

Scottish Procurement

Scottish Procurement Policy Note

SPPN 2/2019

13 February 2019



Scottish Government
Riaghaltas na h-Alba
gov.scot

Update: Procurement legislation in Scotland in the event of a 'no-deal' Brexit

Purpose

1. This SPPN is to tell you that the Scottish Government has proposed [further changes to public procurement legislation](#) in case the UK exits the European Union without an agreement (a 'no deal' Brexit).

Key Points

- The Scottish Government believes that the prospect of a 'no-deal' Brexit would be highly damaging, but that we must prepare for it in case it happens.
- [SPPN 1/2019](#) explained the key points of changes to public procurement legislation proposed by the Scottish Government in the event of a 'no-deal' Brexit.
- These further proposals deal with changes to the way which the EU's international obligations would be dealt with in a 'no-deal' situation.

The law as it stands today

2. Because the EU is a signatory to the World Trade Organisation's Government Procurement Agreement (the GPA), the procurement Directives currently require public bodies to ensure bidders from other countries which are also signatories to the GPA are treated in the same way as bidders from the UK. This is reflected in domestic procurement regulations (see, for example, [regulation 26 of the Public Contracts \(Scotland\) Regulations 2015](#)).
3. The EU also has a number of other international agreements with third countries which cover procurement. The procurement Directives, and domestic procurement regulations, currently also require equal treatment for bidders from these other countries.

The changes proposed in January

4. [The changes proposed in January](#) would, amongst other things, remove the requirement on public bodies to ensure equal treatment to bidders from GPA countries eight months after a 'no-deal' exit from the EU. This was at the request of the UK Government, which had taken a similar approach to amending the procurement regulations covering England, Wales and Northern Ireland. In anticipation of the UK joining the GPA in its own right, this was intended to help facilitate the UK's smooth accession.
5. The changes proposed in January would also remove immediately on exit from the EU the duty on public bodies in Scotland to provide equal treatment to bidders from other countries with which the EU has agreements covering public procurement. This was also consistent with the approach taken by the UK Government in amending the procurement regulations covering England, Wales and Northern Ireland.

The changes now proposed

6. The changes proposed in this new legislation would mean that the requirement of equal treatment for bidders from GPA countries would remain in the Scottish procurement regulations for eighteen months rather than eight months.
7. The requirement to ensure equal treatment to bidders from countries with which the EU has an international agreement covering procurement would also be retained for a period of eighteen months, rather than being removed immediately on exit from the EU.

Why these changes are being proposed

8. This new approach is also at the request of the UK Government, which has introduced similar proposed [changes to the procurement regulations covering England, Wales and Northern Ireland](#).
9. As well as trying to negotiate the UK's independent accession to the GPA, the UK Government is attempting to negotiate the 'roll-over' of the EU's international agreements covering procurement, so that they continue to apply to the UK.
10. The original approach set out in January was based on a planning assumption that powers contained in clause 1 of the UK Government's Trade Bill could be used to implement the UK's accession to the GPA and that powers contained in

clause 2 of that Bill could be used to implement those new international agreements covering procurement.

11. It is, however, now no longer safe to assume that the Trade Bill will receive Royal Assent and pass into law in sufficient time. Without these powers, there would be no other way of implementing the UK's membership of the GPA, or the other agreements, without alternative primary legislation. This means that the procurement regulations would not reflect the UK's international obligations.

12. Leaving these 'legacy' EU obligations active for a period of eighteen months is therefore intended to allow sufficient time either for the Trade Bill, or another primary legislative vehicle, to become law. It will ensure in the meantime that domestic regulations meet international requirements.

Next steps

13. The Scottish Parliament will consider these proposed changes to legislation – those submitted last month and those now being submitted - over coming weeks. If the Parliament approves the draft legislation, and if the UK exits the EU without an agreement which covers procurement, these changes would take effect. In that case, we would publish more detailed guidance on transitional arrangements, for example, as exit day approaches.

Dissemination

14. Please bring this SPPN to the attention of all relevant staff, including those in agencies, non-departmental public bodies and other sponsored public bodies within your area of responsibility.

Contact

15. If you have any questions about this SPPN, please contact us at scottishprocurement@gov.scot.

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