EXPLANATORY MEMORANDUM TO

THE PUBLIC PROCUREMENT (INTERNATIONAL TRADE AGREEMENTS) (AMENDMENT) REGULATIONS 2021

2021 No. [XXXX]

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument will give effect in domestic regulations to the United Kingdom's (UK) procurement obligations covered by UK-third party international trade agreements signed with countries that had an agreement with the EU before exit day. It will require contracting authorities to give effect to those obligations when carrying out their procurements. Without this instrument, the UK would not be able to implement its international procurement obligations in trade agreements which would leave the UK government open to a legal challenge from a third country.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument varies between provisions.

3.3 Part 2 of this instrument amends the Public Contracts Regulations 2015 (PCR), the Concession Contracts Regulations 2016 (CCR) and the Utilities Contracts Regulations 2016 (UCR). These provisions extend to England, Wales and Northern Ireland. Part 3 of this instrument amends the Public Contracts (Scotland) Regulations 2015 (PCR Scotland), the Concession Contracts (Scotland) Regulations 2016 (CCR Scotland) and the Utilities Contracts (Scotland) Regulations 2016 (UCR Scotland). The Scottish Parliament gave its approval on 10 December 2020 to those amendments.

3.4 The powers under which this instrument is made cover the entire UK (see section 2 Trade Act 2021) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the whole of the United Kingdom.

4.2 The territorial application of this instrument is set out in Section 3 under "Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)".

5. European Convention on Human Rights

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

"In my view the provisions of the Public Procurement (International Trade Agreements) (Amendment) Regulations 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument will amend the PCR, the UCR and the CCR which apply to England, Wales and Northern Ireland. This instrument will also amend the PCR Scotland, the CCR Scotland and the UCR Scotland which apply to Scotland.

6.2 This instrument is made under section 2 (implementation of international trade agreements) of the Trade Act 2021. This power allows an appropriate authority (including a Minister of the Crown and devolved authorities) to implement trade agreements with countries that were signatories to an international trade agreement with the European Union immediately before exit day. The section 2 power is in place for five years from IP completion day, and can be extended for a further five-year period by Parliament, subject to the agreement of both Houses.

6.3 The current domestic public procurement regulations give effect to the procurement provisions of international agreements by which the EU is bound. These have to be updated to reflect that the UK is no longer a member of the EU. Moreover, domestic public procurement regulations need to be amended to ensure that new international agreements by which the UK is bound are given legal effect.

6.4 Specifically, this instrument will create a new schedule in domestic public procurement regulations which lists the international trade agreements by which the UK is bound which contain relevant procurement provisions. The amendments made by this instrument will also oblige contracting authorities to ensure that when they carry out procurements, no less favourable treatment is accorded to the works, supplies, services and economic operators of those countries where the procurement is covered by the terms of the listed agreements, and that the duty owed to economic operators from the UK or Gibraltar to comply with provisions of the public procurement regulations is similarly extended to economic operators from those countries.

6.5 The schedules listing the international trade agreements will need to be updated via further affirmative statutory instruments as the UK signs new agreements which contain relevant procurement provisions or when such agreements are updated to include such provisions.

7. Policy background

What is being done and why?

7.1 This instrument needs to amend domestic public procurement regulations to ensure that the UK, outside of the EU, is able to give legal effect to procurement obligations in UK-third party international trade agreements signed with countries that had procurement agreements with the EU before exit day.

7.2 This instrument will only affect trade agreements that have already been scrutinised via the procedure set out in the Constitutional Reform and Governance Act 2010 and

were entered into with countries that had an agreement with the EU before exit day. The instrument will make simple, technical changes that will not cover any future trade agreements with countries that did not have an agreement in place with the EU before exit day like Australia and New Zealand. These agreements will require separate legislation.

7.3 Without the amendments made by this instrument, the UK would not be able to implement its international procurement obligations in trade agreements, which would leave the UK open to legal challenge from a third country. If a challenge were brought against the UK to the WTO there is a high chance that it would be successful which could result in penalties against the UK, retaliatory measures from international partners, claims for financial compensation and reputational damage.

7.4 The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 and the Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 ("the EU Exit SIs") made under the European Union (Withdrawal) Act 2018 preserves the UKs existing procurement obligations for 12 months from the end of the Implementation Period. These provisions were included in the EU Exit SIs as it became apparent that the power to make this instrument would not be available in time for the instrument to be made by 1 January 2021. It does not mitigate the risk entirely, so as to render this instrument unnecessary, as it does not take account of any changes made to the UK-third country texts and the protections offered by the EU Exit SIs fall away after 12 months at which point the UK would immediately be in breach of all its international procurement obligations.

7.5 The amendments made by these Regulations are "steady state amendments", as that term is defined in the EU Exit SIs. As such, in accordance with the transitional provisions in the EU Exit SIs, these amendments do not affect any procedure (as that term is defined in the Schedules to the EU Exit SIs) launched before but not yet finalised by IP completion day.

8. European Union Withdrawal and Future Relationship

8.1 This instrument is not being made under the European Union (Withdrawal) Act 2018 but relates to the withdrawal of the United Kingdom from the European Union because it is a required change to reflect that the UK now has international procurement obligations independently of the EU.

9. Consolidation

9.1 There are no current plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

10.1 There has been no consultation on this instrument. The changes made are intended to provide legal effect to procurement obligations in continuity trade agreements that have already been signed and been through the relevant Parliamentary scrutiny processes. Moreover, section 28(3)(b) of the Small Business, Enterprise and Employment Act 2015 is clear that there is no need to consult for procurement SIs.

10.2 Regular discussions on the content of this instrument have been held with the devolved administrations throughout the drafting process in accordance with the Intergovernmental Agreement.

11. Guidance

11.1 Guidance will be available for stakeholders by the time this instrument comes into force. It will remind UK contracting authorities of the international obligations which result from the UK entering into international agreements that contain procurement obligations.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the framework and principles underlying the regulations being amended have not been substantially amended. Modifications contained in this instrument have been made to ensure the regulations function 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 applies to activities that are undertaken by small business.

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 John Kenyon at the Cabinet Office, Telephone 07899 918387 or email john.kenyon@cabinetoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Edward Green, Deputy Director for the International and Reform Team at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister Lopez at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.