

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Fifth Delegated Legislation Committee

DRAFT DEFENCE AND SECURITY PUBLIC
CONTRACTS (AMENDMENT) (EU EXIT)
REGULATIONS 2019

Monday 11 February 2019

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The Committee consisted of the following Members:

Chair: MR NIGEL EVANS

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| † Andrew, Stuart (<i>Parliamentary Under-Secretary of State for Defence</i>) | † Moore, Damien (<i>Southport</i>) (Con) |
| Campbell, Mr Ronnie (<i>Blyth Valley</i>) (Lab) | † Morton, Wendy (<i>Aldridge-Brownhills</i>) (Con) |
| † David, Wayne (<i>Caerphilly</i>) (Lab) | † Scully, Paul (<i>Sutton and Cheam</i>) (Con) |
| † Flint, Caroline (<i>Don Valley</i>) (Lab) | † Smith, Owen (<i>Pontypridd</i>) (Lab) |
| † Goodwill, Mr Robert (<i>Scarborough and Whitby</i>) (Con) | † Tami, Mark (<i>Alyn and Deeside</i>) (Lab) |
| † Grant, Peter (<i>Glenrothes</i>) (SNP) | † Timms, Stephen (<i>East Ham</i>) (Lab) |
| † Hall, Luke (<i>Thornbury and Yate</i>) (Con) | † Tomlinson, Michael (<i>Mid Dorset and North Poole</i>) (Con) |
| † Harrison, Trudy (<i>Copeland</i>) (Con) | Ian Bradshaw, <i>Committee Clerk</i> |
| † Kyle, Peter (<i>Hove</i>) (Lab) | |
| † Mills, Nigel (<i>Amber Valley</i>) (Con) | † attended the Committee |

Fifth Delegated Legislation Committee

Monday 11 February 2019

[MR NIGEL EVANS *in the Chair*]

Draft Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019

6 pm

The Parliamentary Under-Secretary of State for Defence (Stuart Andrew): I beg to move,

That the Committee has considered the draft Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019.

It is a pleasure to serve under your chairmanship, Mr Evans. A responsible Government plan for all eventualities. As part of the preparations to leave the European Union, it is essential that we ensure that our legislation governing defence and security procurement functions properly beyond exit day in a no-deal scenario. It is the first duty of a Government to keep their citizens safe and the country secure. As part of that, the Government need to be able to procure the critical equipment and capabilities they need smoothly and with confidence.

In the event of no deal, these amending regulations will provide procurers and suppliers with legal continuity and certainty, giving them the stability they need to conduct business after 29 March. Clearly, the amendments reflect the UK's new status outside the EU in a no-deal scenario, but the framework and principles underlying the defence and security procurement regime remain otherwise unchanged. That is in accordance with the powers given to amend retained EU law in the EU (Withdrawal) Act 2018. The Act does not allow major policy changes or the introduction of new legal frameworks beyond those changes to fix deficiencies to ensure that the law continues to function properly and changes to remove any reciprocal obligations that are no longer appropriate from exit day.

Brexit will offer us real opportunities, including reform of our defence and security procurement regulations. In the near term, however, the regulations ensure that the UK's defence and security procurements continue to function smoothly in a no-deal scenario, but with that all-important autonomy from the European Union.

To protect the UK's essential security interests, the regulations will maintain the effect of article 346 of the treaty on the functioning of the European Union by writing its substance into the existing regulations. The regulations already make clear that they can be trumped by article 346. Article 346 enables us to disapply the defence and security procurement rules where necessary to protect essential national security interests.

Through the amendments, control over our procurement is returned to the United Kingdom. For example, the Secretary of State for Defence will take the power previously held by the European Commission to modernise, although not broaden, the 1958 list of warlike stores that falls under article 346(1)(b). All notices for defence and security procurement opportunities will in the future

be published on a new UK e-notification system. Business continuity meanwhile is assured through the transitional provisions. There will be no defence procurement cliff edge.

