

FINAL BUSINESS AND REGULATORY IMPACT ASSESSMENT

1. Title of proposal

Amendments to, and the consolidation of, the Public Contracts (Scotland) Regulations 2006¹ and the Utilities Contracts (Scotland) Regulations 2006² (the “2006 Regulations”).

2. Purpose and intended effect

Context

The public sector spends over £9 billion each year on goods, works and services. Public procurement therefore has a key role to play in supporting sustainable economic growth in Scotland and delivering high quality services to the people of Scotland.

Encouraging a competitive supply base is essential if the public sector is to achieve value for money in its purchases. Businesses rightly expect that public contracts will be awarded fairly, transparently and on merit and in compliance with EU procurement law.

EU procurement law is currently given effect in Scots law by the Public Contracts (Scotland) Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006.

Objectives

Amendments are required to the 2006 Regulations to take account of the judgment of the Court of Justice of the European Union (CJEU) in *Uniplex v NHS Business Services Authority*³. 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 2010⁴ and new offences relating to serious organised crime introduced by the Criminal Justice and Licensing (Scotland) Act 2010⁵. These amendments will ensure that public bodies and utilities 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.

Finally, because the 2006 Regulations have already been amended six times since their introduction in January 2006, we are taking this opportunity to consolidate the Regulations.

¹ S.S.I. 2006/1: <http://www.legislation.gov.uk/ssi/2006/1/contents/made>

² S.S.I 2006/2: <http://www.legislation.gov.uk/ssi/2006/2/contents/made>

³ (C-406/08): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0406:EN:HTML>

⁴ <http://www.legislation.gov.uk/ukpga/2010/23/contents>

⁵ <http://www.legislation.gov.uk/asp/2010/13/contents>

Background

Proceedings in Scotland relating to breaches of EU procurement law

The 2006 Regulations provide for court proceedings relating to breaches of EU procurement law to be brought in the Sheriff Court or the Court of Session and state that, in general, court proceedings must be brought “promptly and in any event within 3 months from the date when grounds for the bringing of proceedings first arose”.

In the *Uniplex* case, the CJEU held that the requirement to bring proceedings “promptly” is not compatible with EU law because it can be appraised in a discretionary manner and so gives rise to uncertainty. The CJEU further held that, in order to guarantee the effectiveness of the remedy, the period for bringing proceedings should start from the date on which the challenger knew, or ought to have known, of the infringement rather than the date when grounds for the bringing of proceedings first arose.

The amendments to the 2006 Regulations will remove uncertainty around the current requirement to bring court proceedings “promptly” and change the start date for bringing proceedings.

Exclusion of tenderers which have been convicted of an offence relating to bribery or serious organised crime from the procurement process

The 2006 Regulations require public bodies and utilities to exclude potential tenderers from the procurement process if they have actual knowledge that the business or its directors or any other person who has powers of representation, decision or control over it, has been convicted of 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 or bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003.

The Bribery Act 2010 introduced new offences relating to the bribery of another person (section 1) and the bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business (section 6). The amendments to the 2006 Regulations will ensure that public bodies and utilities exclude potential tenderers from the procurement process if they have actual knowledge that the business or its directors or any other person who has powers of representation, decision or control over it, has been convicted of either of these offences.

The 2006 Regulations also require public bodies and utilities to exclude potential tenderers from the procurement process if they have actual knowledge that the business or its directors or any other person who has powers of representation, decision or control over it, has been convicted of the common law offence of conspiracy where that conspiracy relates to participation in a criminal organisation.

The Criminal Justice and Licensing (Scotland) Act 2010 introduced new offences relating to involvement in serious organised crime (section 28) and directing serious organised crime (section 30). The amendments to the 2006 Regulations will ensure that public bodies and utilities exclude potential tenderers from the procurement process if they have actual

knowledge that the business or its directors or any other person who has powers of representation, decision or control over it, has been convicted of either of these offences.

Consolidation of the Regulations

We are mindful of the Scottish Parliament's view that Scottish Statutory Instruments should not be amended substantively more than five times.

Because the 2006 Regulations have already been amended six times since their introduction in January 2006, we are taking this opportunity to consolidate the Regulations.

We have used the consolidation exercise to make a number of minor amendments to the drafting of the Regulations.

Rationale for Government intervention

Government intervention is necessary to bring the 2006 Regulations in line with the CJEU's judgment in the *Uniplex* case and to ensure that the Regulations make reference to the new offences introduced by the Bribery Act 2010 and the Criminal Justice and Licensing (Scotland) Act 2010.

The consolidation exercise will make it easier for procurement professionals and other stakeholders to consult and make reference to the Regulations.

