

EXECUTIVE NOTE TO
THE PUBLIC CONTRACTS (SCOTLAND) REGULATIONS 2012

S.S.I. 2012/88

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 negative resolution procedure.

Purpose of the Instrument

This instrument consolidates the Public Contracts (Scotland) Regulations 2006 (the “2006 Regulations”) (S.S.I. 2006/1) and all subsequent amendments. It also introduces a number of changes (see “Policy Objectives” below).

Legislative context

This instrument gives effect in Scots law to: Directive 2004/18/EC of the European Parliament and Council of 31st March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services; Directive 89/665/EEC of 21st December 1989 on the co-ordination of the laws, regulation and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended; and Directive 2007/66/EC of the European Parliament and Council of 11th December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

The above Directives were previously given effect in Scots law by the 2006 Regulations. The instrument consolidates the 2006 Regulations and all subsequent amendments. The consolidation exercise has resulted in the re-numbering of certain regulations. A table of changes and derivations is attached which shows where numbering has changed.

Policy Objectives

Amendments are required to the 2006 Regulations to take account of the judgment of the Court of Justice of the European Union in *Uniplex v NHS Business Services Authority* ([C-406/08](#)). These amendments will remove uncertainty around the current requirement to bring court proceedings in Scotland relating to breaches of EU procurement law “promptly” and change the start date for bringing proceedings.

Amendments are also required to the 2006 Regulations to take account of changes to offences relating to bribery introduced by the Bribery Act 2010 and new offences relating to serious organised crime introduced by the Criminal Justice and Licensing (Scotland) Act 2010. These amendments will ensure that public bodies take the correct approach to excluding tenderers which have been convicted of one of the new bribery or serious organised crime offences from the procurement process.

Amendments are also required to reflect machinery of Government changes and changes made by the Treaty of Lisbon.

Finally, because the 2006 Regulations have already been amended six times since their introduction in January 2006, we have undertaken a consolidation exercise. Aside from the amendments discussed above and minor drafting amendments, this instrument represents a straightforward consolidation of the 2006 Regulations.

Territorial Extent and Application

This instrument applies to Scotland only. Equivalent changes have been made to the Regulations applying to England, Wales and Northern Ireland.

.Consultation

Public consultation on the amendments to the 2006 Regulations (and the equivalent Regulations applying to utilities) and a partial Business and Regulatory Impact Assessment took place in December 2010. We also consulted directly with stakeholders who had previously expressed an interest in being informed of changes to procurement policy and legislation via [Scottish Procurement Policy Note 11/2010](#).

Consultation with business was conducted via the organisations represented on the Public Procurement Advisory Group. The Advisory Group's remit is to provide an ongoing framework for dialogue about, and influence upon, public procurement practices as they affect suppliers. In addition, we brought the consultation to the attention of businesses registered on the Scottish Government's national advertising portal for public sector contracts - [Public Contracts Scotland](#).

We received a total of 15 responses to the consultation from a range of organisations within the public and private sectors and have taken full account of these in finalising the amendments to the Regulations. Where respondents gave permission for their [responses](#) to be made public, these have been published on the Scottish Government's webpages. We have also published a [consultation report](#).

We intend to issue a further Scottish Procurement Policy Note to stakeholders to alert them to the amendments to the Regulations and the consolidation exercise and to provide advice on the practical steps they will need to take before the new Regulations come into force. This Note will be also be published on the Scottish Government's website and the Public Contracts Scotland portal.

Impact Assessment

This instrument will have no impact on people from any of the equality groups. As a result, an equality impact assessment has not been completed.

Financial Effects

A final Business and Regulatory Impact Assessment has been completed and is attached. In our view, the instrument will not impact on the costs to businesses or the third sector of participating in public procurement processes. Public bodies will be required to update their tender and contract documentation. However, as much of this documentation is standardised, we do not believe that this will result in significant costs to the public sector.