Competition remains the cornerstone of defence procurement policy, ensuring that we equip our armed forces with the right capability at the right price. Currently, we allow bids from suppliers outside the EU, although the existing regulations provide the legal right of market access required by EU law only for suppliers based in the EU. Any restrictions on, for example, bidding on national security grounds are made clear from the outset of any procurement. The regulations provide a legal right of market access for suppliers based in the UK and Gibraltar that currently enjoy rights under the EU defence and security directive. After exit day, suppliers in the EU will lose their legal right of market access, but we will still allow them to bid on the same basis as suppliers outside the EU. That reflects the UK's new status as a third country outside the EU.

Mr Robert Goodwill (Scarborough and Whitby) (Con): Much EU environmental legislation, such as for vehicle emissions, has an exemption for military use. After we Brexit, will that situation change under any of the provisions in the regulations?

Stuart Andrew: Nothing in this order, which purely transfers our procurement regulations, does that. We can look at a whole raft of matters once we have properly left. We will obviously consider the point that my right hon. Friend raises, but that would be under further consultation, and legislation would then have to come through the House.

Nigel Mills (Amber Valley) (Con): To take the Minister back to what he was saying about allowing companies based in the EU to have access to our defence procurement, is that a reciprocal requirement? If any part of the EU refused to allow our defence companies access to their markets, could we refuse companies in their countries access to ours?

Stuart Andrew: As it stands at the moment, these regulations would come into force should we leave without a deal. British companies would not have a legal right of access to those European competitions. Having said that, a minimal number of contracts have been won by UK companies through that legal right, compared with the number of exports that our industry secures. I have a lot of faith in the British defence industry and believe that it will be successful in terms of all the other international competitions that will take place.

Although the amending regulations mainly relate to exiting the EU in a no-deal scenario, they also make some updates and corrections to the Defence and Security Public Contracts Regulations 2011. These will come into force before exit day, regardless of whether there is no deal. Through the amending regulations, the Government will ensure that UK defence and security procurement continues to function properly and appropriately, with solid legal foundations underpinning it. This instrument would give procurers and suppliers the confidence and continuity in procurement that they would need in the case of a no-deal scenario, and I commend the regulations to the Committee.

6.7 pm

Wayne David (Caerphilly) (Lab): It is a pleasure to serve under your chairmanship, Mr Evans. This is a very worrying amendment to the regulations, because it deals with the doomsday scenario of a no-deal Brexit. We have 46 days left before we leave the European Union, and the Government are coming forward at this late stage with quite a significant piece of legislation that requires far more detailed scrutiny and far greater preparation. If the Government were serious about considering this, why on earth did they not do so months and months earlier? I am concerned about the regulations, which are indicative of the Government's irresponsible approach to Brexit as we near the end of the process.

The explanatory memorandum explains that the central purpose of these regulations is to ensure that there is "little or no distinction between the treatment of economic operators from the EU and other places outside the UK."

In other words, this mechanism—as far as defence procurement regulations are concerned—provides the brick wall between Britain and the EU and the rest of the world. However, it is important to bear in mind that this issue works both ways. It would not apply simply to companies from abroad—whether outside or inside the EU—that wish to engage in commercial activities here, but would have an impact on British companies' work in other European countries, which is an important point. The Government correctly argue that the export capacity of British industry in the military sector is significant—not just to the rest of the world, but to our partners in Europe. I am concerned that companies with long-term strategies increasingly oriented towards an export capacity will find trade more difficult if this measure is introduced.

Mr Goodwill: The hon. Gentleman is absolutely right that this uncertainty is damaging, but should he not take the advice of 57.6% of people in Caerphilly who voted to leave the European Union, and back the deal?

Wayne David: It is important at this stage in the process that we do not engage in such cheap debating points. We need to look at the nature of our economy and the impact that a no-deal Brexit would have. This is too important for simple political digs or empty rhetoric. We need cool heads and a sharp analysis of what is before us. That is what I am seeking to do, and I hope, in the national interest, that the Government will do so too. We are getting perilously close to the point of no return. We have 46 days. We must take a deep breath, stand back and put the interests of our country and our constituents first.

Why have the Government adopted this approach? The impact assessment says that there are no policy changes, and therefore they do not require a detailed business impact assessment. However, I suggest that it is a policy change because it cuts across what we have been doing and saying for many years in this country. There should therefore be a fully-fledged business assessment so that we can understand the economic consequences of what we are doing. Incredibly, that is lacking. I come back to the point that I made at the start. If we had any sense, and if we were seriously considering a no-deal Brexit, this issue should have been considered in detail months ago—indeed, two years ago. Europe is a vital export market for us, and this will have a big impact.

