



Amendments to the Public Contracts and Utilities Contracts (Scotland) Regulations 2006

To: All Chief Governments, Main Contacts and Email Contacts (Scotland)

CC: All Chief Governments, Main Contacts (England, Northern Ireland and Wales)

Key issues

A consultation document issued by the Scottish Procurement Directorate

Amendments reflect the accession of Bulgaria and Romania to the EU, and the mandatory requirement for transparency, non-discrimination and equal treatment in the tendering of public service contracts

The Draft Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2007 are the proposed amendments to the Public Contracts (Scotland) Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006. The amendments, publicised by the Scottish Procurement Directorate, concern one particular issue of interest to APSE's membership, the change in Scots law to clarify the requirement of all contracting authorities to adhere to European Treaty principles of free trade amongst EU member states. The original policy note from the Scottish Procurement Directorate can be found at <http://www.scotland.gov.uk/Publications/2007/09/28092817/0>.

The introduction of the EU Single Market sought to provide for the EU Treaty principles of free movement of goods, services and people. The 2004/18/EC Directive on public works contracts, public supply contracts and public service contracts, and the 2004/17/EC Directive on the special sectors of water, energy and postal services, carried the Single Market principles and applied them to the public sector. The public procurement market is worth, on average, 16% of total Gross Domestic Product (GDP) spending within EU Member States, and so it was argued by the EU that opening public sector markets to competition amongst domestic and foreign suppliers would best deliver efficiency savings and thus improve service delivery within EU Member States.

In Scotland both the Public Contracts (Scotland) Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006 (the 'Regulations') included the EU Directive's principles of transparency, non-discrimination and equal treatment with regard to securing public contracts. The Regulations enshrined the EU Directives in Scots law, and also made lower value contracts subject to the same mandatory conditions of adequate advertising as higher value contracts.

However, since the implementation of the Regulations, the European Commission has accepted the EU Directive to grant the accession of Bulgaria and Romania. The Draft Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2007 (the 'Amended Regulations') look to incorporate Bulgaria and Romania into the EU Directive as EU Member States, updating the lists of professional and trade registers from Member States, and imposing a requirement that contracts are awarded in line with the EU principles of transparency, non-discrimination and equal treatment.

It is the last point of the Amended Regulations that is of primary importance to our membership. The previous Regulations gave effect to rulings of the European Court of Justice, that even where the EU Directive does not require an advertisement to be placed in the Official Journal of the European Union, adequate publicity for contract opportunities is required. The Amended Regulations state that not only must adequate publicity be provided, the contract itself must be awarded in line with the EU Treaty principles of transparency, non-discrimination and equal treatment. These obligations include when the estimated value of the contract falls below the threshold set in the Regulations. So, for example, contracting authorities must ensure that all potential bidders know in advance on what conditions the contract will be awarded, and are given sufficient time to express their interest. It is expected that the 'Amended Regulations' will be implemented by March 2008.

Comments relating to the specific amendments that are being proposed are welcomed before 21 December 2007.

APSE response

The Amended Regulations underline the necessity of transparency, non-discrimination and equal treatment when tendering contracts. However, the Regulations would normally only come into effect when services are procured externally. Where local authorities provide services directly they would not be subject to the Regulations. APSE would argue that in many cases direct service delivery can provide a flexible and cost effective approach which avoids the costs and time involved in procurement, and ensures a level of responsiveness to local conditions that can not be taken for granted in a contractual relationship. By keeping services 'in-house', knowledge and expertise learnt from day-to-day operations is retained by the organisation, and is not lost to the private sector. The innovative approach many authorities have taken with shared services demonstrates the benefits of public bodies jointly learning from their experiences, and channelling the knowledge back into the organisation. Such examples of shared services also have the advantage of not being subject to the EU public procurement rules.

The impact of EU legislation on public services (cf. Briefing 07/50 August 2007 Shared services in the Scottish Public Sector: Impact of the EU Public Procurement Rules) is a particular area that APSE is committed to keeping its membership up to date on. The alignment of EU law and national legislation is of vital importance to the effective delivery of services, in ensuring practice complies with the law and not open to legal challenge that can be prevented. In Scotland we have seen the financial impact of the non-implementation of EU legislation, for example in the case of the Scottish Prison Service and the 'slopping-out' dispute.

APSE recognises that public employment means more than effective delivery, it has core values and benefits that can be overlooked on a balance sheet. In our recent publication 'Towards a future for public employment', APSE set out the value of public employment in providing effective leverage over local economies, in shaping places, in managing costs and transactions, in sustaining democratic networks and accountability, and in realising the potential of the local workforce. Direct service delivery provides the flexibility to respond to the public's requirements without the need for complex and area-specific contractual arrangements.

If you wish to comment on the Amended Regulations, or any other points in relation to the briefing, please contact via email at afildes@apse.org.uk.

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