A short guide to:  
Public procurement reform in Scotland

This short guide provides an overview of the new Public Contracts (Scotland) Regulations 2015 (the “Regulations”) and the Procurement Reform (Scotland) Act 2014 (the “Act”), which largely come into force throughout Scotland on 18 April 2016. As readers will be aware, the Regulations implement the EU Public Sector Procurement Directive 2014/24/EU (the “Directive”).

The Regulations essentially mirror the Articles of the Directive. As with the 2012 Public Contracts (Scotland) Regulations which they replace, the 2015 Regulations will take some time to bed in. Interpretation of key provisions is likely to evolve over time, particularly in light of upcoming guidance from the Scottish Government, as well as case law from the Courts (both in Scotland and in the rest of the UK where very similar rules have been in place since February 2015).

The majority of the substantive provisions of the Act also enter force on the same date. The Act contains various rules, similar in nature to those under the Regulations, that will apply to public contracts that fall below the prescribed EU thresholds and supplements the obligations which apply under the Regulations. At the heart of the Act is the concept of social responsibility, including an increased drive to deliver greater community benefits through public procurement.

The Regulations

The Regulations will come into force on 18 April 2016. These changes apply to Scotland only. Very similar rules were implemented in the rest of the UK in February 2015, and as a result many of the novelties of the Regulations have already been tested throughout the UK.

Which regulations apply - 2015 or 2012?

The Regulations will apply to all new tender processes started on or after 18 April 2016. Contracting authorities and bidders should therefore expect to follow the Regulations if on or after this date:

• a contract notice is dispatched to the OJEU
• a bidder responds to any other form of advertisement published by an authority (e.g. an advertisement on the authority’s website)
• a bidder receives a direct approach from an authority in respect of a proposed public contract
• a bidder makes an unsolicited approach to an authority regarding a potential public contract.

Otherwise, you will generally still be operating in the familiar territory of the 2012 Regulations. This includes if you are bidding for, or awarding, call-off contracts under a framework agreement set up before 18 April 2016.

When does a contracting authority have to go to market?

The scope of the Regulations remains broadly the same as the 2012 Regulations. A contracting authority is only obliged to go to market (by which we mean to publish a contract notice) if it is seeking offers in respect of a public contract for works, goods or services, the value of which is expected to equal or exceed the relevant financial threshold. Certain general exclusions from the application of the 2012 Regulations (e.g. acquisition of land or existing buildings on land, employment contracts, etc.) are also retained in the Regulations.

Clarifications and codifications

The Regulations clarify and “codify” certain key principles arising out of EU case law, all of which elaborate on the scope of the Regulations as readers know them. These include:

• Important clarification for developers: it is essential to know when a development arrangement might trigger the Regulations and, in broad terms, this will hang on whether the various elements of the definition of a “public works contract” are present. The Regulations reflect the requirement which has arisen out of EU case law for the authority to have a “decisive influence” on the type or design of the work (C-451/08, Helmut Muller). Further guidance on this point can also be found in the Recitals to the Directive.

• Understanding when an authority can keep services “in-house”: the Regulations confirm the “Teckal” line of case law that a contracting authority can contract directly with an entity without undertaking a procurement process if: (i) the authority exercises over that entity a control similar to that which it exercises over its own departments; (ii) the entity carries out more than 80% of its activities with the controlling authority; and (iii) there is no private sector capital participation in the controlled entity. This exemption is typically relied on by contracting authorities who set up wholly owned subsidiaries. There is also scope under the exemption for the controlled entity to procure services from its parent authority without the need to go to market (so-called “reverse Teckal”).

• “Inter-authority co-operation” (“Hamburg Waste” scenario): an arrangement will be excluded from the scope of the Regulations if (i) two or more contracting authorities come together to cooperate to deliver a public service they are charged with delivering with a view to achieving objectives they have in common; (ii) the co-operation is implemented in a manner

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governed solely by considerations relating to the public interest; and (iii) the participating authorities perform less than 20% of the activities covered by the co-operation on the open market.

What is the new “light touch regime” and what does it mean for you?

The “light touch regime” is a new regime that will apply to the award of certain types of services contracts (generally for “services to the person”) if the value of those services equals or exceeds the financial threshold of £589,148 (€750,000). It takes over from where the Part B services’ regime under the 2012 Regulations left off. Now services are either fully regulated under the Regulations or are regulated by the new “light touch regime”. If you provide any of the following services, you are likely to need to get to grips with the “light touch regime” sooner rather than later: health; social and related services; benefit services; legal services; prison related services; security services and postal services. The good news is that procurements for “light touch services” are likely to be fairly flexible. The requirements associated with running a tender process for these services are minimal:

• a contract notice must be published or a prior information notice used as a call for competition (the circumstances for doing so are prescribed)
• the award procedure must comply with the principles of equal treatment and transparency
• the contract must be awarded in line with the advertised procedure
• time limits must be reasonable and proportionate.