The Government talk a great deal about competition, but it is worth bearing in mind that 40% of the Ministry of Defence budget is single-sourced. There is no competition; the MOD simply gives the money to a particular company or amalgam of companies. It is therefore important that we question the Government's commitment to competition.

Mark Tami (Alyn and Deeside) (Lab): I was thinking of the airborne warning and control system, for which there did not appear to be any procurement policy. We just opted for the American option, rather than something that would have benefited employment in this country.

Wayne David: That is a very good and important example. There was at least one other strong alternative to the Boeing bid for AWACS, but the Government decided not to consider it at all. There was no publicity, openness or transparency; they just came to a cosy little arrangement with an American company, and effectively bought the equipment off the shelf from the United States, with minimal investment in the British economy.

Mr Goodwill: Would the hon. Gentleman agree that sometimes there can be great benefits to the UK from that? For example, General Dynamics is building a new light tank for the British Army in Merthyr Tydfil, employing 950 people.

Wayne David: Yes, indeed. I commend the work that General Dynamics is doing, but let us not forget that that company lost out because of the lack of competition for the mechanised infantry vehicle. Again, the Government put competition to one side and came to a cosy little deal with a German-led consortium for the Boxer vehicle, and General Dynamics lost out. It quite rightly said, as Saab and others said about the Wedgetail, that it does not mind losing a bid, but it at least should have the chance to bid openly for it. The Government should be giving contracts to the best companies at the best price to have the best impact on this country's economy. Sadly, that is not what they are doing.

The draft regulations will transpose into British legislation article 346 of the treaty on the functioning of the European Union—an important article that allows exceptions to competition rules where national security issues arise. However, fleet solid support ships remain an issue: despite representations from Labour, from other Opposition parties and from trade unions, the Government have decided not to issue the contract to a British company. Instead, they are putting it out to international tender, saying, "It's these terrible European rules that are making us do this—we're tied into the straitjacket of European competition rules." But which EU rule are they referring to? Article 346! If their rhetoric is true, why are the Government taking that article en bloc and transposing it into British legislation? For the life of me, I cannot understand it, if they are sincere in their comments about the invidiousness of article 346.

I would very much like to hear the Minister explain how he can square that circle and face both ways at the same time. If the Government were serious about a no-deal Brexit, surely it would have been sensible to take the opportunity to ditch article 346 and have decisions taken in this country, in the interests of British industry and British jobs, rather than putting contracts

[Wayne David]

out to competition. However, I fear that the Minister's response will confirm that the Government are not concerned about that. They want to ensure as smooth a rhetorical transition as possible, but they have not gone into the depths of detail that are required.

I come back to the point that this Committee and all such Committees are going through a façade, because the Government are not really contemplating a no-deal Brexit; this is all part of blackmailing Parliament to ensure that the Government get their own way. I have raised a couple of points that I would like the Minister to respond to, but I particularly ask him to do his best to refute my last point about the Government's strategy.

The Chair: I call the Minister. [Interruption.] If hon. Members wish to catch my eye, will they at least look at me?

6.17 pm

Peter Grant (Glenrothes) (SNP): I apologise, Mr Evans; I might have thought that somebody on the Conservative Benches would want to say something about the draft regulations, but there we go. It is a pleasure to serve under your chairmanship.

I echo the concerns raised by the hon. Member for Caerphilly about how we got into this position. We are now counting down in days rather than weeks and months to Brexit day, yet we still do not have a legislative framework in place to make it work, and we still do not know whether there will be a deal. As the hon. Gentleman said, a lot of this is clearly Government scaremongering to get Members through the right Lobby, at a date yet to be decided, because the prospect of no deal is just so terrifying.

The same comments could apply to a lot of the legislation that is being considered by Delegated Legislation Committees just now. Next week's recess has had to be cancelled, not because major legislation needs to be debated on the Floor of the House, but because the Government have run down the clock without allowing enough time to lay secondary legislation before Parliament—an indication that their competence in government is disastrously lacking.

