



INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

AGENDA

5th Meeting, 2016 (Session 4)

Wednesday 3 February 2016

The Committee will meet at 9.30 am in the Adam Smith Room (CR5).

1. **Ofcom's draft Annual Plan 2016/17:** The Committee will take evidence from—
Sharon White, Chief Executive, Ofcom.
2. **Inquiry into the circumstances surrounding the closure of the Forth Road Bridge:** The Committee will take evidence from—
John Evans, Consultant, Flint & Neill;
Richard Fish, Independent Engineering Consultant;
Peter Hill, General Manager and Bridgemaister, Humber Bridge Board.
3. **Subordinate legislation:** The Committee will consider the following negative instrument—
The Public Contracts (Scotland) Regulations 2015 (SSI 2015/446)
4. **Inquiry into the circumstances surrounding the closure of the Forth Road Bridge (in private):** The Committee will consider the evidence heard earlier in the meeting.

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Clerk to the Infrastructure and Capital Investment Committee
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The papers for this meeting are as follows—

Agenda item 1

Ofcom Cover Note	ICI/S4/16/5/1
PRIVATE PAPER	ICI/S4/16/5/2 (P)

Agenda item 2

FRB Inquiry Cover Note	ICI/S4/16/5/3
PRIVATE PAPER	ICI/S4/16/5/4 (P)
SSI 2015/446 Cover Note	ICI/S4/16/5/5

Infrastructure and Capital Investment Committee

5th Meeting, 2016 (Session 4), Wednesday 3 February 2016

Evidence Session with Sharon White, Chief Executive, Ofcom

Ofcom's draft Annual Plan 2016/17

Background

1. Ofcom is the UK-wide independent communications regulator. It oversees the TV and radio sectors, fixed line telecoms, mobiles, postal services, plus the airwaves over which wireless devices operate. It was established by the [Office of the Communications Act 2002](#).

2. In November 2014, the [Smith Commission](#) recommended that there should be a formal consultative role for the Scottish Government and the Scottish Parliament in setting the strategic priorities for Ofcom with respect to its activities in Scotland. The [Scotland Bill 2015-16](#) proposes to do so by putting in place measures that will require Scottish Ministers to appoint one member of Ofcom capable of representing the interests of Scotland.

3. The measures will also ensure that Ofcom's Annual Report and statement of accounts be laid before the Scottish Parliament and that the Scottish Parliament can require Ofcom to appear before its Committees. A draft Memorandum of Understanding between Ofcom, the Scottish Government and UK Government is currently in development.

4. Ofcom is currently consulting on its [draft annual plan for 2016/17](#), with a view to publishing the final version, taking into account responses from stakeholders, in March 2016. It is expected that the plan will set out its priorities for the year ahead, including how it will work towards its long term goals which are to—

- Promote competition and ensure that markets work effectively for consumers
- Secure standards and improve quality
- Protect consumers from harm

Next steps

5. The Committee will take evidence from the Chief Executive of Ofcom, Sharon White, on its proposed Annual Plan for 2016/17.

Jason Nairn
Assistant Clerk
February 2016

Infrastructure and Capital Investment Committee

5th Meeting, 2016 (Session 4), Wednesday 3 February 2016

Inquiry into the circumstances surrounding the closure of the Forth Road Bridge

Introduction

1. At its meeting on 16 December 2015 the Infrastructure and Capital Investment Committee agreed to hold an inquiry into the circumstances surrounding the closure of the Forth Road Bridge. This followed the closure of the bridge to all traffic on public safety grounds on 4 December due to the discovery of steelwork defects of a support beam.¹ Specifically, the remit of the inquiry is:

“To examine the management, monitoring and maintenance of the Forth Road Bridge principally in the 10 year period prior to its closure on public safety grounds in December 2015”

2. While the Committee understands that the closure of the Bridge brought frustration to travellers and continues to bring significant impact upon many businesses, it agreed that its inquiry should focus on the structural defects identified and whether these could have been avoided or dealt with differently. The Committee acknowledged that these related and hugely important issues might however be investigated at a later stage.

