

PROCUREMENT REFORM (SCOTLAND) ACT 2014

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](#)¹) 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

¹ <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.

Part 2: General Duties and Procurement Strategies

General duties

Section 8 – General duties

18. **Section 8(1)** introduces a requirement on contracting authorities, when undertaking regulated procurement, to treat all “relevant economic operators” equally and without discrimination, to act transparently in terms of their procurement activities and to ensure that any actions and decisions a contracting authority takes are proportionate in relation to the contract(s) in question (although see section 11 on supported businesses, section 12 on health or social care services contracts and section 14 on other circumstances in which a contract can be awarded without competition).
19. **Section 8(2)** places a requirement on a contracting authority to comply with the sustainable procurement duty (see section 9). However section 8(3) states that in complying with the sustainable procurement duty, a contracting authority may not act in a way which conflicts with its duty under section 8(1). Section 8(4) defines “relevant economic operator”.

Section 9 – Sustainable procurement duty

20. **Section 9(1)** sets out the specific requirements of the sustainable procurement duty on a contracting authority. This duty includes considering, before starting a procurement competition, how, by the way in which it conducts the procurement process, it might improve the economic, social and environmental well-being of the authority’s area, how it might facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses, and to consider how it can promote innovation. Section 9(1) (b) requires an authority to conduct its procurements in a way designed to secure the improvements identified.
21. **Section 9(2)** makes clear that the improvement activity considered must only extend to those matters which are relevant to what is being procured and to the extent that such matters are proportionate to the procurement.
22. **Section 9(3) and (4)** defines and explains certain terms used in section 9.

Section 10 – Guidance on sustainable procurement duty

23. **Section 10** permits the Scottish Ministers to publish guidance on the sustainable procurement duty. Contracting authorities must have regard to any such guidance. The Scottish Ministers must lay a copy of any such guidance before the Scottish Parliament.

Section 11 – Supported businesses

24. **Section 11** permits a contracting authority to seek offers from supported businesses only, notwithstanding the general duties under section 8. This means that if a bidder does not meet the definition of a supported business, it can be precluded from participating in a competition on that basis alone. This does not mean that a contract can be awarded directly to a particular supported business (i.e. without competition), but rather that the competition will be amongst supported businesses only. The general duties will still apply to the procurement competition that is run amongst supported businesses.
25. **Section 11(3)** provides the definition of a supported business, for the purposes of this Act. A supported business is an economic operator who operates a supported business, supported employment programme or supported factory within the meaning of regulation 7 of the Public Contracts (Scotland) Regulations 2012².

² http://www.legislation.gov.uk/ssi/2012/88/pdfs/ssi_20120088_en.pdf

Section 12 – Contracts for health or social care services

26. As an exception to the requirement to treat all bidders equally and without discrimination (section 8(1)), section 12(1) permits a contracting authority to award a contract for health or social care services without seeking offers in relation to the proposed contract.
27. In the case of direct award under section 12(1), the contracting authority is exempted from the requirement to publicise its intention to seek offers set out in section 23(1).
28. [Section 12\(3\)](#) gives the Scottish Ministers a power to make regulations to specify what is a health or social care service for the purposes of the Act. The power is subject to the negative procedure (see section 44(3)).

Section 13 – Guidance on procurements for health or social care services

29. [Section 13](#) obliges the Scottish Ministers to publish guidance on the carrying out of regulated procurements relating to contracts for health or social care services. Contracting authorities must have regard to such guidance. The Scottish Ministers must lay a copy of such guidance before the Scottish Parliament.

Section 14 – Other circumstances in which contract can be awarded without competition

30. [Section 14](#) gives the Scottish Ministers a regulation-making power to specify circumstances in which a contracting authority may, as an exception to the requirement to treat all bidders equally and without discrimination (section 8(1)), award a regulated contract without seeking offers in relation to the proposed contract. The power is subject to the affirmative procedure.
31. In the case of direct award outlined in section 14(1), the contracting authority is exempted from the requirement to publicise its intention to seek offers set out in section 23(1).