Flexibility and limited regulation could potentially create uncertainty or lead to situations (as happened with Part B service procurements) where authorities base tender processes on more fully regulated procedures (e.g. a restricted procedure). Authorities are advised to consult the CPV codes in order to determine whether a service requirement previously classified as “Part B” falls inside or outside the new “light touch regime”.

 Procedures

An authority’s choice of procedure remains largely similar under the Regulations: a choice of open procedure; restricted procedure; competitive dialogue; and competitive procedure with negotiation (the “re-branded” negotiated procedure with prior advertisement). However, there are some changes to note:

• Accelerated forms of the open procedure and competitive procedure with negotiation will be available in addition to the accelerated form of the restricted procedure which was already available under the 2012 Regulations. In all cases an authority may rely on this expedited procedure only in situations of urgency that it can duly substantiate.
• Minimum time limits are generally shorter across all of the procedures, e.g. for open procedures the authority could potentially limit the period for tender returns to 30 days (compared to the minimum 40 days under the 2012 Regulations).
• The grounds for use of the competitive dialogue or competitive procedure with negotiation have been aligned and, arguably, widened. For most complex projects, authorities should have a choice between these two procedures and may be able to justify use of one or other procedure on the basis that design or innovative solutions are involved or the contract cannot be awarded without prior negotiation due its complexity.
• Calls for competition using prior information notices (rather than contract notices) will be possible for local authorities and other non-central government entities adopting restricted procedures or competitive procedures with negotiation.
• Confirmation that negotiations are not mandatory under the competitive procedure with negotiation provided this possibility is highlighted from the outset.
• More flexibility post-tender under competitive dialogue has been introduced. An authority may clarify, specify and “optimise” (as opposed to “fine-tune”) final tenders. Negotiations with the preferred bidder are also now allowed within certain parameters. To use, these changes appear to extend what is permissible post-tender under competitive dialogue.

The biggest change of all is of course the introduction of the “innovation partnerships” procedure.

Innovation partnerships

Innovation partnerships are a completely new procedure introduced by the Regulations. This procedure is intended to enable long-term working arrangements (a partnering type arrangement as opposed to a legal partnership) between the public and the private sector to develop an “innovative” good, work or service, which the public sector subsequently purchases. What counts as innovation is set out in the Regulations but may include a new or significantly improved product such as a new construction process or marketing method.

The procedure for the award of an innovation partnership is based on the competitive procedure with negotiation, which may provide some degree of familiarity in this unchartered territory. There are some additional rules which may assist bidders too, such as the obligation on authorities to be clear on the minimum requirements that bidders must meet when submitting high level proposals to deliver the innovative product sought and for these minimum requirements not to be varied in negotiations with bidders.

Many suppliers are asking what innovation partnerships might be suitable for. They are clearly intended by the EU as a basis for addressing EU societal, environmental and economic goals. Could

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they ever become a norm for more day-to-day procurements here in the UK? This would seem unlikely but not impossible: unlikely in view of additional constraints on how innovation partnerships must be structured and operated as laid down in the Regulations; but not impossible given that an innovative product need not be "new" but rather "significantly improved".

Innovation partnerships are a potentially good talking point for bidders when engaging with authorities but bidders will clearly need to be careful about protecting any confidential information and intellectual property rights. There are some limited rules on these issues in the Regulations.

Standard form notices

With the new Regulations, come new standard forms for publication in the OJEU (for example, standard form contract notice and prior information notice etc.). Authorities in particular will need to familiarise themselves with these new forms ahead of 18 April 2016, as there are important differences between the old and new regimes. Bidders may also have to update their searching systems to ensure that important notices are not being missed.

The selection stage

The Regulations introduce new rules at the PQQ stage of a procurement process, including:

• a requirement that generally authorities may not set a minimum annual turnover requirement that exceeds two times the estimated contract value.

• the Regulations contain an updated list of mandatory and discretionary exclusion grounds relating to e.g. child trafficking offences and non-payment of taxes (mandatory exclusion) and conflicts of interest (discretionary exclusion). Perhaps the most noteworthy clarification is an authority’s right to reject a bidder for poor past performance.