3. Consultation

Within government

The following government agencies and departments have been consulted in the preparation of this Business and Regulatory Impact Assessment (BRIA):

- Better Regulation and Industry Engagement Branch, Scottish Government has provided advice on the preparation of this BRIA;
- Justice Directorate, Scottish Government has provided advice on the Scottish courts and legal system and the new bribery legislation;
- Organised Crime Unit, Scottish Government has provided advice on the new offences relating to serious organised crime;
- Legal Aid Team, Scottish Government has provided advice on the implications for the legal aid fund;
- Office of Fair Trading has provided advice on the competition assessment;
- Scottish Government Legal Directorate has provided advice on the legal issues raised in this consultation; and
- Efficiency and Reform Group, Cabinet Office has contributed to discussions on implementation of the CJEU's judgment in the *Uniplex* case from UK Government's perspective⁶.

⁶ The Cabinet Office leads transposition of EU Directives on Public Procurement for England, Wales and Northern Ireland. Equivalent changes were made to the Regulations applying to those jurisdictions in October 2011: <http://www.legislation.gov.uk/uksi/2011/2053/made>.

Public consultation

Public consultation on the proposed amendments to the 2006 Regulations and a partial BRIA took place in December 2010. We also consulted directly with stakeholders who have previously expressed an interest in being informed of changes to procurement policy and legislation via a Scottish Procurement Policy Note (SPPN)⁷.

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 webpages⁸. We have also published a consultation report⁹.

Business

Consultation with business on the proposed amendments to the 2006 Regulations 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. Its membership at the time of the consultation included:

- Scottish Trade Unions Congress;
- Scottish Chambers of Commerce;
- Community Care Providers Scotland;
- Institute of Directors;
- Glasgow Council for the Voluntary Sector;
- Social Firms Scotland;
- CBI Scotland;
- Scottish Council for Development and Industry; and
- Federation of Small Businesses.

We also asked the above organisations to help us to locate businesses which may wish to engage in face to face discussions with us about the proposed amendments.

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](#).

4. Options

Option 1 – do nothing

Non-implementation of the CJEU's judgment in the *Uniplex* case would trigger infraction proceedings and the UK could be liable for substantial penalties. The Scottish Ministers are

⁷ Scottish Procurement produces Scottish Procurement Policy Notes on an ad hoc basis on current procurement policy issues. SPPNs are circulated widely to stakeholders and are also published on our website: www.scotland.gov.uk/Topics/Government/Procurement.

⁸ <http://www.scotland.gov.uk/Publications/2011/03/31072706/0>

⁹ <http://www.scotland.gov.uk/Publications/2012/01/9231/downloads>

obliged by the terms of the Scotland Act to fulfil their obligations under EU law. We therefore intend to implement the CJEU's judgment in line with our obligations under the Treaty on the Functioning of the European Union and the Scotland Act.

Failure to amend the 2006 Regulations to make reference to the new offences introduced by the Bribery Act 2010 would mean that public bodies and utilities would be required to exclude tenderers convicted of existing offences relating to bribery and corruption but would not be required to exclude tenderers convicted of the new offences under the 2010 Act.

Failure to amend the 2006 Regulations to make reference to the new offences introduced by the Criminal Justice and Licensing (Scotland) Act 2010 would mean that public bodies and utilities would be required to exclude tenderers convicted of the existing common law offence of conspiracy where that conspiracy relates to participation in a criminal organisation but would not be required to exclude tenderers convicted of the new offences under the 2010 Act.

Option 2 – amend and consolidate the 2006 Regulations

It is necessary to amend the 2006 Regulations to implement the CJEU's judgment in the *Uniplex* case and ensure that public bodies and utilities take the correct approach to excluding tenderers which have been convicted of the new bribery or serious organised crime offences from the procurement process.

Consolidating the 2006 Regulations at the same time will make it easier for procurement professionals and other stakeholders to consult and make reference to the Regulations.

Option 3 – amend the 2006 Regulations without consolidation

The 2006 Regulations have been amended six times since their introduction in January 2006.

Further amendments to the 2006 Regulations without consolidation would make it harder for procurement professionals and other stakeholders to consult and make reference to the Regulations.

Sectors and groups affected

The following are likely to be affected by changes to legal proceedings in Scotland relating to breaches of EU procurement law: public bodies and utilities whose procurement of goods, works and services is governed by the 2006 Regulations; contractors, service providers and suppliers to the public sector and utilities in Scotland; legal firms; and the courts.

Changes to the list of offences resulting in the mandatory exclusion of tenderers will require public bodies and utilities to update their tender and contract documentation and will, in future, result in the exclusion of any potential tenderer which has been convicted of the new bribery or serious organised crime offences.

Benefits – option 1

None. In our view, failure to implement the CJEU's judgment in the *Uniplex* case or to amend the 2006 Regulations to make reference to the new offences introduced by the Bribery

Act 2010 and Criminal Justice and Licensing (Scotland) Act 2010 would result in uncertainty for all parties.

Benefits – option 2

In amending the 2006 Regulations to take account of the *Uniplex* judgment, we have tried to ensure an appropriate balance between the need for certainty and the need to give challengers sufficient time to bring court proceedings. Removing the uncertainty around the current requirement to bring proceedings “promptly” will benefit all parties. Changing the start date so that the period for bringing proceedings starts from the date on which the challenger knew or ought to have known of the breach will also promote greater certainty.

