

PARLIAMENTARY DEBATES

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OFFICIAL REPORT

Thirteenth Delegated Legislation Committee

DRAFT PUBLIC PROCUREMENT (AMENDMENT
ETC.) (EU EXIT) REGULATIONS 2019

Wednesday 13 February 2019

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The Committee consisted of the following Members:

Chair: SIR HENRY BELLINGHAM

- | | |
|---------------------------------------------------------------------|-----------------------------------------------------------------|
| † Brown, Alan (<i>Kilmarnock and Loudoun</i>) (SNP) | † Knight, Sir Greg (<i>East Yorkshire</i>) (Con) |
| † Chishti, Rehman (<i>Gillingham and Rainham</i>) (Con) | † Lord, Mr Jonathan (<i>Woking</i>) (Con) |
| † Churchill, Jo (<i>Bury St Edmunds</i>) (Con) | † McMorris, Anna (<i>Cardiff North</i>) (Lab) |
| † Dent Coad, Emma (<i>Kensington</i>) (Lab) | † Platt, Jo (<i>Leigh</i>) (Lab/Co-op) |
| † Dowden, Oliver (<i>Parliamentary Secretary, Cabinet Office</i>) | † Rashid, Faisal (<i>Warrington South</i>) (Lab) |
| † Fletcher, Colleen (<i>Coventry North East</i>) (Lab) | † Rimmer, Ms Marie (<i>St Helens South and Whiston</i>) (Lab) |
| † Graham, Luke (<i>Ochil and South Perthshire</i>) (Con) | † Thomson, Ross (<i>Aberdeen South</i>) (Con) |
| † Grant, Mrs Helen (<i>Maidstone and The Weald</i>) (Con) | † Whitfield, Martin (<i>East Lothian</i>) (Lab) |
| † Jayawardena, Mr Ranil (<i>North East Hampshire</i>) (Con) | |
| | Sarah Rees, <i>Committee Clerk</i> |
| | † attended the Committee |

Thirteenth Delegated Legislation Committee

Wednesday 13 February 2019

[SIR HENRY BELLINGHAM *in the Chair*]

Draft Public Procurement (Amendment etc.) (EU Exit) Regulations 2019

2.30 pm

The Parliamentary Secretary, Cabinet Office (Oliver Dowden): I beg to move,

That the Committee has considered the draft Public Procurement (Amendment etc.) (EU Exit) Regulations 2019.

May I say what a pleasure it is to serve under your chairmanship, Sir Henry? The Government are committed to securing an agreement on the UK's exit from the EU, but clearly we must be prepared for all outcomes. The legal framework for the regulation of public procurement by the Government and public sector bodies is essential to the day-to-day running of the public sector and to the economy. If no deal is reached with the EU, certain aspects of that legal framework will be deficient, leaving the public sector and businesses without legal clarity. The statutory instrument therefore seeks to address those deficiencies in a no-deal scenario.

The amendments in the draft regulations provide a balance between the need to maintain continuity based on the established framework and principles, and the need to correct those deficiencies to the extent permitted by the European Union (Withdrawal) Act 2018. Principally, the statutory instrument amends three sets of regulations that implement EU directives on awarding contracts and concessions in the public and utilities sectors outside the field of defence and security.

One of the key amendments is to replace the requirement to publish contract notices in the *Official Journal of the European Union* with a requirement to submit notices to the UK e-notification service. That is intended simply to comply with the publication requirements of the World Trade Organisation agreement on Government procurement. The UK e-notification service is being developed and is on track to be in place by exit day.

Sir Greg Knight (East Yorkshire) (Con): I realise that the explanatory memorandum does not officially form part of the instrument we are debating, but it is there to help us. Paragraph 6.6 of the memorandum states:

“There are some deficiencies in the Regulations that have not been fixed in this instrument.”

Can the Minister tell us what those deficiencies are, when they are likely to be fixed and debated, and why we are doing this in a piecemeal manner?

