

# White Paper Edinburgh Conference: Awarding Public Contracts Lawfully and Skilfully within the Scottish Procurement Rules

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How do you incorporate the Scottish Government's procurement agenda into your procurements, including fair working practices and the sustainable procurement duty?

# Outline

- Scottish model of procurement
- Scottish legal framework
- Procurement Reform (Scotland) Act 2014
- Guidance under the Procurement Reform (Scotland) Act 2014
- Statutory Guidance on the Selection of Tenderers and Award of Contracts - Addressing Fair Work Practices, including the Living Wage, in Procurement October 6, 2015

# Scottish Model of Procurement

- **The Scottish Model of Procurement**
- The Scottish Model of Procurement puts procurement at the heart of Scotland's economic recovery. It sees procurement as an integral part of policy development and service delivery.
- Like all good ideas, it's a simple concept - business friendly and socially responsible. Looking at outcomes not outputs, it uses the power of public spend to deliver genuine public value beyond simply cost and /or quality in purchasing.
- Government led, it benefits from strong political leadership including three successive Cabinet Secretaries. It is also owned by all of the Scottish public sector. Working together to develop strategic relationships with key business, Third Sector organisations and, a project level partnership with them to agree solutions to specific problems.
- The Value for Money triangle sums up the Scottish Model of Procurement; it is not just about cost and quality, but about the best balance of cost, quality and sustainability.

# The Scottish legal framework

- **Implementing the new legislation**
- A co-ordinated approach has been taken in transposing the EU Directives into Scots law to ensure that a comprehensive suite of guidance could be produced to support the new legislation. The new regulations came into effect on 18 April 2016. The new suite of legislation is:
  - [Procurement Reform \(Scotland\) Act 2014](#)
  - [The Procurement \(Scotland\) Regulations 2016](#)
  - [Public Contracts \(Scotland\) Regulations 2015](#)
  - [Utilities Contracts \(Scotland\) Regulations 2016](#)
  - [Concessions Contracts \(Scotland\) Regulations 2016](#)
- In addition to the regulations the Scottish Government has produced [statutory guidance](#) which describes how public bodies should support the ambitions of the Act.

# The Scottish legal framework (2)

- Public procurement is governed by a legal framework which includes fundamental principles deriving from the Treaty on the Functioning of the European Union (TFEU); European Procurement Directives (the Directives) as implemented in national legislation; other national legislation; and, Court of Justice of the European Union and national case law.
- In combination, this legal framework establishes procedures that must be followed by a contracting authority whenever it purchases goods, works or services.
- The three 2014 European Directives in relation to public procurement have been transposed into national legislation by Regulations:
  - Directive 2014/24/EU on public procurement, replacing the 2004 Directive for Public Sector Contracts; transposed by The Public Contracts (Scotland) Regulations 2015;
  - Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, replacing the 2004 Directive for Utilities Contracts; transposed by The Utilities Contracts (Scotland) Regulations 2016; and
  - Directive 2014/23/EU on the award of concession contracts, which does not directly replace any previous Directive; transposed by The Concessions Contracts (Scotland) Regulations 2016.

# Procurement Reform (Scotland) Act 2014

- The Act provides a national legislative framework for sustainable public procurement that supports Scotland's economic growth through improved procurement practice.
- The Act focuses on a small number of general duties on contracting authorities regarding their procurement activities and some specific measures aimed at promoting good, transparent and consistent practice in procurement processes.
- The opportunity of the changes introduced by both the Directives and the Act has been used by the Scottish Government to apply consistent rules to public contracts above and below European Union (EU) threshold contract values where appropriate.
- The Act gives the Scottish Government the discretion to do this as it covers lower value regulated contracts.
- This means that even further consistency can readily be applied to the majority of public procurement contracts in Scotland, therefore simplifying and streamlining the procurement process for contracting authorities and economic operators alike.