Current work

Written evidence

3. The Committee issued a [call for written evidence](#) on 16 December 2015 and the closing date for submissions is Friday 29 January 2016. A full list of submissions received so far is listed in the **Annexe**.

4. The Scottish Parliament Information Centre (SPICe) has also published a briefing on the [closure of the Forth Road Bridge](#). The briefing outlines the history of the Forth Road Bridge, how it has been managed, funding for bridge operations and looks in more detail at the events leading up to its temporary closure.

Evidence sessions

5. The Committee is holding a series of oral evidence sessions in January and February 2016.

6. At its first evidence session on 20 January 2016, the Committee heard evidence from representatives of Transport Scotland and Amey as well as bridge engineers from Arup and Fairhurst who had provided independent advice on the structural defects. On 27 January the Committee then spoke with representatives of the former Forth Estuary Transport Authority (who had previously managed and maintained the Bridge up to June 2015).

¹ The bridge was subsequently reopened to all traffic except Heavy Goods Vehicles (HGVs) on 23 December 2015. The restriction for HGVs is expected to be in place until mid-February 2016.

7. At its meeting on Wednesday 3 February the Committee will hear from a panel of bridge experts from across the UK while the final evidence session with the Minister for Transport and Islands will take place on Wednesday 24 February.

Visits

8. On 19 January the Committee visited the Forth Road Bridge to see where the steelwork failure occurred and the interim solution which had been put in place.



Report

9. The Committee will take into account all evidence received on the closure of the Forth Road Bridge prior to publishing a report on its findings prior to dissolution of the Scottish Parliament in March 2016.

Andrew Proudfoot
Senior Assistant Clerk
January 2016

Annexe

Written submissions to the Infrastructure and Capital investment Committee

- [Audit Scotland](#)
- [Cllr Ian Chisholm, Board Member and Fife Council elected representative to the former Forth Estuary Transport Authority \(FETA\)](#)
- [The Forth Estuary Transport Authority \(FETA\)](#)
- [Bob Hopewell, Civil Engineer](#)

Infrastructure and Capital Investment Committee

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Subordinate legislation

Title of Instrument

[Public Contracts \(Scotland\) Regulations 2015 \(SSI 2015/446\)](#)

Type of Instrument

Negative

Laid Date

18 December 2015

Minister to attend the meeting

No

SSI's drawn to the Parliament's attention by Delegated Powers and Law Reform (DPLR) Committee

Yes (more information below)

Reporting Deadline

8 February 2016

Purpose and ICI Committee consideration

1. The purpose of this instrument is to revoke and replace the Public Contracts (Scotland) Regulations 2012 and to transpose into domestic law European Parliament Directive 2014/24/EU on public procurement, along with existing European laws and directives on public procurement.
2. This instrument will have effect from 18 April 2016, which is the date by which all member States of the European Union must have implemented Directive 2014/24/EU. Allowing time between laying of these regulations and their entry into force is intended to give those concerned by the changes to the procurement rules sufficient time to prepare for these.
3. The instrument is the first in a number of instruments laid by the Scottish Government to enact changes in public procurement in Scotland. In an update following the Committee's scrutiny of the Procurement Reform (Scotland) Bill, the Cabinet Secretary for Infrastructure, Investment and Cities wrote to the Committee providing an update on the measures to be enacted and this is attached at Appendix A.
4. The Cabinet Secretary indicates that this instrument will be followed by further negative instruments to give effect to European Parliament Directives 2014/25/EU and 2014/23/EU, which regulate the award of utilities contracts and concession contracts, respectively. The Committee will consider these at future meetings. A further affirmative instrument will bring forward regulations under the Procurement Reform (Scotland) Act 2014. The Committee will take evidence from the Cabinet Secretary regarding this instrument and during that

session, the Committee will have the opportunity to receive an update on the whole suite of secondary legislation in relation to public procurement.

Procedure

5. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament.

6. If that is also agreed to, Scottish Ministers must revoke the instrument. Each negative instrument appears on a committee agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow correspondence to be entered into or a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendation on it.

