

## **PROCUREMENT REGULATIONS GUIDANCE No 3:**

### **ADVERTISING CONTRACTS THAT ARE EXEMPT FROM THE SCOTTISH PROCUREMENT REGULATIONS**

#### **Purpose**

1. The purpose of this Note is to provide guidance on regulation 8(21) of The Public Contracts (Scotland) Regulations 2006 (SSI 2006/1) and regulation 11(20) of The Utilities Contracts (Scotland) Regulations (SSI 2006/2) (hereinafter referred to as “regulations 8(21) and 11(20)”).

2. Regulations 8(21) and 11(20) give effect in Scots law to the ruling of the European Court of Justice (“ECJ”) in the “*TelAustria*” case (ECJ C-324/98). In that case the court held that, even where the European Procurement Directives (and hence the Scottish Regulations referred to at paragraph 1 above) do not require an advertisement to be placed in the Official Journal of the European Union (“OJEU”), there will usually be a need for contract opportunities to be subject to some form of publicity so as to meet basic EC Treaty requirements such as transparency, equal treatment and non-discrimination.

#### **Background**

3. The ruling has been included in the Public Contracts (Scotland) Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006 (hereinafter referred to as “the Scottish Regulations”) to ensure that there is clarity about its implications for purchasers and to ensure that there is greater transparency for businesses of contract opportunities, particularly lower value (below OJEU threshold) contracts, which are likely to be of most interest to SMEs.

#### **Text of the Regulations**

4. Regulation 8(21) states:-

“When a contracting authority proposes to award a public contract which has an estimated value for the purpose of paragraph (1) which is below the relevant threshold, or where a proposed public contract is otherwise exempt from the requirement for prior publication of a contract notice, the contracting authority shall,

if required by its general Community obligations, for the benefit of any potential economic operator, ensure a degree of advertising which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non discrimination and transparency.”

[The reference to paragraph 1 in this extract is to regulation 8(1) of the Public Contracts (Scotland) Regulations 2006, which sets out the threshold levels at which the Regulations apply].

Regulation 11(20) of the Utilities Contracts (Scotland) Regulations sets out equivalent requirements for utility entities, but is limited in application to utilities which are also public undertakings. “Public undertaking” is defined in regulation 3(2) of the Utilities Regulations.

### **EC Treaty Obligations**

5. The *TelAustria* judgement established the principle that contracting authorities and utilities which are public undertakings (“contracting bodies”) are bound to comply with the rules and principles of the EC Treaty when awarding contracts, even where the contract is exempt from the detailed rules of the Community Directives on public procurement (e.g. because the contract is below threshold value, is for a Part B service or is otherwise exempt). These principles include the free movement of goods (Article 28 EC-Treaty), the right of establishment (Article 43 EC-Treaty), the free movement of services (Article 49 EC-Treaty) and the principles of non-discrimination and transparency.

6. The Court stated that the principle of non-discrimination on the ground of nationality implies an obligation of transparency which “consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed”. In other words, even where the Scottish Regulations do not require advertisement of a contract opportunity, there is a requirement (derived from fundamental Treaty principles) that contract opportunities are publicised in a manner that would allow interested parties (including those based in other member States) to identify such opportunities.

7. This obligation of transparency means that contracting bodies are required to ensure that any company which may be interested in bidding for a contract (including companies located in another Member State) can access appropriate information regarding the contract opportunity so that it may determine whether it is interested in tendering and, if so, how it can express its interest in bidding for that contract or how it can obtain information.

### **Main Types of Contract Affected**

8. The main types of contract affected by regulations 8(21) and 11(20) are:

- Contracts below the value threshold at which the detailed advertising procedures in the Scottish Regulations apply;
- Contracts for services categorised as “Part B”;
- Contracts otherwise exempt from application of the detailed advertising procedures in the Scottish Regulations.

### **Form of Publicity Required**

9. Regulations 8(21) and 11(20) do not lay down any rules on the form that an advertisement must take or for the means of publication. It is for individual contracting bodies to determine the form and means of publication taking into account the value of the contract and the extent to which it is likely to be of interest to the market.

10. Advertisement in OJEU is not required although there is nothing to prevent an advert being placed in OJEU on a voluntary basis (and this might be a useful step in the case of higher value contracts that are likely to be of significant international interest).

11. Publication on a contracting body’s website or on recognised websites and portals created for the purposes of publicising contract opportunities (including the various commercial sites) will usually be enough to ensure “adequate publicity”. Other means of advertising could include publication in relevant trade journals or specialised publications and also in national newspapers.

12. In all cases, the method of publication should reflect the relevance of the contract to the Internal Market. For example, where a requirement is likely to be only of interest to small, local firms, publication in a local newspaper may suffice. On the other hand, an advert in a local newspaper is unlikely to constitute “adequate publicity” for a high value service concession contract.

