

POLICY NOTE

THE UTILITIES CONTRACTS (SCOTLAND) REGULATIONS 2016

SSI 2016/49

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 Utilities Contracts (Scotland) Regulations 2012. It gives effect in Scots law 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 repealing Directive 2004/17/EC; and Council Directive 92/13/EEC of 25 February 1992 on coordinating 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.

3. This 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, which regulates the award of public contracts, 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. A further instrument will be laid shortly to give effect to Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, which regulates the award of concession contracts.

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 2014/25/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 2014/25/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 utilities. 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 £328,352.

6. This instrument clarifies how utilities should calculate the estimated value of a contract for the purpose of determining whether or not these Regulations apply, sets out various exclusions from the application of these Regulations, and sets out the tests which utilities 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 2014/25/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 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.

8. Part 5 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 Utilities Contracts (Scotland) Regulations 2012, as Council Directive 92/13/EEC, as amended, is unchanged by Directive 2014/25/EU.

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 utilities’ requirements.

9.3 The instrument clarifies that utilities 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.

Taking social, environmental and employment issues into account

9.5 Directive 2014/25/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 utilities to place conditions in their contracts to this effect.

9.6 The Scottish Government has decided to continue to allow utilities to reserve some contracts to supported businesses, meaning that only supported businesses are allowed to bid for the contracts in question. However, Directive 2014/25/EU has changed the definition of supported business for this purpose. Currently, a utility 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 2014/25/EU, a utility 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.

9.7 This instrument makes clear that the technical specifications set out by a utility may now refer to any stage of the life cycle of what is being bought. It also makes clear that the utility 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 (provided that they are linked to the subject-matter of the contract and proportionate to its value and objectives).

9.8 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 2014/25/EU to make it clear in this instrument that contracts awarded by utilities which are also contracting authorities or public undertakings should never be awarded on the sole basis of lowest price or lowest cost. This restriction does not apply to utilities which are not contracting authorities or public undertakings, i.e. private sector bodies.

Selection criteria and grounds for exclusion

9.9 Directive 2014/25/EU on the procurement of utilities contracts sets the rules for the selection and exclusion of bidders by reference to Directive 2014/24/EU, on the procurement of public contracts. This instrument therefore says that utilities may establish objective rules and criteria for selection and exclusion, and that these may include both the selection criteria referred to in regulation 59, and the grounds for exclusion set out in regulation 58 of the Public Contracts (Scotland) Regulations 2015, on the terms set out in those regulations.

9.10 Directive 2014/25/EU therefore introduces a cap on the minimum level of annual turnover which a utility 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 work.

9.11 Directive 2014/25/EU clarifies that where the utility is also a contracting authority, the grounds for exclusion which are mandatory under Directive 2014/24/EU are also mandatory for those utilities which are contracting authorities. This includes a failure to meet tax or social security obligations, 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 utility. A failure to meet these obligations, which has not been established by such a decision, but which the utility can demonstrate by any appropriate means, remains a discretionary ground for exclusion.

9.12 The Scottish Government believes that blacklisting of workers is an unacceptable practice, and so has also decided to use the flexibility offered by Directive 2014/25/EU to make it mandatory for utilities which are contracting authorities to exclude businesses which have been found (by final judicial decision) to

have committed an act prohibited under the Employment Relations Act 1999 (Blacklists) Regulations 2010, or which have admitted doing so.

9.13 The Scottish Government has decided to maintain the right of utilities which are also 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.

9.14 Directive 2014/24/EU introduces a new ground for exclusion which deals with breaches of social, environmental and employment law obligations. When a utility 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.

9.15 Whereas this instrument makes some grounds for exclusion mandatory in respect of procurement exercises carried out by utilities which are also contracting authorities, it reflects Directive 2014/25/EU in leaving all grounds for exclusion at the discretion of utilities which are not contracting authorities, i.e. private utilities.

9.16 Because Directive 2014/25/EU simply says that potential grounds for exclusion should apply on the same terms as set out in Directive 2014/24/EU, this instrument says that the grounds for exclusion should apply on the same terms as set out in the Public Contracts (Scotland) Regulations 2015. This has the effect of formally introducing 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 utility considers these measures to be sufficient, the business should not be excluded.

9.17 It also means that in the absence of such acceptable “self-cleansing” measures, the maximum period of exclusion is five years from the date of the conviction for one of the offences specified in regulation 58(1) of the Public Contracts (Scotland) Regulations 2015, 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 (including, where applicable, any interest accrued or fines), 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 €1 million.

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 utilities (save for certain provisions which Directive 2014/25/EU requires to be by electronic means from 18 April 2016), in order to give all concerned sufficient time to prepare. These are the dates by which Directive 2014/25/EU requires electronic communication.

Consultation

10. The Scottish Government carried out a formal consultation¹ on its plans to transpose Directive 2014/25/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 the coming days.

Financial Effects

13. There are no obligations placed on businesses bidding for contracts under the new legislation. All obligations are placed on utilities 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 utilities which 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.

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 the coming days.

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/pa rtEQIA>

Scottish Government
Scottish Procurement and Commercial Directorate

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