Oliver Dowden: I am happy to write to my right hon. Friend with fuller details, but the instrument essentially seeks to align the procurement regime we have under the EU and bring it into UK law. There will be further opportunities to fix deficiencies as we continue to reform regulation in a post-EU environment.

Alan Brown (Kilmarnock and Loudoun) (SNP): The Minister says there will be future opportunities. Surely, as the Minister responsible, he has already identified those opportunities and planned a timeline for making the fixes he thinks are required. Will he clarify that?

Oliver Dowden: The best approach to identifying opportunities for reforming procurement laws is to look at those laws in totality once we have left the European Union so that, to the point made by my right hon. Friend the Member for East Yorkshire, we can consider their full scope rather than doing things in a piecemeal fashion. In that way, we will be able to reform EU procurement law in its totality and ensure that we address the range of concerns about how that law works. Since we will no longer be bound by it, we will have the opportunity to do that in a full-hearted way.

Mr Ranil Jayawardena (North East Hampshire) (Con): Further to the point made by the hon. Member for Kilmarnock and Loudoun, may I make a suggestion? Does my hon. Friend agree that broadband is critical for the future of our country, but that too often public procurement rules have been used to stop the roll-out of broadband by setting artificially high barriers to the provision of state aid by the Government? The state aid rules have been used against local communities. Will he look at that as he takes this policy area forward?

Oliver Dowden: That is one example. There are many such examples. The Government are still working on the assumption that we will reach agreement on the withdrawal agreement, that it will be passed by Parliament and that we will have a transition period, which will allow us two years to consider this further. I would like to have a Green Paper first so that we can discuss all the ideas before formally bringing forward legislation, to make sure we capture all the related issues.

Alan Brown: Can the Minister explain what checks and balances there are? The EU procurement rules were about open competitive tendering. We know that with Ferrygate it was a direct award. What checks and balances are there to stop the UK Government, rather than the Cabinet Office, from having too much power in the procurement process?

Oliver Dowden: The draft regulations take all the existing EU procurement rules and replace them in the law of the United Kingdom. All the remedies that exist under EU law will exist under these regulations. Such cases can be pursued in court, as was the case previously. There is no change to the law other than to bring these things into UK law, and no change to the remedies—they still exist in the courts as they did previously.

This statutory instrument confers a number of regulation-making powers. They mirror powers that the EU Commission and the European Council have under EU directives and regulations or the treaty on the functioning of the European Union. The current procurement regulations are subject to the derogation in article 346 of the treaty on the functioning of the European Union. That provision enables the UK to take necessary measures to protect essential security interests connected with the production of or trade in armed munitions and war material. That includes overriding the procurement rules or aspects of them.

To ensure that the UK continues to benefit from this important derogation once we have left the EU, we have incorporated the text of article 346 into the procurement regulations, with appropriate modifications. Currently, the arms and munitions that fall within the scope of the derogation are determined by a list drawn up by the Council of Ministers of the European Economic Community as it then was, back in 1958. The list includes portable and automatic firearms, ammunition, guided missiles, military vehicles and so on. The modifications we have made include a power for the Secretary of State for Defence to update that 1958 list, for example to take account of developments in technology. Given the nature of this regulation-making power and its potential to affect the scope of the procurement regulations, its exercise has been made subject to the affirmative procedure.

The other regulation-making powers will be exercised by the Minister for the Cabinet Office. They include the function to revalue the main financial thresholds following a biennial review on the same basis as the European Commission, and to convert thresholds of the agreement on Government procurement directly into equivalent sterling values. Also transferred is the power that the directives confer on the Commission to update the exemptions to the use of electronic means of communication, in the light of technological developments, and to update the technical requirements relating to tools and devices for the electronic receipt of tenders, as well as to take account of technological developments.

The updates would be made through regulations that are subject to the prior consent of Welsh Ministers or Northern Ireland Departments in respect of devolved Welsh or Northern Ireland authorities. The Commission's power to amend the list of international agreements in the field of environmental, social and labour law, set out in annexes to the directives, has also been conferred on the Minister for the Cabinet Office by means of the Minister's power to treat the list as though certain international agreements were removed and others not covered were listed. Again, any ensuing regulations are subject to the prior consent of Welsh Ministers or Northern Ireland Departments in respect of Welsh or Northern Ireland devolved authorities.

