

EXPLANATORY MEMORANDUM TO
THE UTILITIES CONTRACTS REGULATIONS 2016

2016 No. 274

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Cabinet Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument implements Directive 2014/25/EU (“the Utilities Directive”) which provides modernised rules for the procurement of goods, services and works above certain thresholds by contracting entities (“utilities”) operating in the water, energy, transport and postal services sectors. This instrument also re-enacts the relevant provisions of the Directive 92/13/EEC¹ on remedies and review procedures for public procurement (“the Utilities Remedies Directive”), as implemented by the UK in the Utilities Contracts (Amendment) Regulations 2009.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Cabinet Office’s general approach to drafting this instrument has been to use the ‘copy-out’ technique, where available. So far as was considered practical, the text of these provisions has been conformed to UK standards of legislative structure and drafting. But, on the whole, this instrument retains the key operative phrases which the Directive uses to express the obligations which are to be imposed on utilities. The approach to transposing the Utilities Directive has mirrored that taken for the Public Contracts Directive 2014/24/EU on public procurement (“the Public Contracts Directive”), which was implemented by the Public Contracts Regulations² and Directive 2014/23/EU on the award of concessions contracts, which is being implemented by the Concessions Contracts Regulations 2016. All three Directives (“the Public Procurement Directives”) comprise a package of measures to improve public procurement processes as explained further in paragraph 7 of this Explanatory Memorandum. Therefore, so far as possible, provisions that are common with the Public Contracts Regulations have been aligned to ensure consistency and to avoid any ambiguity.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

¹ As amended by Directive 2007/66/EC and the Concessions Directive (2014/23/EU)

² S.I. 2015, No. 102

4. Legislative Context

- 4.1 Public procurement plays an important role in the overall economic performance of the European Union. In Europe, public authorities and utilities spend around 14 % of GDP on supplies, works and services. The Public Procurement Directives regulate procurement by public authorities and utilities. By guaranteeing transparent and non-discriminatory procedures, these Directives principally aim to ensure that economic operators from across the Single Market benefit fully from the basic freedoms in competing for contracts let under the Directives.
- 4.2 In January 2011 the European Commission published a Green Paper consultation on the modernisation of EU public procurement policy³. Cabinet Office, with inputs from various UK stakeholders, coordinated and published the UK's response⁴ in July 2011. The Commission concluded that there was an urgent need for a streamlined and flexible set of procurement rules so that Member States can obtain high quality goods and services while delivering value for money for the public purse.
- 4.3 As a result, the Commission came forward in late 2011 with draft proposals to modernise the previous Directives published in 2004, which covered respectively contracts let by contracting authorities (2004/18/EC) and by utilities (2004/17/EC), through three new directives, covering public sector contracts, utilities sector contracts, and concession contracts.
- 4.4 Provision on legal review procedures and the remedies that are available when the rules are breached are contained in the Utilities Remedies Directive, which has been re-transposed in part 5 of this instrument.
- 4.5 The Cabinet Office submitted an Explanatory Memorandum on 17 January 2012 relating to: 18966/11 "Proposal for a Directive Of The European Parliament And Of The Council On Public Procurement" and 18964/11 "Proposal For A Directive Of The European Parliament And Of The Council On Procurement By Entities Operating In The Water, Energy, Transport And Postal Services Sectors". The Cabinet Office also submitted an Explanatory Memorandum on 17 January 2012 on 18960/11 "Proposal for A Directive of The European Parliament and of The Council on The Award of Concession Contracts". The Commons European Scrutiny Committee recommended a Reasoned Opinion on subsidiarity (Report No 57 Session 2010/2012); the Reasoned Opinion motion was debated and agreed by the House of Commons on 6 March (Hansard 6 March 2012 Columns 749-767). European Scrutiny Committee cleared these as legally and politically important in report 12 on 17 June 2013, following correspondence between the Chairman and Cabinet Office Ministers.
- 4.6 The Lords Select Committee on the EU sifted these Explanatory Memoranda to sub-committee B (Sift 1454 Session 10/12) and cleared them on 28 May 2012 following

3

http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/consultations/index_en.htm#maincontentSec2

4

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61554/0707UKGPpbResponsefinal_20_2_.pdf

correspondence between Lords Roper and Boswell and the Minister for the Cabinet Office.

