

Scottish Procurement

Scottish Procurement Policy Note

SPPN 05/2021

Date 18 August 2021



Scottish Government
Riaghaltas na h-Alba
gov.scot

Changes to Scottish procurement legislation following the UK's exit from the EU

Purpose

1. The purpose of this Scottish Procurement Policy Note (SPPN) is to inform of changes to procurement legislation that have arisen from the UK's exit from the European Union (EU).

Key Points

2. The key points are:
 - A number of changes to Scottish procurement legislation have been made to amend the deficiencies in domestic legislation as a result of leaving the EU.
 - In addition, following the UK's exit from the EU, the UK has become a member of the World Trade Organisation's (WTO) Government Procurement Agreement (GPA) as a party in its own right, requiring technical changes to be made to public procurement rules.
 - All amendments have been technical in nature and have no significant impact on the application of public procurement rules.
 - The UK has also become party to the Trade and Cooperation Agreement (TCA) with the EU, which has been implemented into UK law without any changes being required to procurement legislation.
 - Updates to the public procurement systems in Scotland have also been implemented to ensure these are compatible with the relevant post-EU agreements and regulations:
 - European funded projects must advertise via Tenders Electronic Daily (TED)/ Official Journal of European Union (OJEU) and ensure correct completion of section II.2.13 of contract notices on PCS.

- Notices issued via TED/OJEU prior to 31 December 2020 must also be awarded via TED/OJEU.
- The section of the Single Procurement Document (SPD) (Scotland) that requires buyers to retrospectively add the Find a Tender reference to the form has been removed.

Background

3. As a result of the UK's exit from the European Union on 31 December 2020, various deficiencies arose within domestic legislation. These have been addressed through a number of different pieces of amending legislation which provided the necessary technical changes to the relevant legislation – namely, the Public Contracts (Scotland) Regulations 2015 (PC(S)R 2015), the Concession Contracts (Scotland) Regulations 2016 (CC(S)R 2016), the Utilities Contracts (Scotland) Regulations 2016 (UC(S)R 2016), the Procurement Reform (Scotland) Act 2014 (PR(S)A 2014) and the Procurement (Scotland) Regulations 2016 (P(S)R 2016).
4. At the same time as leaving the EU, the UK acceded to the WTO's GPA in its own right, having previously been party to the agreement as a member of the EU. This prompted further technical changes to public procurement rules in Scotland. Accordingly, amendments have been, and continue to, be made to the legislation.

Summary of changes

5. The changes are largely technical in nature and do not impact on procurement procedures which remain fundamentally unchanged. The basic requirements to advertise contracts, observe minimum timescales, and follow rules on technical specifications and award criteria, for example, remain in place.
6. However, given the various amendments made to the legislation to date, it is worthwhile highlighting these changes to ensure contracting authorities are aware of the current legal landscape.

The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020¹

7. The amendments made by this instrument to the Scottish procurement legislation are outlined in SPPN 11/2020².

¹ <https://www.legislation.gov.uk/ssi/2020/468/contents/made>

² <https://www.gov.scot/publications/changes-to-procurement-legislation-at-the-end-of-the-eu-exit-transition-period-sppn-11-2020/>

8. On the whole, these changes do not make significant amendments to Procurement Regulations and the impact on the application of the Regulations following the UK's exit from the EU is minimal.

The Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021³

9. This instrument, with permission from the Scottish Ministers, was created under a Statutory Instrument by the UK Government, made changes to the PC(S)R 2015, the CC(S)R 2016 and the UC(S)R 2016, and came into force on 11 June 2021.
10. The main changes to the Regulations relate to the inclusion of a Schedule listing other parties to the GPA and updating the obligations owed by contracting authorities under the GPA. For example, to accord no less favourable treatment to the works, supplies, services and economic operators of any GPA party, and extend the duty to apply GPA rules to public procurements with economic operators from GPA parties.
11. This instrument amended Scottish public procurement rules to ensure the UK complies with its GPA obligations. Nonetheless, these changes have not impacted the practical application of the PC(S)R 2015, CC(S)R 2016 and UC(S)R 2016.