13. As a rule of thumb, the greater the value of the contract or market interest in the contract, the greater the coverage of the advert should be. In all cases, the form of advertising should be sufficient to allow interested companies a reasonable prospect of identifying the opportunity through their own market research.

### **Level of Detail to be Publicised**

14. The level of detail contained in the advertisement should be sufficient to enable prospective suppliers to decide whether they are interested and should be proportionate to the value and complexity of the requirement. In most cases the requirement will be satisfied by the provision of a short description of the essential details of the contract to be awarded and of the award procedure, together with an invitation to contact the contracting body in order to obtain additional information.

### **Form of Competition Required**

15. Regulations 8(21) and 11(20) do not dictate a particular form of competition following advertisement of the requirement. The contracting body may determine the form of competition which should, of course, be proportionate to the value and complexity of the requirement and should be sufficiently robust to enable the contracting body to justify its decision on objective grounds. However there should still be some form of evaluation criteria to ensure that the basic principles of openness, transparency and equality of treatment are demonstrated.

### **Circumstances Where Advertising (“Adequate Publicity”) is Not Required**

16. Advertising is not required in every instance. The Regulations themselves contain derogations from advertising even where the full procedural rules would otherwise apply. These derogations form a useful starting point for identifying the circumstances where advertising is not required.

17. In the case of lower value contracts, consideration must also be given to disproportionate cost (for both purchasers and suppliers). It would be inappropriate for very low contracts to be advertised where the resulting costs would be disproportionate to what is being purchased. In the “*Coname*” case (C-231/03) the ECJ indicated that contracts of very modest economic interest may be of no interest to economic operators elsewhere and that for such contracts “the effects on the fundamental freedoms are therefore to be regarded as too uncertain and indirect to warrant the applications of standards derived from primary Community law.”

18. The following are examples of circumstances where, in our opinion, regulations 8(21) and 11(20) would not apply:

- Where advertisement would result in disproportionate costs to purchasers and/or suppliers (in particular for very low value contracts);
- Where the contract is to be awarded under an existing framework, approved list or other qualification system which has itself been the subject of adequate publicity;
- Where, had the contract been subject to the full procedural rules on advertising in the Scottish Regulations, a derogation from advertising would have applied (e.g. where for technical or artistic reasons the contract can only be performed by a particular person and for reasons of extreme urgency).

## **Enforcement of the Regulations and Actions for Contracting Bodies**

19. Regulations 8(21) and 11(20) mean that the award of a contract without any advertising or competition may be challenged by aggrieved suppliers in the Sheriff Court or Court of Session, even where the contract is itself exempt from the detailed advertising and procedural requirements in the Scottish Regulations.

20. It is for individual contracting bodies to decide whether advertising is required (and in what form) and to defend their decisions as necessary. Decisions which are documented and based on legitimate business needs and objective criteria are likely to be defensible. Decisions which are not documented, are arbitrary or which are based solely on convenience to the contracting body or a long standing relationship with a particular supplier are unlikely to be defensible.

21. It is important that decisions not to advertise are adequately documented. It may also be advisable to introduce arrangements under which decisions to award higher value contracts without advertisement are subject to independent approval at an appropriate management level.

## **Closed Tender Lists**

22. Closed tendering (i.e. contracting bodies generating competition by simply contacting companies on an ad-hoc basis and inviting them to submit a bid) is unlikely to be consistent with the judgement and therefore with regulations 8(21) and 11(20) even if the practice includes inviting companies from other member states or all potential suppliers known to the contracting body. However, in some circumstances, for example in niche markets where all the companies capable of meeting the requirement have been identified and invited to tender, closed lists may be regarded as acceptable. It should be remembered that the burden of proof will rest with the contracting body which may need to defend its actions in the courts. It is important to note that, except for very low value contracts, it would not normally be an adequate defence to claim to have identified all those capable of meeting the requirement in Scotland. This is because the requirement for adequate publicity is intended to benefit all those who may be interested in meeting the requirement in the wider EU.

## **Framework Agreements, Approved Lists and Qualification Systems**

23. Individual contracts to be awarded under a framework agreement, approved list or qualification system need not be advertised provided that the lead contracting body has taken the necessary steps to meet the requirement for adequate publicity at the time it awards/establishes the framework agreement, approved list or qualification system and provided that the rules for participation and its operation also comply with fundamental Treaty obligations and any applicable rules in the relevant Regulations.

## **Dissemination**

24. Please bring this SPPN to the attention of all relevant staff, including those in Agencies, Non-Departmental Public Bodies and other sponsored public bodies within your field of responsibility.

## **Enquiries**

25. Any enquiries in relation to this SPPN should be addressed to Iain Moore (tel: 0141 242 5596), email: [iain.moore@scotland.gsi.gov.uk](mailto:iain.moore@scotland.gsi.gov.uk)

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