

2015 No.

PUBLIC PROCUREMENT

Illustrative Regulations: Clause 38 SBEE Bill

PART 1

GENERAL

Definitions

1.—(1) In these Regulations, except where the context otherwise requires,—

“Academy” means a person who is the proprietor, within the meaning of section 579(1) of the Education Act 1996 of an Academy within the meaning of that section;

“bodies governed by public law” means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they have any of the following characteristics:-

(i) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;

(ii) they are subject to management supervision by those authorities or bodies; or

(iii) they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

“contracting authorities” means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;

“economic operator” means any person or group of such persons including any temporary association of undertakings, which offers the execution of works and / or a work, the supply of products or the provision of services on the market;

“maintained school” means the governing body of a maintained school within the meaning of section 39 of the Education Act 2002;

“public contracts” means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

“Public Contracts Regulations 2015” means the (draft) regulations transposing the requirements of Directive 2014/24/EU of the European Parliament and of the Council;

“SME” means “an enterprise falling within the category of micro, small and medium-sized enterprises defined by the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises”;

“VCSE” means a non-governmental organisation that is value-driven and which principally reinvests its surpluses to further social, environmental or cultural objectives;

“written” means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information transmitted and stored by electronic means.

Extent

2.—(1) These regulations do not apply to contracting authorities, whose functions are wholly or mainly devolved functions, namely—

- (a) Scottish devolved functions, that is to say functions the exercise of which would be within devolved competence (within the meaning of section 54 of the Scotland Act 1998);
- (b) Northern Ireland devolved functions, that is to say functions which could be conferred by provision included in an Act of the Northern Ireland Assembly made without the consent of the Secretary of State (see sections 6 to 8 of the Northern Ireland Act 1998), or
- (c) Welsh devolved functions, that is to say functions which could be conferred by provision falling within the legislative competence of the National Assembly for Wales (as defined in section 108 of the Government of Wales Act 2006).

PART 2

ABOVE EU THRESHOLD PROCUREMENTS

Scope of Part 2

3.—(1) Subject to paragraph (2), this Part applies to procurements by contracting authorities with respect to public contracts where, because the estimated value of the procurement is above the relevant threshold in regulation 5 of Public Contracts Regulations 2015, Part 2 of those Regulations applies.

(2) This Part does not apply to any of the following cases:—

- (a) where the requirements in Part 2 would not have applied even if the estimated value of the procurement had been above the relevant threshold mentioned in regulation 5 of the Public Contracts Regulations 2015;
- (b) the procurement of health care services for the purpose of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013;
- (c) contracts awarded by a contracting authority which is a maintained school or an Academy.

Pre-procurement market engagement

4.—(1) Where a contracting authority decides to carry out market engagement before commencing a procurement procedure (“pre-procurement market engagement”):

- (a) this must be carried out in a manner calculated to increase awareness of and interest in bidding for the procurement by relevant SMEs, VCSEs and other economic operators; and
- (b) it may include, but is not limited to:—
 - (i) publishing a Prior Information Notice;
 - (ii) advertising the planned procurement in any form of media that is available free of charge to potential bidders;
 - (iii) publishing the planned procurement on internet-based portals that are available free of charge to potential bidders and which list future planned procurements;
 - (iv) carrying out a consultation exercise with potential bidders;
 - (v) hosting a bidder event;
 - (vi) holding documented meetings with potential bidders.

(2) Paragraph (1) does not require a contracting authority to do anything that is disproportionate to the value or complexity of the procurement.

(3) The outcome of any pre-procurement market engagement may be used in the planning and conduct of the procurement procedure, provided it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

(4) In meeting the requirements of this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office, in particular regarding:

- (a) the meaning of “disproportionate”;
- (b) what might constitute pre-procurement market engagement; and
- (c) how pre-procurement market engagement might lead to greater involvement in a procurement process by SMEs or VCSEs.

Application of Lean sourcing principles

5.—(1) For contracts falling within this Part, a contracting authority, when exercising its functions relating to procurement, must have due regard to the following principles (“Lean sourcing principles”), applying them in a way proportionate to the complexity and value of the contract:

- (a) obtaining a clear understanding of the business outcomes required by the procurement;
- (b) ensuring that the contracting authority’s needs are agreed and clearly stated through structured engagement with business stakeholders;
- (c) effective and proportionate pre-procurement market engagement with prospective suppliers;
- (d) effective planning and management of the procurement process and of any contract awarded;
- (e) ensuring through information supplied before or at the time the procurement opportunity is advertised, that suppliers are given sufficient information for them to make informed decisions about whether they wish to tender for the contract; and
- (f) monitoring and measuring performance of procurement and contract management processes in order to continuously improve them.

(2) When meeting the requirement in paragraph (1), a contracting authority shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to Lean sourcing principles and in particular in relation to how appropriate regard may be taken of these within a procurement process.

PART 3

MISCELLANEOUS OBLIGATIONS

Reporting requirements

6.—(1) Every financial year, each contracting authority shall publish on the internet a written report showing, for the preceding financial year, how far the contracting authority has complied with any obligations under Part 2 of these Regulations that apply to its exercise of functions relating to procurement during that financial year.

(2) In paragraph (1), “publish on the internet” means—

- (a) make freely available on the internet, and
- (b) maintain such availability, subject to temporary interruptions for technical reasons, until the publication under paragraph (1) of the report for the following financial year.

(3) In relation to regulation 4, where the contracting authority has carried out pre-procurement market engagement, the report shall include how the contracting authority has had due regard to the matters set out in regulation 4(1)(a) and (b).

(4) In relation to regulation 5, the report shall include how the contracting authority has had due regard to Lean sourcing principles.

(5) Every financial year, a contracting authority shall, at the same time as publishing the report referred to in paragraph (1), send the Cabinet Office a copy of that report.

(6) In paragraphs (1) and (5), “financial year” means the period in respect of which the accounts of the contracting authority are prepared.

(7) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office.

(8) Such guidance may, in particular, recommend model templates for presenting the report and specify the means by which the form should be submitted.