

Update on the implementation of the provisions of the Procurement Reform (Scotland) Act 2014 and the European Single Procurement Document

Purpose

1. This note tells you about changes to the rules on public procurement in Scotland arising from:
 - The Procurement Reform (Scotland) Act 2014 (Commencement No. 3 and Transitional Provisions) Order 2016
 - The Procurement (Scotland) Regulations 2016
 - The introduction of the European Single Procurement Document

Key Points

2. The Commencement Order No 3, commences all remaining provisions of the Procurement Reform (Scotland) Act 2014, that have not yet been commenced so far. Almost all of the remaining provisions of the Act will come into force on 18 April 2016.
3. The new Regulations¹, which give effect to provisions of the Procurement Reform (Scotland) Act 2014, have been laid in the Scottish Parliament and, subject to Parliament's agreement, will take effect on 18 April 2016 – the same day that Regulations transposing the new EU Procurement Directives will enter into force.
4. SPPN 6/2015 provided specific information on other changes to the rules on public procurement in Scotland arising from three new EU procurement directives and the Procurement Reform (Scotland) Act 2014. It also provided information on plans to publish statutory guidance and proposed training provision to take account of the changes.
5. The European Single Procurement Document, introduced by the new EU Procurement Directive for contracts worth more than the EU thresholds, represents a potentially significant change to selection processes.

¹ <http://www.legislation.gov.uk/sdsi/2016/9780111030868>

Changes to the procurement rules brought about by the new Regulations

6. The Procurement (Scotland) Regulations 2016 do not govern all procedures in a procurement process. They give effect to provisions of the Procurement Reform (Scotland) Act 2014, which state that Ministers may make further provision for certain issues covered by the Act.
7. They will ensure that the rules applying to lower value contracts regulated by the Procurement Reform (Scotland) Act 2014 are comparable with the equivalent rules for higher value contracts regulated by the Public Contracts (Scotland) Regulations 2015. This is intended to ensure consistency and clarity. This approach is in keeping with the views of those who responded to the public consultation on the changes to procurement legislation last year.
8. The Procurement (Scotland) Regulations 2016 provide further detail in the following areas:
 - how the estimated value of a contract is to be determined;
 - the provisions of the Act which apply to the establishment and operation of dynamic purchasing systems;
 - what is a health or social care service for the purposes of the Act;
 - the circumstances in which a contracting authority may award a contract under the Act without competition;
 - details regarding the publication of contract opportunity notices, prior information notices and contract award notices on the Public Contracts Scotland website;
 - the circumstances under which a contracting authority must exclude a business from a competition under the Act;
 - the circumstances in which a business may or may not be excluded from bidding for a contract under the Act; and
 - the rules for drafting technical specifications for contract documents.
9. The Scottish Government will provide a package of support for the introduction of the new legislation. This will include e-learning which will be available on the Procurement Journey by the end January 2016. The e-learning provides detailed information on the key changes to the Scottish procurement legislation. The e-learning will be supplemented by face to face seminars for public purchasers and

further information on these will be available through the usual communications channels.

European Single Procurement Document

10. The 2014 EU Procurement Directives made provision for the introduction of a European Single Procurement Document (ESPD), which is intended to replace the requirement for suppliers to provide up-front evidence or certificates by allowing them to self-declare that they:
 - do not fall within an exclusion clause (or, if they do, they can demonstrate that they have taken self-cleaning measures);
 - meet the relevant selection criteria.
11. The European Commission has recently published an implementing regulation establishing the standard form for the ESPD², the implications of which we are now assessing as a matter of urgency. Such a major change to the selection process will make disruption inevitable, however Scottish Government officials are working to minimise any disruptive impact arising from the ESPD's introduction.
12. The ESPD is intended by the European Commission to remove some of the barriers to participation in public procurement, especially for SMEs.
13. The ESPD will be mandatory for use by contracting authorities and will replace the standard pre-qualification questionnaire (SPQQ), and any other PQQs that Scottish contracting authorities are currently using. Work is currently being undertaken to map the new ESPD questions to the existing sPQQ questions, in order to minimise the impact on suppliers that have already stored information on the electronic version of the sPQQ contained within the PCS-Tender system.
14. As the ESPD will be generic and the same for all of the EU member States, buyers will have to set out the specific requirements and minimum standards into their contract notices. Suppliers will use the ESPD response to indicate whether or not they have complied with the minimum standards and any other requirements set out in the contract notice.
15. All Scottish contracting authorities must use the ESPD form from 18 April 2016, the date of entry into force of the Public Contract (Scotland) Regulations 2015. The requirement to publish the ESPD exclusively in an electronic format, however, has been postponed until 2018.

² <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0007>

16. In summary, contracting authorities:

- must issue and accept the ESPD as part of the initial selection process;
- must request a separate ESPD from other entities upon whose capability and capacity the main bidder relies in order to meet the selection criteria, and must require a contractor to replace such an entity if it does not meet a relevant selection criterion, or if it falls foul of any of the mandatory grounds for exclusion (authorities may also require the entity to be replaced if it falls foul of any of the discretionary grounds for exclusion);
- may request a separate ESPD from sub-contractors (other than those on whose capability and capacity the main bidder relies in order to meet the selection criteria). In such a case, contracting authorities must require the replacement of a sub-contractor which falls foul of any of the mandatory grounds for exclusion, and may require the replacement of a sub-contractor which falls foul of any of the discretionary grounds for exclusion;
- must request a separate ESPD from each member of a consortium, to ensure all members meet the relevant selection criteria and comply with exclusion grounds;
- must ask the successful bidder for the relevant evidence and certificates prior to awarding the contract (except in respect of call-off contracts from framework agreements). or before the ITT stage of the restricted procedure as part of their due diligence process;
- may ask for evidence and certificates at any stage of the process if they consider it necessary to ensure the proper conduct of the process.

17. Further advice on updates to the procurement tools and systems provided by the Scottish Government and practical guidance will follow as soon as possible.

Dissemination

18. Please bring this SPPN to the attention of all relevant staff within your field of responsibility to whom it may be of interest.

Enquiries

19. Any enquiries in relation to this guidance should be addressed to Scottish Procurement: Scottishprocurement@gov.scot

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