Consideration by the DPLR Committee

7. At its meeting on 19 January 2016, the DPLR Committee considered the instrument and determined that it required to draw to the attention of Parliament some drafting matters within its remit, including some cross referencing errors and an issue regarding the definition of “central government authority” in Regulation 2(1).

8. Prior to the DPLR Committee’s consideration of the instrument, the Scottish Government committed to correcting the cross-referencing errors by laying an amending instrument. The DPLR Committee welcomed this commitment, however, it also recommended that the Scottish Government use this opportunity to clarify the issue regarding the definition “central government authority”. (an extract of the DPLR Committee’s report is attached at Appendix B).

9. The Scottish Government laid [the amending instrument on 28 January 2016](#) and whilst this is still to be considered by the DPLR Committee, it seeks to address both the cross-referencing and definition issues. The ICI Committee will also consider the amending instrument at a future meeting.

Recommendation

10. **The Committee is invited to consider any issues that it wishes to raise in reporting to the Parliament on this instrument.**

Jason Nairn
Assistant Clerk
February 2016

Appendix A**Letter from the Cabinet Secretary for Infrastructure, Investment and Cities to the Infrastructure and Capital Investment Committee, dated 17 December 2015**

Following my appearance before the Infrastructure and Capital Investment Committee on 17 June 2015, I undertook to update the committee on our plans to transpose the new European procurement Directives into Scots law.

I intend to lay regulations which transpose Directive 2014/24/EU on public procurement later this week. These will regulate most above-threshold public contracts awarded in Scotland. I intend to lay further regulations, transposing Directives 2014/23/EU and 2014/25/EU, on the procurement of concession contracts and utilities contracts respectively, in the new year. In order to give public bodies and businesses time to prepare for the changes these regulations will bring about, they will all take effect on 18 April 2016, the date by which all EU member States are required to have transposed these Directives.

In advance of that, I am today publishing the Scottish Government's response to the consultation exercise we undertook earlier in the year. I have attached a copy of that document, and will also make it available in SPICe.

You will recall that member States each have a number of choices to make about how they implement the Directives. That document sets out how the regulations will be brought forward in each area where we had a such a choice to make.

An analysis of all the responses we received as part of the consultation, which was published in August, showed that in very large part, those who responded to the consultation agreed with our proposals. It follows, therefore, that I intend, in very large part, to lay regulations which reflect those proposals.

The committee may be interested in my intended approach to transposition in three areas in particular.

Firstly, I will be taking strong action to tackle the issue of blacklisting of workers – a subject which has rightly received a great deal of attention.

The Directives set out several grounds on which a business may be excluded from bidding for public contracts. Until now, a contracting authority which wished to exclude a business that had blacklisted would have to rely on being able to demonstrate that it was guilty of grave professional misconduct.

The new Directive, however, introduces another ground on which contracting authorities may exclude a business from bidding for contracts. This is a broad ground, which covers situations when a business has breached its environmental, social or employment law obligations. By default, exclusion on this ground is at the discretion of the contracting authority, but member States have the option, when transposing the Directives, to go further, and to make this a mandatory ground for exclusion.

Blacklisting blights lives and has a significant impact on those affected. If blacklisting is still occurring, it must be stopped. For this reason, I have decided to use the flexibility the Directives give us to bring forward regulations which will make it a legal requirement for public bodies to exclude businesses which have either been found to have committed an act prohibited under the Employment Relations Act 1999 (Blacklists) Regulations 2010, or which have admitted doing so.

This requirement will remain in force until either such time as the business has taken appropriate remedial measures, or a period of three years has elapsed since the blacklisting occurred (this is the longest period that exclusion on this ground is allowed for under the EU Directive). The remedial measures I refer to are that the business must prove that it has paid, or undertaken to pay, compensation in respect of any damage caused, clarified the facts and circumstances by actively collaborating with investigating authorities and taken concrete technical, organisational and personnel measures appropriate to prevent further offences or misconduct.

I will also bring forward regulations under the Procurement Reform (Scotland) Act 2014 to extend this requirement to lower-value regulated contracts.

