



SOCIAL CARE PROCUREMENT: ADVERTISING AND COMPETITION

Purpose

1. The purpose of this Scottish Procurement Policy Note (SPPN) is to clarify the application of the Public Contracts (Scotland) Regulations 2006 to social care procurement/contracts. This Note should be read in conjunction with Policy Note SPPN 3/2006: Advertising contracts that are exempt from the Scottish Procurement Regulations issued in March 2006; it supersedes previous guidance issued in April 2007 (Supporting People – Procurement Information Sheet).
2. In particular, the Annex to this Note provides advice on the requirement to advertise social care contracts and to award such contracts through open and fair competition.
3. This SPPN is not intended to be a comprehensive guide and public procurement officials are advised to consider taking legal advice in any case where doubt may exist.

Dissemination

4. Please bring this SPPN to the attention of all relevant staff within your field of responsibility to whom this Note may be of interest.

Contact

5. Enquiries about this SPPN should be addressed to Jessie Laurie, Scottish Procurement Directorate, telephone 0141 242 5672 or e-mail jessie.laurie@scotland.gsi.gov.uk.

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SOCIAL CARE PROCUREMENT: ADVERTISING AND COMPETITION**Background: the Public Contracts (Scotland) Regulations 2006**

1. The Public Contracts (Scotland) Regulations 2006 (SSI 2006 No. 1) came into force on 31 January 2006. They implement the European Union's Directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Directive 2004/18/EC).

2. The 2006 Regulations specify the procedures to be followed in relation to the award of public contracts above certain thresholds¹ by contracting authorities². For the purposes of the Regulations, contracts for the provision of services are split into two categories: Part A services, to which the full requirements of the 2006 Regulations apply; and Part B services, to which fewer requirements apply. Contracts for health and social services are classified as Part B services.

Summary of requirements

3. The full requirements of the 2006 Regulations, including the requirement for adverts to be published in the Official Journal of the European Union (OJEU) inviting potential providers of the service to register an interest in submitting a bid, do not apply to Part B services.

- Part B services are, however, subject to Regulation 8(21). Regulation 8(21) states that, where EC Treaty principles require it, contracting authorities should “ensure a degree of advertising and follow a procedure leading to the award of the contract which is sufficient to enable open and fair competition”. See paragraph 4 for details.
- It is the responsibility of individual contracting authorities to decide whether EC Treaty principles require advertising and competition and, if so, the form of publicity and competition required. See paragraph 5 for details.
- Where the potential value of a Part B service contract exceeds the financial threshold in the Regulations, a contract award notice must be submitted to the European Commission once the contract has been awarded (Regulation 31)³.

¹ For information on current threshold values, see <http://www.scotland.gov.uk/Topics/Government/Procurement/PublicProcurement/thresholdjan06>.

² Local authorities are “contracting authorities” for the purpose of the 2006 Regulations.

³ It is not necessary to place a notice in OJEU on award of a contract under a framework agreement: Regulation 31(3).

EC Treaty principles: equal treatment, non-discrimination and transparency

4. Regulation 8(21) gives effect in Scots law to the ruling of the ECJ in the “*Telaustria*” case (ECJ C-324/98) that in awarding any public contract⁴, contracting authorities must meet the requirements of the EC Treaty principles of equal treatment, non-discrimination and transparency. According to the ECJ, “the obligation of transparency which is imposed on the contracting authority 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 procurement procedures to be reviewed”.

Deciding whether the EC Treaty principles require advertising and competition

5. The European Commission has confirmed⁵ that it is the responsibility of individual contracting authorities to decide whether EC Treaty principles require advertising and competition. This decision should be based on the individual circumstances of the case, taking into account:

- the subject matter of the contract;
- the estimated value of the contract;
- the specifics of the sector concerned (the size and structure of the market, commercial practices etc.); and
- the geographic location of the place of performance.

Circumstances where advertising and competition may not be required

6. In the “*Coname*” case (ECJ C-231/03), the ECJ clarified that there may be individual cases where “because of special circumstances, such as a very modest economic interest at stake”, EC Treaty principles would not require advertising and competition.

7. Decisions should be taken on a case by case basis. In our opinion, advertising may not be required where:

⁴ This applies even where the contract is exempt from the full requirements of the 2006 Regulations, for example because the contract is below threshold value, is for a Part B service or is otherwise exempt.

⁵ Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, Brussels, 23.6.2006

- it would result in disproportionate costs to contracting authorities and/or service providers (in particular where the total sum to be paid under a contract will be low);
- where a service is of such a specialised nature that no market of suitable potential providers exists;
- where, for example, the separate competitive tendering of a housing related support service would result in the withdrawal of the accommodation currently provided for the support service users, and those units of accommodation could not be replaced;
- where, had the contract been subject to the full procedural rules on advertising in the Scottish Regulations, a derogation from advertising in accordance with Regulation 14 would have applied (for example where, for technical or artistic reasons a contract can only be performed by a particular person or where there are reasons of extreme urgency);
- where the contract is to be awarded under an existing framework agreement⁶, approved list or other qualification system⁷ which has itself been the subject of adequate publicity.