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The Public Contracts (Scotland) Regulations 2012 – Consolidation – Table of proposed changes and derivations

Regulation	Old wording	New wording/numbering
Preamble	The Scottish Ministers in exercise of the powers conferred by section 2(2) of the European Communities Act 1972, hereby make the following Regulations:	The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of, and paragraph 1A of Schedule 2 to, the European Communities Act 1972(a) and all other powers enabling them to do so. The Regulations make provision for a purpose mentioned in that section and it appears to Scottish Ministers that it is expedient for the references to the European Parliament and Council Directives 2004/18/EC concerning the procedures for the award of certain public contracts and 2004/17/EC co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors to be construed as references to those Directives as amended from time to time.
2(1) Interpretation	“candidate concerned” means a candidate which has not been informed that they have been unsuccessful in accordance with regulation 16(23), 17(19A), or 18(19A); “contractor” means a person who offers on the market work or works and – (a) who sought, who seeks, or would have wished, to be the person to whom a works contract is awarded; and	“candidate concerned” means a candidate which has not been informed that they have been unsuccessful; “contractor” means a person who offers on the market work or works and – (a) who either sought, seeks or would have wished, to be the person to whom a works contract is awarded; and
	“disabled person” means any person recognised as disabled within the meaning of the Disability Discrimination Act 1995 and “disabled persons” shall be interpreted accordingly; “disability” has the same meaning as in the Disability Discrimination Act 1995;	“disabled person means any person recognised as disabled within the meaning of the Equality Act 2010(a); “disability” has the same meaning as in the Equality Act 2010.

	“EC Treaty” [...]	delete definition
	“established” has the same meaning as in the Community Treaties:	“established”, unless the context otherwise requires, has the same meaning as in the EU Treaties;
	“Office of Government Commerce” [...]	delete definition
	“relevant standstill period” means – (a) where the notice referred to in regulation 32(1) or 47B(9)(a) [...]	(a) where the notice referred to in regulation 32(1) or 49(9)(a) [...]
	“services provider” means a person who offers on the market services and – (a) who sought, who seeks or would have wished – [...]	“services provider” means a person who offers on the market services and – (a) who either sought, seeks or would have wished – [...]
	“supplier” means a person who offers on the market goods for purchase or hire and – (a) who sought, who seeks or would have wished, to be the person to whom a public supply contract is awarded, and	“supplier” means a person who offers on the market goods for purchase or hire and – (a) who either sought, seeks or would have wished, to be the person to whom a public supply contract is awarded, and
	“tenderer concerned” means a tenderer which – (a) has not been informed that they have been excluded from the competition and that exclusion competition in accordance with regulation 17(23)(b) or 18(23)(b); or (b) has been informed that they have been excluded from the competition in accordance with regulation 17(23)(b) or 18(23)(b) and that exclusion	“tenderer concerned” means a tenderer which – (a) has not been informed that they have been excluded from the competition; or (b) has been informed that they have been excluded from the competition and that exclusion (i) is not prevented from being the subject of proceedings under Part 9 by virtue of regulation 47(6)(b); [...]

	(i) is not prevented from being the subject of proceedings under Part 9 by virtue of regulation 47(6)(b); and [...]	
		“TFEU” means the Treaty on the Functioning of the European Union(b)” The reference to the Treaty has been amended accordingly in regulations 6(2)(d); 6(2)(l); 30(8)(b); 36(6)(d) and 36(6)(e). The wording has been amended according to the Lisbon Terminology in regulations 2(1) (definition of ‘established’); 4(4); 8(21); 9(5); 23(1)(e); 25(4); 39(1); 47(1) and 47(10).
2(1A)		2(2)
		new 2(3) In these Regulations, unless the context otherwise requires, any reference to a numbered Part, regulation, paragraph or Schedule is a reference to the Part, regulation, paragraph or Schedule bearing that number in these Regulations.
2(2)	Subject to paragraph (3) [...]	2(4) Subject to paragraph (5) [...]
2(3)		2(5)
2(4)		2(6)
3 Contracting authorities		
3(1)(j)	a fire authority constituted by a combination scheme under the Fire Services Act 1947	a fire authority constituted by a combination scheme or administration scheme under the Fire Services Act 1947(c) and continued under section 5 of the Fire (Scotland) Act 2005(d)
3(1)(k)(iv)	-	within the meaning of section 1 of the Fire (Scotland) Act 2005
3(1)(l)	a joint fire board constituted by an administration scheme under section 147 of the Local Government (Scotland) Act 1973	a joint fire board constituted by an administration scheme under section 147 of the Local Government (Scotland) Act 1973 (f) and continued under section 5 of the Fire (Scotland) act 2005
3(1)(m)		a joint fire and rescue board within the meaning of section 2 of the Fire (Scotland) Act 2005
previous 3(1)(m)		3(1)(n)
3(1)(n)		3(1)(o)
3(1)(o)		3(1)(p)
(p)		(q)

