

DRAFT STATUTORY INSTRUMENTS

2020 No.

EXITING THE EUROPEAN UNION

PUBLIC PROCUREMENT

The Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020

Made - - - - *****

Coming into force in accordance with regulation 1

The Secretary of State makes these Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(a), as read with paragraph 1A(b) of Schedule 2 to that Act, and sections 8(1), 8A, 8B(1) and (2)(c) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018.

The Secretary of State is designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to public procurement(d).

In accordance with paragraph 1(3) of schedule 7 to the European Union (Withdrawal) Act 2018, a draft of this instrument has been laid before Parliament and approved by a resolution of each House of Parliament.

Citation and commencement

1.—(1) These Regulations may be cited as the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020.

(2) This regulation and regulation 2 come into force on the day after the day on which these Regulations are made.

(3) Regulation 3 comes into force immediately before IP completion day.

(a) 1972 c. 68. The European Communities Act 1972 was repealed by section 1 of the European Union (Withdrawal) Act 2018 (c. 16) with effect from exit day, but saved with modifications until IP completion day by section 1A of that Act (as inserted by section 1 of the European Union (Withdrawal Agreement) Act 2020 (c. 1)). Section 2(2) of the European Communities Act 1972 was amended by the European Union (Amendment) Act 2008 (c. 7), Part 1 of the Schedule.

(b) Paragraph 1A was inserted by the Legislative and Regulatory Reform Act 2006 (c. 51), section 28, and was amended by the European Union (Amendment) Act 2008, Part 1 of the Schedule.

(c) Sections 8A and 8B were inserted by the European Union (Withdrawal Agreement) Act 2020, sections 3 and 18 respectively.

(d) S.I. 2009/2743.

Pre-exit amendments of the Defence and Security Public Contracts Regulations 2011

2.—(1) The Defence and Security Public Contracts Regulations 2011(a) are amended as follows.

(2) In regulation 3 (interpretation), in paragraph (1), in the definition of “military equipment”, for “26 February 2018 as amended from time to time” substitute “17 February 2020(b)”.

(3) In regulation 12 (technical specifications in the contract documents)—

(a) in paragraph (1), for the definition of “European technical approval” substitute the following—

““European Technical Assessment” means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the relevant European Assessment Document as defined in point 12 of Article 2 of Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC(c);”;

(b) in paragraph (5)(b), for “European technical approvals” substitute “European Technical Assessments”;

(c) in paragraph (10)(b), for “European technical approval” substitute “European Technical Assessment”.

(4) In regulation 23 (criteria for the rejection of economic operators), in paragraph (4), sub-paragraph (k), for “(12) and (13)” substitute “(12), (13) and (14)”.

Amendments of The Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019

3.—(1) The Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019(d) are amended as follows.

(2) In regulation 3 (exit-related amendments of the Defence and Security Public Contracts Regulations 2011)—

(a) in paragraph (3), in both places it occurs, for “exit day” substitute “IP completion day”;

(b) in paragraph (5)—

(i) in sub-paragraph (c)(i), for “£65,630” substitute “£70,778”;

(ii) in sub-paragraph (c)(ii), for “£820,700” substitute “£884,720”.

(3) For regulation 4 (transitional and saving provision in relation to amendments made by regulation 3), substitute—

“Transitional and saving provision in relation to the amendments made by regulation 3

4.—(1) In this regulation, “relevant amendments to the 2011 Regulations” means—

(a) amendments made by regulation 3; and

(b) any other amendments, including future amendments, to the 2011 Regulations that—

(i) come into force on, or begin to apply from, IP completion day or any time after IP completion day; and

(a) S.I. 2011/1848, amended by S.I. 2015/102, 2016/275, 2019/697 and by S.S.I. 2015/446 and 2016/49; there are other amending instruments, but none are relevant.

(b) OJ C 85, 13.3.2020, p.1-37.

(c) OJ No L 88, 4.4.2011, p.5-43, last amended by Commission Delegated Regulation (EU) No 574/2014 (OJ No L 159, 28.5.2014, p.41).

(d) S.I. 2019/697.

(ii) are not made by or under any of sections 7A, 7B, 7C, 8B and 8C of the European Union (Withdrawal) Act 2018^(a).

(2) Relevant amendments to the 2011 Regulations do not affect any procedure launched by a contracting authority under the 2011 Regulations if the procedure—

- (a) was launched before IP completion day; and
- (b) was not yet finalised by IP completion day.

(3) For the purposes of paragraph (2), a procedure is launched—

- (a) when a call for competition or any other invitation to submit applications has been made in accordance with the 2011 Regulations; or
- (b) where the 2011 Regulations do not require such a call or invitation, when the contracting authority contacted economic operators in relation to the specific procedure.

(4) For the purposes of paragraph (2), a procedure is finalised—

- (a) upon publication of a contract award notice in accordance with the 2011 Regulations;
- (b) where the 2011 Regulations do not require the publication of such a notice, upon conclusion of the relevant contract; or
- (c) where the contracting authority decided not to award a contract, upon informing the tenderers, or persons otherwise entitled to submit applications, of the reasons why the contract was not awarded.

