EXPLANATORY MEMORANDUM TO

THE PUBLIC PROCUREMENT (INTERNATIONAL TRADE AGREEMENTS) (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 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 under the Free Trade Agreement between the UK and Iceland, Liechtenstein and Norway (EEA EFTA Agreement). It will require contracting authorities and utilities to give effect to those obligations when carrying out their procurements.

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 the whole of the United Kingdom.

4.2 The application of this instrument varies between provisions. Regulations 2 to 4 make amendments to the Public Contracts Regulations 2015 (PCR), the Utilities Contracts Regulations 2016 (UCR) and the Concession Contracts Regulations 2016 (CCR), which apply in respect of England, Wales and Northern Ireland. Regulations 5 to 7 make amendments to the Public Contracts (Scotland) Regulations 2015 (PCR Scotland), the Utilities Contracts (Scotland) Regulations 2016 (UCR Scotland) and the Concession Contracts (Scotland) Regulations 2016 (CCR Scotland), which apply in respect of Scotland. The Scottish Parliament gave its consent on 13 December 2021 to those amendments.

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 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 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 preserved the UK's procurement obligations, contained in existing international agreements by which the

EU was bound before the end of the Implementation Period, for 12 months from the end of the Implementation Period. Accordingly, from 1 January 2022 the procurement obligations under those EU international agreements ceased to have effect in UK domestic law. The UK's procurement obligations under new international agreements that it has entered into in its own right must therefore be implemented in domestic law.

6.2 The EEA EFTA Agreement was signed on 8 July 2021 and laid before Parliament on 16 July 2021. The scrutiny period prescribed under the Constitutional Reform and Governance Act 2010 ended on 26 October 2021. This instrument, by implementing the EEA EFTA Agreement in domestic procurement law, will enable the UK to bring into force the procurement provisions contained within the Agreement. The power contained in section 2 (implementation of international trade agreements) of the Trade Act 2021 allows an appropriate authority to implement trade agreements with countries that were signatories to an international trade agreement with the European Union immediately before exit day, which the EEA EFTA states were.

6.3 The Public Procurement (International Trade Agreements) (Amendment) Regulations 2021 inserted into the six sets of UK public procurement regulations a schedule of international trade agreements which contain relevant procurement provisions by which the UK is bound. This instrument will update those schedules to include the EEA EFTA Agreement.

7. Policy background

What is being done and why?

7.1 The UK's public procurement regulations require amendments to give legal effect to obligations contained within procurement chapters in new international trade agreements. These include the EEA EFTA Agreement. Non-procurement elements of this agreement are not part of the scope of this instrument.

7.2 The UK, Iceland, Liechtenstein and Norway are all parties to the World Trade Organisation's Agreement on Government Procurement (GPA) and the relevant provisions of the GPA are incorporated into the EEA EFTA Agreement. The Agreement also contains procurement coverage wider than that in the GPA, which is similar to the UK's previous and existing coverage contained in the EU's Agreement with the EEA EFTA states, with some exceptions including in respect of health services. The amendments made by this instrument will add the EEA EFTA Agreement to the schedule in each of the UK public procurement regulations setting out the international trade agreements containing procurement provisions by which the UK is bound.

7.3 The amendments will oblige contracting authorities and utilities to ensure that when they carry out procurements, no less favourable treatment is accorded to economic operators of those countries where the procurement is covered by the terms of the EEA EFTA Agreement respectively, and that the duty owed to economic operators from the UK to comply with provisions of the public procurement regulations is similarly extended to economic operators from those countries. The obligations related to the EEA EFTA Agreement will take effect once the procurement provisions in the Agreement are brought into force.

7.4 Article 6.9 of the EEA EFTA Agreement includes provision for making enquiries as to subsidies for abnormally low tenders. The amendment being made to implement

this provision is applicable to all procurements and economic operators (as a consequential amendment under section 4(1)(c) of the Trade Act 2021) to ensure contracting authorities take a consistent approach.

7.5 Prior to the UK leaving the EU, contracting authorities and utilities receiving an abnormally low tender could investigate whether the economic operator had obtained State aid and, if this was not compatible with Article 107 of the Treaty on the Functioning of the European Union, could reject the tender. Any such rejections had to be reported to the EU Commission. From the end of the Implementation Period there was not a policy justification to either continue to effectively use the procurement regulations to treat EU economic operators differently to those from other third countries, or 'police' State aid given by EU member States. As such, these provisions were removed from the public procurement regulations with effect from the end of the Implementation Period by the EU Exit SIs. Article 6.9 of the EEA EFTA Agreement provides that where a tender appears to be abnormally low, the contracting authority may ask a supplier if the price in a tender takes into account subsidies. This is not a return to the State aid provisions. Article 6.9 does not confer on contracting authorities the ability to reject an abnormally low tender on the basis of the receipt of a subsidy alone and therefore no new provision for this is being made in the public procurement regulations. As set out in the abnormally low tenders' provision in each of the respective UK public procurement regulations (see, for example, regulation 69 PCR), the contracting authority shall assess the information provided by the tenderer, which may include information as to the receipt of subsidies, and use it to determine whether the tender shall be rejected in accordance with the further provisions of that regulation. There is no specific definition for "subsidy" relevant to Article 6.9. As such, no definition as to what kind of subsidy about which a contracting authority can make enquiries has been included within the public procurement regulations. While it is recognised that it is likely already possible without the amendments made by this instrument for contracting authorities to make enquiries in this way about any subsidies in respect of an abnormally low tender, the necessary removal of the State aid provision may lead some contracting authorities to believe that such enquiries are not possible. In order to ensure full implementation of the EEA EFTA Agreement, the Government is of the view that making it explicit on the face of the public procurement regulations that requesting such information is allowable will ensure contracting authorities are clear as to the functions they can exercise with respect to abnormally low tenders.

7.6 The UK has an open procurement market underpinned by principles of non-discrimination and equal treatment. However, without this instrument there is a risk that the economic operators from the EEA EFTA states will not be, for the scope of the procurement outlined in their agreements, entitled to legal remedies. If there was an example of non-compliance with either agreement or an inability for the UK to guarantee access to remedies there would remain a legal risk of challenge, under international law, to the UK Government.

7.7 Any future trade agreements are not part of this instrument and will require separate legislation to be similarly implemented.

7.8 The amendments made by this instrument 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 that were 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 or European Union (Future Relationship) Act 2020. However it does relate 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 The Green Paper, *Transforming public procurement* published in December 2020 proposes to reform and consolidate the legislation amended by this instrument. The Government received over 600 responses to the Green Paper consultation and published its response in December 2021[1]. Legislation to reform public procurement will be introduced when Parliamentary time allows.

10. Consultation outcome

10.1 There has been no consultation on this instrument. 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 principles contained within the Devolution Memorandum of Understanding, dated October 2013.

11. Guidance

11.1 Guidance will be published reminding UK contracting authorities of the procurement obligations which result from the UK's international trade agreements.

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 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.

[1] https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement.

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 Sam Russell at the Cabinet Office, telephone: 07540315012 or email: sam.russell@cabinetoffice.gov.uk can be contacted with any queries regarding the instrument.

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

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