Finally, the Commission currently has the power to amend the annexes to EU regulation 2195/2002 of the European Parliament and of the Council on the common procurement vocabulary—CPV. That regulation will become retained direct EU legislation on exit day. The Minister for the Cabinet Office is given the same power to amend the annexes to the retained version of the regulation.

Martin Whitfield (East Lothian) (Lab): I want to raise an issue about the drafting of the regulations that sticks in my craw slightly. Regulation 17(2) refers to the Utilities Contracts (Scotland) Regulations 2016. Clearly, the idea of adopting the Scottish Parliament's statutory instrument to replace the European Union regulations is how the Government want to proceed, which is fine. However, unfortunately, in drafting it, the Government have omitted to make provision for it to be amended. Given that the Minister for the Cabinet Office has powers to increase the amounts when regulations kick in, a similar power rests with the Scottish Parliament and should be reflected in the regulations, so that the correct, updated regulations are referred to for utility

companies. This provision is made earlier on in the regulations, so I think it is just a mere omission and if we have to revisit it, it can be done at the appropriate stage.

Oliver Dowden: I thank the hon. Gentleman for his intervention. I think he is quite right in that interpretation but I will confirm that.

The annexes set out a sophisticated vocabulary that enables numerical codes to be used to describe different kinds of works, supplies and services in, for example, notices that advertise procurement opportunities and so enable suppliers quickly to identify procurements that are of potential interest to them.

Moving on to the other amendments, the UK is moving forward in its activity to join the WTO agreement on Government procurement in its own right. We have reached the stage where GPA parties have agreed in principle to our market access offer and accession. However, in this instrument, we have taken precautions in case the UK's accession to GPA has not been fully completed by exit day. One of the amendments ensures continued guaranteed access, rights and remedies on current terms for suppliers from existing GPA countries for a period of eight months from exit day. Without this amendment, suppliers from GPA parties would no longer have the guaranteed access, rights and remedies that they currently enjoy in our public procurement contracts. This will mitigate the risks of a short gap in GPA membership by facilitating continued market access.

Delays in the Trade Bill mean that we have also laid before Parliament for approval a further statutory instrument that would amend the regulations we are now debating, to implement a similar measure for certain bilateral trade agreements between the EU and third countries to which the UK is currently party via its membership of the EU. That will keep alive existing obligations towards suppliers in the countries with which the EU has, before exit day, entered into trade agreements, with provisions relating to public procurement, by which it is bound.

This second amending statutory instrument would also preserve existing duties towards GPA economic operators and amend the time period to 18 months from exit day. This change in the time period bring the GPA provisions in line with those related to the UK's transitioned international agreements. This SI is also subject to the affirmative procedure.

Section 3 of the withdrawal Act has the effect that any EU legislation in force and applicable on exit day will automatically become part of UK law. The draft regulations modify various EU regulations and decisions that will become retained direct EU legislation. They also revoke for the whole of the UK the Commission's implementing regulation that establishes standard forms of public procurement. The forms laid out in the Commission's regulation will not be required for the new UK e-notification service. The service itself will be designed to elicit information in the form and the way it is to be submitted.

In summary, the regulations seeks to ensure that the current public procurement regime will continue to function after our withdrawal from the EU. It does not seek to make major policy changes or introduce new frameworks. Instead, it makes largely technical changes

[*Oliver Dowden*]

to correct deficiencies that will naturally emerge within our legislation on exit day. Left unamended, the existing regulations would not work as intended and would cause confusion and uncertainty for procurers and suppliers, hampering the public sector's ability to obtain value for money from procurement. I therefore commend the regulations to the Committee.