The Public Procurement (Agreement on Government Procurement) (Amendment) (No. 2) Regulations 2021⁴

12. This statutory instrument has also been made by the UK Government with the consent of the Scottish Ministers. It provides amendments to the PC(S)R 2015, UC(S)R 2016 and CC(S)R 2016 to reflect updates made to the GPA agreement from 16 May 2021 and come into force on 16 August 2021.
13. The main change made is to update the list of Central Government Bodies at Schedule 1 of PC(S)R 2015 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 updated Schedule 1 list is split into two parts, recognising that some of the bodies currently listed are not part of the list of central government bodies in Annex 1 to the UK's Appendix I to the GPA, but are still considered central government bodies for the purposes of the Regulations. This amending legislation reorders these remaining bodies into alphabetical order under the heading "Other Central Government Contracting Authorities" to distinguish

³ <https://www.legislation.gov.uk/uksi/2021/573/contents/made>

⁴ <https://www.legislation.gov.uk/uksi/2021/872/contents/made>

these central government contracting authorities from those in Annex 1 to the UK's Appendix I to the GPA.

The UK-EU Trade & Cooperation Agreement ("TCA")⁵

14. The UK Government concluded negotiations on the TCA with a provisional application from 1 January 2021. This was implemented in the UK via the European Union (Future Relationship) Act 2020⁶.
15. The TCA provides market access that goes beyond the level set in the GPA based on clear and enforceable rules and standards. It intends to protect UK-owned businesses based in the EU from the risk of discrimination in EU public procurements due to their UK ownership. It also aims to add competition to the public procurement markets in the utility sectors where there are monopolies.
16. The UK's requirements under the TCA for covered procurements are within "Title VI (Public Procurement)" and "Annex PPROC-1: Public Procurement" of the TCA. Annex A below summarises these requirements in the context of our domestic rules.

Procurement systems update

EU Funded Procurements

17. Article 138 of the TCA provides for the UK's continued participation in the European Structural Investment Fund (ESIF) and European Regional Development Fund (ERDF) programmes committed in the Multi-annual Financial Framework for 2014-2020. Article 138(1) makes it explicit that applicable Union law will continue to apply to the UK for these Funds, which means that all EU legislation relating to ESIF will continue to apply, including EU procurement law. This includes the continued requirement to use the European Single Procurement Document (ESPD) for these procurement processes. It is therefore also a requirement to continue to advertise ESIF projects in the OJEU.
18. In order to meet the OJEU obligation for ESIF Operations, the PCS system has been updated to ensure that these types of notices will be sent to TED/ OJEU automatically. All EU funded notices sent to OJEU will comply with the requirement to publish these notices on TED prior to their publication at a national level.

⁵ The UK-EU Trade & Cooperation Agreement ("TCA")

⁶ European Union (Future Relationship) Act 2020 (legislation.gov.uk)

19. For this to function correctly, it is essential that section II.2.13 of notices, titled 'Information about European Union Funds', is completed by the purchasers for any contract notice which is over the OJEU threshold and is being used within any ESIF Operation, or could be in the future.
20. Please ensure that your procurement teams are aware of this change, as failure to complete this section, and therefore advertise in OJEU, may result in a financial correction being made. This could have a wider impact on both Lead Partner and Scottish Government. Further information for public sector buyers regarding this requirement is available at the Procurement Journey website⁷.

Higher value transitional procurements

21. Additionally, higher value procurements (for example, those where a Contract Notice or PIN as a call for completion was placed on TED before 31 December 2020 and are awaiting Contract Award Notices) should be concluded by publishing associated award notices on the TED system. The system release of PCS that took place on 8 July will ensure that these notices also comply with the requirement to be published on TED prior to their publication at a national level.

Update to the SPD (Scotland) template

22. The section of the SPD (Scotland) that requires buyers to retrospectively add the Find a Tender reference to the form has been removed. Scottish Procurement has updated all three versions of the SPD (Scotland) - within the Procurement Journey, PCS-Tender, and the SPD module within Public Contracts Scotland.

Dissemination

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

Contact

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

⁷ See <https://www.procurementjourney.scot/eu-exit>

UK-EU Trade & Cooperation Agreement (TCA)

What procurements are covered by the TCA?

