

## **Explanatory Memorandum to The Public Procurement (International Trade Agreements) (Amendment) (Wales) (No.2) Regulations 2023**

This Explanatory Memorandum has been prepared by the Chief Operating Officer's Group and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

### **Minister/Deputy Minister's Declaration**

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Public Procurement (International Trade Agreements) (Amendment) (Wales) (No.2) Regulations 2023.

Rebecca Evans MS  
Minister for Finance and Local Government

23 May 2023

## **PART 1**

### **1. Description**

These Regulations revoke and replace the Public Procurement (International Trade Agreements) (Amendment) (Wales) Regulations 2023 (S.I. 2023/506 (W.76) (“the Original Regulations”).

The substance, purpose and effect of these Regulations is identical to that of the Original Regulations.

The Original Regulations made amendments to various United Kingdom public procurement regulations for the purpose of implementing procurement obligations in two Free Trade Agreements entered into by the United Kingdom, one with Australia, and the other with New Zealand insofar as they relate to devolved Welsh authorities. Similar implementing legislation is being laid by UK Government for contracting authorities in England and Wales that are not devolved Welsh Authorities and for Northern Ireland and by Scottish Government for contracting authorities in Scotland.

### **2. Matters of special interest to the Legislation, Justice and Constitution Committee**

The purpose of these Regulations is to revoke and replace the Original Regulations in response to the report of the Legislation, Justice and Constitution Committee (Report No: SL(6)356).

The effect of these Regulations will be to fulfil an obligation to implement the Free Trade Agreements between the UK and Australia and the UK and New Zealand in respect of devolved Welsh authorities (“the Free Trade Agreements”).

In accordance with section 11A(4) of the Statutory Instruments Act 1946, the Llywydd has been informed that the Public Procurement (International Trade Agreements) (Amendment) (Wales) (No.2) Regulations 2023 will come into force less than 21 days after the instrument has been laid. It is necessary for the Regulations to come into force the day after the equivalent regulations made by UK Government, which will come into force on 25 May 2023. This is to ensure the Free Trade Agreements can be fully implemented across the United Kingdom. Therefore, the Public Procurement (International Trade Agreements) (Amendment) (Wales) (No.2) Regulations 2023 will come into force on 26 May 2023.

### 3. Legislative background

The Welsh Ministers make these Regulations, in exercise of the powers conferred by sections 1(1) and (2), and 2(1)(b), (c) and (d) of the Trade (Australia and New Zealand) Act 2023<sup>(1)</sup>.

These Regulations are being made via the negative resolution procedure.

Amendments are required to the Public Contracts Regulations 2015, the Concession Contracts Regulations 2016 and the Utilities Contracts Regulations 2016 in order to implement the free trade agreements entered into between the United Kingdom of Great Britain and Northern Ireland and Australia, and the United Kingdom of Great Britain and Northern Ireland and New Zealand.

### 4. Purpose and intended effect of the legislation

Public procurement in Wales and England and Northern Ireland is governed by the rules in the Public Contracts Regulations 2015 (PCRs), the Concession Contracts Regulations 2016 (CCRs) and the Utilities Contracts Regulations 2016 (UCRs) (“existing procurement regulations”).

These Regulations will give effect in the existing procurement regulations to the public procurement obligations included in the two Free Trade Agreements (FTA) between the UK and Australia and the UK and New Zealand in respect of devolved Welsh Authorities, (within the meaning given by section 157A of the Government of Wales Act 2006<sup>(2)</sup>),

The UK-Australia FTA was signed in December 2021 and the UK-NZ FTA in February 2022. Implementation of the government procurement chapters of these FTAs requires the amendment of UK procurement regulations.

Such domestic implementation needs to be in place before the formal entry into force of the FTAs in order to ensure that the UK is not in breach of the agreements.

The technical amendments to the three sets of Regulations concern the following three areas:-

- a) unknown contract value:** where the value of a procurement cannot be estimated, the procurement is to be treated as having been valued at the relevant threshold for that type of procurement;
- b) prior information notice:** to remove the possibility of using a prior information notice and a periodic indicative notice, respectively, as the call for competition;
- c) termination of awarded contracts in order to avoid obligations under**

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<sup>(1)</sup> 2023 c.9.

<sup>(2)</sup> 2006 c. 32. Section 157A was inserted into the Government of Wales Act 2006 by the Wales Act 2017 (c. 4), section 4(1).

**our international agreements:** prohibit contracting authorities and utilities from terminating contracts in a manner that circumvents obligations in the UK-Australia FTA.

Each of the existing procurement regulations contain a Schedule listing international agreements that contain public procurement obligations to which UK contracting authorities are subject. The UK Government are amending the existing procurement regulations to add the Australia and New Zealand FTAs to those Schedules for contracting authorities that are non-devolved Welsh Authorities and these Regulations will amend those Schedules so that they also apply to devolved Welsh authorities in Wales.

The changes being made by these Regulations will apply to all procurements subject to the UK's domestic regime, not just those covered by the FTA's with Australia / New Zealand. Failure to extend the same terms to other members of the World Trade Organisation Agreement on Government Procurement (GPA) would put the UK in breach of its obligations under that agreement. As such, the amending provisions which implement the specified changes must have general effect rather than being specifically for Australian or New Zealand suppliers.

## **5. Consultation**

These Regulations make limited technical amendments to domestic legislation in order to implement procurement obligations set out in the New Zealand and Australia Free Trade Agreements. The UK Government are responsible for FTA's, the details have already been scrutinised by Parliament as part of the Constitutional Reform and Governance Act 2010 process, as well as during the passage of the Trade (Australia and New Zealand) Act 2023.

There is no opportunity to change the policy at this point in time and therefore a consultation has not been held.

## **6. Regulatory Impact Assessment (RIA) and Other Impacts**

These Regulations are made in the exercise of powers within section 1(1) of the Trade (Australia and New Zealand) Act 2023. Section 1(1) states that the Welsh Ministers "may" make regulations to implement the government procurement chapters of the Free Trade Agreement. On the face of it, therefore, it would appear that the Welsh Ministers have discretion as to whether to make such regulations and an RIA should normally be produced in these circumstances.

In practice, however, once Welsh Ministers made the decision not to allow UK government to legislate in relation to Wales, they were essentially *required* to implement the government procurement chapters in order to comply with their international obligations. As such it is our view that paragraph 3.2 of the Welsh

Ministers' regulatory impact assessment code for subordinate legislation applies in this situation, in particular the exception relating to statutory powers granted by an Act or Measure which do not in any way give the Welsh Ministers discretion as to how those powers should be exercised.

This is in line with the policy set out in the Welsh Ministers' code of practice for carrying out regulatory impact assessments for subordinate legislation.

Furthermore, as the amendments relate to small technical amendments to the existing procurement regulations and the impact on businesses, organisations etc is deemed to be minor no formal impact assessment has been undertaken.