2.44 pm

Jo Platt (Leigh) (Lab/Co-op): It is a pleasure to serve under your chairmanship, Sir Henry. I welcome this opportunity to discuss our procurement system and the proposed changes. I thank the Minister for his opening remarks. With just 44 days before our scheduled departure from the European Union, I only wish that this was not happening in such rushed and chaotic circumstances. However, that is what we have come to expect from this Government.

Before I comment on the statutory instrument before us, I must point out, as we in the Labour party have been doing for the last few years, that our procurement system is fundamentally broken. It is a system that works for big business at the expense of our small and medium-sized enterprises and, most importantly, the public. It rewards companies with poor employment practices that do not pay their fair share of tax and, in the cases of Carillion and Interserve, have flawed business models. The explanatory memorandum states that the purpose of these regulations is to transpose into law an "open and competitive" system in which "suppliers are treated equally and fairly."

I do not think that is possible without a fundamental shift in Government policy.

We know, for example, that under the current system SMEs receive a declining proportion of Government cloud spending. We also know that the number of businesses receiving late payments from the Cabinet Office has nearly tripled in the past two years, and that many large outsourcers simply do not pay their suppliers on time. Most importantly, a few mega-firms that are too cosy with Government continue to be dominant at the top. Although we accept and recognise that we need to address the statute book deficiencies that result from the UK exiting the EU, if the Government are serious about creating a procurement system that is truly open and fair, they must start at the root and overhaul this broken system.

Martin Whitfield: Is it not right that this statutory instrument yet again demonstrates the pressure that the incredibly hard-working civil servants are under to have everything in place for no-deal day? As was mentioned earlier, there are deficiencies that have been identified and not listed. An explanation for that has been given, but I feel that time pressure was probably more of a reason why those deficiencies were not listed. Given the drafting errors that this statutory instrument contains, the pressure pot is about to explode.

Jo Platt: I thank my hon. Friend for making that point, and share his concerns that this Government are not prepared for a no-deal exit from the EU. The fact is that the Government could stop this today by taking no deal off the table.

I will raise a number of specific issues with the Minister, on which I would like clarity. The first is the e-notification service that is proposed to replace the *Official Journal of the European Union*, in which tenders are currently published. We are told that the e-notification service will be ready by 29 March, so will the Minister confirm that that deadline will be met? Given this Government's record on the delivery of technology, there is no reason for optimism. The gov.uk Verify programme, the national security vetting solution, the common platform programme, the digital services at the border project and the emergency services mobile communications programme are just a few flagship Government IT programmes; they have all been plagued by delays, spiralling costs or outright failure. To put it bluntly, this Government have consistently proven themselves incapable of introducing new technology across the public sector without causing significant disruption. Just this month, we have been discussing the Government's failure to develop a EU citizen registration programme that works on both Android and Apple phones, so why should we have any confidence that they will deliver on this technological aspect of EU exit?

That e-notification service is particularly important because of the consequences of the system not being fully operational on exit day. The UK awards the most procurement contracts by value of any EU nation. Should that system be non-functional or error-prone as a result of the chaotic circumstances in which it has been created, the economic consequences could be dramatic, and the challenges to the public sector of maintaining procurement could be significant. That is the primary reason why we on the Opposition Benches are perplexed that no impact assessment has been carried out. We are especially concerned about SMEs, which often lack the access to technical expertise that large companies enjoy. If there are problems with the e-notification service, the impacts of those problems will be felt unevenly, and the Government will be further baking into the system the imbalances that already exist in our procurement market.

Turning to the Competition and Markets Authority and its oversight role in enforcing state aid rules, which is noted in the SI, will the Minister please update us on the CMA's preparedness for exit day and whether it has the staff and resourcing that it needs? As my hon. Friend the Member for East Lothian pointed out earlier, as we know from extensive reporting in the media, the civil service is facing a challenge of historic proportions as it scrambles to prepare for both a no-deal Brexit and a transition Brexit. As the head of Her Majesty's Revenue and Customs, Jon Thompson, recently said, the civil service is "hamstrung" by this lack of clarity. The Labour party has said that the civil service is incapable of fulfilling its role because of nearly a decade of public sector cuts.