1. The TCA applies to procurements covered by those entities outlined under Annex 1 of the GPA, and additional procurements set out in Section B of Annex PPROC-1 of the TCA.
2. Section B of Annex PPROC-1 is divided into Sub-section B1 (setting out the EU's commitments) and Sub-section B2 (setting out the UK's commitments). These commitments are referred to as "additional market access". NHS clinical healthcare services are expressly excluded from the TCA.
3. Additional market access is made up of additional procuring entities and additional services.
4. The financial thresholds that apply to additional market access are included in the relevant paragraphs and notes in Section B and are the same as the relevant thresholds that apply under the Public Contracts (Scotland) Regulations 2015 ("PC(S)R 2015") and the Utilities Contracts (Scotland) Regulations 2016 ("UC(S)R 2016").
5. The additional procuring entities (for the UK, see Sub-section B2, paragraph 1) are utilities that operate in the gas and heat sectors that are covered by the UC(S)R 2016 and private utilities that act as a monopoly in all utility sectors that are covered by the UC(S)R 2016.
6. The additional services (for the UK, see Sub-section B2, paragraph 2) are:
 - a. Hotel and restaurant services (CPC 641);
 - b. Food serving services (CPC 642);
 - c. Beverage serving services (CPC 643);
 - d. Telecommunication related services (CPC 754);
 - e. Real estate services on a fee or contract basis (CPC 8220);
 - f. Other business services (CPC 87901, 87903, 87905-87907);
 - g. Education services (CPC 92).
7. Hotel and restaurant services, food serving services, beverage serving services, and education services contracts above the relevant thresholds for social and other specific ("light touch") services are included under the "national treatment" regime. This means that the non-discrimination principle of the GPA applies, rather than the detailed GPA or TCA rules. This non-discrimination principle requires that each party must give goods, services and suppliers of any other party treatment no less favourable than the treatment

given to (a) domestic goods, services and suppliers; and (b) goods, services and suppliers of any other party. In practice, for these services, this means that the light touch regime rules at Regulations 74 to 76 of the PC(S)R 2015 and Regulations 88 to 90 of the UC(S)R 2016 apply. The other services set out at paragraph 6 above are covered procurement to the extent that they exceed the current threshold for services.

What are the additional procurement rules for procurements covered by the TCA?

8. The TCA incorporates many of the rules of the GPA (set out in Section A of Annex PPROC-1) and also provides for additional procurement rules (over and above the GPA rules) to apply to all covered procurement.
9. Contracting authorities are obliged to apply the rules set out in the TCA to all covered procurements. The procurement rules are set out at Title VI (Public Procurement) of Heading One of Part Two and are largely consistent with our domestic regulations. You will be compliant with the TCA if you follow the rules in the PC(S)R 2015 and UC(S)R 2016 (as relevant) on:
 - a. procurement by electronic means (PC(S)R 2015 and UC(S)R 2016);
 - b. publication of notices (PC(S)R 2015 and UC(S)R 2016);
 - c. supporting documentation requirements at initial selection or tender stage (PC(S)R 2015 and UC(S)R 2016);
 - d. dynamic purchasing systems (PC(S)R 2015 and UC(S)R 2016);
 - e. ensuring genuine competition when reducing the number of candidates or tenderers in a procurement (PC(S)R 2015);
 - f. the use of environmental, labour and social criteria in procurements(PC(S)R 2015 and UC(S)R 2016); and
 - g. the general principle of non-discrimination, which would, for example, prohibit discrimination on the grounds of where a supplier has gained its experience and ownership of the supplier (PC(S)R 2015 and UC(S)R 2016).
10. In addition, in order to be compliant with the TCA, you must, in any procurement under the UC(S)R 2016 where only qualified suppliers are invited to submit a tender, ensure that the number of suppliers invited to submit a tender is sufficient to ensure genuine competition without affecting the operational efficiency of the procurement. This rule is in the PC(S)R 2015 but not the UC(S)R 2016. You will need to treat the UC(S)R 2016 as if they have been amended in this way.

What can contracting authorities do if they receive an abnormally low tender?

11. The TCA also provides that if a supplier submits a tender with an abnormally low price, the contracting authority may ask the supplier if the price takes any subsidies into account. This is not stated in the PC(S)R 2015 or UC(S)R 2016 and you will need to treat the PC(S)R 2015 and UC(S)R 2016 as if they had been amended to reflect this right.

What are the additional procurement rules for non-covered procurements?

12. The TCA provides⁸ that with regard to any procurement (which includes non-covered procurement), contracting authorities in the UK must treat EU-owned suppliers based in the UK no less favourably than UK-owned suppliers based in the UK. This is subject to defence and national security and other general exceptions set out in the GPA and the additional exceptions in Annex PPROC-1.
13. This obligation is already a requirement of the non-discrimination principle in the PC(S)R 2015 and UC(S)R 2016. However, the non-discrimination principles in the PC(S)R 2015 or UC(S)R 2016 do not currently apply to non-covered procurements so contracting authorities must treat the PC(S)R 2015 and UC(S)R 2016 as if they have been amended to include this specific rule for procurements not currently covered.

Further advice

14. If you have any concerns about how the TCA may affect your procurement exercises, or require further information, you should discuss this with your legal advisers.

⁸ The UK-EU Trade & Cooperation Agreement, Articles PPROC.12 and PPROC.13