• an ability for bidders to rely on a new "self-cleaning mechanism" under which they can demonstrate why, despite falling within an exclusion ground, they ought not to be prevented from bidding for a contract.

• by 18 April 2018, use of the “European Single Procurement Document” will be mandatory. The ESPD is essentially a bidder’s passport to getting shortlisted for public contracts throughout the EU. It will ask bidders to demonstrate their financial and economic standing, technical capacity and ability and previous experience.

Awarding the contract

Contracts must be awarded on the basis of the "most economically advantageous tender" ("MEAT"). Price or cost cannot be used as the sole award criteria. Accordingly, contracts can no longer be awarded on the basis of price or cost only (which is a different position to the one in the rest of the UK).

Note that contracting authorities are still obliged to disclose the criteria on which they are relying to determine MEAT and any associated weightings or order of priority. A few additional points worth noting in relation to tender evaluation under the Regulations:

• Use of life-cycle costing is promoted in order to encourage authorities to factor in internal costs such as energy consumption, end of life costs, etc. that are associated with a particular contract.

• The Regulations legitimise evaluation of the qualifications and experience of staff at the award stage, if the quality of the staff assigned to a contract may affect contract delivery.

• Authorities are obliged to take steps to verify the accuracy of information provided by a bidder if it has any doubts as to its veracity (e.g. the ability of a bidder to meet an authority’s specification or delivery date).

Contract variation

The Regulations confirm the circumstances in which contracts may be varied without necessitating a new procurement process. These circumstances include:

• low value/below threshold changes ("safe harbour" provisions)

• changes (regardless of their monetary value) that have already been provided for in the initial procurement documents in “clear, precise and unequivocal” review clauses.

• changes that are not “substantial”, this being defined with reference to the familiar “materiality” tests established in the 2008 EU Pressetext judgment.

• additional works/services/supplies provided by the original contractor, where a change of contractor is not possible for economic or technical reasons (e.g. interoperability issues) or would result in significant inconvenience or substantial duplication of costs for the authority.

• changes which were unforeseeable by the contracting authority.

The most noteworthy development is the ability to allow a new supplier to step into the shoes of the originally appointed supplier, in whole or in part, following corporate restructuring such as a takeover or insolvency, provided certain conditions are satisfied.

It is also worth noting that if an authority seeks to rely on the final two grounds above, it will be required to publish a new notice in the OJEU relating to contract modifications.

Contract termination

The Regulations enable an authority to terminate a public contract in three situations:

• there is a substantial modification as defined in the 2015 Regulations
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- at the time of contract award the supplier met one of the grounds for mandatory exclusion under the Regulations and should therefore have been excluded
- the contract should not have been awarded to the supplier in view of a serious infringement of Directive 2014/24/EU that has been declared as such by the Court of Justice of the European Union.

Such termination rights are to be written into all public contracts (failing which, they will be implied).

New reporting and retention requirements

Reporting and recording obligations are more extensive for authorities under the Regulations. Authorities should ensure their internal systems are updated to reflect these new requirements, including:

- A requirement to retain all concluded contracts if the contract value exceeds €1 million (supplies or services) or €10 million (works) at least for the duration of the contract, and to grant access to these contracts if requested subject to EU or national rules on access to documents and data protection. This creates a new basis for suppliers to request sight of contract documents.
- A requirement to collate a report on every contract, framework agreement or dynamic purchasing system to which the Regulations apply in their entirety. This report should be held on file but may be requested in whole or in part by the European Commission and/or the Scottish Ministers. It would be prudent for authorities to prepare a template report that they can use for all fully regulated contracts and framework agreements.

It is worth noting the potential information that authorities ought to have and that therefore could be requested by third parties, whether under the Regulations themselves or the Freedom of Information (Scotland) Act. In light of this, bidders should be aware that it is now more likely that information they provide to contracting authorities could later become available within the public domain.

Have bidders’ potential remedies changed under the 2015 Regulations?

No. Bidders’ rights to information during the standstill period and the availability of remedies (pre and post contract award) have not changed under the Regulations. However, the Regulations open up potentially new grounds for challenge, such as whether an authority’s decision to divide a contract into lots was justified in the circumstances.

The Act

The Procurement Reform (Scotland) Act 2014 saw the commencement of procurement reform in Scotland. Its introduction in 2014 signposted the importance of sustainability and community benefits to procurement reform in Scotland.