These truly are trying times to be a public servant, and it is in this climate that the Competition and Markets Authority will attempt to enforce a state aid regime the nature of which we do not yet know, and in which the CMA has no experience. In other words, we do not know yet how a significant feature of the procurement market will work.

I seek clarification from the Minister on our GPA membership in the event of no deal, which is absolutely essential if we are to protect the access of UK suppliers across the EU. Although, as the Minister mentioned

earlier, we have an agreement in principle, will he assure us that we will definitely be ready for independent GPA membership on exit day?

If the UK leaves the EU without GPA membership, the explanatory memorandum states in paragraph 7.20 that Government policy will be to offer other nations access into our procurement market, seemingly without any assurances that this arrangement would be reciprocated. We could then be in the incredible situation of allowing international suppliers competing with UK firms to fulfil our procurement contracts while UK firms might be prevented from accessing global procurement markets. This policy would be disastrous for UK firms and emphasises the totally chaotic handling of these negotiations. It further adds to the uncertainty that businesses are already facing with Brexit.

Let me reiterate that if our GPA membership is not finalised before exit day, this is yet another area in which we are simply not ready for exiting the European Union next month without a deal. Six pieces of legislation are not in place that would need to be. The Government are seriously behind on the passage of statutory instruments such as this, which are needed if we are to leave without a deal or a transition period. Equally, our Border Force is woefully unprepared, without the staff or IT systems needed for EU exit. We can add GPA membership to the growing list of reasons that we are simply unable to leave next month without serious chaos and disruption.

Finally, I have two quick points of clarification. With reference to the transitional measures set out in the schedule, specifically in paragraph 2, what assurances have we received from the EU that existing contracts with UK suppliers will be honoured? Will the Minister clarify the mechanism that the Government will use to cancel or nullify this SI in the event that the UK does leave the EU with a deal? Will he also confirm that a further SI will then be needed during the transition period to prepare the statute book for our future negotiated relationship?

In closing, I want to reflect on and state our disbelief that there are no impact assessments accompanying this SI. I dedicated my speech to pointing out the enormous changes these regulations will cause to the UK procurement system, from a new IT system to the possibility of UK SMEs being restricted from applying for EU procurement contracts.

Impact assessments should quite clearly have been carried out, especially when the stability of some of our SMEs is at stake. However, the explanatory note states that

“no, or no significant, impact”

on the private or voluntary sector is foreseen. It even goes on to say that the impact on small business is expected to be low. How is that defensible after all that we have heard? It is a disservice to those businesses that assessments have not been completed but, quite frankly, I should not be surprised, as it is characteristic of this Government’s handling of this entire process: “Trust us and we’ll sort it out.”

I take this opportunity to restate our position that no deal must be categorically ruled out by the Government. As these regulations confirm, we are not ready for the chaos it would cause. These regulations, most of all, risk baking in the imbalances our SMEs too often face in the system, and they confirm our belief that the

procurement system needs urgent transformation, to put real social value at its heart. If only we had a Government willing to stand up in the interests of the many, and to reform the broken system that, too often, works just for the few.

2.55 pm

Oliver Dowden: The Opposition spokesperson raised a large number of issues and I shall seek to address them all. If I fail to do so, I will be more than happy to write to her.

The starting point is to remember that the regulations are not intended to change our procurement regime. The opportunity to do that will come afterwards, depending on the future relationship that we negotiate—or sooner, in a no-deal scenario. With the regulations, we seek to replicate existing procurement rules to give stability to companies engaged in procurement, so that they will know that the rules under which they currently bid will continue after we leave the European Union. Of course there are areas of procurement that we would like to reform, but the regulations are not the appropriate vehicle for doing so; it would be better for us to look subsequently at reforming procurement in the round.

