

POLICY NOTE

THE PUBLIC CONTRACTS (SCOTLAND) REGULATIONS 2015

SSI 2015/446

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. This instrument revokes and replaces the Public Contracts (Scotland) Regulations 2012. It gives effect in Scots law to: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014; Directive 89/665/EEC of 21 December 1989 on the co-ordination of the laws, regulation and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended; and Directive 2007/66/EC of the European Parliament and of the Council of 11 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.

3. This instrument will be followed in early 2016 by further instruments to give effect to Directives 2014/25/EU of the European Parliament and of the Council of 26 February 2014, and 2014/23/EU of the European Parliament and of the Council of 26 February 2014, which regulate the award of utilities contracts and concession contracts, respectively. Another instrument will bring forward regulations under the Procurement Reform (Scotland) Act 2014. These will be complemented by the publication of statutory guidance.

4. This instrument will have effect from 18 April 2016, which is the date by which all member States of the European Union must have implemented Directive 2014/24/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.

5. Directive 2014/24/EU sets out the rules governing the procurement of supplies, services and works which have an estimated value equal to or greater than the relevant thresholds, by contracting authorities. The European Commission sets these thresholds every two years, and fixes them in all currencies of the European Union. For the procurement of works, this threshold will initially be £4,104,394. For the procurement of supplies and services, the threshold will initially be £106,047 if being procured by a central government body, or £164,176 if being procured by another contracting authority.

6. This instrument clarifies how contracting authorities should calculate the estimated value of a 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.

7. The instrument follows Directive 2014/24/EU in setting out 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 in the Public Contracts (Scotland) Regulations 2012, which gave effect in Scots law to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004, on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

8. Part 3 of the Regulations makes provision for remedies in the case of breach of the requirements laid down by the Regulations. The remedies 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

9. Areas of key changes to the rules surrounding public procurement, or where the Scottish Government has taken a key decision in terms of how to transpose a particular provision include:

Procedural rules

9.1 The minimum time limits for procurement exercises have been reduced, meaning that contracts can be put in place more quickly.

9.2 The concept of an “Innovation Partnership” is introduced, increasing the scope to use public procurement to develop new solutions to meet authorities’ requirements.

9.3 The instrument clarifies that contracting authorities may engage in pre-market consultation to inform how they approach the procurement exercise.

9.4 The rules on the use of Dynamic Purchasing Systems have been simplified.

9.5 The Scottish Government has chosen to use a flexibility within Directive 2014/24/EU to allow sub-central contracting authorities to use a Prior Information Notice as a call for competition, potentially simplifying procedures further.

9.6 Contracting authorities must now consider dividing their requirements into smaller lots, which might encourage smaller businesses to bid. Where a contracting authority decides not to do this, it must explain why it has not done so.

Taking social, environmental and employment issues into account

9.7 Directive 2014/24/EU requires member States to take appropriate measures to ensure that businesses comply with their obligations in social, environmental and employment law whilst performing public contracts. The Scottish Government has

reflected that in this instrument by placing a requirement on authorities to place conditions in their contracts to this effect.

9.8 The Scottish Government has decided to continue 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, Directive 2014/24/EU has changed the definition of supported business for this purpose. Currently, 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 2014/24/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.

9.9 This instrument makes clear that the technical specifications set out by a contracting authority may now refer to any stage of the life cycle of what is being bought. It also 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, even where such factors do not form part of their material substance.

9.10 The Scottish Model of Procurement emphasises that value for money is a result of an appropriate balance between cost, quality and sustainability. The Scottish Government has therefore decided to use the flexibility offered by Directive 2014/24/EU to make it clear in this instrument that contracts should never be awarded on the sole basis of lowest price or lowest cost.

Selection criteria and grounds for exclusion

9.11 Directive 2014/24/EU introduces a cap on the minimum level of annual turnover which a contracting authority can require a business to have in order to bid. This will now be limited to no more than two times the value of the contract, apart from in exceptional circumstances. This should have the effect of making it easier for smaller businesses to bid for public work.

9.12 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. Previously, the decision of whether or not to exclude a business on this ground was at the discretion of the contracting authority. 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.

9.13 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.

9.14 The Scottish Government has decided to maintain the right of 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.

9.15 Directive 2014/24/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.

9.16 Directive 2014/24/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.

9.17 In the absence of such acceptable “self-cleansing” measures, Directive 2014/24/EU says that member States must specify the maximum period of exclusion allowed. Directive 2014/24/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 58(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 2014/24/EU.

9.18 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

9.19 This instrument introduces some changes to the rules for the award of contracts for care, support and some other services. The key change is the introduction of a new, lighter-touch regime, where the value of these contracts exceeds €750,000.

Rules about communication

9.20 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. These are the dates by which Directive 2014/24/EU requires electronic communication.

9.21 Directive 2014/24/EU also introduces the concept of an European Single Procurement Document (ESPD). This will allow businesses to complete one document containing their basic selection and exclusion information and use this in competitions across Europe, building on the progress made in Scotland through the development of the standard pre-qualification questionnaire. This is a significant change, and so the Scottish Government has decided to make use of the flexibility offered by Directive 2014/24/EU to delay the need to provide the ESPD in electronic format only, until 18 April 2018, and to delay until 18 October 2018 a provision which says that contracting authorities may not require businesses to send to them copies of supporting documents which they already possess.

Consultation

10. The Scottish Government carried out a formal consultation¹ on its plans to transpose Directive 2014/24/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

11. 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 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.

12. 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.

Financial Effects

13. There are no obligations placed on businesses under the new legislation. All obligations are placed on public bodies 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 public bodies 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.

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>

14. 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 early 2016, alongside regulations giving effect to Directives 2014/25/EU and 2014/23/EU.

Scottish Government
Scottish Procurement and Commercial Directorate

18 December 2015

⁶ <http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/implementEUDirProcRef/PartBRIA>