

# Final Business and Regulatory Impact Assessment

## **Title of Proposal**

**Final Business and Regulatory Impact Assessment (BRIA) associated with proposed changes to the public procurement rules in Scotland.**

## **1. Purpose and intended effect of changes to the public procurement rules**

### **Objectives:**

- to implement a series of changes to the public procurement rules in Scotland derived from the three EU Directives<sup>1</sup> published in the Official Journal of the European Union on 28 March 2014 – the measures will largely be implemented through new Scottish Regulations – by 18 April 2016;
- to modernise and simplify the procurement process (consistent with trends at national and EU levels), increase access to public contracts, and ensure that we use public spend to support wider aims, including social and environmental, as a result;
- to meet the legislative requirements of the Procurement Reform (Scotland) Act 2014<sup>2</sup> (the Act); and to,
- support our overall purpose to deliver sustainable economic growth.

### **Background**

1.1 The public sector spends over £10 billion each year on goods, works and services. The size of that spend means that improving the way the public procurement market operates can improve economic efficiency and growth, by encouraging public bodies to make the best use of public money (through public contracts) to deliver best value and to match the needs of the people of Scotland.

1.2 The Scottish Government is responsible for the rules that regulate the award of these contracts by public bodies across Scotland. These rules must be consistent with wider EU legislation (known as 'European Directives') and must be followed by public bodies and utility bodies whenever they purchase goods, services or works from suppliers.

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<sup>1</sup> Directive 2014/24/EU on public procurement, replacing the 2004 Directive for Public Sector Contracts; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport, postal services sectors, replacing the 2004 Directive for Utilities Contracts; Directive 2014/23/EU on the award of concession contracts, which does not directly replace any previous directive.

<sup>2</sup> <http://www.legislation.gov.uk/asp/2014/12/contents>

1.3 EU legislation is currently given effect in Scots law by the Public Contracts (Scotland) Regulations 2012 and the Utilities Contracts (Scotland) Regulations 2012.

1.4 The purpose of this document is to provide a final Business and Regulatory Impact Assessment (BRIA) of forthcoming changes to the public procurement rules. It should be read together with the associated consultation document “Public Procurement: A Consultation on Changes to the Public Procurement Rules in Scotland”<sup>3</sup>.

1.5 The consultation document (associated with this BRIA) describes a series of proposed changes to the public procurement rules from 2016.

1.6 These changes largely arise from three European Procurement Directives which were developed following a review of existing European legislation. The European Commission published three European Union Directives in the Official Journal of the European Union on 28 March 2014 (hereinafter referred to as the Directives). These are:

- Directive 2014/24/EU<sup>4</sup> on public procurement, replacing the 2004 Directive for Public Sector Contracts;
- Directive 2014/25/EU<sup>5</sup> on procurement by entities operating in the water, energy, transport and postal services sectors, replacing the 2004 Directive for Utilities Contracts; and,
- Directive 2014/23/EU<sup>6</sup> on the award of concession contracts, which does not directly replace any previous directive.

1.7 These changes must be implemented in new Scottish Regulations by 18 April 2016.

1.8 The overall rationale for these changes is positive. The aim is to simplify the public procurement process, support wider aims (environmental and social for example) and, in turn, improve supplier access to public contracts.

1.9 The changes will apply where contracts are within scope of the EU procurement Directives and above the thresholds. In addition, the Procurement Reform (Scotland) Act 2014 introduces some requirements on public bodies (such as complying with the sustainable procurement duty and publishing an annual procurement strategy) as well as some specific processes to be followed for contracts above the threshold value for the Act (£50,000 for contracts for goods and services and £2,000,000 for construction contracts), such as the criteria that can be used to exclude suppliers from bidding, and the rules that will apply to advertising contract opportunities. Scottish Procurement Policy Note (SPPN) 5/2015 publicises the threshold values that apply to public procurement exercises from 1 January

<sup>3</sup> <http://www.gov.scot/Resource/0046/00469645.pdf>

<sup>4</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&rid=1>

<sup>5</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0025&rid=1>

<sup>6</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0023&rid=1>

2016. SPPN is available on the Scottish Government website at:  
<http://www.gov.scot/Resource/0049/00491054.pdf>.

1.10 Many of the changes are required under the EU procurement Directives are mandatory and the Scottish Government has no choice but to implement these. There are also a series of optional elements that we must consider how best to implement in a Scottish context. The optional elements are discussed in more detail in the associated consultation paper: Changes to the Public Procurement rules in Scotland which is available on the Scottish Government website at:

<http://www.gov.scot/Publications/2015/02/4903/downloads>, along with a partial BRIA, issued at the same time. The Scottish Government published a report of the analysis of the responses to the consultation at:

<http://www.gov.scot/Publications/2015/08/1618> and its formal response to the consultation, outlining the decisions we have taken on the discretionary elements of the EU Directives. This response is at:

<http://www.gov.scot/Resource/0049/00491147.pdf>

1.11 We believe that it would also be sensible to use the opportunity of the changes introduced by both the Directives and the Act to apply consistent rules both above and below the European financial thresholds where appropriate. The Act gives the Scottish Government the discretion to do this as it covers lower value contracts. It also enables the development of guidance. This means that further consistency can readily be applied to the majority of public procurement contracts in Scotland.

1.13 An earlier impact assessment for the Act was published in October 2013. This is also available on the Scottish Government website at:  
<http://www.scotland.gov.uk/Resource/0043/00435515.pdf>.

1.14 As a result, the main focus of this BRIA is on the changes introduced by the new European Directives. It does touch briefly on the Act where relevant. This is where, in particular, any changes introduced by the Directives will also apply to lower value contracts.

### **Rationale for Government Intervention**

1.15 Apart from the legislative requirement for changes to be made, the overall rationale for Government action on procurement is set within:

- general EU modernisation of the public procurement rules;
- public procurement reform in Scotland; and,
- the overall current economic environment.

1.16 The Scottish Government's National Purpose is at the heart of public procurement activity; *'to focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth'*. The delivery of public services needs to be efficient and effective to ensure the fair, transparent and non-discriminatory spend of public funds, to help achieve this purpose.

1.17 Also, the Scottish model of procurement uses the power of public spend to deliver genuine public value beyond simply cost or quality in purchasing. This is particularly important in these challenging times of increasing demand for services and reduced financial resources. In particular, procurement needs to ensure value for money, remove inconsistencies, and assist in delivering wider social, economic and environmental aims. In effect, every last drop of value needs to be extracted from public procurement spend, be that economic, social or environmental.

1.18 The Act plays a significant role in supporting this work. For example, the Public Contracts Scotland (PCS) advertising portal was established in 2008. It provides a national advertising website for Scottish public bodies to publish contract opportunities and awards. The use of the portal is currently voluntary. The Act will make the use of this system mandatory for all public sector contracts of £50,000 and over.<sup>7</sup> In doing so, it will increase transparency and help to tackle unnecessary inconsistencies for suppliers doing business with the public sector.

1.19 There are clearly recurring themes and links between the Act and the European Directives. The changes introduced by both of these therefore provide an opportunity to ensure that there is more consistency in the rules that apply to the majority of public contracts in Scotland.

1.20 The above reasons provide the rationale for Scottish Government intervention.

## **2. Consultation**

### **Procurement Community**

2.1 The main elements of the new Directives were summarised to stakeholders at a Policy Forum event in Glasgow on 3 September 2014. These were also highlighted to a wide range of procurement buyers and suppliers who attended the annual Scottish procurement conference on 21 October 2014.

2.2 We have also consulted informally with the governance bodies associated with the wider reform of public procurement, including the Ministerial Support Group-Procurement (MSG-P) and the Procurement Reform Delivery Group (PRDG). Those bodies include members from across the public sector, including central government, local government (including COSLA), the NHS, Universities and Colleges. For example, the Government held a heads of procurement session on 18 June 2015 to further engage stakeholders in the public procurement reform programme and the changes to the public procurement rules in Scotland.

### **Within Government**

2.3 The consultation document was made available to the following Scottish Government Directorates: Communities, Enterprise, Environment and Innovation, Finance, Health and Social Care, Learning and Justice, Strategy and

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<sup>7</sup> [Section 23 Procurement Reform \(Scotland\) Act 2014](#)

External Affairs.

2.4 The consultation document was also made available to Transport Scotland, Revenue Scotland and shared informally with a number of external stakeholders. We have also consulted informally with the Cabinet Office and Audit Scotland. Their comments helped to shape the consultation document.

2.5 Engagement with relevant policy areas within Scottish Government and the wider public sector continued during the consultation period and throughout the work to implement the changes to the rules.