(q)			(r)
(r)			(s)
(s)			(t)
(t)			(u)
(u)			(v)
(v)			(w)
(w)			(x)
(x)	any joint board, the constituent members of which consist of any of the bodies specified in paragraphs (i), (j), (l), (n), (o), (p), (q), (r), (s), (t), (u), (v) and (w)	any joint board, the constituent members of which consist of any of the bodies specified in paragraphs (i), (j), (l), (n), (o), (p), (q), (r), (s), (t), (u) and (v)	(y) any joint board, the constituent members of which consist of any of the bodies specified in paragraphs (i), (j), (l), (o), (p), (q), (r), (s), (t), (u), (v) and (w)
(y)			(z)
(z)			(aa)
(aa)			(bb)
(bb)			(cc)
(cc)		to the extent not specified in sub-paragraphs (a) to (z), [...]	(dd) to the extent not specified in sub-paragraphs (a) to (aa), [...]
4 Economic operators			
4(2)	When these Regulations apply, a contracting authority must not treat a person who is not a national of a relevant State and established in a relevant State more favourably than one who is.	When these Regulations apply, a contracting authority must not treat a person who is not a national of a relevant State and established in a relevant State more favourably than one who is.	When these Regulations apply, a contracting authority must not treat a person who is not a national of a relevant State and is not established in a relevant State more favourably than one who is.
6 General Exclusions			
6(2)(n)			new sub-paragraph: where – (i) the Defence and Security Public Contracts Regulations 2011(a) apply; or (ii) the application of those Regulations is excluded by regulation 9 (thresholds) or 7 (general exclusions) of those Regulations.
8 Thresholds			
8(4)(d)	a Part B services contract to which regulation 34 does not apply.	a Part B services contract to which regulation 34 does not apply.	a Part B services contract.
8(14)(b)(ii)	the financial year if that is longer	the financial year if that is longer	the financial year where the end of that financial year is later than 12 months after the first

	than 12 months.	date of the delivery or the first date on which the services will be performed, as the case may be.
17 The negotiated procedure		
17(19A)		17(20)
17(20)		17(21)
17(21)		17(22)
17(22)		17(23)
17(23)		17(24)
18 The competitive dialogue procedure		
18(19A)		18(20)
18(20)		18(21)
18(21)		18(22)
18(22)		18(23)
18(23)		18(24)
18(24)		18(25)
18(25)		18(26)
18(26)		18(27)
18(27)		18(28)
18(28)		18(29)
18(29)		18(30)
20 Dynamic purchasing systems		
20(14A)		20(15)
20(15)		20(16)
20(16)		20(17)
20(17)		20(18)
23 Criteria for the rejection of economic operators		
23(1)	Subject to paragraph (2), a contracting authority shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the	Subject to paragraph (2), a contracting authority must treat as ineligible and must not select an economic operator in accordance with these Regulations if the contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences-

	contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences-	
23(1)(a)	the common law offence of conspiracy where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA(a) or an offence under sections 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010(b);	the common law offence of conspiracy where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA(a) or an offence under sections 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010(b);
23(1)(b)	corruption within the meaning of section 1 of the Public Bodies Corrupt Practices Act 1889 or section 1 of the Prevention of Corruption Act 1906;	corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889(c) or section 1 of the Prevention of Corruption Act 1906(d), where the offence relates to active corruption as defined in Article 3 of the Council Act of 26 May 1997(e) and Article 3(1) of the Council Joint Action 98/742/JHA(f);
23(1)(c)	bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice Act 2003;	bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003 (g) where the offence relates to active corruption, or bribery within the meaning of sections 1 or 6 of the Bribery Act 2010(h);
23(1)(d)	the common law offence of incitement to commit a crime;	no change
23(1)(e)	fraud, where the offence relates to fraud affecting the financial interests of the European Communities as defined by Article 1 of the Convention relating to the protection of the financial interests of the European Communities, within the meaning of-	no change
23(1)(e)(i)	the offence of cheating the Revenue;	no change
23(1)(e)(ii)	the common law offence of fraud;	no change