Procurement strategy and annual report

Section 15 – Procurement strategy

32. This section describes the circumstances in which a contracting authority is required to prepare a procurement strategy and what, as a minimum, it must contain.
33. Before the start of any financial year in which a contracting authority considers that it may have a total expenditure on regulated procurements (see section 2) exceeding £5,000,000 (excluding VAT) it is required to prepare a procurement strategy or review an existing procurement strategy and make any necessary changes before the start of the next financial year.
34. Subsection (3) applies if, before the start of its financial year, a contracting authority did not prepare a procurement strategy but after the start of that financial year it becomes apparent to a contracting authority that its total expenditure on public contracts for that financial year is likely to be greater than £5,000,000. It is required, as soon as practicable, to prepare a procurement strategy or review and revise its existing strategy as necessary, as soon as reasonably practicable after it becomes aware of the likelihood of the spend over £5,000,000. However, there is nothing to preclude a contracting authority from reviewing and making revisions to its procurement strategy at any additional interval as it considers appropriate.
35. [Section 15\(5\)](#) describes what a procurement strategy must include as a minimum and provides a power for the Scottish Ministers to make an order subject to the negative procedure specifying other matters that a procurement strategy should address (see sections 15(5)(e) and 44(3)).

36. **Section 15(6)** provides an order-making power for the Scottish Ministers to amend the threshold value at which a procurement strategy is required to be prepared or reviewed. By virtue of section 44(2) such an order is subject to the affirmative procedure.

Section 16 – Joint strategies

37. This section allows two or more contracting authorities who are required to prepare a procurement strategy to have a joint procurement strategy which covers their collective interest.

Section 17 – Compliance with strategy

38. This section places a requirement on a contracting authority obliged to have a procurement strategy to ensure, as far as is reasonably practicable, that its regulated procurement exercises are carried out in accordance with its procurement strategy.

Section 18 – Annual procurement reports

39. This section requires a contracting authority that is obliged to prepare or revise a procurement strategy to prepare, as soon as reasonably practicable after the end of its financial year, an annual procurement report on its regulated procurement activities.
40. **Section 18(2)** provides details of the minimum content that a report should contain.
41. A significant requirement of subsection (2) is that the contracting authority includes a summary of the regulated procurements that have been completed in the financial year. In relation to this, subsection (3) explains that a regulated procurement is completed when the award notice is published or when it otherwise comes to an end.

Section 19 – Publication etc.

42. **Section 19** requires a contracting authority to publish any procurement strategy (section 15), any revised strategy and any annual procurement report (section 18) it has prepared. Publication can take any form the authority deems appropriate, but must as a minimum include publication on the internet. Once publication has occurred, the authority is required to notify the Scottish Ministers accordingly (section 19(3)).

Section 20 – Guidance

43. This section requires the Scottish Ministers to publish guidance on the preparation and publication of procurement strategies (section 15) and annual procurement reports (section 18). Subsections (2) and (3) provide details of what the guidance may cover, including the possibility of it setting out a model procurement strategy and a model annual report. Subsection (4) requires a contracting authority to have regard to the guidance. In accordance with subsection (5) the Scottish Ministers must lay a copy of the guidance before the Scottish Parliament.

Section 21 – Annual report on procurement activity in Scotland

44. **Section 21(1)** requires the Scottish Ministers to prepare, as soon as reasonably practicable after the end of each financial year, a report on procurement activity in Scotland. The report is to be based upon the individual annual reports that contracting authorities publish under section 19(1)(c). Subsection (2) provides details of the minimum content that the Scottish Ministers' report should contain.
45. Subsection (4)(a) requires the Scottish Ministers to publish their report in such manner as they deem appropriate. Subsection (4)(b) provides that the Scottish Ministers must lay a copy of the report before the Scottish Parliament.