### **Public Consultation**

2.6 We have consulted informally with key stakeholders on the new EU Directives, with a particular emphasis on the optional elements open to the Scottish Government and stakeholders.

2.7 Formal engagement began on 9 February 2015, when the Scottish Government launched its public consultation 'Changes to the Public Procurement rules in Scotland' looking at the changes needed to implement the new EU legislation. The consultation also discussed elements of the Procurement Reform (Scotland) Act 2014 that were yet to be further described in Scottish Regulations or guidance. The Scottish Government set out, in the consultation document, its views on how best to implement the changes and invited views and comments from stakeholders.

2.8 The consultation ran until 30 April 2015 and focused on nine key themes:

1. Taking social environmental and employment issues into account.
2. Making contracts more accessible for smaller businesses.
3. Selection criteria and grounds for exclusion.
4. Contracts for care, support and other specific services.
5. Procedural rules.
6. Rules about communication.
7. Central purchasing bodies.
8. Enforcement and monitoring.
9. Opening contract.

2.9 The consultation paper contained 63 questions and invited respondents to answer any or all of these questions.

2.10 There were 140 responses to the consultation: 133 from organisations and 7 from individuals. On the whole, the response to the consultation was very positive, with the majority of respondents agreeing with the proposals put forward by the Government in the consultation.

2.11 The main themes to emerge, across respondent groups and at the majority of the question areas, were the need for consistency, proportionality and transparency. The findings from the analysis of the responses has informed the Scottish Government's plans to implement the changes to the public procurement rules in

Scotland.

2.12 Three respondents commented specifically on the partial BRIA:

- One respondent expressed support for the improvements that simplify the process for suppliers - in particular SMEs, social enterprises and charities - to do business with the Scottish Government. It also expressed a number of concerns regarding the new rules:

- The respondent body commented on the need for clear guidance to prevent inconsistent application of the new rules which could result in more challenges to public body decisions where in similar circumstances, public bodies treat individual suppliers differently.
  - The Act, as discussed above in paragraph 1.9, extends the rules applicable under the EU Directives to lower value contracts under the Act. By aligning the rules applicable to lower value contracts with those applicable to higher value contracts, greater consistency in application can be achieved.
  - Scottish Ministers will issue, in February 2016, statutory guidance to support provisions of the Act on:
    - organisational procurement strategies and annual reports;
    - sustainable procurement duty;
    - community benefit requirements;
    - selection of tenderers and award of contracts – assessment of the suitability of suppliers; and
    - procurement of health, social and related services.

Ministers issued statutory guidance on addressing fair work practices, including the Living Wage in procurement in October 2015<sup>8</sup>.

The statutory guidance provides public bodies with guidance on the application of provisions of the Act and indirectly on the Regulations. The guidance takes full account of the fact there is no one-size-fits-all approach to public procurement and, as such, has been tailored to provide public bodies with flexibility while maintaining consistency.

- We are currently assessing and considering the scope of the training provision required for public purchasers as a result of these changes. We are progressing work to ensure that the systems are compatible with the rule changes and to ensure that training is made available before the new rules come into force, in order to support a smooth transition. This training will

<sup>8</sup> <http://www.gov.scot/Resource/0048/00486741.pdf>

focus on changes from existing to new rules and there will be a level of assumption that people are already proficient with current EU procurement legislation.

- The respondent body highlighted the need for central investment in the development and the maintenance of a single database which can be used to support public bodies in the collection and sharing of information.
  - Public Contracts Scotland (PCS) was launched in July 2008 to provide businesses with easy access to contract opportunities. As at November 2015, over 400 public bodies were placing their contract opportunities on PCS in a standard format. PCS also provides up to date contract information to the Scottish Procurement Information Hub.
  - The Scottish Procurement Information Hub is a centrally funded analytical tool which allows procurement professionals to determine:
    - how much they are spending on external goods and services from third party suppliers;
    - who the key suppliers are;
    - where the suppliers are used in common – and therefore where collaborative opportunities exist.
  - Scotland leads the UK by using a comprehensive, joined up suite of procurement improvement tools to drive procurement reform and deliver greater value for money in public procurement. PCS and the Scottish Procurement Information Hub are delivered as a shared service offering to the entire Scottish public sector.
- The respondent body commented on the lowering of thresholds for many obligations which may have a negative impact on businesses, in particular SMEs, due to increased bureaucracy. This may also negatively impact on public bodies due to increased costs and burdens.
  - The concern of the respondent relates to thresholds provided for in the Act. A separate earlier public consultation was conducted in relation to the development of the Bill for the Act. An analysis of the responses to that consultation is available on the Scottish Government website at: <http://www.gov.scot/Resource/0041/00412974.pdf>. In addition, a separate BRIA was completed by the Scottish Government focusing on that legislation. That document can also be found on the Scottish Government website at: <http://www.gov.scot/Topics/Government/Procurement/policy/ProcurementReform/implementEUDirProcRef>.

