

**EXPLANATORY MEMORANDUM TO**

**THE PUBLIC PROCUREMENT (AGREEMENT ON GOVERNMENT  
PROCUREMENT) (THRESHOLDS) (AMENDMENT) REGULATIONS 2021**

**2021 No. 1221**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by Cabinet Office and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

- 2.1 This instrument implements the changes required to update the United Kingdom's (UK) public procurement reviewable financial thresholds which govern the procedures for the award of public contracts for goods, works and services. This instrument also changes the calculation of the estimated value of a procurement in relation to VAT to ensure the UK complies with its obligations under the Agreement on Government Procurement (GPA).

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 This instrument amends the Defence and Security Public Contracts Regulations 2011 (DSPCR), the Public Contracts Regulations 2015 (PCR), the Concession Contracts Regulations 2016 (CCR) and the Utilities Contracts Regulations 2016 (UCR). This instrument will be made using the powers in sections 1 and 4 of the Trade Act 2021, regulation 5A of the PCR, regulation 9A of the CCR and regulation 16A of the UCR.

**4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument varies between provisions. Regulations 2 to 5 make amendments to existing secondary legislation. Those amendments are generally of the same territorial application as the underlying instrument, or Part of that instrument, being amended. The amendments to the DSPCR made by regulation 2 therefore apply throughout the United Kingdom. The amendments to the PCR made by regulation 3 principally apply in respect of England, Wales and Northern Ireland, with the exception of paragraph (3)(e) of regulation 3 which amends provisions which also extend to Scotland and apply in respect of contracting authorities whose functions are not mainly or wholly Scottish devolved functions. The amendments to the CCR made by regulation 4 and the amendments to the UCR made by regulation 5 apply in respect of England, Wales and Northern Ireland only.

**5. European Convention on Human Rights**

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **6. Legislative Context**

- 6.1 As a member State, the UK was subject to a package of directives (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 for England, Wales and Northern Ireland by the PCR, CCR and UCR (together, the Procurement Regulations). Scotland implemented the directives in separate and parallel regulations. The DSPCR implemented Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and services contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.
- 6.2 During the transition period and as a result of the European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2019, the relevant provisions of EU law continued to apply until IP completion day.
- 6.3 Prior to the UK's withdrawal from the EU on 31 January 2020, the UK was a member of the GPA by virtue of its status as a member State. The GPA is a plurilateral agreement within the World Trade Organisation framework between many of the major international economies, including the US, Canada, the EU and Japan. 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), (the reviewable financial thresholds), on a biennial basis in accordance with the EU's obligations under the GPA.
- 6.4 On IP completion day, the Procurement Regulations, as amended by the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020, and the DSPCR, as amended by the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019 and the Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2020, became retained EU law. The UK became an independent member of the GPA on 1 January 2021.
- 6.5 The Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021, which came into force on 11 June 2021, implemented the UK's accession to independent membership of the GPA.
- 6.6 This instrument amends the Procurement Regulations and the DSPCR in two ways: firstly to provide for the biennial review and revision of the reviewable financial thresholds in accordance with the UK's obligations under the GPA, and secondly to change the calculation of the estimated value of a procurement based on the total amount payable without making a deduction for VAT, in accordance with the GPA.
- 6.7 The reviewable financial thresholds were last updated in October 2019 and came into effect in the UK on 1 January 2020. Pursuant to regulation 5A of the PCR (and parallel provisions in the UCR and CCR), the Minister for the Cabinet Office must review and revise the financial thresholds every two years to verify whether they correspond with the thresholds established for those purposes in the GPA. This must be done by calculating their sterling value in terms of the special drawing rights mentioned in the GPA. If the sterling value differs from the current financial thresholds, the Minister must make regulations amending the thresholds which must be made and laid before Parliament before 1 November 2021 to come into force on 1 January 2022.

