

PROCUREMENT REFORM (SCOTLAND) ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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 2012¹.

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

¹ http://www.legislation.gov.uk/ssi/2012/88/pdfs/ssi_20120088_en.pdf

£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.