(5) If the condition in paragraph (6) is met, the relevant amendments to the 2011 Regulations do not affect any procedure relating to the performance of a framework agreement, including the award of contracts based on such an agreement, under regulations 20(3) to (5), (7) to (9), (11) and (12) of the 2011 Regulations.

(6) The condition is that the framework agreement—

- (a) was concluded before IP completion day and had neither expired nor been terminated before IP completion day; or
- (b) was concluded after IP completion day in accordance with a procedure to which paragraphs (2) to (4) applied.

(7) The amendments made by regulation 3(30) do not apply in relation to a voluntary transparency notice that was published in the Official Journal if the notice was sent before IP completion day to be so published.

(8) In relation to a procedure to which paragraphs (2) to (6) apply, the 2011 Regulations are to be read, on and after IP completion day, and so far as the context permits or requires, as if—

- (a) any reference (however expressed) to a member State included the United Kingdom;
- (b) any reference (however expressed) to—
 - (i) EU law;
 - (ii) any particular EU Treaty or any part of it;
 - (iii) any EU instrument, or other document of an EU entity or of the EU, or any part of any such instrument or document;
 - (iv) any part of EU law not falling within paragraph (ii) or (iii);
 - (v) any tax, duty, levy or interests of the EU; or
 - (vi) any arrangements involving, or otherwise relating to, the EU of a kind not falling within paragraph (i), (ii), (iii), (iv) or (v),

(a) Sections 7A, 7B, 7C, 8B and 8C were inserted by the European Union (Withdrawal Agreement) Act 2020, sections 5, 6, 26(2), 18 and 21 respectively.

were a reference to any such thing (including any such thing as may have existed previously) so far as it is applicable to and in the United Kingdom by virtue of the relevant withdrawal provisions;

- (c) any reference to the territory of the EU included the United Kingdom;
- (d) any reference to an enforceable EU obligation were a reference to an obligation that is enforceable by virtue of section 7A or 7B of the European Union (Withdrawal) Act 2018; and
- (e) such other modifications were made as are necessary for any purpose of the relevant withdrawal provisions and are capable of being ascertained from any such purposes or otherwise from those provisions.

(9) In paragraph (8), “relevant withdrawal provisions” means—

- (a) Title 8 of Part 3 of the withdrawal agreement (ongoing public procurement and similar procedures);
- (b) Title 5 of Part 3 of the EEA EFTA separation agreement (ongoing public procurement and similar procedures).

(10) In this regulation—

“the 2011 Regulations” means the Defence and Security Public Contracts Regulations 2011;

“amendment” includes modification, revocation and substitution.

(11) In this regulation, “contract”, “contracting authority”, “contract award notice”, “economic operator”, “framework agreement”, “Official Journal”, “prior information notice”, “tenderer” and “voluntary transparency notice” have the same meaning as in the 2011 Regulations.

(12) None of the savings in this regulation implies any limitation of the scope of any of the other savings in this regulation(a).”

Date

Name
Minister of State
Ministry of Defence

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make amendments to the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/697) (“the 2019 Regulations”) and further amendments to the Defence and Security Public Contracts Regulations 2011 (S.I. 2011/1848) (“the 2011 Regulations”).

Regulation 2 makes amendments to the 2011 Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 (c.16). Regulation 2(2) updates the reference to the Common Military List of the European Union so that it refers to the current list (adopted on the 17th February 2020). Regulation 2(3) replaces an out of date reference to European technical approvals and regulation 2(4) corrects a mistaken omission.

(a) For example, paragraph (7) saves the previous wording of regulation 60(3) of the 2011 Regulations in certain cases, but that does not prevent a more general saving in paragraph (2) from applying to save the previous wording of regulation 60(3) in other cases.

Regulation 3(2)(a) makes amendments to the 2019 Regulations in exercise of the powers conferred by section 8A of the European Union (Withdrawal) Act 2018 (c. 16) (“the 2018 Act”) in order to implement Part 4 (transition) of the withdrawal agreement.

Regulation 3(2)(b) makes amendments to the 2019 Regulations in exercise of the powers conferred by section 8(1) of the 2018 Act in order to address failures of retained EU law to operate effectively and other deficiencies (in particular under paragraph (g) of section 8(2)) arising from the withdrawal of the UK from the European Union.

Regulation 3(3) makes amendments to the 2019 Regulations in exercise of the powers conferred by section 8B(1) and (2) of the 2018 Act in order to implement Title 8 (ongoing public procurement and similar procedures) of Part 3 of the withdrawal agreement and the corresponding Title 5 of Part 3 of the EEA EFTA separation agreement^(a). Regulation 3(3) of this instrument replaces the transitional and savings provisions found at regulation 4 of the 2019 Regulations in order to provide, as required by the withdrawal agreement and EEA EFTA separation agreement, for procedures that are ongoing on IP completion day to continue without being subject to any substantive changes in the procurement rules applicable to them.

A full impact assessment has not been produced for this Instrument as no, or no significant, impact on the private or voluntary sector is foreseen.

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(a) For the meaning of “withdrawal agreement”, “EEA EFTA separation agreement” and “IP completion day” see section 39(1) of the European Union (Withdrawal Agreement) Act 2020.

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