- 4.7 Following intensive scrutiny and debate between the EU Council, Commission and European Parliament, a package of three new Procurement Directives was published in the Official Journal of the EU on 28 March 2014 and came into force on 17 April 2014. The UK and other EU Member States have 2 years from this latter date (i.e. by 18 April 2016) in which to implement the new directives in national legislation.
- 4.8 The three new Directives are:
- a) Directive 2014/24/EU⁵ on public procurement, replacing the 2004 Directive for Public Sector Contracts;
 - b) Directive 2014/25/EU⁶ on procurement by entities operating in the water, energy, transport and postal services sectors, replacing the 2004 Directive for Utilities Contracts;
 - c) Directive 2014/23/EU⁷ on the award of concession contracts.
- 4.9 The instrument that this memorandum accompanies transposes the Utilities Directive.
- 4.10 The instrument contains a number of ambulatory references to EU legislation, which will give effect in UK law to technical updates to relevant EU legislation, respecting the principle of “copy out” by avoiding inadvertent gold plating while ensuring that UK legislation will remain up to date as technical changes are made at EU level. These references appear in regulations:
- a) 2(1), which sets out the definitions of ‘common technical specification,’ ‘CPV’ (the Common Procurement Vocabulary) by reference to the relevant EU regulations;
 - b) 5(6) (b), which refers to legal acts listed in Annex II of the Utilities Directive. The listed legal acts provide for procedures which, if followed, would mean that “special or exclusive rights” are not applicable;
 - c) 16(3) which sets the threshold amounts by reference to the Utilities Directive. These thresholds are routinely revised every 2 years by the Commission in accordance with article 17 of that Directive, to reflect fluctuations in currency exchange rates;
 - d) 21, which cross-refers to technical definitions in various directives which set out the scope of exemptions from this instrument for certain public service contracts;
 - e) 29(5) (a), which refers to Directive 2013/34/EU, which concerns the accounts of certain undertakings;
 - f) 35(1)(b)(ii) refers to Annex III which lists EU legislation, which when implemented and applied, indicates that market access is not restricted;
 - g) 40(17) (c), which refers to the definition of advanced electronic signatures in the relevant EU Directive;
 - h) 60(16), definitions of common technical specification;
 - i) 71(5) and 114(4), which refer to the Commission Implementing Regulation on Standard Forms (2015/1986/EU);

⁵ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG

⁶ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG

⁷ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG

- j) 76(6), which refers to Annex XIV in the Utilities Directive, which lists international environmental, social and labour law provisions breach of which will permit a utility to exclude a tenderer from bidding for a contract; and
 - k) 83(6), which refers to Annex XV in the Utilities Directive of legislative acts setting out common methods for life-cycle costing.
- 4.11 A transposition note has been submitted separately.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales and Northern Ireland.
- 5.2 The territorial application of this instrument is England and Wales and Northern Ireland.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 The Government is committed to a strategy of reforming UK public procurement processes, to stimulate economic growth. The Government negotiated successfully in Brussels to simplify and modernise the existing framework of EU procurement directives, to make public procurement faster, less costly and enable better value outcomes for government and industry.
- 7.2 This instrument is needed to implement the legal provisions contained in the Utilities Directive. This new Directive modernises and simplifies the procurement rules that apply to contracts awarded by Utilities.
- 7.3 Part 5 of this instrument re-transposes the Utilities Remedies Directive, which covers review procedures and remedies available for breaches of the procurement rules; this is only necessary because this instrument replaces the Utilities Contracts Regulations 2006 (as amended), which transposed both the 2004 Utilities Directive and the Utilities Remedies Directive. The general approach has been to move the existing remedies rules from the 2006 Regulations⁸ into this instrument, with only comparatively minor amendments, including adjustments necessary to mesh with the instrument overall and some minor drafting improvements. However, we have taken the opportunity to provide for the remedies to be available not only to economic operators from non-EEA countries where covered by the World Trade Organisation Agreement on Government Procurement (which the 2006 Regulations did) but also to those from other third countries where required by any other international agreement by which the EU is bound.
- 7.4 Implementation of the Utilities Directive is mandatory, though certain aspects of the provisions permit Member States some flexibility in deciding how, or in some cases whether, to implement them. Although the underlying purpose of the rules, which is

⁸ As heavily amended in 2009 by S.I. 2009/2992 to transpose the Directive 2007/66/EC amending the Utilities Remedies Directive, and then further amended by S.I.2011/2053).

to make sure that contracts are awarded fairly and transparently, has not changed, the rules have been updated and simplified.