8. Where a contracting authority decides that EC Treaty principles do not require a service to be advertised and put out to competitive tender, it may decide to move to contract (or to extend or renew an existing contract).

- Any decisions not to advertise or competitively tender a contract should be based on sound and objective business reasons and should be fully documented.
- Contracting authorities should ensure that they comply with their authority's standing orders and local procurement policy and that they are able to demonstrate that best value has been achieved.

⁶ A framework agreement is an agreement with providers which sets out the terms and conditions under which contracts will be awarded throughout the term of the agreement. Framework agreements for Part B services should be advertised, where necessary to comply with the EC Treaty's transparency requirements. Contracts awarded under the framework agreement do not then need to be re-advertised.

⁷ Approved lists or other qualification systems enable contracting authorities to maintain a list of providers who are qualified for, or interested in, particular types of contract. Lists or qualification systems relating to Part B services should be advertised, where necessary to comply with the EC Treaty's transparency requirements. Contracting authorities can then select providers from the list to compete for individual procurements without advertising each contract. The operation of an approved list or qualification system does not obviate the need for competition.

- Decisions should also be subject to regular review. For example, a decision not to advertise and tender a contract because of its low value will need to be reviewed should the total sum to be paid under that contract increase.

9. Contracting authorities should be aware that the award of Part B service contracts without any advertising or competition may be challenged by aggrieved suppliers in the Sheriff Court or Court of Session⁸.

Where advertising and competition are required: form of publicity and competition

10. Where a contracting authority decides that advertising and competition are required, the contracting authority must also decide on the form of publicity and competition required.

11. Regulation 8(21) does not specify the form of publicity required, nor does it specify the form of the competition leading to the award of the contract. Both are for individual contracting authorities to determine, taking into account the value of the contract and the extent to which it is likely to be of interest to the market.

12. A range of competitive procurement methods can be used for the procurement of social care services. For example, contracting authorities may decide to follow a procedure based on the open/restricted procedures detailed in the Regulations or to tender for a group or sector of services using a framework agreement. In the case of higher value contracts which are likely to be of significant international interest, contracting authorities may decide that it is appropriate to place an advert in OJEU on a voluntary basis (this is not a requirement of the Regulations).

Where advertising and competition are required: moving to competition

13. Contracting authorities should have a strategy for the procurement of social care services which recognises the need to maintain the quality and continuity of services and addresses the concerns of vulnerable service users and their relatives.

14. Local service reviews may point to a staged approach to the tendering of certain contract opportunities. Contracting authorities do not have to tender all contract opportunities at the same time if they have objective business reasons for adopting a different timetable. What constitutes an appropriate timetable is a matter for individual contracting authorities: they should aim to strike a reasonable balance between legal requirements to competitively tender contract opportunities and the

⁸ Regulation 47, The Public Contracts (Scotland) Regulations 2006

need to manage competitions effectively while ensuring that quality and continuity of service is not adversely affected.

15. Where contracting authorities have decided against opening certain contracts to competition immediately (perhaps to ensure continuity of service) they should ensure that their procurement strategies for those services clearly document their reasons for adopting a staged approach and set out how they will move towards competition in the future.

E-auctions

16. The 2006 Regulations and corresponding EU Directive 2004/18/EC confirmed that e-auctions were compatible with procurement law, subject to certain pre-conditions.

17. The e-auction stage of the evaluation process allows tenderers to submit new prices/values throughout each phase of auction. When the e-auction closes the contract must be awarded on the basis of the result of the auction – no further evaluation or clarification is allowed.

18. Whilst the legislation explicitly permits the use of an e-auction as part of the tender evaluation process for contracts for goods, works and services, its use will only be appropriate where both the price and quality elements of the tender evaluation criteria can be expressed as a value suitable for incorporation within an electronic formula which automatically and instantaneously ranks bids, and displays this information to all participants in the auction. Contracting authorities are therefore urged to exercise extreme caution when considering the appropriateness of an e-auction as part of the evaluation process for social care contracts.

19. The Office of Government Commerce has issued a guidance note on this subject which can be downloaded from http://www.ogc.gov.uk/documents/OGC_Guidance_on_eAuctions.pdf.

Contract duration

20. Contract duration should be determined locally, taking into account the contracting authority's requirements and the needs of service users. There are no explicit limits in public procurement law on the duration of a contract, although excessively long contracts may be open to challenge on the grounds that they are designed to distort markets/competition.

21. Decisions on contract duration should be objective and based on business needs. Contracting authorities may decide to award contracts of longer duration

where this is necessary to ensure continuity of services for service users. It is possible to frame contracts in a way which would allow the service provider to continue to provide a service to an individual service user for an extended period (e.g. the provision of continuous or 'lifetime' support for an individual, subject to satisfactory performance, for as long as that support is required) where there would be benefits in having such arrangements, for example where consistency of staffing is crucial to the welfare of service users. It is also possible to extend existing contracts. Again, this is a matter for individual contracting authorities to determine⁹. The duration of contracts and the justification for contracts of a particular duration should be specified in the procurement strategy for the service.

**Scottish Procurement Directorate
August 2008**

⁹ What is reasonable, in terms of contract extensions, will depend on the market in question. Contracting authorities must not use contract extensions in such a way as to prevent, restrict or distort competition.