

# **PROCUREMENT REFORM (SCOTLAND) ACT 2014**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 1: Key Concepts and Application**

##### **Contracting authorities**

###### *Section 1 – Contracting authorities*

6. [Section 1\(1\)](#) of the Act describes those bodies to whom the provisions of this Act will apply, by providing a definition of a “contracting authority”. This includes the bodies, office-holders and persons listed in the schedule and contracting authorities, as defined in the Public Contracts (Scotland) Regulations 2012, whose functions are exercisable in or as regards Scotland and do not relate to reserved matters. Broadly this includes all Scottish bodies that are subject to procurement obligations under the Regulations.
7. [Section 1\(2\)](#) gives power to the Scottish Ministers to modify the meaning of “contracting authority” by order, including the power to amend the definition and the list in the schedule. By virtue of [section 44\(2\)](#) such an order is subject to the affirmative procedure.

##### **Regulated procurements**

###### *Section 2 – Regulated procurements*

8. [Section 2](#) defines what is meant by a “regulated procurement”. A regulated procurement starts from the point at which a contracting authority seeks offers (when a contract notice is published), includes the selection of economic operators and all other steps in the process continuing through to the award of the contract. It does not include any pre-market engagement or similar activity undertaken by a contracting authority before it seeks offers under a procurement process, nor does it include any activity after the contract is awarded.

##### **Regulated contracts**

###### *Section 3 – Regulated contracts*

9. This section defines what is meant by a “regulated contract”. A regulated contract is a contract which is a “public contract” (defined in [section 42](#) as having the same meaning as in Directive [2004/18/EC](#)<sup>1</sup>) under which the contracting authority expects to pay £50,000 or more. If the contract is a “public works contract” (also defined in [section 42](#) as having the same meaning as in Directive [2004/18/EC](#)), the threshold value is £2,000,000 or more. [Section 5](#) provides further detail on the estimated values of

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<sup>1</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF>

contracts, for the purpose of these thresholds. Public contracts meeting these thresholds will be subject to the provisions of this Act unless they are explicitly excluded (see section 4).

10. **Section 3(3)** enables the Scottish Ministers by order to amend the thresholds for application of this Act. By virtue of section 44(2) such regulations are subject to the affirmative procedure.

#### ***Section 4 – Excluded contracts***

11. **Section 4(1)**, by reference to regulations 6(1) and 6(2) of the Public Contracts (Scotland) Regulations 2012, excludes certain specific types of contracts from the scope of the Act. A contract is also excluded where it is for the purpose of acquiring goods, works or services in order to sell, hire or provide them to other persons, where the contracting authority will not have an exclusive right to sell, hire or provide the goods, works or services, and the conditions on which the contracting authority intends to sell, hire or provide them are the same as or similar to the conditions on which another person could sell, hire or provide the same or similar goods, works or services as a reseller. Contracts that are for the principal purpose of undertaking research and development activity will also be excluded from the application of the Act.
12. **Section 4(2)** enables the Scottish Ministers to amend, by regulations, the types of contracts which are excluded from the scope of this Act. By virtue of section 44(2) such regulations are subject to the affirmative procedure.

#### ***Section 5 – Estimated value of contract***

13. **Section 5** provides that, for the purposes of calculating contract values for the purposes of the Act, the relevant amount is the sum that a contracting authority expects to pay under a public contract. It is an estimate of the amount, excluding any VAT, that the contracting authority expects to pay as opposed to the actual sum payable.
14. **Section 5(2)** enables the Scottish Ministers to make further provision by regulations regarding the method used to calculate the value of the contract. These regulations will be subject to the negative procedure (see section 44(3)).

### **Framework agreements and dynamic purchasing systems**

#### ***Section 6 – Framework agreements and call-off contracts***

15. This section applies provisions of the Act to framework agreements and to call-off contracts. It provides a definition of framework agreement and call-off contract. Subsection (2)(a) provides that for the purposes of the Act frameworks are to be regarded as a “public contract” (see section 3) and therefore the provisions of the Act apply to them. By virtue of subsection (2)(b), some specific provisions will not apply to a regulated procurement in so far as it relates to a call-off contract, being a contract entered into pursuant to a framework agreement. The provisions that will not apply to call-off contracts are section 8(2) (sustainable procurement duty), section 11 (supported businesses), section 23(1) (publication of intention to seek offers on the Public Contracts website) and section 27 (exclusion of economic operators).

#### ***Section 7 – Dynamic purchasing systems***

16. A dynamic purchasing system is a procedure through which a contracting authority may buy goods, services or works (construction). Section 7(1) gives power to the Scottish Ministers to make provision in regulations about the application of the provisions of the Act to dynamic purchasing systems and contracts awarded under them. These regulations are subject to affirmative procedure (see section 44(2)).
17. **Section 7(2)** defines dynamic purchasing systems for the purposes of this section.