- A respondent expressed concern over the Concessions Directive and its potential impact following the EU Commission's official impact assessment



which estimates that under the definition in new Directive, there are 8,000 Public-Private Partnerships (hereinafter referred to as PPPs) in the UK liable to be regarded as 'concessions'.

- Currently, service concession contracts are exempt from procurement legislation and there is no central database which captures the wider use of concession contracts. It is, therefore, not possible to precisely estimate the potential use of these procedures under the forthcoming legislation in future.
- The Commission has previously estimated that 60% of PPP contracts could fall within the definition of a concession contract. In Scotland, PPP contracts are now awarded on the basis of the Non-Profit Distributing Model and are mostly infrastructure projects which, because of their nature, do not include any right to exploit the asset. Such contracts would therefore not be classed as concession contracts under procurement legislation.
- More generally, the Scottish Government's view is that, insofar as is possible, the rules on concession contracts should be consistent with the rules applicable to public contracts. The new Concessions Directive provides us with the flexibility to say that all communication about concession contracts should be electronic. In the public consultation on the changes to the rules, we said that we believe that concession contracts will mostly be complex, high economic value contracts which are more likely to be handled through an electronic procurement system. We put forward our view that this method is important in making procurement simpler, faster and more transparent and it was also important to ensure that, where possible, rules for different types of contracts are the same. The response to the consultation is supportive of that proposal and we will, therefore, make rules that state all communication about concessions contracts should be electronic. In line with the rules we are making for public contracts, this requirement will be phased in, which allow for time for organisations to adapt to new ways of working and embed new systems.

- Another respondent, although welcoming the inclusion of community benefit requirements in contracts above £4 million expressed concern over the costs of evidencing community benefits:

- Community benefit requirement requirements have been increasingly used in public contracts since 2008, costs associated with their use has not been a feature of their use. In addition to this, there is often free-of-charge support available to public bodies and suppliers using community benefits and the 2008 report produced by the Scottish Government: Community Benefits in Public Procurement indicated that training associated with community benefits requirements did not attract



additional costs  
(<http://www.gov.scot/Resource/Doc/212427/0056513.pdf>).

2.13 This final BRIA has been informed by the responses to the public consultation, further engagement with key stakeholders, and the other impact assessments, which describe the possible effects of the changes.

### **Business Consultation**

2.14 As stated at paragraph 2.1 we consulted informally with stakeholders at a specific event about the main elements of the new Directives. We brought the consultation process to a wide range of stakeholders using a variety of communications; this included businesses registered on PCS by setting up an alert which provided information on how to engage in the public procurement reform programme. Also (and, again, as mentioned at paragraph 2.2 above), we have engaged with the governance bodies associated with the wider public procurement reform programme. Stakeholders such as the Federation of Small Businesses, Scottish Chambers of Commerce, Scottish Trade Unions Congress and Social Firms Scotland are represented on these groups.

## **3. Options**

3.1 Given the **legislative** basis for intervention, taking no action is not an option that we can realistically consider.

3.2 Also, we do not believe that it is realistic to make minimal changes by implementing only the mandatory elements of the Directives. Such an approach would meet our legal obligations to implement the Directives on the one hand. It would, however, miss a key opportunity to drive best practice through further standardisation and simplification of the public procurement rules in Scotland, on the other.

3.3 As a result, we have focused only on the costs and benefits of the two remaining main options throughout this partial BRIA. These are described at **paragraph 3.5** immediately below.

3.4 Further information about the range of changes introduced by the Directives can be found in the consultation paper.

3.5 The two main remaining options for change are:

Option 1 – Implement the mandatory changes described in the Directives and also some of the optional elements which we believe will best meet the overarching aims of simplification and flexibility.

Option 2 – Implement the mandatory changes described in the Directives and mandate all of the optional elements, removing choice from public bodies.

