

Changes to the public procurement rules in Scotland

1. Purpose

This note tells you about key changes to the rules on public procurement in Scotland, arising from:

- EU Directive 2014/24/EU (“the public procurement directive”);
- EU Directive 2014/25/EU (“the utilities directive”);
- EU Directive 2014/23/EU (“the concessions directive”); and
- The Procurement Reform (Scotland) Act 2014 (“the Act”)

and when these will take effect.

2. Key Points

- Regulations transposing the public procurement directive¹ have been laid in the Scottish Parliament today and will take effect on 18 April 2016.
- Three further sets of regulations:
 - transposing the utilities directive
 - transposing the concessions directive; and
 - under the Act;will be laid in January 2016 and will also come into effect on 18 April 2016.
- Most provisions of the Act will commence on 18 April 2016, but some will commence later.
- Statutory guidance under the Act will be published in the early part of 2016
- Training on the changes to the rules will also be available from early 2016.

¹ <http://www.legislation.gov.uk/ssi/2015/446/contents/made>

3. Key changes to the procurement rules

3.1 Some of the changes brought about by the new public procurement directive are mandatory for all member States, and we have no choice about how to implement them in Scotland. These include:

- The minimum time limits for procurement exercises have been reduced, meaning that contracts can be put in place more quickly.
- “Innovation Partnerships” are introduced, increasing the scope to use public procurement to develop new solutions to meet authorities’ requirements.
- There is greater clarity that contracting authorities may engage in pre-market consultation to inform how they approach a procurement exercise.
- The rules on the use of Dynamic Purchasing Systems have been simplified.
- It is now clear that the technical specifications set out by a contracting authority may now refer to any stage of the life cycle of what is being bought.
- It is now clear that the contracting authority may consider factors involved in the specific process of production, provision or trading, or other processes for another stage of the life cycle of what is being provided, even where such factors do not form part of their material substance.
- The minimum level of annual turnover which a contracting authority can require a business to have in order to bid will now be limited to no more than two times the value of the contract, apart from in exceptional circumstances. This should have the effect of making it easier for smaller businesses to bid for public work.
- A failure to meet tax or social security obligations becomes a mandatory ground for excluding a business from bidding, where this has been established by either a judicial or an administrative decision. Previously, the question of whether or not to exclude a business on this ground was at the discretion of the contracting authority. A failure to meet these obligations, which has not been established by such a decision, but which the contracting authority can demonstrate by any other appropriate means, remains a discretionary ground for exclusion. Exclusion on this ground lasts until such

time as the tax owed has been repaid, a binding agreement for its repayment has been entered into, or until the tax is otherwise no longer owed.

- There is a new ground for exclusion which deals with breaches of social, environmental and employment law obligations. When a contracting authority can demonstrate by any appropriate means that a business has breached one of these obligations, it may, at its discretion, choose to exclude that business from bidding for contracts.
- The concept of “self-cleansing” is formally introduced into regulations. This means that a business which is in one of the situations which would or may lead to it being excluded from bidding may present evidence about remedial measures it has taken to prove its reliability. If the contracting authority considers these to be sufficient, the business should not be excluded.
- There are changes to the rules for the award of contracts for care, support and some other services. The key change is the introduction of a new, lighter-touch regime, where the value of these contracts exceeds €750,000.
- The concept of a European Single Procurement Document (ESPD) is introduced. This will allow businesses to complete one document containing their basic selection and exclusion information and use this in competitions across Europe, building on the progress made in Scotland through the development of the standard pre-qualification questionnaire.

3.2 The public procurement directive provides some options about how best to transpose other changes. The Scottish Government consulted on these changes earlier this year². The responses received as part of that consultation³ and a report analysing these⁴ were published on 10 August 2015. The Scottish Government has now published its response to the outcome of that consultation⁵. There was strong support expressed for the proposals the Scottish Government put forward as part of that consultation, and so the regulations reflect, in very large part, those proposals, including:

² <http://www.gov.scot/Publications/2015/02/4903/>

³ <http://www.gov.scot/Publications/2015/08/8975>

⁴ <http://www.gov.scot/Publications/2015/08/1618>

⁵ <http://www.gov.scot/Publications/2015/12/1845>

- The Scottish Government believes that blacklisting of workers is an unacceptable practice, and so has decided to use the flexibility offered by the public procurement directive to make it mandatory for contracting authorities to exclude businesses from procurement exercises which have been found to have committed an act prohibited under the Employment Relations Act 1999 (Blacklists) Regulations 2010, or which have admitted doing so.
- In the absence of acceptable “self-cleansing” measures, the public procurement directive says that member States must specify the maximum period of exclusion allowed. The public procurement directive says that this maximum period can be no longer than five years from the date of the conviction for one of the offences specified in Regulation 58(1), or three years from the date of the relevant event in all other cases. The Scottish Government puts a great deal of importance on ensuring that only suitable businesses can win public work, and so has set these time periods at the maximum allowed by the public procurement directive.
- The regulations maintain the right of contracting authorities, in very exceptional circumstances relating to the public interest only, not to exclude a business which is in one of the situations which would normally require it to be excluded.
- The Scottish Model of Procurement places an emphasis on value for money being a result of an appropriate balance between cost, quality and sustainability. In line with the consultation feedback, the Scottish Government has therefore decided to use the flexibility offered by the public procurement directive to make it clear in law that contracts should never be awarded on the sole basis of lowest price or lowest cost.
- The public procurement directive requires member States to take “appropriate measures” to ensure that businesses comply with their obligations in the fields of social, environmental and employment law, whilst performing public contracts. Respondents to the consultation agreed that the best way of ensuring this is for contracts to include a clause requiring contractors to take such measures, and the regulations have been written to reflect this.