23(1)(e)(iii)	the common law offence of theft or fraud;	no change
23(1)(e)(iv)	fraudulent trading within the meaning of section 993 of the Companies Act 2006;	fraudulent trading within the meaning of section 485 of the Companies Act 1985(d) or section 993 of the Companies Act 2006(e);
23(1)(e)(v)	defrauding the Customs within the meaning of the Customs and Excise Management Act 1979 and the Value Added Tax Act 1994;	fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(a) or section 72 of the Value Added Tax Act 1994(b);
23(1)(e)(vi)	an offence in connection with taxation in the European Community within the meaning of section 71 of the Criminal Justice Act 1993; or	
23(1)(e)(vii)	the common law offence of uttering;	the common law offence of uttering; or
23(1)(e)(viii)	the criminal offence at common law of attempting to pervert the course of justice;	The common law offence of attempting to pervert the course of justice;
23(1)(f)	money laundering within the meaning of the Money Laundering Regulations 2007;	money laundering within the meaning of section 340(11) of the Proceeds of Crime Act 2002 (a) or the Money Laundering Regulations 2007(b); an offence in connection with proceeds of drug trafficking within the meaning of section 49, 50, 51 of the Drug Trafficking Act 1994(c); or
23(1)(g)	any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by national law of any relevant state.	no change
23(4)	A contracting authority may treat an economic operator as ineligible or decide to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator-	no change

<p>23(4)(h)</p>	<p>is guilty of serious misrepresentation in providing any information required of that economic operator under this regulation;</p>	<p>is guilty of serious misrepresentation in providing any information referred to in this regulation or regulation 24, 25, 26 or 27 or has not provided such information in response to a request by the contracting authority;</p>
<p>27 Official list of approved economic operators</p>	<p>(1) This regulation applies where an economic operator is registered in accordance with paragraph (2) or certified in accordance with paragraph (3). (2) An economic operator is registered in accordance with this regulation where it is registered on the official list of approved contractors, services providers or suppliers in a relevant State which maintains such lists and in which the economic operator is established. (3) An economic operator is certified in accordance with this regulation where it is certified by a certification body complying with European certification standards in a relevant State which maintains such certification and in which the economic operator is established. (4) Where an economic operator which is registered or certified submits to the contracting authority— (a) a certificate of registration issued by the authority administering the official list referred to in paragraph (2); or (b) a certificate issued by the body</p>	<p>(1) Subject to paragraph (5), where an economic operator which is registered or certified submits to the contracting authority a certificate referred to in paragraph (2) and which deals with the matters referred to in paragraph (3), the contracting authority must accept the certificate as evidence of the matters referred to in that paragraph, and is not entitled to seek any information, or supplementary information according to regulation 26, in relation to such matters. (2) The certificates referred to in this paragraph are (a) a certificate of registration issued by the authority administering the official list; or (b) a certificate issued by the body administering the certification which specifies the information submitted to that authority or body which enabled the economic operator to be registered or certified and which states the classification given. (3) The matters referred to in this paragraph are the grounds referred to in regulations 23(1), 4(a) to (e), (h) and (j), 24(1)(b)(ii) and (iii) and — (a) in the case of a contractor, regulation 25(2)(b), (d), (g), (i) and (j); (b) in the case of a service provider, regulation 25(2)(c), (e), (f), (g), (h), (i), (j) and (k); or (c) in the case of a supplier, regulation 25(2)(c), (d), (e), (f), (l) and (m). (4) In this regulation— “registered” means an economic operator who is registered on the official list of approved contractors, service providers or suppliers in a relevant State which maintains such lists and in which the economic operator is established; and “certified” means an economic operator who is certified by a certification body complying with European standards in a relevant State which maintains such certification and in which the economic operator is established. (5) A contracting authority is not required to comply with paragraph (1) where it considers that it has justification for not doing so.</p>

administering the certification referred to in paragraph (3); which specifies the information submitted to that authority or body which enabled the economic operator to be registered or certified and which states the classification given, the contracting authority shall accept the certificate as evidence of the matters referred to in paragraph (5).

(5) Subject to paragraph (6), where the certificate referred to in paragraph (4) deals with the grounds referred to in regulations 23(1), (4)(a) to (e), (h) and (j), 24(1)(b)(ii) and (iii) and—

(a) in the case of a contractor, regulation 25(2)(b), (d), (g), (i) and (j);

(b) in the case of a services provider, regulation 25(2)(c), (e), (f), (g), (h), (i), (j) and (k); or

(c) in the case of a supplier, regulation 25(2)(c), (d), (e), (f), (l) and (m),

the contracting authority shall—

(i) accept the certificate as evidence that the economic operator does not fall within the grounds specified in regulation 23(1), (4)(a) to (e), (h) and (j) and shall not be entitled to require the economic operator to submit such information relating to those grounds as is specified in

