

POLICY NOTE

THE CONCESSION CONTRACTS (SCOTLAND) REGULATIONS 2016

SSI 2016/65

1. 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 procedure.

Background

2. The instrument gives effect in Scots law to Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, on the award of concession contracts.

3. The instrument follows SSI 2015/446, laid before the Scottish Parliament on 18 December 2015, which gives effect to: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014, on the award of public contracts; SSI 2016/49, laid before the Scottish Parliament on 28 January 2016, which gives effect to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors; and a draft instrument laid before the Scottish Parliament on 18 January 2016 which brings forward regulations under the Procurement Reform (Scotland) Act 2014. These will be complemented by the publication of statutory guidance.

4. The instrument will apply to concession contracts awarded by both contracting authorities, as defined by SSI 2015/446 and utilities, as defined by SSI 2016/49. For ease of reference, this note uses the term 'contracting authority'.

5. The instrument will, apart from some specific provisions relating to electronic communication (detailed at paragraph 11.14), have effect from 18 April 2016, which is the date by which all member States of the European Union must have implemented Directive 2014/23/EU. Allowing time between laying of these regulations and their entry into force is intended to give those concerned by the changes to the procurement rules sufficient time to prepare for these.

6. Directive 2014/23/EU sets out the rules governing the procurement of concession contracts. A concession contract can either be for works or services. A concession contract is formed where one or more contracting authorities entrust to a business either the execution of works (e.g. construction of an asset) or the provision of services, and where some or all of the money which that business will make will come from operating that asset, or providing those services. Examples of concession contracts include the building and operating of toll roads or leisure centres. Importantly, the business concerned must also assume the operating risk associated with the contract – in other words, it must not be guaranteed to recoup its investments or costs.

7. Currently, works concession contracts are subject to minimal regulation by the Public Contracts (Scotland) Regulations 2012, which transpose Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Service concession contracts are currently excluded from the scope of those regulations.

8. The instrument will apply to concession contracts, awarded by contracting authorities, which have an estimated value equal to or greater than the relevant thresholds. The European Commission sets these thresholds every two years and fixes them in all currencies of the European Union. This threshold will initially be £4,104,394.

9. The instrument clarifies how contracting authorities should calculate the estimated value of a concession contract for the purpose of determining whether or not these regulations apply, it sets out various exclusions from the application of these regulations, and sets out the tests which contracting authorities must apply in order to determine which provisions apply in the event that a contract contains elements which would be subject to these regulations, and elements which would not.

10. The instrument follows Directive 2014/23/EU in setting out basic procedural rules for procurement exercises, the circumstances in which a business may be excluded from bidding for public contracts, the basis on which contracts may be awarded, and the circumstances in which contracts may be modified. These provisions are, in many cases, similar to the provisions set out SSI 2015/446, which gives effect in Scots law to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014, on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

11. Part 5 of the Regulations makes provision for remedies in the case of breach of the requirements laid down by the Regulations. The remedies, which now extend to service concessions as well as works concessions are the same in substance as they were under the Public Contracts (Scotland) Regulations 2012, as Directives 89/665/EEC and 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC (commonly referred to as the Remedies Directives) are unchanged.

Policy Objectives

12. Key elements of the rules surrounding the procurement of concession contracts, and areas where the Scottish Government has taken a key decision in terms of how to transpose a particular provision include:

Procedural rules

12.1 The duration of concession contracts must be limited. Where the contract lasts longer than five years, the maximum duration must not be longer than the time that a business could reasonably be expected to take to recoup its investment, together with a return on invested capital.

12.2 Contracting authorities awarding a concession contract must publish a notice advertising this, as well as a notice advertising the award of the contract. It must take appropriate measures to prevent, identify and remedy conflicts of interest.

12.3 Contracting authorities must, in carrying out a procurement for the award of a concession contract, treat businesses equally and without discrimination and act in a transparent and proportionate manner.

Taking social, environmental and employment issues into account

12.4 The Scottish Government has decided to allow contracting authorities to reserve some contracts to supported businesses, meaning that only supported businesses are allowed to bid for the contracts in question. However, in line with Directive 2014/24/EU and Directive 2014/25/EU, Directive 2014/23/EU has changed the previously established definition, for this purpose, of a supported business. Under the 2004 Procurement Directives, a contracting authority can choose to reserve contracts to supported businesses if at least 50 per cent of their workforce is disabled. Under the new rules established by Directive 2014/23/EU, a contracting authority will be able to reserve contracts to supported businesses or supported employment programmes whose main aim is the social and professional integration of disabled or disadvantaged persons, and where at least 30 per cent of the employees are disabled or disadvantaged persons.