# Procurement Reform (Scotland) Act 2014 (2)

- Procurement Reform (Scotland) Act 2014 (the Act) allows Ministers to publish statutory guidance on the following:
- procurement strategies and annual procurement reports (section 20 of the Act);
- sustainable procurement duty (section 10 of the Act);
- community benefit requirements in procurement (section 26 of the Act);
- selection of tenderers and award of contracts (section 29 of the Act); and
- procurement for health or social care services (section 13 of the Act).
- In October 2015, the Scottish Ministers published statutory guidance under section 29 of the Act on:
- **Addressing Fair Work Practices, including the Living Wage, in Procurement**

# Guidance under the Procurement Reform (Scotland) Act 2014

- This suite of statutory guidance provides advice on what a contracting authority should do to comply with the Act, The Public Contracts (Scotland) Regulations 2015 (which transpose the public procurement Directive) and The Procurement(Scotland) Regulations 2016 (which were made under the Act).
- A contracting authority must have regard to this guidance and should read it together with the relevant sections of the Act and the Regulations.
- A contracting authority should also take into account any other relevant guidance or good practice where appropriate.

# Guidance under the Procurement Reform (Scotland) Act 2014 (2)

- **Procurement strategies and annual procurement reports**
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- Preparing a strategy
- Form and content
- Monitoring, reviewing and reporting on a procurement strategy

# Guidance under the Procurement Reform (Scotland) Act 2014 (3)

- **Sustainable procurement duty**
- Improving the economic, social and environmental wellbeing of the authority's area
- Facilitating the involvement of small and medium enterprises (SMEs), third sector bodies and supported businesses
- Promoting innovation

# Guidance under the Procurement Reform (Scotland) Act 2014 (4)

- **Community benefit requirements in procurement**
- When to use community benefit requirements
- Identifying community benefit requirements through stakeholder consultation
- Incorporating community benefit requirements into the procurement process
- Other guidance and examples

# Guidance under the Procurement Reform (Scotland) Act 2014 (5)

- **Selection of tenderers and award of contracts**
- Exclusion of economic operators
- Basis on which to select economic operators
- European Single Procurement Document
- Award of contracts

# Guidance under the Procurement Reform (Scotland) Act 2014 (6)

- **Procurement for health or social care services**
- Special considerations for the procurement for health or social care services
- Links to supporting best-practice guidance specifically covering care and support services
- Summary of the changes to the public procurement rules affecting health or social care services
- Specific changes to the public procurement rules for health or social care services
- Quality and cost considerations before procuring
- Application of the rules – thresholds and other considerations before procuring health or social care services
- Compliance

# Fair Work Practices, including the Living Wage, in Procurement

- Statutory guidance under the Procurement Reform (Scotland) Act 2014 provides guidance to public bodies on how to evaluate fair work practices, including the Living Wage when selecting tenderers and awarding contracts
- As part of the range of statutory guidance under the Procurement Reform (Scotland) 2014 Act this statutory guidance deals with fair work practices including the Living Wage as part of procurement processes.

## Fair Work Practices, including the Living Wage, in Procurement (2)

- The guidance makes clear that the Scottish Government considers payment of the Living Wage to be a significant indicator of an employer's commitment to fair work practices and that the payment of the Living Wage is one of the clearest ways that an employer can demonstrate that it takes a positive approach to its workforce.
- The guidance emphasises that whilst failure to pay the Living Wage would be a strong negative indicator it does not mean that the employer's approach automatically fails to meet fair work standards.
- Public bodies must now consider, before undertaking a procurement exercise, whether it is relevant and proportionate to include a question on fair work practices as part of the competition.

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Mark Clough QC is a senior counsel in Dentons' Brussels office. Mark is one of the UK's leading experts in EU and competition law, including competition litigation, merger control, state aid, public procurement, international trade and economic regulation. He has represented clients for more than 25 years before the UK competition authorities and UK courts, including the Competition Appeal Tribunal, as well as the European Commission and EU Courts in Luxembourg.

He has advised clients on all areas of UK and EU competition law, from mergers, joint ventures and market investigations to cartels, dawn raids and investigations, distribution strategies, compliance programmes, including advice on competition strategies for dominant firms, and related economic regulation - in sectors as diverse as energy, water, financial services, transport including shipping, ICT, and food and drink. He was appointed Queen's Counsel in 1999 and a Scottish Solicitor in 2013.

Mark was chairman of the Solicitors Association of Higher Court Advocates, SAHCA (2003 – 2006) and chair of the EU Committee of the Law Society (2010 – 2013) as well as being a member of the Law Society Working Group on Banking Reform. As an elected member of the Council of the European Law Institute based in Vienna, he chaired the Project Group on the European directive on competition law damages and Recommendation on Collective Redress.

# Thank you

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