

POLICY NOTE

The Procurement (Scotland) Regulations 2016

SSI 2016/

1. The Procurement (Scotland) Regulations 2016 (“the instrument”) is to be made in exercise of the powers conferred by sections 5(2), 7(1), 12(3), 14(1), 23(3), 27, 28, 30 and 44(1) of the Procurement Reform (Scotland) Act 2014. The instrument is subject to the affirmative procedure.

Background

2. The instrument makes further provisions about matters dealt with under the Procurement Reform (Scotland) Act 2014 (“the Act”) and will be complemented by the publication of statutory guidance required under the Act.

3. The instrument will come into force on 18 April 2016, to align with the coming into force of Regulations which give effect in Scots law to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014, and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, which regulate the award of public contracts, utilities contracts and concession contracts respectively. Allowing time between laying and making of this instrument and its coming into force will also give those affected by the changes to the procurement rules sufficient time to prepare for these.

The Procurement Reform (Scotland) Act 2014

4. The Procurement Reform (Scotland) Act 2014 (2014 asp 12) received Royal Assent on 17 June 2014, although only a limited number of its provisions came into force at that time.

5. The Procurement Reform (Scotland) Act 2014 (Commencement No. 1) Order 2015 (SSI 2015/331) came into force on 28 September 2015. This Commencement Order brought sections 1, 2, 15(5)(b)(iii) (only for the purpose of the definition of the “living wage”), 15(7) and 29 of, and the Schedule to, the Act into force on that date. These sections enable Scottish Ministers to publish guidance under the Act and for that guidance be laid before the Scottish Parliament. *“Statutory Guidance on the Selection of Tenderers and Award of Contracts; Addressing Fair Work Practices, including the Living Wage, in Procurement”* was published on 6 October 2015.

6. The Procurement Reform (Scotland) Act 2014 (Commencement No. 2) Order 2015 (SSI 2015/411) came into force on 11 January 2016. This Commencement Order brought sections 10, 13, 20 and 26 of the Act into force on that date. Those sections enable Scottish Ministers to publish guidance under the Act and for that guidance to be laid before the Scottish Parliament.

7. The Procurement Reform (Scotland) Act 2014 (Commencement No. 3 and Transitional Provisions) Order 2016 will be made on 19 January 2016 and come into force on 18 April 2016. That Order will commence those provisions of the Procurement Reform (Scotland) Act 2014 that are not already in force.

8. In broad terms, the Act introduces a degree of regulation for procurements for public contracts for goods and services valued at £50,000 and above and for works contracts valued at £2,000,000 and above.

9. The Act places a small number of general duties on contracting authorities regarding their procurement activities and some specific measures aimed at promoting good, transparent and consistent practice in procurement; notably creating obligations concerning advertising and the use of community benefits in contracts. The Act also places some administrative requirements on larger spending contracting authorities to publish procurement strategies and annual reports, which will aid visibility of the purchasing activities of these bodies and how they will meet their procurement obligations.

10. The Act makes provision for Scottish Ministers to make provision by regulations in respect of the following:

- 10.1 how the estimated value of a contract is to be determined;
- 10.2 applying provisions of the Act to the establishment and operation of a dynamic purchasing system as it applies to the carrying out of a regulated procurement;
- 10.3 specifying what is a health or social care service for the purposes of the Act;
- 10.4 specifying the circumstances in which a contracting authority may award a contract under the Act without competition in relation to the proposed contract;
- 10.5 details regarding the publication of contract opportunity notices, prior information notices and contract award notices on the Public Contracts website;
- 10.6 the circumstances under which a contracting authority must exclude a business from a competition under the Act;
- 10.7 the circumstances in which a business may or may not be excluded from bidding for a contract under the Act, as well as the selection criteria which contracting authorities may apply; and
- 10.8 the use of technical specifications in regulated procurements.

11. The instrument makes further provision regarding the matters listed in the immediately preceding paragraph.

12. Part 2 of the instrument sets out the methods by which the estimated value of regulated contracts shall be calculated and the provisions of the Act which will not apply to Dynamic Purchasing Systems.