It was interesting to hear the Minister speaking about control over procurement reverting to the United Kingdom. Brexit was not supposed to be about bringing control back to the United Kingdom; it was supposed to be about bringing it back to the United Kingdom Parliament. I see no role at all for the UK Parliament among the significant powers that will now be vested in the Secretary of State. Those powers are currently vested in the European Commission, which is held to account in a way in which individual Secretaries of State in this place are not. Perhaps the Government are trying to make it look as if the European Commission's powers will instead, in a like-for-like swap, be exercised by a Secretary of State. However, an individual Secretary of State is subject to less transparency and parliamentary democratic oversight than the European Commission.

That is particularly the case with defence contracts. The two big excuses that are always given to keep the contents of a contract completely hushed up—at the time and sometimes for years or decades afterwards—are commercial confidentiality and national security. When we

get contracts of millions or even billions of pounds where commercial confidentiality and national security can both be played, it is very easy to shut down transparency. It should be no surprise, therefore, that defence contracts form a large proportion of those that should never have gone down the road we took. I hope that the measure is not laying of foundations for yet more scandals, whereby a contractor is not competent and a very expensive buy-out is required in order to get somebody who is fit for purpose and able to do the job.

I welcome the Minister's admission—if I copied his words down correctly—that the Government currently allow bids from suppliers from outside the European Union. That will come as news to people in Scotland, because five years ago they were telling us that they would not even accept bids from Scotland if we were not part of the United Kingdom. I am pleased that that has been laid to rest, at last.

That is how it should be, because we are purchasing essential equipment for our armed forces and they deserve the best that we can provide. It should not necessarily be about who can provide it at the cheapest price; it should be about who can provide, within the required time, the best equipment and that it will be reliable in intense, testing conditions. Soldiers have died in Iraq because their equipment was not up to standard. We cannot allow that to happen again.

To the extent that the draft regulations fill a gap that the Government have chosen to create in our domestic legislation, I certainly do not oppose them. I am concerned, however, that they simply concentrate further powers among individual Secretaries of State, who historically this Parliament has found extremely difficult to hold to account. I wonder whether in 10 or 15 years' time we will be looking at a lot more, and even worse, examples than recent ones. Defence procurement decisions have clearly not been made purely in the interest of the defence of these islands and our citizens, but for some other reason that had to be kept under lock and key for the next 20 years.

As I have said, I do not oppose the draft regulations, but the fact that it is necessary to bring them to Committee so close to Brexit day is an admission of incompetence—and nothing less—by the Government.

6.22 pm

Mr Goodwill: I will not detain the Committee for long. Following on from the point made by the hon. Member for Glenrothes, this is not about getting the cheapest equipment, but about getting the best equipment. Although much of the equipment built in the UK is state of the art, the global market may supply particular specialists, such as drones. In the Nimrod contract more than 20 years ago, a political decision to revamp the old Nimrod airframes ended in disaster. Lockheed Martin had a perfectly good alternative that would have meant jobs in the UK for companies like Hunting Aviation at East Midlands airport.

It was mentioned that the Boxer vehicle had been given to a German company. To be fair, it should be made clear that 60% of the value of that project will go to British companies, including BAE Systems, TALIS UK and Pearson Engineering. When we place an order abroad, there is often collaboration. Indeed, the frames for the tank being built in Merthyr Tydfil are being built

in Spain. Part of our negotiating strategy is to ensure UK involvement in such projects. I hope that the Committee will understand that the Boxer is not a purely German-built vehicle, but a vehicle with a high degree of UK content. Indeed, if further contracts are awarded around the world for Boxer, we could hope and expect to get a share of that.

Wayne David: The right hon. Gentleman makes an important point, but it is also significant that recently Rheinmetall has taken over a part of BAE Systems. That is an issue of concern.

Mr Goodwill: Exactly. The hon. Gentleman is absolutely right, although, in the spirit of collaboration, the new turret for the Warrior, which I think has gone to Lockheed Martin, will involve a gun from Rheinmetall. Germany has a long record of building very good guns, as we have found out to our cost at times, but it is important that we look at that collaborative approach. Indeed, many UK companies, such as BAE Systems, have interests in other factories around the European Union. That should not change following Brexit.