Part 3: Specific Duties

Publication of notices on Public Contracts website

Section 22 – Public Contracts website

46. **Section 22** places a requirement on the Scottish Ministers to establish and maintain a website (the “Public Contracts website”), which is to be used by contracting authorities to publicise the seeking of offers and the award of a contract (which, by virtue of section 6(2)(a), includes a framework agreement).

Section 23 – Publication of contract notices and award notices

47. **Section 23(1)** and **(2)** requires all contracting authorities to publicise their intention to seek offers (contract notice) and the award of a contract or framework agreement (award notice) on the Public Contracts website.
48. **Section 23(3)** enables the Scottish Ministers to include in regulations, made by negative procedure (see section 44(3)), provisions about publication of this information. Subsection (4) details a list of particular, but not exhaustive, provisions that can be included in regulations in respect of publication of contract notices and award notices.

Community benefit requirements

Section 24 – Community benefit requirements

49. This section introduces a definition of community benefit requirement for the purpose of the Act. This is relevant to a contracting authority’s procurement strategy (see section 15(5)(b)) and also to the duty on a contracting authority in section 25 to consider imposing such requirements in certain procurements.

Section 25 – Community benefit requirements in major contracts

50. **Section 25** applies where a contracting authority proposes to carry out a regulated procurement equal to or greater than £4,000,000. In doing so, a contracting authority must consider whether to impose community benefit requirements as part of the contract delivery before carrying out the procurement. The contracting authority must include in the contract notice a summary of the community benefit requirements it intends to impose or the reasons for not including any requirement.
51. **Section 25(4)** states that where community benefits requirements are to be included in the contract, the contracting authority must state in the award notice the details of the benefits it considers will be derived.
52. **Section 25(5)** provides for the threshold for community benefit requirements to be amended by the Scottish Ministers, by order, subject to the affirmative procedure (see section 44(2)).

Section 26 – Guidance on community benefit requirements

53. **Section 26** gives the Scottish Ministers power to publish statutory guidance in relation to the use of community benefit requirements and makes provision regarding the content of that guidance. Section 26(3) requires a contracting authority to have regard to any guidance published under this section. Section 26(4) obliges the Scottish Ministers to lay a copy of the guidance before the Scottish Parliament.

Selection of tenderers and award of contracts

Section 27 – Exclusion of economic operators on grounds of criminal activity

54. The section applies only to regulated procurements which are not also EU-regulated procurements, that is procurements covered by regulation 5(1) of the Public Contracts (Scotland) Regulations 2012. These are a proposed public supply contract, public works contract, Part A services contract, framework agreement or dynamic purchasing system, save certain exclusions. Subsection (1) enables the Scottish Ministers to make regulations, subject to the negative procedure, requiring contracting authorities to exclude an economic operator where the operator or certain people connected with the operator have been convicted of an offence specified in the regulations.
55. The regulations made by Ministers may explain how contracting authorities are to determine whether or not a bidder has been convicted of an offence.
56. The regulations may also set out the specific circumstances under which a contracting authority may award a contract to a bidder despite the fact that the bidder meets the criteria which requires its exclusion.

Section 28 – Selection of tenderers

57. [Section 28](#) enables the Scottish Ministers to make regulations, subject to the negative procedure, about the selection of economic operators in regulated procurements which are not EU-regulated procurements. The regulations may include provision about the use of minimum standard criteria which are designed to identify the suitability of a potential bidder to be invited to submit a bid in a regulated procurement. A minimum standard criterion is one which relates to the financial health of the potential bidder, its technical ability or any other characteristic referred to in the regulations that this section empowers Ministers to make.
58. The regulations may also specify how a contracting authority determines whether a potential bidder meets the specified minimum standard or not, and section 28(3) sets out criteria which may be specified in the regulations.