Our scope for tackling blacklisting head-on in Scotland has been somewhat limited by the fact that the Scottish Parliament does not have responsibility for employment law. But by taking this action, we are going as far as we can to reform the part of the law in relation to blacklisting that we do have responsibility for. This also goes further than any other part of the UK has gone to make sure that those who blacklist do not win public contracts.

Secondly, the committee may also be interested to know that I do not intend, for now, to take up the option to allow public bodies to reserve certain categories of contracts to mutuals, or similar organisations. Many respondents to the consultation said that they would see some advantages to this, while a larger number were more neutral in their response.

I am not convinced that this provision would be very useful in practice, however. The Directive makes clear that participation in competitions can be restricted only to those businesses which have an objective in pursuit of a public services mission linked to the particular contract being tendered, which reinvest profits with a view to achieving that objective, which have a structure of management or ownership which is based on employee ownership, and which have not been awarded a similar contract by the same public body using this procedure in the preceding three years. Additionally, any contract awarded under this procedure must not exceed three years. Collectively, these conditions mean that such a provision may rarely be applicable.

I am prepared to consider making such a provision in the future, however. This Article of the Directive has a review clause built into it, which requires the European Commission to assess its effects and report to the European Parliament and Council by 18 April 2019. It would seem to be sensible to await the outcome of that review, and to consider any conclusions it reaches.

Finally, I will be bringing forward regulations which will not allow contracting authorities to award regulated contracts on the sole basis of lowest price or lowest cost. This is in line with the Scottish Model of Procurement, which emphasises the importance of balancing cost, quality and sustainability in order to get the greatest possible value from public spending.

All three of the measures I have outlined here are areas where the Scottish approach to transposition of the Directives stands in marked contrast with the approach taken by the UK Government, and will, I believe, give Scotland a better, more balanced set of procurement regulations.

Appendix B

Extract from the Delegated Powers and Reform Committee's 6th Report 2016**Public Contracts (Scotland) Regulations 2015 (SSI 2015/446)
(Infrastructure and Capital Investment)**

4. The purpose of this instrument is to revoke and replace the Public Contracts (Scotland) Regulations 2012 and to transpose into domestic law Directive 2014/24/EU on public procurement.

5. In considering the instrument, the Committee asked the Scottish Government whether it is intended that the central government authorities listed in Schedule 1 to the regulations are also to be understood as contracting authorities for the purposes of the regulations. The correspondence is reproduced at Annexe A.

6. The Scottish Government considers that the central government authorities, which are the bodies listed in Schedule 1 to the instrument, fall within the definition of the term "contracting authority" in regulation 2(1) and that this is clear from the terms of the regulations. The Committee considers however that the definition of the term "central government authority" should refer to "the *contracting* authorities listed in Schedule 1" rather than simply to "the authorities listed in Schedule 1" in order to make clear the policy intention that all central government authorities are intended to be contracting authorities. The Committee notes that the definition of "central government authority" in Directive 2014/24/EU refers to "*contracting* authorities" rather than simply to "authorities" (emphasis added).

7. The Committee also raised queries on a number of apparent cross-referencing errors. The correspondence is reproduced at Annexe A. The Scottish Government acknowledged the errors identified and undertook to lay a further instrument to correct them in time for the commencement of the regulations on 18 April 2016.

8. The Committee accordingly draws the instrument to the attention of the Parliament under reporting ground (h) as the meaning of regulation 2(1) could be clearer in the following respect:

9. Regulation 2 defines the term "central government authority" as "the authorities listed in Schedule 1 and, where any such authority is succeeded by another authority which is itself a contracting authority, their successors". Regulation 2 also defines the term "contracting authority" as "the state, a regional or local authority, body governed by public law or association formed by one or more such authorities or bodies". Directive 2014/24/EU defines "central government authorities" as the *contracting* authorities listed in Annex 1 however the definition of "central government authority" in regulation 2 does not refer to

“contracting authorities”, but only to “authorities”. The central government authorities listed in Schedule 1 of the instrument are intended to be “contracting authorities” for the purposes of the regulations however the definition of “central government authority” as set out in regulation 2(1) could make this policy intention clearer.