6.25 pm

Stuart Andrew: I am grateful to all hon. Members who have spoken. As they will be acutely aware, delivering the deal we have negotiated with the EU remains the Government's top priority. However, these amending regulations will provide for continuity and legal certainty in this important area in the event of no deal. It is prudent to plan to ensure that we have some certainty. The hon. Members for Caerphilly and for Glenrothes said this was bad planning. The whole point of the draft regulations is to ensure that we are prepared for every eventuality. I question whether they are massively significant, given that we have tried to replicate as much of the current regulations as possible so the industry knows where it stands and can have confidence that not too much has been changed.

The hon. Member for Caerphilly mentioned concern about the effect of UK businesses not having a legal right to bid when other EU member states procure. I am sure the Committee will be interested to know that between 2011 and 2015, UK defence exports totalled £40.2 billion and contracts from the EU to British companies under the current EU directive were €168 million. That is a significant difference, but regardless of the changes made by the draft regulations, British businesses will still be able to bid. Given the world-class industry and technology we have in this country, I am sure that many of those businesses will be successful.

The hon. Gentleman also mentioned single-source procurement. That is often done either because we need the equipment quickly or because we need the proven capability that is on offer. AWACS was mentioned. I have said on a number of occasions that the capability that is being offered works and is proven. The Australians are using it. Some of our armed forces personnel are out there at the moment learning about the equipment. The hon. Gentleman mentioned the Airbus and Saab alternative, but they have not even put it on the plane yet. We know from experience that when it comes to this sort of equipment, we can spend years and years trying to prove a capability that does not work and ends up costing us billions.

Mark Tami: Does the Minister accept that the American alternative is not currently being sold? They will have to restart the production lines to produce our order.

Stuart Andrew: Those planes are ready at the moment. Some of them are ready for us at the moment. They are on the production line. That will not be an issue at all. As I said, we are still going through a lot of the assessments, but the point is that the Airbus alternative has not even been proven. This is a capability that we need. I agree completely with the hon. Member for Glenrothes that we need to give our armed forces equipment that they can rely on and depend on. This is a classic example of why we have to do that.

Wayne David: I hear what the Minister is saying, and he may have a case, but would it not have been far better simply to have an open procurement competition under which every competitor could set out what it had to offer and everybody could see which was best?

Stuart Andrew: It would have taken them some time to prove the capability. The point is that we do not have the time. The E-3 system is not really up to standard, and we need to replace it. That is why, as I say, we look at these situations very carefully.

I am glad that my right hon. Friend the Member for Scarborough and Whitby talked about the Boxer. It is a proven capability, and he is absolutely right that we negotiated for 60% of the supply chain to come from this country. The hon. Member for Caerphilly said that BAE Systems had been taken over by Rheinmetall. This is a joint venture; it is something we should be really pleased about.

Wayne David: It is the majority shareholder.

Stuart Andrew: We are seeing investment in this country, and I am surprised that the hon. Gentleman is not welcoming the fact that jobs will be sustained in Telford, and more jobs will be created, because of this joint venture. It is disappointing that Labour Front Benchers are not welcoming this investment in the British defence industry and the jobs it will secure.

Regarding article 346, the whole point is that we have transferred the wording, because in this instance we want that continuity to take place. It also allows us to exempt the need to go into international competition, should there be a national reason why we have to keep that capability within this country. The hon. Gentleman said that we have not gone into the changes in depth, but, as I said in my opening comments, those are for future discussion. Once we have left, we want to have a look at the opportunities available to reform our defence procurement systems.

Finally, the hon. Member for Glenrothes said that the 1958 list will be transferred to the Secretary of State. It is not fair to say that the Secretary of State will not be held to account. There will be many opportunities to hold him to account, including questions in the House and Select Committee hearings, but the most important point is that any changes that the Secretary of State might suggest to the 1958 list would have to go through this House as an SI, and would therefore need the approval of both Houses. It is not fair to say that he can

[Stuart Andrew]

make such changes on a whim. I hope I have answered all of the specific questions, and clarified the implications of the amended legislation.

Question put and agreed to.

Resolved,

That the Committee has considered the draft Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019.

6.32 pm

Committee rose.