	<p>regulation 23;</p> <p>(ii) not be entitled to require the economic operator to provide information specified in regulation 24(1)(b)(ii) and (iii) and—</p> <p>(aa) in the case of a contractor, regulation 25(2)(b), (d), (g), (i) and (j);</p> <p>(bb) in the case of a services provider, regulation 25(2)(c), (e), (f), (g), (h), (i), (j) and (k); and</p> <p>(cc) in the case of a supplier, regulation 25(2)(c), (d), (e), (f), (l) and (m); and</p> <p>(iii) not be entitled to seek any supplementary information in accordance with regulation 26 in relation to the matters specified in sub paragraphs (c)(i) and (ii).</p> <p>(6) A contracting authority is not to be required to comply with paragraph (5) where it considers that it has justification for not doing so.</p>	
<p>36 Public Works Concession Contracts</p>		
<p>36(6)(d)</p>	<p>where Article 296 of the EC Treaty applies [...]</p>	<p>where Article 346 of the TFEU applies [...]</p>
<p>41 provision of reports 41(1)</p>	<p>Where a contracting authority is a Scottish public authority it shall send the report to the Scottish Ministers otherwise it shall send the report to the Minister responsible for that contracting</p>	<p>Where a contracting authority is a Scottish public authority it must send the report to the Scottish Ministers otherwise it must send the report to the Minister responsible for that contracting authority and that Minister is responsible for sending the report to the Cabinet Office.</p>

	authority and that Minister shall be responsible for sending the report to the Office of Government Commerce.	
41(3)	Any question as to which Minister of the Crown's areas of responsibility are most closely connected with the functioning of a contracting authority in accordance with paragraph (2) is determined by the Cabinet Office whose determination is final.	
47 Enforcement of obligations		
47(4)(a)(ii)	who is a national of a relevant State and established in a relevant State; and	who is a national of a relevant State or established in a relevant State; and
47(7)(a)(i)	For the purpose of paragraph 6(b), proceedings shall be brought – (a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 47B) (ii) where paragraph (9) applies, within 30 days from the relevant date referred to in that paragraph; or	For the purpose of paragraph (6)(b), proceedings must be brought— (a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 49)— (ii) where paragraph (8) applies, within 30 days from the relevant date referred to in that paragraph; or
47(7)(b)	in any other case, promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is a good reason for extending the period within which proceedings may be brought.	in any other case, within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen unless the Court considers that there is a good reason for extending the period within which proceedings may be brought, in which case the Court may extend that period up to a maximum of 3 months from that date.
47(8)		deleted

47(9)		47(8)
47(10)		47(9)
47(11)		47(10)
47A		48
Powers and duties of the court		
47B Ineffectiveness Orders		49
47C		50
Financial Penalties		
48		51 Revocations
Repeals and Revocations		Subject to regulation 52, the instruments specified in column 1 of Part A of Schedule 7 (which have the numbers specified in column 2) are revoked to the extent specified in column 3 of that Part.
49		52 Savings and transitional provisions
Savings and transitional provisions		<p>(1) Where a contracting authority has commenced a contract award procedure or design contest before 1st May 2012, the Regulations specified in regulation 51 continue to have effect on and after 1st May 2012 in relation to that contract award procedure, as if those Regulations had not been revoked in accordance with regulation 51.</p> <p>(2) For the purposes of paragraph (1), a procedure or contest has been commenced before 1st May if, before that date –</p> <p>(a) a contract notice has been sent to the Official Journal in accordance with the Public Contracts (Scotland) Regulations 2006(a) in order to invite offers or requests to be selected to tender for, or to negotiate, or to be selected to participate in a dialogue in relation to a contract, in respect of a proposed public contract, framework agreement or dynamic purchasing system;</p> <p>(b) in any case where there is no requirement to send a contract notice to the Official Journal in accordance with the Public Contracts (Scotland) Regulations 2006, the contracting authority has dispatched any form of advertisement seeking offers or expressions of interest in a proposed contract, framework agreement or dynamic purchasing system;</p> <p>(c) where there is no such advertising, the contracting authority has contacted any economic operator in order to –</p> <p>(i) seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system; or</p> <p>(ii) respond to an unsolicited expression of interest or offer in respect of a proposed contract, framework agreement or dynamic purchasing system; or</p>

		<p>(d) the contracting authority has sent a notice to the Official Journal in accordance with the Public Contracts (Scotland) Regulations 2006 in order to hold a design contest.</p> <p>(3) Where a framework agreement has been concluded before 1st May 2012, these Regulations do not apply to the award of any specific contract under that framework agreement.</p>
		<p>53 Consequential amendments</p> <p>The instruments specified in column 1 of Part B of Schedule 7 (which have the numbers specified in column 2) are amended in accordance with the provisions in column 3 of that Part.</p>