

Scottish Procurement Policy Note: SPPN 1/2022

04 April 2022

Public Procurement - Russian and Belarusian companies

Purpose

The Scottish Government joins the world in condemning Russia's invasion of Ukraine. This note sets out procurement implications and options that public bodies may choose to take, beyond the UK sanctions regime, with a view to discouraging activity which may support the Russian government's action.

Key points

- public bodies are encouraged to exclude companies established in Russia and Belarus from new contracts
- if existing contracts with companies established in Russia or Belarus, or companies controlled by entities established in Russia or Belarus are identified, public bodies should consider terminating those contracts in line with the provisions of the contracts
- property contracts (such as leases, option agreements and conditional disposal/acquisition contracts) should be included in the consideration of existing contracts. Proposed property contracts should also be reviewed for the involvement of companies established in Russia or Belarus
- section 17 of the Local Government Act 1988 prevents local authorities and some other public bodies from taking non-commercial matters, including the location of any country or territory of the business activities or interests of contractors, into account in procurement or contract termination decisions

New contracts

Neither Russia nor Belarus is a signatory to the World Trade Organisation's Agreement on Government Procurement (the GPA). Nor does the UK have any international agreements on procurement with Russia or Belarus. This means that companies

established in Russia and Belarus are not owed duties of equal treatment in relation to the process leading to the award of public contracts in Scotland.

Accordingly, most public bodies are likely to be able to reject bids from companies established in Russia and Belarus if this would be an appropriate measure, for example because it is considered necessary to protect public policy or public security. Similarly, public bodies should consider whether to avoid entering new property contracts with companies established in Russia or Belarus.

A company established in Russia or Belarus is considered to be one which is constituted or organised under the laws of Russia or Belarus.

A company may also be open to exclusion from bidding for a new contract if established outside of Russia or Belarus but that company's 'Persons with Significant Control'¹ information states Russia or Belarus as the place of residency.

However, a company should not be automatically excluded if it (or any member of the supply chain on which it will rely to deliver the contract):

- is registered in the UK, or in a country with which the UK has an international agreement with reciprocal rights of access to public procurement; and/or
- has substantive business operations in the UK, or in a country with which the UK has an international agreement with reciprocal rights of access to public procurement

In either of these cases, the duties of non-discrimination and equal treatment, and the right of remedies provided under the Public Contracts (Scotland) Regulations 2015, are likely to apply.

Substantive business operations means having a registered office, factory or other permanent base in the relevant country from which meaningful business operations are being conducted. Public bodies should conduct due diligence to check supplier details with Companies House and other open information sources, or seek verification directly from the supplier.

As is usual in procurement competitions, each public body is accountable for its own decisions and should carry out its own due diligence, including taking such legal advice as is considered appropriate. Considerations such as a bidder's Person with Significant Control status or whether meaningful business are being conducted are not

¹ A 'Person with Significant Control' or beneficial owner is defined as holding i) more than 25% of shares in the company; and/or ii) more than 25% of voting rights in the company; and/or iii) the right to appoint or remove the majority of the board of directors and/or has the right to exercise, or actually exercises, significant influence or control over the company

determinative, but are factors which should be taken into account by the public body in deciding whether to exclude such companies.

Even where it is decided that it is not possible or appropriate to exclude such a company from a procurement, it may still be possible not to award a contract to a bidder in the context of the commercial practicalities of contract delivery. In particular, the impact of a supplier's links to or operations in Russia or Belarus on its ability to deliver the requirements of a contract should be considered.

Existing contracts

The Scottish Government is supportive of public bodies seeking to divest from Russia and Belarus and public bodies should consider how they can further cut ties with companies established in Russia and Belarus, while minimising the impact to taxpayers and the delivery of public services. Public bodies are encouraged to review their contracts to identify any contracts with companies which are established in Russia and Belarus, as well as companies which may be established elsewhere, but which are controlled by an entity established in Russia or Belarus, such as a parent company or where the 'Persons with Significant Control' information states Russia or Belarus as the place of residence. This review should also include reviewing the place of establishment or control of any existing property landlords or parties to other property contracts.

This information may have been captured as part of the selection stage of the procurement process. Public bodies may need to undertake further verification of this information, however, and should use as many sources as are available to them to do so.

Where such a contract is identified, public bodies are encouraged to consider whether it would be appropriate and proportionate to terminate that contract in line with any normal contract law considerations and any termination provisions contained in it.

Before deciding to terminate such a contract, public bodies should take appropriate legal and other advice and consider, for example:

- whether and in what circumstances the contract allows for termination
- what the impact on supply or service delivery would be
- the availability of alternative providers
- the financial and other implications of termination. Other implications of termination could include scenarios where termination could be beneficial to the contractor; for example under an energy contract where the current market price is much higher than the agreed price under the contract and termination would allow the contractor to sell their energy at a higher price

There may be a valid financial, operational, commercial, legal or other reason why a contract cannot or should not be terminated.

The decision whether to terminate a contract is for each public body to make in line with its own internal governance and procedures and on a case-by-case basis.

As a matter of good commercial practice, public bodies should also review key supply chains to identify and work to ensure supply chain resilience and mitigate any exposures which may arise from the use of sub-contractors with links to Russia or Belarus. In particular, the impact of a supplier's links to or operations in Russia or Belarus on its ability to deliver the requirements of a contract should be considered.

Public bodies should take a proportionate and risk-based approach to reviewing their contract portfolio to identify Russian and Belarusian contractors.

Local authorities and other specific bodies

Section 17 of the Local Government Act 1988 prohibits local authorities and certain other bodies (listed in [Schedule 2](#) to the Act) from taking non-commercial considerations into account and defines the scenarios where this applies. These include entering into and terminating contracts for non-commercial reasons, and using location of suppliers as a factor in decision making in procurements. This means that local authorities are unlikely to be able to either reject bids from companies by reason of being established in Russia or Belarus, or to terminate existing contracts on that basis. Those sections of this note do not therefore apply to local authorities. The Scottish Government is exploring options in this area.

Dissemination

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 area of responsibility, including those that have responsibility for property contracts.

Contact

If you have any questions about this SPPN, please contact us at scottishprocurement@gov.scot.