EXPLANATORY MEMORANDUM TO

THE PUBLIC CONTRACTS (AMENDMENT) REGULATIONS 2022

2022 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Cabinet Office and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 This SI will update the lower thresholds in the Public Contract Regulations 2015[1] ("the 2015 Regulations") which determine whether a procurement which would not otherwise be regulated must nevertheless comply with certain requirements. These requirements are the advertising of contract opportunities and awards on the Government's Contracts Finder database, a prohibition on including a pre-qualification stage in the procurement, and a requirement for authorities to pay suppliers within 30 days.

2.2 The thresholds need to be adjusted upwards following the inclusion of VAT in the estimation of contract values, which in effect lowered the value at which these obligations are triggered. This has brought more contracts into scope, thus creating an increased burden on government authorities.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales and Northern Ireland.

5. European Convention on Human Rights

5.1 The Minister for the Cabinet Office has made the following statement regarding Human Rights:

5.2 "In my view the provisions of the Public Contract (Amendment) Regulations 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 The Public Procurement (Agreement on Government Procurement) (Thresholds) (Amendment) Regulations 2021[2] were laid on 1 November 2021 and amended the 2015 Regulations to provide that VAT must be taken into account when valuing a contract for the purposes of determining how it is to be regulated. As this had the effect of increasing regulatory burdens by bringing more contracts within scope, the thresholds are to be revised to take account of the value of VAT. In respect of below

[1] S.I. 2015/102.

[2] S.I. 2021/1221.

threshold procurement, since the demarcation of below threshold procurement is by definition determined by the threshold, it must follow that below threshold contracts should be calculated in the same way as Part 2 contracts.

6.2 Powers in section 39 of the Small Business, Enterprise and Employment Act 2015 will be used to make these changes. Section 39(1) provides that the Minister for the Cabinet Office may make regulations to impose on a contracting authority duties in respect of the exercise of its functions relating to procurement. Section 39(2) provides that "the exercise of functions relating to procurement" includes the exercise of functions in preparation for entering into contracts and in the management of contracts.

6.3 Section 39(4) provides that the powers cannot be used in respect of procurement by a devolved Welsh authority, or by a contracting authority with wholly or mainly devolved functions in respect of Scotland or Northern Ireland. Part 4 of the 2015 Regulations does not apply to a contracting authority with functions which are mainly devolved in respect of Northern Ireland, Wales or Scotland. As such, this instrument amends the figures for below threshold procurements in respect of reserved procurement only.

6.4 These changes apply to:

6.5 (e) in regulation 109(2) (scope of Chapter 8)—

6.6 (i) sub-paragraph (b);

6.7 (ii) sub-paragraph (c)(ii).

6.8 The specific change amended the contract valuation reference from stating 'exclusive' of VAT to 'inclusive' of VAT as highlighted:

6.9 Chapter 8, regulation 109(2):

6.10 (b) where the contracting authority is a central government authority and the procurement has a value inclusive of VAT estimated to be less than £10,000;

6.11 (c) where the contracting authority is—

6.12 (i) a sub-central contracting authority or an NHS Trust, and

6.13 (ii) the procurement has a value inclusive of VAT estimated to be less than £25,000

6.14 The impact of this change was to force an actual reduction of the below thresholds to an even lower value i.e. The £10k threshold becomes £8,333. This SI will amend the below threshold values to remain at £10k and £25k when VAT is included in the contract valuation by amending the figures to £12k and £30k.

6.15 We also wish to take this opportunity to align the requirements for publication on NHS foundation trusts with NHS trusts. Central Government authorities are defined in regulation 2 of the 2015 Regulations (and include the bodies in Schedule 1). This includes NHS Trusts and NHS Foundation Trusts.

6.16 Regulation 109(2)(c)(i) of the 2015 Regulations sets out that subcentral contracting authorities and NHS Trusts are subject to a higher contract value limit of £25,000 than central government authorities for the purposes of publishing notices on Contracts Finder.

6.17 While NHS Foundation Trusts have always been considered Central Government authorities, they were added to Schedule 1 last year as a category distinct from other

NHS Trusts for clarity. However, regulation 109(2)(c)(i) does not currently include NHS Foundation Trusts alongside NHS Trusts in applying the higher value limit. The impact of this is that NHS Foundation Trusts must follow the lower contract value limit of £10,000 in respect of publishing notices on Contracts Finder.

6.18 We wish to rectify this by applying the same threshold to NHS foundation trusts as is currently observed by NHS trusts.

7. Policy background

What is being done and why?

7.1 The main financial thresholds in the various sets of domestic procurement regulations stem from the UK's obligations under the World Trade Organisation (WTO) Agreement on Government Procurement (GPA). These are referred to here as the 'upper' thresholds, and contracts valued at or above these thresholds must be regulated in accordance with the GPA, as implemented domestically. There are also some 'lower' thresholds in the 2015 Regulations. A further set of rules applies to contracts valued between the upper and lower thresholds, known as the 'below-threshold regime'. This comprises, inter alia, requirements to advertise opportunities on Contracts Finder along with other obligations.

7.2 The Public Procurement (Agreement on Government Procurement) (Thresholds) (Amendment) Regulations 2021 amended the 2015 Regulations such that contracting authorities are now required to include VAT in the estimation of contract values for the purposes of establishing whether a contract is above or below threshold.

7.3 When the UK was a Member State of the EU, it was obliged to adopt the EU's methodology for calculating the thresholds and estimating the value of contracts. The EU's thresholds included a 13% unilateral VAT reduction agreed upon in 1987 as a solution to a dispute with the United States. This was, and remains, an internal EU measure which it is no longer appropriate to apply in the UK now we are an independent member of the GPA.

7.4 To ensure a consistent approach, this change was applied to all thresholds in domestic procurement regulations, including the lower thresholds. While the upper thresholds were increased to make allowance for this, the lower thresholds were not, which in effect has resulted in a lowering of those thresholds.

7.5 This SI will address the impact of the new requirement to include VAT on (a) central and (b) sub-central authorities by raising the lower thresholds from £10,000 to £12,000 and £25,000 to £30,000 respectively. This will ensure the thresholds effectively remain the same once contract values are calculated inclusive of VAT.

8. European Union Withdrawal and Future Relationship

8.1 This instrument relates to withdrawal from the European Union to the extent described above.

9. Consolidation

9.1 There is no intention to consolidate the relevant legislation.

10. Consultation outcome

10.1 We have consulted with in-scope bodies affected by this change, and the view of Departmental Commercial leads is that this is the only option to resolve the impact of changes to the lower thresholds as a result of now requiring VAT to be included in estimates of contract value.

10.2 We are not seeking approval from the Devolved Administrations, because the below-threshold regime does not apply to a contracting authority if its functions are wholly or mainly devolved.[3]

11. Guidance

11.1 A Procurement Policy Note will be published providing the updated threshold values and notifying the change.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is a deregulatory impact on the public sector, in that procurements beneath the threshold amended by this instrument will not be required to comply with certain obligations.

12.3 An Impact Assessment has not been prepared for this instrument because the framework and principles underlying the Procurement Regulations have not been substantially amended. Modifications contained in this instrument have been made to ensure the Procurement Regulations function more 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 does not apply to activities that are undertaken by small businesses.

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 email: julie.bremner@cabinetoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Edward Green, Deputy Director for Commercial Policy at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Rt. Hon. Jeremy Quin M.P. at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.

[3] Regulation 1(8) Public Contracts Regulations 2015, S.I. 2015/102.