Section 29 – Guidance on selection of tenderers and award of contracts

59. [Section 29\(1\)](#) provides the Scottish Ministers with the power to publish guidance for contracting authorities on the selection of economic operators and the award of contracts in relation to a regulated procurement.
60. By virtue of section 29(2), the guidance may cover, in particular, the use of questionnaires and matters relating to the recruitment, remuneration (including payment of a living wage) and other terms of engagement of those persons who will be involved in producing, providing or constructing the subject matter of the regulated procurement, and employee representation including trade union recognition.
61. [Section 29\(3\)](#) requires a contracting authority to have regard to this guidance when assessing the suitability of tenderers.
62. [Section 29\(4\)](#) obliges the Scottish Ministers to lay a copy of the guidance before the Scottish Parliament.
63. [Section 29\(5\)](#) provides a definition for the reference to “living wage” in subsection (2) (b), so that it has the same meaning as in section 15(5)(b)(iii), being remuneration which is sufficient to ensure an acceptable standard of living.

Technical specifications

Section 30 – Technical specifications

64. **Section 30** applies only to regulated procurements which are not also EU-regulated procurements.
65. **Section 30(1)** enables the Scottish Ministers to make regulations, subject to the negative procedure (see section 44(3)), regarding the use of technical specifications in regulated procurements (other than EU-regulated procurements). Technical specifications referred to are those used in invitation to tender documentation to describe goods, services or works to be provided pursuant to the procurement or the way in which the goods, services, materials or works are to be produced or provided.
66. This section also details a non-exhaustive list of particular provisions that may be included in regulations in respect of the use of technical specifications.

Charges for participation in procurement process

Section 31 – Charges for participation in procurement process

67. **Section 31** prohibits a contracting authority charging a supplier any sort of fee for participation in the procurement process. This includes a fee to provide any document required to participate in that process.

Giving of reasons

Section 32 – Giving of reasons to unsuccessful participants

68. The section applies only to regulated procurements which are not also EU-regulated procurements. It imposes an obligation on contracting authorities to notify any supplier that submitted a pre-qualification questionnaire of the contracting authority's decision at pre-qualification stage (section 32(2)). Section 32(4) imposes an obligation on contracting authorities to notify all unsuccessful tenderers of its contract award decision as soon as reasonably practicable after awarding the contract or the framework agreement.
69. An economic operator who was excluded from participating in the procurement before submitting a tender must be given a notice with the information set out in section 32(3). An economic operator who was an unsuccessful tenderer must be given a notice of the decision with the information set out in section 32(5).

Section 33 – Request for further information

70. **Section 33** sets out that an economic operator who was excluded from participating in the procurement before submitting a tender, an unsuccessful tenderer and the successful tenderer can ask for further detail over and above any information that may already have been provided by the contracting authority under section 32. The request must be made in writing and no later than 30 days after receiving the notification. Section 33(4) details the relevant further information which must be provided by the contracting authority and to whom.

Section 34 – Withholding information

71. **Section 34** provides the circumstances in which a contracting authority would be justified in withholding information about the contract award decision from those who would otherwise be entitled to receive it under sections 32 and 33.

Contracts register

Section 35 – Contracts register

72. **Section 35** requires a contracting authority to keep and maintain a register of current contracts and make it publicly available, as a minimum on the internet. The register must include those contracts which have been awarded as a result of a regulated procurement. An entry can be deleted only after the relevant contract has expired or been terminated.
73. **Section 35(6)** gives details of the circumstances in which a contracting authority is able to decide not to include a particular contract in the register.

Procurement of recycled and recyclable products etc.

Section 36 – Amendment of Climate Change (Scotland) Act 2009

74. **Section 36** creates a new section 82A in the Climate Change (Scotland) Act 2009. That new section provides a power for the Scottish Ministers, by regulations, to require specified contracting authorities to ensure that a certain proportion of things procured comprise of or include recycled material or material that is designed to be recycled. Subsection (3) sets out the kind of provisions that can be made. Subsection (4) provides for guidance to be given to enforcement authorities by the Scottish Ministers.
75. The new provision complements the existing powers in section 82 of the 2009 Act.

