


Australia and New Zealand Free Trade Agreement drives changes to the Public Procurement rules

 23 June 2023

The Public Procurement (International Trade Agreements) (Amendment) Regulations 2023

Following the signing of the Free Trade Agreement between the United Kingdom (UK) and Australia (*“the UK-Australia FTA”*) and the Free Trade Agreement with New Zealand the Government has been prompted to modify the Public Procurement rules. The amendments made by these [regulations](#) have a broad scope and aim to implement the FTAs in general. Additionally, they include three sets of amendments of general application under section 1(2) of the Trade (Australia and New Zealand) Act 2023, which are necessary to ensure compliance with commitments made in the UK-Australia FTA.

The most notable change is the introduction of a provision that prohibits a contracting authority from terminating a contract in a manner that evades the procurement rules. This provision could be argued to raise the risk of challenges to a contracting authority that intends to terminate a public contract.

It is important to note these changes do not apply to contracting authorities in Wales. Welsh ministers are preparing a separate statutory instrument to implement the FTAs specifically for the authorities. Similar adjustments are also made in Concession Contract Regulation 2016 (CCR) and Utilities Contract Regulations 2016 (UCR).

Legal Changes

The Public Procurement (International Trade Agreements) (Amendment) Regulation 2023 came into effect on May 25th, 2023. The three key changes are:

1. Valuation of contracts
2. Termination of contracts
3. Prior Information Notice (PIN).

Valuation of Contracts

The first amendment introduces a rule that when the value of procurement cannot be estimated, it should be treated as if it has been valued at the corresponding threshold for that specific type of procurement.

Regulation 6 of the PCRs (methods for calculating the estimated value of procurement), regulation 9 of the CCRs (threshold amounts and methods for calculating the estimated value of concession contracts) and regulation 17 of the UCRs (methods for calculating the estimated value of the procurement) of the UCRs are being amended. These amendments address situations where the value of a contract cannot be estimated, the procurement will be considered to have a value equivalent to the relevant threshold amount, unless specifically excluded.

Furthermore, if a contract is composed of different lots and the value of one or more of those cannot be estimated, the exemptions provided in regulation 6(15A) PCR and 17(14) UCR are available, but only to a maximum of 20% of the aggregate value of those lots that

can be estimated.

Termination of contracts

This amendment aims to ensure that contracting authorities and utilities adhere to their obligations under the FTA and do not terminate contracts in a manner that undermines the principles and provisions of the agreement between the UK and Australia. Regulation 18(4) (principles of procurement), regulation 36 (principles of procurement) of the UCRs and regulation 8 (principle of equal treatment, non-discrimination, and transparency) of the CCRs are being amended to prevent contracting authorities from terminating public contracts with the intention of avoiding international procurement obligations.

Prior Information Notice (PIN)

The third amendment specifically eliminates the option of using prior information notice (PIN) or periodic indicative notice as a call for competition. Consequently, several consequential amendments have been made to both the PCR and UCR in response to this change. The removal of this provision means that contracting authorities and utilities can no longer rely on PINS or periodic indicative notices as substitutes for the formal call for competition process.

More specifically, amendments are being made to regulation 26 (choice of procedures), 48 (prior information notices) and 54 (invitations to candidates) of the PCR to remove sub central contracting authorities to use to use notices of planned procurement as a call for competition. Parallel amendments are being made to regulations 44 (choice of procedure), 67 (periodic indicative notices) and 74 (invitations to candidates) of the UCR.

What is the effect of these changes?

These regulations stipulate that they do not impact any procurement process that was initiated before the regulations came into force. The term procurement covers “the whole of the procedures” that originate from the commencement of the procurement in accordance with the applicable Procurement Regulations. However, it should be noted that procedures undertaken to modify a contract or framework agreement are not considered to stem from the original commencement of the procurement that led to the award of that contract or Framework agreement.

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