### **Option 1: Implement the mandatory changes and provide flexibility in the way in which the optional elements are transposed into Scots law**

3.6 This approach involves providing public bodies with flexibility to choose how best they wish to implement options to suit the needs of individual procurement exercises. This way, public bodies can take decisions on a case-by-case basis that are proportionate, best simplify the procurement process and also improve access for businesses.

Examples of this approach are:

- Ensuring that public bodies retain discretion to split requirements into smaller lots and to award more than one lot to the same bidder as opposed to placing a requirement on public bodies to split particular contracts into lots;
- Ensuring that public bodies have the discretion to decide whether to request additional information about sub-contractors; and
- providing sub-central bodies with the flexibility to use a Prior Information Notice as a call for competition.

There could be some views that this approach would miss an opportunity to go further and to be more prescriptive.

### **Option 2: Implement the mandatory changes and mandate the application of all of the optional elements**

3.7 Public procurement rules can be considered to be quite complex hence the overall drive to simplify these. Opting to mandate those elements of the Directives which provide a choice on implementation may be viewed by some as adding further complexity and inflexibility into the process. For example, and using one of the examples from paragraph 3.6, article 46 of Directive 2014/24/EU stated that Member States may make it obligatory for public bodies to award contracts in the form of separate lots under conditions to be specified by the Member State. This would have meant that public bodies would have been required to split, what may otherwise be a single contract, into several smaller contracts, irrespective of whether that was a sensible approach in light of all relevant circumstances applicable at the time. It was felt this approach was not proportionate and was inflexible, failing to allow for individual factors affecting individual procurement exercises to be taken into consideration when devising a procurement strategy.

### **Sectors and Groups Affected**

3.8 Both options are relevant to the following sectors and groups:

- Public Sector
- Private Sector
- Third Sector
- SMEs
- Supported Businesses

## **Benefits and Costs of the Options**

### **3.9 Option 1 – Benefits:**

- Targeted and proportionate changes for Scotland.
- Public bodies remain largely free to interpret the public procurement rules and apply these appropriately on a case-by-case basis.
- More limited change may reduce the risks in terms of possible costs and change management issues.
- This approach arguably best meets national objectives of simplification/standardisation and consistency.
- Opportunity to match and co-ordinate changes neatly with those introduced by the Act.
- Ensures more consistency in the rules as a result for higher and lower value contracts. That is, businesses should benefit through greater consistency and standardised processes and systems.

### **3.10 Option 1 – Costs**

- Public bodies already operate within EU procurement legislation and therefore, to a large extent, many of the processes and procedures in the new legislation will replicate current processes and procedures, and as such, should not result in new costs arising.
- It is not envisaged that there will be significant costs or burdens associated with this option. This is because we are proposing what we believe are targeted and proportionate changes intended to reduce burdens and costs and that changes are consistent with the overall drive towards simplification, proportionality and flexibility.
- Any costs associated with elements of the Act (for example, a key element of the Act is the development by public bodies of local strategies and reports) were previously identified as part of the introduction of that Act.
- The Act and the monitoring requirements included in the Directives are aligned and, as a result, we expect that any new reporting requirements (beyond those already provided for under that Act) on public bodies should be minimised as a result.
- There might be some costs associated with some of the mandatory changes included in the Directives. For example, under the terms of the new Directives, the majority of public procurement communication and information exchanges will become electronic. We plan to take advantage of the opportunity provided by the Directives - in terms of timing - for the introduction of these changes. This should allow a longer transitional period for businesses. It should also offset any possible difficulties/cost implications that some businesses might have where they are required to update or co-ordinate their systems.

### **3.11 Option 2 – Benefits:**

- A wider range of changes would be introduced than those under option 1.

### 3.12 Option 2 – Costs

- Reduced flexibility, as a result, could mean that procurements cannot be tailored to best match local need.
- There might be some costs associated with some of the mandatory changes included in the Directives. For example, there may be additional costs for public bodies in splitting contracts into smaller ‘lots’ and running a competitive tendering exercise on that basis. This could result in additional costs for bidders, who may have to submit several bids for smaller contracts rather than one bid covering the overall requirement, and there is the potential for higher costs to the taxpayer if best value would be achieved through a single contract as opposed to several smaller elements.
- Our overall view is that arguments against adopting some of the available options and retaining flexibility in the procurement process outweigh the alternative of mandating the application of all options within the Directives. We believe that a more proportionate approach would be to introduce targeted measures instead, which is an approach that is consistent with **Option 1** above.