7.5 The most significant changes are as follows:

- 7.5.1 Electronic procurement techniques have been encouraged and enhanced. The rules on Dynamic Purchasing Systems have been simplified: electronic catalogues and electronic auctions are provided for; and electronic communications will be introduced in phases, becoming mandatory for most procurements by 18 October 2018.
- 7.5.2 There are improved rules on social and environmental aspects, making it clear that: social aspects can be taken into account in certain circumstances; buyers can require certification/labels or other equivalent evidence of social/environmental characteristics, further facilitating procurement of contracts with social/environmental objectives; and refers to factors directly linked to the production process.
- 7.5.3 There are various improved safeguards from corruption, including: requirements that utilities take appropriate measures to effectively remedy and prevent conflicts of interest arising during procurement procedures; time limits regulating the period that suppliers can be excluded from procurement by utilities (e.g. where convicted for corruption); and self-cleaning measures, for suppliers that have cleaned up their bad practices.
- 7.5.4 Various innovations to enhance SME participation: buyers will be encouraged to break contracts into lots, but there is discretion not to do so where appropriate; a turnover cap has been introduced, whereby buyers will not be able to set company turnover requirements at more than two times contract value; a much simpler process of assessing bidders' credentials, involving greater use of supplier self-declarations, and where only the winning bidder should have to submit various certificates and documents to prove their status.
- 7.5.5 The new rules encourage and allow preliminary market consultation between buyers and suppliers, which should facilitate better specifications, better outcomes and shorter procurement times.
- 7.5.6 The full life-cycle of costings can be taken into account when awarding contracts; this could encourage more sustainable and/or better value procurements, which may save money over the long term, but appear more costly on the initial purchase price.
- 7.5.7 The introduction of a new light-touch regime for contracts for certain social and health and some other services, replacing the former distinction between Part A and Part B Services. The new scheme necessitates advertising of relevant contracts above a threshold of €1,000,000 (£764,100) and requires Member States to impose national procedural rules for these contracts of its own design, respecting the different approaches of Member States to such contracts.

7.6 These changes support UK Government priorities of economic growth and deficit reduction by making the procurement process faster, less costly, and more effective for business and procurers alike.

7.7 For utilities, this means being able to run procurement exercises faster, with less red tape, and more focus on getting the right supplier and the best tender. There will be corresponding benefits for suppliers, as the process of bidding for contracts let by

utilities should be quicker, less costly, and less bureaucratic, enabling suppliers to compete more effectively.

Consolidation

7.8 Consolidation is not relevant to this instrument.

8. Consultation outcome

8.1 The Cabinet Office has maintained a longstanding programme of involving stakeholders in the rule-modernisation process, since the publication of the original European legislative proposals in 2011. The results of this process informed the Government's negotiating strategies and more recently the national implementation plans.

8.2 Consultation on this instrument took place from 21 August to 18 September 2015. The previous consultation on the Public Contracts Regulations in 2014 had covered many of the issues, such as policy options, that were common to both the Public Contracts Directive and the Utilities Directive. As a result, there were fewer issues to consult on, but the twelve responses received, confirmed that this instrument was fit for purpose. In particular, there was agreement concerning the use of the copy out approach. The outcome was published on 3 February 2016 at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497598/Government_Response_to_Utilities_and_Concessions_Consultations.pdf

9. Guidance

9.1 The Government has developed a blended learning package to support the transposition of the Public Procurement Directives. This was developed initially to support the early transposition in 2015 of the Public Contracts Directive. A handbook covering the main rule changes and supporting Q&A was published with detailed training slides at the following web-page: <https://www.gov.uk/transposing-eu-procurement-directives>. A free e-learning package was also developed. Further, subject specific guidance is also available on this web page. These products will be updated to cover the changes for utilities too.

10. Impact

10.1 The impact on business is that about 60% of utilities caught by this instrument are in the private sector and they will be required to follow its rules for their above threshold procurement. The basic structure of the rules has not changed from the 2006 Utilities Contracts Regulations, but extra flexibilities have been provided.

10.2 The remaining 40% of utilities covered by this instrument are in the public sector and they will be required to follow its rules for their above threshold procurement.

10.3 An Impact Assessment is submitted with this memorandum and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 This instrument applies to activities that are undertaken by small businesses, although utilities in the energy, water, transport and postal services sectors tend to be larger businesses.

- 11.2 No specific action has been taken to minimise regulatory burdens on small business. The modifications in this instrument set out to improve and simplify the procurement process, which should be of general benefit to small business. Many of the modifications have been designed with the specific intention of encouraging small businesses to participate.
- 11.3 Small businesses were consulted as part of the public consultation, see Paragraph 8.2 above.

12. Monitoring & review

- 12.1 A review provision has been provided for in regulation 125 of this instrument.

13. Contact

- 13.1 Peter Bennett at the Cabinet Office. Telephone: 020 7271 1337 or email: peter.bennett@crownccommercial.gov.uk can answer any queries regarding the instrument.