The Act itself operates largely as a framework within which the Scottish Government can issue regulations and guidance. To date only one provision has come into force: the requirement for contracting authorities to have regard to the Scottish Government’s Statutory Guidance on the Selection of Tenderers and Award of Contracts – Addressing Fair Work Practices, including the Living Wage, in Procurement.

The remainder of the provisions are not yet operational. However the Scottish Government is co-ordinating the implementation of the Regulations and the Act. As such, most of the provisions of the Act will enter into law by 18 April 2016.

The Act has two applications. First, the Act will introduce additional obligations for all regulated procurements. Second, it will extend various procurement rules to public contracts that fall below the EU thresholds but which meet or exceed the lower thresholds set out in the Act (“Sub-threshold procurements”). These new obligations are certainly more onerous than similar obligations relating to Sub-threshold contracts in the rest of the UK.

Scope of the Act

The Act will apply to “regulated procurements”: to the seeking of offers for or the award of a public contract, the value of which is equal to or in excess of the prescribed threshold (£2 million for works contracts or £50,000 for other public contracts). This greatly restricts the discretion previously afforded to contracting authorities when procuring Sub-threshold procurements. Furthermore it extends a right of challenge in respect of Sub-threshold procurements which do not benefit from the remedies under the Regulations.

Like the Regulations, the Act will not apply to certain specified contracts such as those that are specifically excluded from the Regulations e.g. the acquisition of land and employment contracts.

A Scottish public authority must comply with both the Regulations and the Act when procuring works, supplies and services.
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The Act as it will apply to all regulated procurements

- A contracting authority must treat bidders equally and without discrimination, and act in a transparent and proportionate manner. Whilst this will be familiar to authorities when procuring contracts above the EU thresholds, this is an altogether new requirement in respect of Sub-threshold procurements (which can importantly be challenged in court).

- A contracting authority must comply with the "sustainable procurement duty" to consider how the process can be used to improve the economic, social, and environmental wellbeing of the authority's area; to facilitate the involvement of SMEs, third sector bodies and supported businesses in the process; and to promote innovation which is relevant and proportionate to what is being procured. The Scottish Government will issue guidance on this in due course and authorities will be obliged to comply with the guidance. (Applicable to procurements which commence from 1 June 2016.)

- In procurements with a value equal to or greater than £4 million, the contracting authority must consider whether to impose a community benefit requirement in the contract.

- A contracting authority which expects to have “significant procurement expenditure” (£5 million or more) in the coming financial year must prepare and publish a procurement strategy before the start of year outlining, among other things, how it will carry out its procurements, how it will deliver value for money and the authority’s policy on the payment of living wage within its supply chain. It must thereafter produce an annual procurement report. (First procurement strategy to be produced by 31 December 2016.)

- A contracting authority must publish its contract notices and contract award notices on the Public Contracts Scotland website.

- A contracting authority must keep and maintain a register of contracts.

- A contracting authority must have regard to the Scottish Government’s Guidance on Fair Working Practices (for all procurements commenced since 1 November 2015).

The Act as it applies to Sub-threshold procurements

- A contracting authority must, as soon as reasonably practicable, notify any excluded bidders or any unsuccessful tenderers and provide a suitable explanation. (This obligation is similar to the standstill requirements imposed under the Regulations however is arguably less onerous).

- The Act provides an unsuccessful bidder with a right of recourse for certain breaches in relation to Sub-threshold contracts:
  - The remedies resemble those provided by the Regulations in respect of procurements above the EU threshold.
  - A challenge must be brought within 30 days of the date on which the person knew or ought to have known of the alleged breach (or within such period as the Court deems appropriate, up to a maximum of three months).
  - The remedies available will be: (i) an order the setting aside the decision or action; (ii) an order requiring the contracting authority to amend any document; or (iii) an award of damages.
  - The challenge regime applies to a breach of only a limited number of the duties including: the duty to treat all bidders equally; the sustainable procurement duty; and requirements to give reasons to unsuccessful/excluded participants.

- The Scottish Ministers may in time impose further regulations governing the Sub-threshold procurement process (such as rules on technical specification and operating the selection/award stage).

The full effect of the Act will only be seen once the Scottish Government has published further regulations/guidance.

We are already working with a wide range of public bodies, contractors, suppliers, service providers and intermediaries to help them adjust to the new regulations.

We are also running a seminar in Glasgow on 3 March 2016. We hope that you can attend.

If we can be of assistance please do not hesitate to contact our Public Procurement Team. The main point of contact is Stuart Cairns, the Head of the Public Procurement Team:

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