12.5 This instrument makes clear that the contracting authority may consider factors involved in the specific process of production, provision or trading, or other processes for another stage of the life cycle of what is being provided, provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

Selection criteria and grounds for exclusion

12.6 A failure to meet tax or social security obligations becomes a mandatory ground for excluding a business from bidding, where this has been established by either a judicial or an administrative decision. A failure to meet these obligations, which has not been established by such a decision, but which the contracting authority can demonstrate by any appropriate means, remains a discretionary ground for exclusion.

12.7 The Scottish Government believes that blacklisting of workers is an unacceptable practice, and so has decided to use the flexibility offered by Directive 2014/24/EU to make it mandatory for contracting authorities to exclude businesses which have been found to have committed an act prohibited under the Employment Relations Act 1999 (Blacklists) Regulations 2010, or which have admitted doing so.

12.8 The Scottish Government has decided to allow contracting authorities, in exceptional circumstances, not to exclude a business which is in one of the situations which would normally require it to be excluded. The Scottish Government intends to address the exceptional nature of this derogation in statutory guidance to be published subsequent to the Procurement Reform (Scotland) Act 2014, however.

12.9 Directive 2014/23/EU introduces a new ground for exclusion which deals with breaches of social, environmental and employment law obligations. When a contracting authority can demonstrate by any appropriate means that a business has breached one of these obligations, it may, at its discretion, choose to exclude that business from bidding for contracts.

12.10 Directive 2014/23/EU also formally introduces the concept of “self-cleansing”. This means that a business which is in one of the situations which would

or may lead to it being excluded from bidding, may present evidence about remedial measures it has taken to prove its reliability. If the contracting authority considers these measures to be sufficient, the business should not be excluded.

12.11 In the absence of such acceptable “self-cleansing” measures, Directive 2014/23/EU says that member States must specify the maximum period of exclusion allowed. Directive 2014/23/EU specified that this maximum period can be no longer than five years from the date of the conviction for one of the offences specified in regulation 40(1), or three years from the date of the relevant event in all other cases. The Scottish Government puts a great deal of importance on ensuring that only suitable businesses can win public work, and so has set these time periods at the maximum allowed by Directive 2014/23/EU.

12.12 The one exception to these maximum periods of exclusion relates to exclusion for breaches of tax or social security obligations. Exclusion on this ground lasts until such time as the tax has been repaid, a binding agreement for its repayment has been entered into, or until the tax is otherwise no longer owed.

Contracts for care, support and other specific services

12.13 The instrument makes clear that only a light-touch regime will apply to the award of concession contracts for care, support and some other services.

Rules about communication

12.14 This instrument introduces a new requirement that all communication as part of a procurement procedure should be by electronic means, except in some specific cases, where this would not be practicable. However, the Scottish Government has chosen to delay the application of this requirement until 18 April 2017 for central purchasing bodies, and until 18 October 2018 for all other contracting authorities, in order to give all concerned sufficient time to prepare. This is in line with the dates by which SSI 2015/446 and SSI 2016/49 require electronic communication.

Consultation

13. The Scottish Government carried out a formal consultation¹ on its plans to transpose Directive 2014/23/EU from 9 February 2015 until 30 April 2015. 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

14. There is already public procurement legislation in place in Scotland; this means that the majority of changes introduced by the Directives will be to existing policy and we expect those changes to be positive overall. That is, these should help to simplify the existing public

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>

procurement rules further and also improve the accessibility of suppliers 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.

15. 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 coming days.

Financial Effects

16. There are no obligations placed on businesses under the new legislation. All obligations are placed on contracting authorities in terms of how they conduct their procurement activities. Though the new Directives contain changes, they are effectively modernising existing European rules for which there is already a routine and on-going cost for contracting authorities and utilities entities who are involved in procuring goods, services or works. It is, therefore, expected that any costs will be nominal and will be absorbed into existing work practices. Whilst contracting authorities will need to become accustomed to operating under the new rules, we are seeking to support a smooth transition by ensuring that training is available before the new rules come into force.

17. A final business and regulatory impact Assessment that builds on the partial assessment that was published in early 2015⁶ is being finalised, and will be published in the coming days.

Scottish Government
Scottish Procurement and Commercial Directorate
1 February 2016

⁵[http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/implementEUDirProcRef/pa
rtEQIA](http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/implementEUDirProcRef/pa
rtEQIA)

⁶ [http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/implementEUDirProcRef/P
artBRIA](http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/implementEUDirProcRef/P
artBRIA)