## 4. Businesses

### Scottish Firms Impact Test

4.1 As stated earlier in this document, we ran a public consultation on the changes to the rules from 9 February to 30 April 2015. The main focus of the consultation was the discretionary elements within the new Directives, and our plans to implement them. The consultation also considered elements of the Act that have yet to be further described in Regulations or Statutory Guidance.

4.2 The public consultation was preceded by informal engagement with stakeholders through 2014-15 and this built on the extensive engagement with stakeholders throughout the development of the Act and its passage through the Scottish Parliament.

4.3 Our engagement with stakeholders harnessed existing groups that support the broader procurement reform agenda. Engagement with Scottish firms on the proposed changes to the rules was conducted via the Procurement Supplier Group. That Group’s remit is to provide an on-going framework for dialogue about, and influence upon, public procurement practices as they affect suppliers. Its membership at the time of the consultation included:

- Scottish Trades Union Congress;
- Scottish Chambers of Commerce;
- Community Care Providers Scotland;
- Scottish Council for Voluntary Organisations;
- Glasgow Council for the Voluntary Sector;

- Social Firms Scotland;
- Scottish Council for Development and Industry; and
- Federation of Small Businesses.

4.4 The majority of the organisations listed above responded to the public consultation. As stated earlier in the document, the response to the consultation was strong with 140 responses received. The consultation Respondent Information Form asked respondents to select from a list of respondent groups. These groups formed part of the analysis process, enabling analysis of whether differences, or commonalities, appeared across the various different types of organisations and / or individuals that responded.

4.5 A respondent profile can be found within the consultation analysis report, and the published consultation responses are available on the Scottish Government website at:

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

4.6 Private companies, as well as others, wanted to ensure fairness and equity of treatment. They felt that private companies should not be subject to any requirements unless these requirements are also placed on public bodies. The need to ensure that no additional burdens are placed on bidders (short timescales, costs or additional bureaucracy, for example) also featured in responses from this group. On the whole, the response to the consultation was very positive, with the majority of respondents agreeing with the proposals put forward by the Scottish Government in the consultation in how best to implement the new legislation.

4.7 The Scottish Government's continued engagement on the changes to the public procurement rules has included a number of well attended round table meetings, such as with Business Services Association, Specialist Engineering Contractor's Group Scotland and SCVO. These events enabled us to engage directly with a wide range of member organisations and individual businesses on the issues relating to public procurement in Scotland.

4.8 In addition to this, the Scottish Government, in association with Ready for Business, hosted a stakeholder engagement event in Edinburgh on 4 August 2015. Invitations were extended to members of the Procurement Supplier Group, as well as a range of other stakeholders. Each member of the Procurement Supplier Group received an invitation to attend along with the opportunity to each invite a further 2-3 representatives from their respective member organisations. The event was well attended comprising representatives from across all sectors, and whilst the event focused primarily on the development of statutory guidance, it also provided an opportunity to engage on the changes to the public procurement rules and their potential impact.

### **Competition Assessment**

4.9 EU procurement law is intended to facilitate greater competition by opening up markets. Using the Competition and Markets Authority guidance we have concluded that the proposals will neither directly or indirectly limit the number or

range of suppliers, limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously. Instead, we believe that any further efficiencies and simplifications that arise as a result of the new rules will improve supplier access to public contracts. An example of this is the requirement that the Act places on all public bodies to advertise their contract opportunities on PCS, where the value of the contract is £50,000 or greater for goods and services and £2,000,000 for construction contracts.

4.10 The broad aim of the new Directives is to ensure that public purchases are made in the most rational, transparent and fair manner in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals.

#### **Test run of business forms**

4.11 Any new forms, arising from the changes introduced by the Directives, will be determined by the European Commission.

### **5. Legal Aid Impact Test**

5.1 The majority of those seeking remedies for breaching procurement law will not be individuals in which case legal aid will not be available. In our view, there will not be a significant impact on the legal aid fund. We have confirmed this assumption with the Scottish Government's Access to Justice Team.

### **6. Enforcement, sanctions and monitoring**

6.1 Public bodies are responsible for ensuring their procurement activity complies with the relevant legislation and that decisions taken, in the context of their procurement activity, are consistent with that legislation.

6.2 Legal proceedings can be brought against a public body where there is a possibility that the public procurement legislation has not been complied with and where the failure to comply could result in the complainant suffering loss or damage.

