

EXPLANATORY MEMORANDUM TO

THE PUBLIC PROCUREMENT (AGREEMENT ON GOVERNMENT PROCUREMENT) (AMENDMENT) (NO. 2) REGULATIONS 2021

2021 No. 872

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Cabinet Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 These Regulations make amendments to various United Kingdom (UK) and Scottish public procurement regulations for the purpose of implementing the Agreement on Government Procurement (GPA) and to give effect in domestic regulations to the modification of the list of central government entities in Annex 1 to the UK's Appendix I to the GPA. This instrument amends the definition of the GPA to refer to the version of the agreement as amended by the modification and updates the list of central government contracting authorities to reflect changes made to the list of bodies following the modification.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument corrects an error to the Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021 (S.I. 2021/573) previously reported by the JCSI in the Seventh Report of Session 2021–22 regarding an inconsistency in the definition of “relevant time” as inserted by regulations 3(4) and 7(4) of that instrument by making amendments to regulation 51A of the Concession Contracts Regulations 2016 and regulation 51A of the Concession Contracts (Scotland) Regulations 2016. The Cabinet Office regrets this error and these Regulations will be issued free of charge to all known recipients of S.I. 2021/573.
- 3.2 In addition to the substantive changes to the regulations, this instrument makes incidental, supplementary or consequential provision in respect of the reordering of Schedule 1 of both the Public Contracts Regulations 2015 and Public Contracts (Scotland) Regulations 2015. This is to reflect the fact that some of the contracting authorities currently listed in those Schedules are not part of the list of central government contracting authorities in Annex 1 to the UK's Appendix I to the GPA, but they should still be considered as central government authorities for the purposes of the regulations and accordingly remain within those Schedules. This instrument does not substantively change which bodies fall within the Schedules but splits the existing Schedules into two parts and reorders these remaining bodies into alphabetical order under the heading “Other Central Government Contracting Authorities” to distinguish these central government contracting authorities from those in Annex 1 to the UK's Appendix I to the GPA.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.3 Not applicable.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the whole of the United Kingdom.

4.2 The territorial application of this instrument is set out in Section 3 under “Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)”.

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 The UK currently gives effect to its obligations under the GPA in regulations. These are the PCR, the CCR, the UCR, the PCR Scotland, the CCR Scotland and the UCR Scotland. These regulations were originally made to implement EU Directives 2014/24/EU, 2014/23/EU, and 2014/25/EU. The Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021 amended these regulations to implement the UK’s independent membership of the GPA into domestic law.

6.2 The Appendices and Annexes to the GPA set out each party’s commitments with respect to the procuring entities covered by that party under the GPA and the threshold values above which certain procurement activities are covered by the agreement for that party. The GPA distinguishes between “central government entities”, “sub-central government entities” and “other entities” (which for the UK covers utilities).

6.3 The regulations provide definitions of the GPA and the terms “contracting authorities”, “central government authorities”, “sub-central contracting authorities” and “utilities”. They provide that duties owed by such bodies under the regulations are extended to economic operators from GPA parties where the procurement in question is covered by the UK’s GPA offer.

6.4 This instrument will amend the PCR, the UCR and the CCR, the PCR Scotland, the CCR Scotland and the UCR Scotland.

6.5 This instrument is made under section 1(1)(a) and (b)(iv) of the Trade Act 2021. The power in section 1(1)(a) allows an appropriate authority (including a Minister of the Crown and devolved authorities) to make such provision as the authority considers appropriate for the purpose of implementing the Agreement on Government Procurement. The power in 1(1)(b)(iv) allows an appropriate authority (including a Minister of the Crown and devolved authorities) to make such provision as the authority considers appropriate in consequence of a modification of the list of central government entities in Annex 1 to the UK’s Appendix I to the GPA. This is the first use of this power.

7. Policy background

What is being done and why?

- 7.1 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. Prior to the end of the transition period agreement between the UK and the EU, the UK participated in the GPA by virtue of the EU's membership. The UK acceded to the GPA as of 1 January 2021 in its own right on substantially the same market access offer as when it was a member by virtue of the EU's membership.
- 7.2 During the accession process, the UK committed to notifying to the Committee of modifications to the UK's Annexes to the GPA to reflect the current configuration of the UK's public sector, specifically removing bodies which no longer exist, adding bodies to which functions had transferred from bodies previously listed and updating the names of bodies to reflect machinery of government changes. The proposed modifications do not represent a change to the bodies covered by the UK's offer as an independent member of the GPA.
- 7.3 A notification of the proposed modifications to Annex 1 to the UK's Appendix I was circulated to GPA parties on 31 March 2021. In accordance with the provisions of Article XIX of the GPA these modifications became effective under the GPA on 16 May 2021 meaning the UK's Annex 1 has now been updated to reflect the changes made by the modification. An updated copy of the UK's Appendix I has been laid before Parliament in Command Paper No. 487.
- 7.4 Now the modification has come into force the various definitions of the GPA need to be updated to reference the version of the GPA as amended on or before 16 May 2021 when the modifications took effect. Secondly, Schedule 1 of both the PCR and the PCR Scotland, which is referred to in the definitions of "central government authorities" in those regulations, needs to be updated to ensure that all bodies listed in the UK's Annex 1 to Appendix I to the GPA following the modification to that list are included.
- 7.5 The correction made to regulations 51A of the CCR and 51A of the CCR Scotland is as a result of an error in the Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021 which incorrectly transposed the definition of "relevant time" from the PCR and the PCR Scotland.

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 European Union because it implements in regulations updates to the UK's market access offer under the GPA made following the UK's accession to the GPA as an independent member.

9. Consolidation

- 9.1 There are no current plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

- 10.1 There has been no consultation on this instrument. The changes made are intended to provide legal effect to the UK's updates to its market access offer under the GPA

made following the UK's accession to the GPA as an independent member. Moreover, section 28(3)(b) 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 No guidance is issued with these Regulations but information on the UK's GPA accession was issued to stakeholders in Procurement Policy Note 02/21 published on 19 February 2021 available at <https://www.gov.uk/government/publications/procurement-policy-note-0221-the-wto-gpa-and-the-uk-eu-tca>.

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 regulations being amended have not been substantially amended. Modifications contained in this instrument have been made to ensure the regulations function effectively. 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 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 Minister Lopez at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.