

EXECUTIVE NOTE

The Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2008 SSI/2008/94

The above instrument was made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972. The instrument is subject to the negative resolution procedure.

Policy Objectives

The purpose of this instrument is to amend the Public Contracts (Scotland) Regulations 2006 (S.S.I 2006/1) (the “Public Contracts Regulations”) and the Utilities Contracts (Scotland) Regulations (S.S.I 2006/2) (the “Utilities Contracts Regulations”) to take account of the accession of Bulgaria and Romania to the European Union.

The instrument amends the lists of professional and trade registers within the Public Contracts Regulations, so as to include professional and trade registers from Member States who joined the European Union in:

- (i) May 2004 (as set out in the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the treaties on which the European Union is founded (O.J. L236 23.9.2003, p.33): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:236:0033:0049:EN:PDF>); and
- (ii) January 2007 (as set out in council Directive 2006/97/EC adapting certain Directives in the field of free movement of goods, by reason of the accession of Bulgaria and Romania (O.J. L363 20.12.2006, p.107): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:363:0107:0128:EN:PDF>).

The instrument makes a number of minor technical amendments which are necessary to clarify the Public Contracts Regulations and the Utilities Contracts Regulations: it clarifies which Scottish fire authorities are contracting authorities for the purpose of the Public Contracts Regulations; it clarifies the application of the Public Contracts Regulations to a framework agreement or dynamic purchasing agreement in relation to which only Part B services contracts can be based or awarded; it provides for the use of the negotiated procedure without prior publication of a contract notice where a competitive dialogue procedure has failed; it clarifies the application of the Public Contracts Regulations to the subcontracting of work under a public works concession contract; it amends the Utilities Contracts Regulations to clarify the calculation of turnover by a utility in respect of its affiliated undertakings; and it clarifies in the Utilities Contracts Regulations the threshold values which apply to design contests.

The instrument also amends regulation 8(21) of the Public Contracts Regulations and regulation 11(20) of the Utilities Contracts Regulations. These regulations require contracting authorities to ensure a degree of advertising which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non-discrimination and transparency. They give effect in Scots law to rulings of the European

Court of Justice (ECJ), in particular the Telaustria case ([2000] E.C.R. I-10745), that even where the European Procurement Directives do not require an advertisement to be placed in the Official Journal of the European Union (OJEU), there will usually be a need for contract opportunities to be subject to some form of publicity and an impartial procurement procedure so as to meet basic EC Treaty requirements.

The amendment confirms that the above Treaty principles require not only adequate publicity of the contract to be awarded, but further that the contract itself must be awarded in line with a procedure sufficient to meet the requirements of the principles of the EC Treaty. For example, contracting authorities must ensure that all potential bidders know in advance how the contract will be awarded and are given sufficient time to express their interest. The amendment is a clarification of existing law and does not, therefore, represent an additional burden on contracting authorities.

Consultation

In accordance with the Scottish Government's rules on external consultation, the draft instrument was published on the Scottish Government's website on 28 September 2007 and a copy was placed in the Scottish Government library. It was also publicised via Scottish Procurement Policy Note 5/2007 which was distributed to public sector procurement organisations and to others with an interest in public procurement. The consultation ended on 21 December 2007.

The consultation attracted a total of seven responses; there were no objections to the proposed amendments. Six of the responses have been published on the Scottish Government's website (the remaining response was submitted in confidence). A report on the consultation, which summarises and analyses respondents' comments on the draft instrument and details the Scottish Government's response, has also been published on the website: <http://www.scotland.gov.uk/Resource/Doc/1265/0055663.pdf>

We will issue a Scottish Procurement Policy Note to stakeholders to inform them of the amendments to the Scottish Regulations. The Note will also be published on the Scottish Procurement Directorate's website.

Financial Effects

This instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Procurement Directorate
Scottish Government
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