- The regulations provide sub-central contracting authorities with the flexibility to use a Prior Information Notice as a call for competition, potentially simplifying procedures further.
- The public procurement directive introduces a new requirement that all communication as part of a procurement procedure should be by electronic means, except in some specific cases where this would not be practicable. This requirement will commence on 18 April 2017 for central purchasing bodies, and 18 October 2018 for all other contracting authorities, thereby giving all concerned sufficient time to prepare (these are the dates by which the public procurement directive requires electronic communication).
- The introduction of the ESPD is a significant change, and similarly the flexibility offered by the public procurement directive to delay the need to provide the ESPD in electronic format only, until 18 April 2018, and to delay until 18 October 2018 a provision which says that contracting authorities may not require businesses to send to them copies of supporting documents which they already possess, has been written into the regulations.
- Contracting authorities will still be able to reserve contracts to supported businesses. The public procurement directive has changed the definition of supported business for this purpose, however. Currently, a contracting authority can reserve contracts to supported businesses if at least 50 per cent of their work force is disabled. Under the new rules, a contracting authority will be able to reserve contracts to supported businesses or supported employment programmes whose main aim is the social and professional integration of disabled or disadvantaged persons, and where at least 30 per cent of the employees are disabled or disadvantaged persons.
- A contracting authority must now consider dividing its requirements into smaller lots, which might encourage smaller businesses to bid. Where an authority decides not to do this, it must explain why it has not done so. Contracting authorities will be able to award more than one lot to the same tenderer, and may award contracts combining several or all lots when they have indicated in the contract notice that they might do this.
- The Scottish Government has decided not to allow public bodies to reserve certain categories of contracts to mutuals, or similar organisations. The public

procurement directive makes clear that participation in competitions for specific categories of contracts specified in the public procurement directive can be restricted in these circumstances only to businesses which have an objective in pursuit of a public services mission linked to the particular contract being tendered, which reinvest profits with a view to achieving that objective, which have a structure of management or ownership based on employee ownership, and which have not been awarded a similar contract by the same public body using this procedure in the preceding three years. Additionally, any contract awarded under this procedure must not exceed three years. Collectively, these conditions mean that such a provision may rarely be applicable. Scottish Ministers are prepared to consider making such a provision in the future, however. This article of the public procurement directive has a review clause built into it, which requires the European Commission to assess its effects and report to the European Parliament and Council by 18 April 2019. The Scottish Government will await the outcome of that review, and consider any conclusions it reaches.

3.3 The Scottish Government's consultation also covered proposals to transpose the concessions and utilities directives, as well as for regulations provided for by the Act. These regulations will be laid in the Scottish Parliament in January 2016.

3.4 Assessments of the impact of all the changes will be published in January 2016, alongside the regulations which transpose the concessions and utilities directives.

3.5 The Act also provides for Scottish Ministers to publish statutory guidance on:

- the selection of tenderers and award of contracts;
- the sustainable procurement duty;
- the carrying out of regulated procurements relating to contracts for health or social care services;
- the preparation and publication of procurement strategies and annual procurement reports; and
- the use of community benefit requirements

3.6 Part of the statutory guidance on the selection of tenderers and award of contracts – on addressing fair work practices, including the Living Wage, in Procurement – was published in October 2015⁶. SPPN 4/2015⁷ gives further information on this. The remainder of the statutory guidance will be published early in 2016.

3.7 Almost all of the remaining provisions of the Procurement Reform (Scotland) Act 2014 will come into force on 18 April 2016, at the same time as the regulations transposing the EU directives, and the regulations further to the Act. The exceptions to this are:

- Contracting authorities will only have to take account of the sustainable procurement duty and community benefit requirements for procurements which commence from 1 June 2016.
- Contracting authorities will need to produce their first procurement strategy by 31 December 2016. This strategy should cover, at a minimum, the remainder of that financial year, and the authority's following financial year.

3.8 These phasing-in arrangements are intended to balance the benefits of the Act with the need to make sure that authorities have enough time to prepare for the new requirements, taking account of the lead times for major procurement exercises.

3.9 The Scottish Government will provide training for contracting authorities which will focus on changes to the rules (participants will be assumed to be already familiar with current legislation). The package of training provision will comprise e-learning, supplemented by face to face seminars, and continued training on sustainable procurement based on the Marrakech Approach. This will be available from early 2016.

3.10 We have been assessing the impact that the changes will have on our systems to ensure compatibility with the new legislative framework. We will ensure that the Public Contracts Scotland (PCS), PCS-Tender and Procurement Journey systems are updated and fully compliant with the new regulations. Whilst the new guidance and functionality will not go live until the changes come into force in April 2016, further information will be communicated to users in advance of this.

⁶ <http://www.gov.scot/Publications/2015/10/2086>

⁷ <http://www.gov.scot/Topics/Government/Procurement/policy/SPPNSSPANS/policy-notes/2015/SPPN42015>

4. Dissemination

Please bring this SPPN to the attention of all relevant staff within your field of responsibility to whom it may be of interest.

5. Enquiries

Any enquiries in relation to this guidance should be addressed to Scottish Procurement: Scottishprocurement@gov.scot

Scottish Procurement

The Scottish Government

5 Atlantic Quay

150 Broomielaw

Glasgow

G2 8LU