Within the context of existing EU procurement rules, we have made significant progress. The hon. Member for Leigh mentioned SMEs. In the last Parliament, for the first time, this Government set a target of 25% of all Government business going to SMEs, and we met it. In this Parliament, we have set a target of 33% and we are making progress towards that. Indeed, I have announced further measures to help us reach that point. However, the regulations are separate from that; they are about ensuring continuity, which in my experience is what businesses are after.

I will try to address some of her specific points. The hon. Lady rightly said the e-notification scheme is due to come into force at the end of March. Ministers in the Cabinet Office take a close interest in that, and we continue to believe that it is on course to do so. I do not think that there is concern about that. A question was asked about what would happen if, as we hope to, we leave with a deal. In that instance, the measures will simply be deferred. They may have to be amended, depending on the nature of the future political framework that is agreed, and how we implement it through primary legislation.

The regulations do not provide for oversight by the CMA of the procurement regime. Agreed suppliers will, however, continue to be afforded remedies provided for in the regulations. In that way, contracting authorities and other entities will be held to account by the courts—again, essentially replicating the situation that we had before.

The hon. Lady rightly raised GPA membership. From listening to her, one could be forgiven for thinking that we were somehow desperately off-track on GPA membership. We have reached agreement in principle for the United Kingdom to join the WTO GPA. We are confident that we will very shortly be in a position to lay statutory instruments before Parliament to enable that to happen.

There is a small chance of a gap between the “in principle” accession to the GPA that is already agreed and the “in law” joining of the GPA, essentially because

[*Oliver Dowden*]

of the number of days required to lay the statutory instruments before Parliament. What we are trying to do with the regulations, and the subsequent SI that I highlighted, is to give certainty in that scenario to all contractors who are not based in the UK that they can continue to access the UK as if we remained members of the GPA.

Theoretically, in that small gap there is a chance that another country could decide that there was no basis for UK companies to access their market. However, there is a pretty small chance of that, first of all because we have moved unilaterally to say that we would allow them access. On the basis of reciprocity, we would expect it.

Furthermore, almost every country, I think bar South Korea, would require an Act to be passed by its Government to exclude UK companies, and it would have to apply to a situation where the procurement process had commenced, a UK company had applied for it, and the process had concluded. Given that we have already reached agreement in principle to join and we are progressing at a very good rate, the chances of that happening are exceptionally small. However, to provide clarity we have said that overseas actors can have access to our market.

Mr Jayawardena: Looking at the history, Moldova was the only country to object to our accession to the GPA. Following further discussion with our mission in Geneva, Moldova has now agreed to withdraw that opposition. Indeed, the members of the GPA committee have agreed to our accession.

Oliver Dowden: My hon. Friend is right. Essentially, political agreement has been reached for the United Kingdom to join the GPA; these are just the remaining technical stages. I would happily outline them in more

detail, but I shall not bore the Committee. In essence, we have reached an agreement; these are just technical measures to ensure that it happens.

The hon. Member for Leigh set great store by the question of an impact assessment. She rightly highlighted the explanatory memorandum, which sets out the impact in broad terms. When impacts are assessed to be below an annual cost of £5 million, a full impact assessment is not required. Our initial analysis is that it falls below that threshold; therefore, such an assessment is not required.

I hope that I have addressed all the points that the hon. Lady raised. As I said, I will happily take up further points subsequently through correspondence. Again, I reassure the Committee that the regulations make provisions for the status quo. They take the existing EU procurement laws and replicate them so that there can be certainty. The only real change relates to notification. Clearly, we will not have access to the *OJEU*, so we are creating our own notification system. However, it will replicate the existing *OJEU* notification system.

There are, of course, questions surrounding how we can reform procurement. In the end, leaving the European Union provides the opportunity for us to look at it more flexibly. However, the proper way to do that is through full consultation, looking at a total process of reform. That will rightly be considered by Parliament through primary legislation, which is a much better vehicle for such reform than a statutory instrument. On that basis, I commend the regulations to the Committee.

Question put and agreed to.

Resolved,

That the Committee has considered the draft Public Procurement (Amendment etc.) (EU Exit) Regulations 2019.

3.3 pm

Committee rose.