

Responses to Consultation on Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2007

We are very grateful to all those who responded to the above consultation. This document contains the responses from all the respondents who agreed that their responses could be published.

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(APUC)

**Response to consultation on amendments to 2006 Regulations - Ashley Gould -
Highland Council - 12 October 2007**

Good afternoon. Our only comment is that we are content with this clarification of the existing regulations. I have attached our completed respondent form.

Regards

Ashley Gould
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12 October 2007

Dear Paul

Section 32(2) of the Public Contracts (Scotland) Regulations 2006

I refer to my telephone discussion with Iain Moore on 11 October 2007. We have identified an error in the Scottish Regulations. Section 32(2) of the Scottish Regulations read:

"The notice referred to in paragraph (1) shall include –

- (a) the criteria for the award of the contract; **or**
- (b) where practicable, the score obtained by –
 - (i) the economic operator which is to receive the notice; and
 - (ii) the economic operator –
 - (aa) to be awarded the contract; or
 - (bb) to become a party to the framework Agreement; and ..."

The requirements of Section 32(2)(a) and (b) should be read conjunctively and not disjunctively as is indicated by the OGC guidelines and the UK wide Regulations. Removing the word "or" from Section 32(2)(a) of the Scottish Regulations would solve the problem.

It would be good if this problem could be solved in the proposed amending regulations to the Scottish Regulations. The current position makes for a difference in the Regulations between Scotland and the rest of the UK and leaves uncertainty as to what the courts' view would be on interpretation.

I look forward to your comments in due course.

Yours sincerely

A handwritten signature in black ink, appearing to read "Alan", with a short horizontal line underneath it.

ALAN BOYD
Director, Public Law
for McGrigors LLP

OUR REF DTM/SHARED/DTM

YOUR REF

maclay murray & spens LLP

Hazel Malcolm
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25 October 2007

Dear Ms Malcolm

Draft Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2007

This letter sets out the views of Maclay Murray & Spens LLP on the draft Scottish Statutory Instrument published on 28 September 2007. As requested, we refer to the draft regulations by number. The range of comments we have is limited as the proposed amendments do not result in any substantive changes to the rules.

1. Regulation 2(3)

We agree that this proposed amendment is appropriate to fully reflect the obligations incumbent upon contracting authorities. We also considered whether it would be worthwhile revisiting the use of the word "advertising" rather than "publicity" in Regulation 8(21) of the Public Contracts (Scotland) Regulations 2006¹ in the light of certain comments of Advocate General Sharpston in her recent Opinion in the case *Commission v Finland*². Her Opinion, in part, concerned the varying terms used in different language versions of the *Telaustria* judgment, apparent inconsistencies and resulting doubt regarding the precise nature of the obligation, but she did not appear to reach any firm conclusion on this point. The Directorate itself alludes to the issue in paragraph 5 of SPPN 5/2007 by referring to "some form of publicity". However, in the absence of a determination by the ECJ and with ongoing uncertainty, considering any amendment would appear precipitate for the moment.

2. Regulation 2(6)(c)

New paragraphs 8A and 8B would be clearer and avoid unnecessary repetition if, in the last line of each paragraph, the State in question was simply named e.g. in 8A the paragraph would read as follows:

"In relation to the procedures for the award of a public services contract an economic operator established in Hungary shall be treated as registered on the professional or trade register for the

¹ Also relevant to Regulation 11(20) of The Utilities Contracts (Scotland) Regulations 2006

² Case C-195/04 *Commission v Finland*, Opinion of Advocate General Sharpston of 18 January 2007 at paragraphs 79-98. See also discussion by Kotsonis in "The Extent of the Transparency Obligation Imposed on a Contracting Authority Awarding a Contract Whose Value Falls Below the Relevant Value Threshold" (2007) 16 P.P.L.R. NA71

purposes of paragraph (4)(j) if the economic operator is certified as being entitled to be engaged in the trade in question in Hungary.”

If this suggestion is not adopted we would also note that for Hungary, the phrase used is “in the State in which he is established” whereas for Spain the wording used is “in the State in which it is established.” We are not aware whether this is deliberate (if the register in Hungary is only relevant to natural persons) or an inadvertent error.

Yours sincerely

A handwritten signature in black ink, appearing to read "David McGowan". The signature is fluid and cursive, with a large initial "D" and "M".

David McGowan
Associate
For Maclay Murray & Spens LLP



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02 November 2007

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Dear Ms. Malcolm

The Draft Public Contracts And Utilities Contracts (Scotland) Amendment Regulations 2007

Our response to your consultation on the above draft regulations is as follows.

Regulation 8(21) of the Public Contracts (Scotland) Regulations and regulation 11(20) of the Utilities Contracts (Scotland) Regulations require contracting authorities to 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 Regulations give effect in Scots law to rulings of the European Court of Justice (ECJ) that, even where the European Procurement Directives (and hence the Scottish Regulations) do not require an advertisement to be placed in the Official Journal of the European Union, there will usually be a need for contract opportunities to be subject to some form of publicity so as to meet basic EU Treaty requirements.

To provide guidance on this issue the European Commission published an Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, in the Official Journal C Series on 1st August 2006. This Communication states that the standards derived from the EC Treaty apply only to contract awards having a sufficient connection with the functioning of the Internal Market. In this regard, the ECJ considered that in individual cases, 'because of special circumstances, such as a very modest economic interest at stake', a contract award would be of no interest to economic operators located in other Member States. In such a case, 'the effects on the fundamental freedoms are ... to be regarded as too uncertain and indirect' to warrant the application of standards derived from primary Community law.