- 6.8 In estimating the value of a procurement, the GPA requires the total value of a procurement, taking into account all forms of remuneration. It does not refer to a deduction for VAT.
- 6.9 Section 1(1)(a) of the Trade Act 2021 allows an appropriate authority (which includes a Minister of the Crown), 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 Procurement Regulations 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 in any event, varies between parties. The reviewable financial thresholds amended by this instrument therefore apply to all procurement regulated by the Procurement Regulations. The thresholds for small lots and light touch regime services are not reviewable financial thresholds and these remain the same, but will now be inclusive of VAT. The financial thresholds in the DSPCR cross-refer and apply the reviewable financial thresholds in the UCR. This instrument therefore also changes the calculation of the estimated value of a procurement in the DSPCR in the same way as the amendments to the Procurement Regulations. The thresholds in the PCR also apply to the procurement of health care services for the purposes of the NHS in the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 made under section 75 of the Health and Social Care Act 2012.

## **7. Policy background**

### *What is being done and why?*

- 7.1 The reviewable financial thresholds in the Procurement Regulations stem from the UK's obligations under the GPA. These must be reviewed and revised every two years to take account of currency fluctuations. This instrument will come into force on 1 January 2022 to update the financial thresholds to reflect the UK's new status as an independent member of the GPA.
- 7.2 As a member State, the UK was obliged to adopt the EU's methodology for calculating the financial thresholds and the estimated value of a procurement. The EU's financial thresholds included a 13% unilateral reduction following the EEC's (as it was) representations in its follow-up to the GPA's VAT Panel Report dated 9 April 1987 in which it put forward the 13% deduction as a solution to a dispute with the United States. This enabled the EU to maintain its policy of requiring the calculation of the estimated value of a procurement to be net of VAT, as an attempt to harmonise differing VAT rates across member States. It was, and remains, an internal EU measure which is no longer appropriate to be applied in the UK after EU Exit.
- 7.3 Since this is the first review and revision of the thresholds after EU Exit, from 1 January 2022, the calculation of the estimated value of a procurement and the reviewable financial thresholds is intended to accord with the standard GPA methodology adopted by non-EU GPA members. This instrument updates the reviewable financial thresholds without a 13% reduction and the calculation of the estimated value of a procurement will include the total amount payment, inclusive of VAT.

## **8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act 2018 but relates to the withdrawal of the UK from the EU as it implements the UK's obligations in respect of the reviewable financial thresholds and calculation of the estimated value of a procurement to reflect the UK's independent membership of the GPA.

## **9. Consolidation**

- 9.1 The Green Paper, Transforming public procurement published in December 2020 proposes to reform and consolidate the legislation amended by this Statutory Instrument. The Government received over 600 responses to the Green Paper consultation and will publish a response in autumn 2021. Legislation to reform public procurement will be introduced when Parliamentary time allows.

## **10. Consultation outcome**

- 10.1 There has been no consultation on this instrument. The main change is to implement the biennial update to the reviewable financial thresholds and reflect the UK's obligations as an independent member of the GPA. Section 39(6) of the Small Business, Enterprise and Employment Act 2015 is clear that there is no need to consult for procurement SIs.
- 10.2 Regular discussions on the content of this instrument have been held with the devolved administrations throughout the drafting process in accordance with the Devolution Memorandum of Understanding.

## **11. Guidance**

- 11.1 A Procurement Policy Note will be published providing the updated threshold values and notifying of the change in the calculation of the estimated value of a procurement to include VAT.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the framework and principles underlying the Procurement Regulations and the DSPCR have not been substantially amended. Modifications contained in this instrument have been made to ensure the Procurement Regulations and the DSPCR function effectively and to accord with the UK's international obligations. Therefore, any impact is expected to be low and are below the threshold required to carry out a full impact assessment.

## **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small business.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The impact on small businesses arising from this instrument is expected to be low.

**14. Monitoring & review**

- 14.1 As this instrument is amending provisions in connection with procurement only, the duty to review in section 28 of the Small Business, Enterprise and Employment Act 2015 does not apply and no review clause is required.

**15. Contact**

- 15.1 Julie Bremner at the Cabinet Office, telephone: 07771 957746 or email: [julie.bremner@cabinetoffice.gov.uk](mailto:julie.bremner@cabinetoffice.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Edward Green, Deputy Director for the International and Reform Team, at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Lord Agnew of Oulton, Minister of State in the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.