU Exit) Regulations 2019

*Laid in the UK Parliament: 18 December 2018*

#### Sifting

Subject to sifting in UK Parliament?	No
Procedure:	Affirmative
Date of consideration by the House of Commons European Statutory Instruments Committee	19 December
Date of consideration by the House of Lords Secondary Legislation Scrutiny Committee	8 January
Date sifting period ends in UK Parliament	N/A
Written statement under SO 30C:	Paper 21
SICM under SO 30A (because amends primary legislation)	N/A

#### Scrutiny procedure

Outcome of sifting	N/A
Procedure	Affirmative
Date of consideration by the Joint Committee on Statutory Instruments	Not known
Date of consideration by the House of Commons Statutory Instruments Committee	Not known
Date of consideration by the House of Lords Secondary Legislation Scrutiny Committee	Not known

#### Commentary

These Regulations are proposed to be made by the UK Government pursuant to section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018.

These Regulations are being made in order to address deficiencies in retained EU law in relation to public procurement arising from the withdrawal of the United Kingdom (UK) from the European Union (EU), ensuring the legislation continues to operate effectively after the UK leaves the EU.

The Welsh Government laid a written statement under Standing Order 30C in respect of these UK Government Regulations on 18 December 2018. It seems that statement was withdrawn and the Welsh Government has now laid another statement in respect of the same Regulations. We were not informed that the original statement was withdrawn, therefore

we ask the Welsh Government to clarify when and why the original statement was withdrawn and why did it take until 25 January 2019 to lay a corrected statement.

The EU legal framework for the regulation of public procurement by public authorities and utilities consists of a package of directives (the EU Procurement Directives) that govern procedures for the award of public contracts over specified financial thresholds to suppliers of works, goods and services. They are aimed at ensuring that the EU public procurement market is open and competitive and that suppliers are treated equally and fairly.

The EU Procurement Directives were implemented for England, Wales and Northern Ireland by the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016 (the Regulations). This instrument also relates to certain directly applicable EU legislation in the field of public procurement. This instrument addresses deficiencies in retained EU law that arise as a result of the withdrawal of the UK from the EU. It amends or removes provisions that are inoperable, inappropriate or would otherwise prevent the legislation from functioning effectively after exit day within the meaning of section 8 of European Union (Withdrawal) Act 2018. For example, provisions that relate to the publication of notices in the Official Journal of the EU (OJEU) and to the submission of reports to the European Commission (the Commission) would no longer be appropriate because they impose requirements and confer functions in respect of EU entities that no longer have such functions in relation to the UK after exit. Legal Advisers make the following comments in relation to the Welsh Government's statement dated 25<sup>th</sup> January 2019 regarding the effect of these Regulations:

- The statement lists the legislation being amended by the Regulations but does not identify which legislative powers of the Assembly or executive powers of the Welsh Ministers are affected by this instrument. The statement says that the Regulations enables functions to be exercised by the Cabinet Office in relation to Devolved Welsh Authorities, either with the consent of the Welsh Ministers or exercised concurrently with the Welsh Ministers. However, the statement doesn't say whether this relates to all functions, whether the regulations restate existing arrangements or whether these represent new arrangements in terms of how functions are exercised in relation to devolved Welsh Authorities.
- The statement correctly identifies implications for the Assembly's competence in the
- future as they would need Minister of the Crown consent under Schedule 7B of the Government of Wales Act 2006 to make any changes in these areas. However, if these are new arrangements it is unclear why the Welsh Government did not lay a SICM as it has in

relation to changes that these regulations make to the Equality Act 2010.

Legal advisors recommend that clarification is sought on the points above in order to enable effective scrutiny of these regulations.

As it is unclear from the Welsh Government's statement dated 25<sup>th</sup> January the impact the Regulations may have on the Assembly's legislative competence and/or the Welsh Ministers' executive competence, Legal Advisers have been unable to assess whether any significant issues arise under paragraph 8 of the Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks in relation to these Regulations.

Pending further clarification from the Welsh Government, Legal Advisers have not identified any legal reason to seek a consent motion at this time under Standing Order 30A.10 in relation to these Regulations.