In a previous draft of the Interpretative Communication (October 2005) the Commission proposed to define contracts with relevance to the internal market, by virtue of a financial threshold set at 10% of the thresholds provided for in Directives 2004/18/EC and 2004/17/EC. Following objections at the Council of Ministers by Austria, France and Germany the European Commission watered down their initial proposal and the requirement for a specific financial threshold was removed from the final version. The unfortunate result is that there is no clear definition of whether a particular contract is of relevance to the internal market and consequently contracting authorities have to make a judgement for every contract.

Following the Telaustria case at the European Court of Justice (ECJ) (Case 324-98), the Commission had instigated infringement proceedings against a number of Member States for the award of contracts without adequate publicity. On 18th January 2007, Advocate General Sharpston of the ECJ delivered her Opinion in one of these cases, i.e. Commission of the European Communities v Republic of Finland (Case C-195/04). AG Sharpston stated that 'what constitutes a sufficient degree of publicity for low value contracts is a matter for national law. If, upon analysis, the Commission takes the view that applicable national rules on public procurement in a particular Member State fail to provide for sufficient transparency and thus jeopardise the application of the principle of equal treatment, it will no doubt bring infringement proceedings against the Member State in question. In

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(cont)

that way, the Commission's and the Court's resources might also perhaps be more effectively employed than by scrutinising infringements allegedly committed in awarding individual low value contracts.'

The current situation is one of legal uncertainty, i.e. there is no specific financial threshold or other guidance that will enable a contracting authority to confidently determine whether a contract is, or is not, of relevance to the internal market and therefore whether it is covered by the EU treaty obligations.

It would therefore seem a pity to waste the opportunity, afforded by the publication of these Amendment Regulations, to provide legal certainty, as recommended by AG Sharpston, so that Scottish contracting authorities are in no doubt as to whether a particular contract is covered by the requirement for adequate publicity.

We concur with the arguments put forward by Austria, France and Germany in their submission to the Council of Ministers, i.e. that a threshold set at 10% of the levels specified in the Directives would impose an administrative burden that is disproportionate to the benefits that might be obtained.

In Scottish Procurement Policy Note SPPN 03/2005, it was proposed that where a contract has an estimated value in excess of £50,000, details of that contract should be published on the procurement organisation's website. It is our opinion that legal certainty is more important than the specific level at which a financial threshold might be set. However, it would appear that a threshold set at £50,000 sets a reasonable balance between any additional administrative burden and the opening up of the public procurement market to effective competition.

Other European Union and European Economic Area member states have broadly similar provisions. For example, in Norway, the public procurement legislation requires all public sector contracts with a value in excess of 500,000 Norwegian Kroner (approximately £44,500) to be advertised on the national procurement website Doffin (www.Doffin.no).

We therefore request that the Scottish Procurement Directorate (SPD) give serious consideration to the inclusion of a specific financial threshold, that would require contracts with a value exceeding this threshold to be openly advertised. The SPD may also wish to consider specifying the Scottish Public Sector Advertising Portal, as the required method of advertising.

Yours sincerely



Tim Williams
Managing Director

**Response to Consultation on amendments to 2006 Regulations – Doug Forbes
– Institute of Commissioning Professionals - 18 December 2007**

Here's our letter to the OCG. The only point relevant is the lack of OJEU's for Scottish contracts for Part B given Telaustria. Will this give the same problem that I have outlined to OGC but on a smaller scale?

It seems that the Scots have the powers to do what is best.

I know ACEVO is concerned for the Third Sector about the lack of general transparency on PtB.



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31/10/07

Dear Sir/Madam,

Consultation on Changes to the Public Procurement Regulations

The Institute of Commissioning Professionals is a newly formed group whose goals include the promotion of Commissioning. Our members also require skills in contracting Part B services so any changes in this area are important to them.

The inclusion of the accession states and registration are mere formalities to which we agree.

The administrative and clerical tidying up changes we suspect will have more local effect. However, we found the attached draft SI very difficult to comprehend given the amount of cross referencing to previous documents. We ask that the final version is more easily understood.

In the remedies area, we welcome any move towards UK level dispute resolution and would be pleased to hear about OGC's service in that area.

There is no plan to change the requirement not to advertise Part B services. This is disappointing given the Scottish version which states a reasonable degree of advertising. This results from the Telaustria ECJ case.

A quick look at SIMAP shows considerable numbers of EU Contract and Award Notices for Health and Social Care contracts throughout Europe. The UK contribution is by comparison, noticeably absent. Isn't this likely to cause a problem between the EU and the UK on the grounds of compliance?

As you are aware, Transparency is a fundamental tenet of EU law and we foresee situations where, in Health and Social Care, increased transparency will help to accelerate the development of the Government's Third Sector polices. This transparency should not just include placement of Contract Notices but also award notices which include details on contract price. Without this information, how can a mature and transparent market develop?

We support a change to introduce a clause like the one in the Scottish SI which promotes greater transparency and opening up competition in this area.

We have no objection to this letter being made available in public records.

Yours sincerely,

A handwritten signature in black ink that reads "Doug Forbes". The signature is written in a cursive style with a large, prominent 'D' and 'F'.

Doug Forbes
Director

**Response to consultation on amendments to 2006 Regulations – Helen Foster
– Advanced Procurement for Universities and Colleges (APUC) – 19 December
2007**

So that we don't miss the 21 December deadline, the collective response from APUC (not the sector – institutions should have responded separately) is that we support the proposed amendments. I cannot access the annex that respondents were requested to complete, but from memory believe it covers permissions for making responses public – which we agree to.

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