6.3 The majority of respondents to the formal public consultation agreed that the monitoring and enforcement body for Scotland should be the Scottish Ministers, acting through the existing SPoE. Scottish Ministers will be able to request information from public bodies in respect of procurement for the purposes of providing information to the European Commission.

### **7. Implementation and delivery plan**

7.1 The changes to the public procurement rules must be implemented in Scottish Regulations by 18 April 2016. The remaining provisions of the Act will also be implemented alongside the new Regulations implementing the EU Procurement

Directives.

7.2 A primary objective for the Scottish Government is to implement the Directives and commence the provisions of the Act in a manner that will make procurement processes as simple and as easy to follow as we can. We want to avoid, where possible, one set of rules applying to contracts covered by the Directives and a different set of rules applying to contracts that are covered by the Act.

7.3 As part of the implementation plan, the Scottish Government has, and will continue to, issue communications updates on the changes to the rules through the relevant channels, such as Scottish Procurement Policy Notes (SPPNs) and PCS, to alert stakeholders to the amendments to the implementing Regulations and statutory guidance.

7.4 The Scottish Government is also progressing work to ensure that the systems will be compatible with the rule changes and to ensure that training is available before the new rules come into force in order to support a smooth transition.

7.5 Training will focus on changes from existing to new rules and there will be a level of assumption that people are already proficient with current EU legislation. There will be an e-learning package available in February 2016 and there will also be face to face seminars, delivered by procurement lawyers, held from February 2016 onwards.

### **Post Implementation Review**

7.8 We continually review the effectiveness of the Scottish Procurement Regulations in giving effect to EU procurement law. The European Commission also has a role in monitoring Member States' compliance with EU procurement law. As part of its role, it assesses whether EU procurement law is fully implemented in national legislation.

7.9 By 18 April 2017 and every three years thereafter Scottish Ministers are required to submit to the European Commission a monitoring report covering, where applicable, information on the most frequent sources of wrong application or of legal uncertainty, including possible structural or recurring problems in the application of the rules, on the level of SME participation in public procurement and about prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities.

7.10 Furthermore, the European Commission has committed to:

- review the practical application of the ESPD, taking into account the technical development of databases in the Member States and report to the European Parliament and the Council by 18 April 2017; and
- review the effects of Article 77 and report to the European Parliament and Council by 18 April 2019.



7.10 The Scottish Government awaits the outcome of these reviews, and will consider, at the appropriate time, any conclusions reached by the Commission.

## **8. Summary and Recommendation**

### **Preferred Option**

#### **Option 1: Implement the mandatory changes and some of the optional elements only**

8.1 Together with some mandatory changes, the new Directives include a series of options that Member States can choose to adopt or not. We set out our views about each of these options in the public consultation document. Although the supporting rationale for many of these options is clear, our preference is not to mandate all of these choices. This is because we believe that this approach could remove much of the flexibility in the system.

8.2 Legislative action needs to be business friendly while also addressing wider social and environmental issues. We believe that a proportionate and targeted approach in Scotland will ensure wider public value in purchasing while retaining essential flexibility. This should, in turn, enable public bodies to adapt their procurements best to match local circumstances.

8.3 Consideration has also been given to those areas where evidence suggests that there is a need for further action. This includes feedback from businesses, who have been telling us for some time that Scotland needs to continue – consistent with the broader procurement reform agenda – to improve procurement processes and drive both good practice and standardisation/simplification. In light of this, we have chosen to adopt those options included in the new Directives that we believe will be most consistent with all of these themes, particularly in a Scottish context.

8.4 Significant burdens on, or costs to, businesses are not envisaged as a result of this approach. This is largely because there are no obligations placed on businesses under the new legislation. The majority of obligations are placed on public bodies in terms of how they conduct their procurement activities. Businesses operating within the utilities sector may be subject to the Utilities Regulations.

8.5 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 public bodies 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.

8.6 Overall, we believe that any new public procurement rules in Scotland should ensure even more consistency both above and below the EU regulated values. This should, in turn, improve access for suppliers (including small and medium enterprises SMEs) to public contracts.

## **9. Declaration and publication**

9.1 I have read the business and regulatory impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs I am satisfied that business impact has been assessed with the support of businesses in Scotland.



**Signed:**

**Date:** 2 February 2016

**Keith Brown MSP**  
**Cabinet Secretary for Infrastructure, Investment and Cities**

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