POLICY NOTE

THE CROSS-BORDER PUBLIC PROCUREMENT (MISCELLANEOUS AMENDMENT) (SCOTLAND) REGULATIONS 2025

SSI 2025/XXX

The above instrument was made in exercise of the powers conferred by section 115(3) of the Procurement Act 2025. The instrument is subject to affirmative procedure.

Summary Box

This instrument makes provision intended to allow contracting authorities in Scotland and elsewhere in the UK to continue to co-operate, following the divergence of the regimes governing public procurement.

Policy Objectives

The Procurement Act 2023 changed the rules governing procurement procedures which are applicable to contracting authorities in the UK, other than devolved Scottish authorities. Devolved Scottish authorities continue to be governed by the Scottish procurement legislation.

Until commencement of the 2023 Act, the procedural rules applicable in the regimes in Scotland and the rest of the UK were to all intents and purposes identical, with both having been transposed from EU Directives.

Following commencement of the 2023 Act, the procedural rules applicable in each regime are different, and so provision is needed to govern the occasions when contracting authorities co-operate on such a basis.

Section 115A of the 2023 Act sets out the provisions of that Act which apply when a devolved Scottish authority carries out procurement under a reserved procurement arrangement. When a devolved Scottish authority awards a contract following a procurement exercise carried out jointly with an authority governed by the 2023 Act, and where that other authority is designated as the lead authority, the terms of the 2023 Act apply in whole to that contract award. This is also the case when a contract is awarded following a procurement procedure carried out by a non-devolved centralised procurement authority.

When a devolved Scottish authority awards a contract under a non-devolved framework, dynamic market or similar arrangement, the provisions of the 2023 Act set out in the table in Schedule 9A to that Act apply.

This instrument makes equivalent provision. It sets out that when a UK contracting authority awards a contract following a procurement exercise carried out jointly with a devolved Scottish authority, and where that devolved authority is designated as the lead authority, the terms of the relevant Scottish legislation apply in whole to that contract award. This is also the case when a contract is awarded following a procurement procedure carried out by a devolved Scottish centralised procurement authority.

When a UK contracting authority awards a contract under a devolved framework agreement, dynamic purchasing system or similar arrangement, the provisions of the relevant Scottish legislation set out in the new Schedules to be inserted into that legislation apply.

In all cases, the policy intention is to apply only those procedural rules which are necessary to sensibly effect the contract award.

This instrument also disapplies some aspects of Scottish procurement legislation, when a devolved Scottish authority awards a contract under a reserved procurement arrangement, so as to ensure that conflicting requirements do not simultaneously apply.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

The Scottish Ministers have made the following statement regarding children's rights.

In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, the Scottish Ministers certify that, in their view, The Cross-Border Public Procurement (Miscellaneous Amendment) (Scotland) Regulations 2025 is compatible with the UNCRC requirements as defined by section 1(2) of the Act.

EU Alignment Consideration

The Public Contracts (Scotland) Regulations 2015, Utilities Contracts (Scotland) Regulations 2016 and Concession Contracts (Scotland) Regulations 2016, which are amended by this instrument, were originally made to transpose the requirements of EU Directives 2014/24/EU, 2014/25/EU and 2014/23/EU.

Those Directives are intended to govern public procurement within an EU context. Whilst Article 9 of Directive 2014/24/EU, Article 27 of Directive 2014/25/EU, and Article 10 of Directive 2014/23/EU do make some provision which exempts contracts from the scope of those Directives where a contracting authority is obliged to follow alternative procurement procedures, such as those of a third country, this is only relevant where there are international law obligations, such as derived from an international agreement, with that third country.

Those provisions are already reflected in the instruments being amended, but clearly do not address the circumstances in which contracting authorities in different parts of the UK can work together.

The provisions of this instrument do, therefore, represent a departure from strict alignment with EU law. It is brought about by the circumstances of the UK's exit from the EU, and the subsequent departure from alignment with EU law in the rest of the UK. These provisions are intended as the least intrusive measure possible to ensure that contracting authorities across the UK can continue to co-operate in public procurement in view of the different requirements placed on them.

The Minister for Public Finance has made the following statement under paragraph 16(2) of Part 1 of schedule 8 of the European Union (Withdrawal) Act 2018: "In my view there are good reasons for the amendments made by this instrument to a number of regulations made under section 2(2) of the European Communities Act 1972.

“The Public Contracts (Scotland) Regulations 2015, Utilities Contracts (Scotland) Regulations 2016 and Concession Contracts (Scotland) Regulations 2016 were each made under section 2(2) of the European Communities Act 1972.

“Were these regulations not amended, there would in light of the provisions of the Procurement Act 2023, be a lack of clarity as to how contracting authorities across the UK, subject to different legal regimes, would be able to co-operate in the award of contracts.

“I have concluded that making these amendments is a reasonable course of action. This is because they are necessary to allow contracting authorities to continue to co-operate when appropriate to do so.”

The Minister for Public Finance has also made the following statement under paragraph 16(3) of Part 1 of schedule 8 of the European Union (Withdrawal) Act 2018: “The Public Contracts (Scotland) Regulations 2015, Utilities Contracts (Scotland) Regulations 2016 and Concession Contracts (Scotland) Regulations 2016 principally transposed the requirements of Directives 2014/24/EU, 2014/25/EU and 2014/23/EU respectively.

“They also gave effect to Directive 89/665/EEC, as amended; and Directive 2007/66/EC, amending Council Directives 89/665/EEC and 92/13/EEC.

“Together, they set standardised rules for the award of contracts subject to the public procurement regime. At present, these regulations extend only to the activity of devolved contracting authorities. The amendments in this instrument bring the award of regulated contracts by other UK authorities into scope of defined provisions of these regulations, when the contract in question is awarded under a devolved procurement arrangement.

“The amendments also disapply certain provisions of the regulations when a devolved contracting authority awards a contract under a reserved procurement arrangement (and is therefore subject to the terms of the Procurement Act 2023)”.

Consultation

There was significant engagement between the UK and Scottish Governments in drafting the relevant provisions of the Procurement Regulations 2024, which inserted section 115A and Schedule 9A into the Procurement Act 2023, and set out how devolved Scottish authorities would be regulated by that Act when awarding contracts under reserved arrangements.

The UK Government then consulted on those proposals in 2023. In its response (https://assets.publishing.service.gov.uk/media/6601780c65ca2f67417da7d6/Govt_response_to_consultation_on_regs_implementing_Procurement_Act.pdf) to that consultation, the UK Government reported that 54% of respondents agreed or strongly agreed that the measures supported the policy intention of facilitating joint or collaborative procurement across the UK. 42% of responses were neutral, while only 4% disagreed or strongly disagreed. There were suggestions made about clarity of drafting, and these were acknowledged and addressed by the UK Government when it laid the subsequent SI.

There has been no specific consultation on the measures contained within this instrument, as they seek to mirror both the content and drafting approach of the UK provisions to the extent

possible. This is necessary in order to ensure that the two regimes function together. There is therefore no realistic scope to take a substantively different approach.

Impact Assessments
Impact assessments have not been carried out in relation to this instrument, as it is technical in nature, and is intended only to ensure continuity of long-standing co-operation between contracting authorities across the UK. The award of all covered contracts will remain subject to rules which are compatible with the UK's overarching international obligations on procurement, including in relation to advertising, equal treatment and non-discrimination.

Financial Effects
The Minister for Public Finance confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Scottish Procurement and Property Directorate

October 2025