Respondents to the consultation on the proposed amendments and partial BRIA commented that the amendments will: deliver increased certainty for public bodies and suppliers; allow contracts to commence on a firmer commercial footing; and assist in striking a balance between suppliers’ rights to challenge a breach of EU procurement law and public bodies’ need to maintain confidence in the procurement process.

Amending the 2006 Regulations to take account of the new offences introduced by the Bribery Act 2010 and the Criminal Justice and Licensing (Scotland) Act 2010 will ensure that tenderers convicted of the new offences are not allowed to participate in public procurement processes.

Respondents to the consultation on the proposed amendments and partial BRIA commented that the amendments will ensure that suppliers with relevant convictions are excluded from the procurement process, to the benefit of public bodies and law-abiding suppliers and increase overall confidence in the fairness and transparency of the procurement process.

Consolidating the 2006 Regulations at the same time will make it easier for procurement professionals and other stakeholders to consult and make reference to the Regulations.

Benefits – option 3

The benefits of amending the 2006 Regulations as described under “option 2” would be delivered. However, this option would result in a seventh set of amending Regulations, making it harder for procurement professionals and other stakeholders to consult and make reference to the Regulations.

Costs – option 1

As stated above, non-implementation of the CJEU’s judgment in the *Uniplex* case would trigger infraction proceedings and the UK could be liable for substantial penalties.

Costs – option 2

In our view, the proposed amendments to the 2006 Regulations will not impact on the costs to business or the third sector of participating in procurement processes or the cost of bringing court proceedings relating to a breach of EU procurement law.

Public bodies and utilities will be required to update their tender and contract documentation to reflect the new bribery and serious organised crime offences. However, as much of this documentation is standardised, we do not believe that this will result in significant costs to the public sector.

Respondents to the consultation on the proposed amendments and partial BRIA commented that, in their view, the proposed amendments will not impose material additional costs on public bodies or utilities.

Costs – option 3

As for “option 2”.

5. Scottish Firms Impact Test

As stated above, consultation with Scottish firms on the proposed amendments to the 2006 Regulations 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. Its membership at the time of the consultation included:

- Scottish Trade Unions Congress;
- Scottish Chambers of Commerce;
- Community Care Providers Scotland;
- Institute of Directors;
- Glasgow Council for the Voluntary Sector;
- Social Firms Scotland;
- CBI Scotland;
- Scottish Council for Development and Industry; and
- Federation of Small Businesses.

We also asked the above organisations to help us to locate businesses which may wish to engage in face to face discussions with us about the proposed amendments.

We did not receive any responses to the consultation from the above organisations, nor did any businesses respond to our invitation for face to face discussions. However, other respondents to the consultation on the proposed amendments and partial BRIA commented that they would not expect the proposed amendments to impact adversely on the competitiveness of Scottish firms.

Competition assessment

EU procurement law is intended to facilitate greater competition by opening up markets. In our view, the amendments to, and consolidation of, the 2006 Regulations will not impact negatively on competition within the relevant markets.

We have confirmed this assumption with the Office of Fair Trading.

“Test Run” of business forms

The amendments to the 2006 Regulations will not introduce any statutory business forms.

6. Legal Aid Impact Test

The majority of those seeking remedies for breach of EU procurement law will not be individuals, in which case legal aid will not be available. In our view, there will therefore not be a significant impact on the legal aid fund.

We have confirmed this assumption with the Scottish Government's Legal Aid Team.

7. Enforcement, sanctions and monitoring

Public bodies and utilities are responsible for ensuring that their procurement activity complies with the 2006 Regulations and that the decisions they take in the context of their procurement activity are in accordance with the 2006 Regulations. Scottish Procurement is not responsible for monitoring compliance.

Contractors, suppliers or services providers can bring proceedings relating to a breach of the 2006 Regulations in the Sheriff Court or the Court of Session. The available legal remedies vary according to the nature of the breach and the timing of the proceedings. Contractors, suppliers or service providers can also make a formal complaint to the European Commission.

8. Implementation and Delivery Plan

We intend to issue a 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.

9. Post-implementation Review

We continually review the effectiveness of the Scottish Procurement Regulations in giving effect to EU procurement law. The European Commission also has a role in monitoring Member States' compliance with EU procurement law. As part of its role, it assesses whether EU procurement law is fully implemented in national legislation.

In addition, the European Commission is undertaking a review of public procurement and recently published legislative proposals which are expected to be adopted by the end of 2012 and transposed into national legislation by June 2014. We therefore anticipate a comprehensive review of the Scottish Procurement Regulations by 2014.

10. Summary and recommendation

In summary, we believe that the benefits associated with the amendments to, and consolidation of, the 2006 Regulations outweigh the costs and therefore intend to proceed with both.

11. Declaration and publication

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

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Cabinet Secretary for Infrastructure and Capital Investment

March 2012

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