

EXECUTIVE NOTE

THE UTILITIES CONTRACTS (SCOTLAND) REGULATIONS 2012

S.S.I. 2012/89

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 Utilities Contracts (Scotland) Regulations 2006 (the “2006 Regulations”) (S.S.I. 2006/2) 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 2004/17/EC of the European Parliament and Council of 31st March 2004 co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 92/13/EEC of 25th February 1992 co-ordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, 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 the public sector) 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 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. Utilities 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.

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The Utilities Contracts (Scotland) Regulations 2012 – Consolidation – table of proposed changes and derivations

Regulation	Current wording	Proposed change
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 22(18); “contracting authority” has the meaning given to it by regulation 3 of the Public Contracts (Scotland) Regulations 2006 “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; substitute for Public Contracts (Scotland) Regulations 2012; “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 “disability” has the same meaning as in that Act; “EC Treaty” [...]	“disabled person” means any person recognised as disabled within the meaning of the Equality Act 2010 and “disability” has the same meaning as in that Act; delete definition
	“established” has the same meaning as in the Community Treaties “Office of Government Commerce” [...]	“established”, unless the context otherwise requires, has the same meaning as in the EU Treaties delete definition
	“Public Sector Directive” means [...]	Public Sector Directive means Directive 2004/18/EC of the European Parliament and of the

	public services contracts;	Council of 31st march 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended from time to time;
	“relevant standstill period” means – (i) where the notice referred to in regulation 33(1) or 45B(9)(a) is sent [...] “services provider” means a person who offers on the market services and – (a) who sought, who seeks or would have wished – [...]	(i) where the notice referred to in regulation 33(1) or 46(9)(a) is sent [...]
	“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 in accordance with regulation 22(19); or (b) has been informed that they have been excluded from the competition in accordance with regulation 22(19) and that exclusion – (i) is not prevented from being the subject of proceedings under Part 9 by virtue of regulation 45(5)(b); and [...]	“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 44(5)(b); and [...]
	insert “TFEU” means the Treaty on the Functioning of the European Union; The reference to the Treaty has been amended accordingly in regulations 6(e) and (i) and 30(8)(b).	

		The wording has been amended according to the Lisbon Terminology in regulations 2(1) (definition of 'established'); 9(3)(c); 11(20); 12(5); 24(3(a)); 36(1) and 44(1).
	"Utilities Directive" means [...] and postal services sectors;	"Utilities Directive" means Directive 2004/17/EC of the European Parliament and of the Council of 31st March 2004 co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as amended from time to time;
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)
2(3)		Subject to paragraph (5) [...]
2(4)		2(5)
6 General Exclusions		2(6)
6(p)		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.
9 Exclusion of contracts where activity is directly exposed to competition		
9(1)(a)		for "Government Office of Commerce" substitute "Cabinet Office"
9(1)(c)(ii)		for "Government Office of Commerce" substitute "Cabinet Office"
10(1) Reserved Contracts		in paragraph (1), omit "and "supported businesses" is interpreted accordingly"; "and "supported employment programmes" is interpreted accordingly" and "and supported factories is interpreted accordingly".
11 (11)(b)(ii) Thresholds	the financial year if that is longer than 12 months.	the financial year where the end of that financial year is later than 12 months after the first date of the delivery or the first date on which the services will be performed, as the case may be.

19 Dynamic purchasing systems		
19(14A)		19(15)
19(15)		19(16)
19(16)		19(17)
19(17)		19(18)
26 Criteria for the rejection of economic operators		
26(1)	Subject to paragraph (2), where a utility is a contracting authority, it shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the utility 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—	Subject to paragraph (2), where a utility is a contracting authority, it must treat as ineligible and must not select an economic operator in accordance with these Regulations if the utility 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—
26(1)(a)	the common law offence of conspiracy where that conviction relates to participation in a participation in a criminal organisation as defined in Article 2(1) of Council Framework Decision 2008/841/JHA	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);
26(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(a) or section 1 of the Prevention of Corruption Act 1906(b), where the offence relates to active corruption as defined in Article 3 of the Council Act of 26 May 1997(c) and Article 3(1) of Council Joint Action 98/742/JHA(d)
26(1)(c)	bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003;	bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003(a) where the offence relates to active corruption, or bribery within the meaning of sections 1 or 6 of the Bribery Act 2010(b);
26(1)(d)(iv)	fraudulent trading within the meaning of section 993 of the Companies Act 2006;	fraudulent trading within the meaning of section 458 of the Companies Act 1985 (a) or section 993 of the Companies Act 2006 (b);