13. Part 3 of the instrument relates to the General Duties under the Act, and covers specification of health and social care services and the circumstances in which a contract may be awarded without a competition.

14. Part 4 of the instrument relates to Specific Duties under the Act, and covers providing details regarding advertising contract opportunities, using prior information notices and publishing contract award notices, setting out the criteria on which businesses must be excluded from bidding for public contracts, the basis on which businesses may be selected to participate in a competition and rules relating to the use of technical specifications and labels in regulated procurements.

Policy Objectives

15. The Act and the instrument will complement the Public Contracts (Scotland) Regulations 2015 (SSI 2015/446) by making provisions similar to existing legal requirements apply to lower value contracts. This will ensure as much consistency as possible regarding procedures used as part of a procurement process under both the Act and the Public Contracts (Scotland) Regulations 2015 (“the 2015 Regulations”).

16. This instrument makes provision to ensure that the methods used to calculate the value of a contract under the Act are the same as the methods used under the 2015 Regulations, and that the grounds under which a contract can be awarded without competition do not differ under the Act from the 2015 Regulations. Likewise, it provides that the criteria that public purchasers use to establish which businesses should be invited to participate in a procurement procedure under the Act are consistent with the criteria found in the 2015 Regulations and that the rules for writing technical specifications used in contract documentation under the Act and under the 2015 Regulations are the same.

17. The instrument will make a Dynamic Purchasing System, a procedural process available for public purchasers to use as a means of awarding contracts under the 2015 Regulations, available to public purchasers for contracts regulated by the Act.

18. The instrument provides, for the purposes of the Act, the specification of health and social care services. It is consistent with the definition contained in the 2015 Regulations.

19. The instrument places obligations on public purchasers in relation to the advertising of contract opportunities, the publication of prior information notices and contract award notices for contracts covered by the Act which are similar to those in the 2015 Regulations.

Consultation

20. The Scottish Government carried out a formal consultation¹ between 9 February and 30 April 2015. This consultation sought views on the content of this instrument as well as how best to transpose the three EU Directives referenced at paragraph 3. Responses to that that consultation were published on 10 August 2015², together with a report analysing them³. The Scottish Government responded to the outcome of that consultation on 17 December 2015⁴.

Impact Assessments

21. There is already public procurement legislation in place in Scotland. The instrument should help to make public procurement rules more consistent as well as improve the accessibility of businesses to public contracts. In light of this, it is anticipated that overall equality impacts should be positive and that any negative equality impacts should be minimal.

22. A final Equality Impact Assessment that builds on the partial assessment that was published in early 2015⁵ is being finalised, and will be published in early 2016, alongside regulations giving effect to Directives 2014/25/EU and 2014/23/EU.

23. An Equality Impact Assessment was also developed during the parliamentary passage of the Act⁶.

Financial Effects

24. There are no obligations placed on businesses under this instrument. All obligations are placed on public bodies in terms of how they conduct their procurement activities. It is, therefore, expected that any costs will be nominal and will be absorbed into existing work practices. Whilst public bodies will need to become accustomed to operating under these rules for contracts of a lower value than at present, keeping these new rules as similar as possible to existing rules under EU Directives should ensure consistency and minimise differences in procurement processes on the basis of the contract value. We are seeking to support a smooth transition by ensuring that training is available before the new rules come into force.

25. A final Business and Regulatory Impact Assessment that builds on the partial assessment that was published in early 2015⁷ is being finalised, and will be published in early 2016, alongside regulations giving effect to Directives 2014/25/EU and 2014/23/EU.

¹ <http://www.gov.scot/Publications/2015/02/4903>

² <http://www.gov.scot/Publications/2015/08/8975>

³ <http://www.gov.scot/Publications/2015/08/1618>

⁴ <http://www.gov.scot/Publications/2015/12/1845>

⁵ <http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/implementEUDirProcRef/partEQIA>

⁶ <http://www.gov.scot/Publications/2013/10/6683>

⁷ <http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/implementEUDirProcRef/PartBRIA>

26. A Business and Regulatory Impact Assessment was also developed during the parliamentary passage of the Act⁸.

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⁸ <http://www.gov.scot/Resource/0043/00435515.pdf>