Part 4: Remedies

Section 37 – Actionable duties

76. **Section 37** applies only to regulated procurements which are not also EU-regulated procurements. This section describes the circumstance in which a “relevant person” can bring legal proceedings against a contracting authority which may not have complied or be complying with its duties under particular sections of this Act. In order to bring proceedings a relevant person must have sought to be awarded the contract and, as a result of the alleged breach, have suffered or is placed at risk of suffering loss or damage.

Section 38 – Procedure and time limits

77. Prior to a supplier bringing proceedings under section 37 which may be brought in the sheriff court or Court of Session, the supplier must notify the contracting authority of its intention to bring proceedings and the failure to comply with the duties referred to above. The time limit for bringing proceedings under section 38 is 30 days from the day on which the supplier knew or ought to have known that grounds for starting the proceedings had arisen, or such longer period of up to three months as the court considers appropriate. Extension of the period may be permitted by the court only if it considers that there is good reason for doing so.

Section 39 – Determination by the court

78. **Section 39** gives the court power to suspend the procedure leading to the award of a contract, and to suspend the implementation of any decision or action taken by a contracting authority in relation to that procedure. This section further details the considerations to be taken into account by the court in considering whether to make such a suspension and lists the remedies available to the court where a contracting authority is found to be in breach of its duties. The court must review the decisions taken by a contracting authority and must consider the balance of negative consequences against the benefits of its decision having regard to specified matters including public interest.
79. Where the breach of duty is in respect of a regulated contract which has already been entered into the only remedy available to the court is the award of damages. Section

*These notes relate to the Procurement Reform (Scotland) Act 2014 (asp 12)
which received Royal Assent on 17 June 2014*

39(6) specifies that nothing in section 39 affects any power that the court may have as a result of any other rule of law.

Section 40 – Transfer of forum to First-tier Tribunal

80. **Section 40** provides the Scottish Ministers with a power to make regulations to amend the forum for dispute resolution to the First-tier Tribunal for Scotland instead of the sheriff court or Court of Session. The power is subject to the affirmative procedure (see section 44(2)).

Part 5: General

Interpretation

Section 41 – The Directive, Public Contracts Regulations and EU-regulated procurements

81. This section provides definitions of these terms as used in the Act. Section 41(2) gives the Scottish Ministers the power to amend the definition of “the Directive” in the Act to take account of any new or subsequent EU directive relevant to this Act. It also gives the Scottish Ministers the power to amend the definition of “Public Contracts Regulations” in the Act to give the flexibility to take account of any relevant changes - for example to refer to an instrument that implements a new EU public procurement directive.
82. **Section 41(3)** provides that an order amending the definition of “the Directive” or of “the Public Contracts Regulations” may make appropriate consequential modifications to the Act.

Section 42 – General interpretation

83. **Section 42(1)** and (2) provide definitions of terms used in the Act.

Final provisions

Section 43 – Ancillary provision

84. **Section 43** provides the Scottish Ministers with the power to make an order making such supplementary, incidental, consequential, transitional or transitory provision or savings as they consider appropriate. Any such order will be subject to the affirmative procedure if the order adds to, replaces or omits any part of the text of an Act (see section 44(2)), otherwise it will be subject to the negative procedure.

Section 44 – Subordinate legislation

85. **Section 44(1)** provides that any power of the Scottish Ministers to make an order or regulations under the Act includes powers to make different provision for different purposes and such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate.
86. **Section 44(4)** provides that this section does not apply to commencement orders.

Section 45 – Commencement

87. **Section 45** provides for sections 41, 42, 43, 44, 45 and 46 of the Act to come into force on the day of Royal Assent. Section 45(2) provides for the other provisions of the Act to be commenced by order made by the Scottish Ministers. Such an order may include transitional, transitory or savings provision.

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Section 46 – Short title

88. This section states the short title of the Act as being the Procurement Reform (Scotland) Act 2014.