26(1)(d)(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);
26(1)(f)	money laundering within the meaning of the Money Laundering Regulation 2007; or	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
26(5)(h)	is guilty of serious misrepresentation in providing any information required of that economic operator under this regulation	is guilty of serious misrepresentation in providing any information referred to in this regulation or regulation 24 to 27 or has not provided such information in response to a request of a contracting authority
34 Design contests		
34(4)		deleted in 2007
34(5)		34(4)
34(6)		34(5)
34(7)		34(6)
34(8)		34(7)
34(9)		34(8)
34(10)		34(9)
34(11)		34(10)
34(12)		34(11)
34(13)		34(12)
34(14)		34(13)
34(15)		34(14)
34(16)		34(15)
34(4)(e)(i)		for "Government Office of Commerce" substitute "Cabinet Office"
34(4)(e)(iii)(a)		for "Government Office of Commerce" substitute "Cabinet Office"
39 Provision of reports		
39(3)		for "Government Office of Commerce" substitute "Cabinet Office"
39(5)		for "Government Office of Commerce" substitute "Cabinet Office"
44	attestation	deleted in 2009
45	Enforcement of obligations	44
	old 45(6)(a)	44(6)(a)

	in the case of proceedings seeking an ineffectiveness order (as defined in regulation 45B) – (i) where paragraph (8) applies, [...]	in the case of proceedings seeking an ineffectiveness order (as defined in regulation 46) – (i) where paragraph (7) applies, [...]
	old 45(6)(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 good reason for extending the period within which proceedings may be brought.	44(6)(b) 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 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.
	old 45(7)	delete
	(8)	(7)
	(9)	(8)
	(10)	(9)
45A	Powers and duties of the court	45
	old 45A(1)(b) if satisfied that a decision or action taken by a utility was in breach of the duty owed under regulation 45(1) or (2), may – [...]	45(1)(b) if satisfied that a decision or action taken by a utility was in breach of the duty owed under regulation 44(1) or (2), may – [...]
	old 45A(3) Where the Court is satisfied that regulation 45B(7)(a) applies [...]	45(3) Where the Court is satisfied that regulation 46(7)(a) applies [...]
	old 45A(7) Subject to paragraph (3) and regulation 45B, [...] breach of duty owed under regulation 45(1) or (2) [...]	45(7) Subject to paragraph (3) and regulation 46, [...] breach of duty owed under regulation 44(1) or (2) [...]
	old 45A(9) [...] in accordance with regulation 45(1) or (2)	45(9) [...] in accordance with regulation 44(1) or (2)
45B	Ineffectiveness Orders	46
	old 45B(17) Regulation 45A(5) and (6) applies to an order made under paragraph (15)(b) as it applies to an order made under regulation	46(17) Regulation 45(5) and (6) applies to an order made under paragraph (15)(b) as it applies to an order made under regulation 45(3)(b).

	45A(3)(b). old 45B(18) In proceedings under this Part to which regulation 45(6)(b) applies, the Court does not have power to make an ineffectiveness order if the proceedings would be incompetent if regulation 44(6)(a) applied.		4(18) In proceedings under this Part to which regulation 44(6)(b) applies, the Court does not have power to make an ineffectiveness order if the proceedings would be incompetent if regulation 44(6)(a) applied.
45C	Financial Penalties		47
46	conciliation		deleted in 2009
47	Revocation		now 48 Revocations Subject to regulation 49, the instruments specified in column 1 of Part A of Schedule 5 (which have the numbers specified in column 2) are revoked to the extent specified in column 3 of that paragraph.
48	Savings and transitional provisions		now 49 (1) Where a utility has commenced a contract award procedure or a design contest before 1st May March 2012, the Regulations specified in regulation 48 continue to have effect on and after 1st May 2012 in relation to that contract award procedure or design contest, as if those Regulations had not been revoked in accordance with regulation 48. (2) For the purposes of paragraph (1), a procedure or contest has been commenced before 1st May 2012 if, before that date— (a) a call for competition has been made in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed contract, framework agreement of dynamic purchasing system; (b) in any case where there is no requirement to make a call for competition, the utility has despatched any form of advertisement seeking offers or expressions of interest in a proposed contract, framework agreement or dynamic purchasing system; (c) where there is no such advertising, the utility has contacted any economic operator in order to— (i) seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system; or (ii) respond to an unsolicited expression of interest or offer in respect of a proposed contract, framework agreement or dynamic purchasing system; or (d) the utility has sent a notice to the Official Journal in accordance with the Utilities Contracts (Scotland) Regulations 2006 in order to hold a design contest. (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>50</p> <p>Consequential amendments The instruments specified in column 1 of Part B of schedule 5 (which have the numbers specified in column 2) are amended in accordance with the provisions in column 3 of that Part.</p>