10. The Committee also draws the instrument to the attention of the Parliament under the general reporting ground, as the following cross-referencing errors arise:

- a. Paragraphs (5), (6) and (7) of regulation 4 refer to, respectively, paragraphs (5)(a), (5)(b) and (5)(c). The references should instead be to paragraphs (4)(a), (4)(b) and 4(c).**
- b. Regulation 38(1) refers to “paragraph (9)(a)” however there is no paragraph (9) in regulation 38.**
- c. Regulation 85(3)(a) and (b) refer to, respectively, regulation 43(11) and 43(10). The references should instead be to regulation 43(14) and 43(13).**
- d. Regulation 91(2) refers to “paragraph (10)(b)”. The reference should instead be to “regulation 92(1)(b)”.**
- e. Regulation 99(5) defines the term “the Utilities amendments” as the amendments made to the Utilities Contracts (Scotland) Regulations 2012 (defined as “the UCR”) by paragraph 9 of Schedule 6. The reference to paragraph 9 should instead be to paragraph 8.**
- f. The new paragraphs (10)(1)(b) and 10(2) of schedule 3 to the Rehabilitation of Offenders (Exclusions and Exceptions) (Scotland) Order 2013 as substituted by paragraph 10 of Schedule 6 to the regulations refer to “regulation 80”. These references should be to “regulation 79”.**

11. The Committee welcomes the commitment given by the Scottish Government to lay a further instrument to correct these cross-referencing errors. The Committee also strongly encourages the Scottish Government to take the opportunity to clarify the term “central government authority” in the amending instrument, to make clear on the face of the Regulations the policy intention that the bodies listed in Schedule 1 are “contracting authorities”.

Annexe A

Public Contracts (Scotland) Regulations 2015 (SSI 2015/446)

On 8 January 2016, the Scottish Government was asked:

1. Regulation 2 defines the term “central government authority” as “the authorities listed in Schedule 1 and, where any such authority is succeeded by another authority which is itself a contracting authority, their successors”. Regulation 2 also defines the term “contracting authority” as “the state, a regional or local authority, body governed by public law or association formed by one or more such authorities or bodies”. Directive 2014/24/EU defines “central government authorities” as the contracting authorities listed in Annex 1 however regulation 2 does not refer to “contracting authorities”, but only to “authorities”.

Are the central government authorities listed in Schedule 1 intended to be “contracting authorities” for the purposes of the regulations? If it is so intended, is the definition of “central government authority” considered to be sufficiently clear?

2. The following cross-referencing queries arise:

a) Paragraphs (5), (6) and (7) of regulation 4 refer to, respectively, paragraphs (5)(a), (5)(b) and (5)(c). Should these references be instead to paragraphs (4)(a), (4)(b) and 4(c)?

b) Regulation 38(1) refers to “paragraph (9)(a)”. There is no paragraph (9) in regulation 38. Can you explain whether this reference should be to another paragraph within regulation 38 or to a “paragraph (9)(a)” within another regulation?

c) Regulation 85(3)(a) and (b) refer to, respectively, regulation 43(11) and 43(10). Should these refer instead to regulation 43(14) and 43(13)?

d) Regulation 91(2) refers to “paragraph (10)(b)”. Should it refer instead to “regulation 92(1)(b)”?

e) Regulation 99(5) defines the term “the Utilities amendments” as the amendments made to the UCR by paragraph 9 of Schedule 6. Should the reference to paragraph 9 be instead to paragraph 8?

f) The new paragraphs (10)(1)(b) and 10(2) of schedule 3 to the Rehabilitation of Offenders (Exclusions and Exceptions) (Scotland) Order 2013 as substituted by paragraph 10 of Schedule 6 to the regulations refer to “regulation 80” of the 2015 regulations. Are the references to regulation 80 correct or should they be to regulation 79? Relatedly, the new sub-paragraph (4)(a) of schedule 3 to the 2013 Order refers to the reference to “regulation 79” of the 2015 regulations in sub-paragraph (1) although no such reference exists (there is, however, a reference to regulation 80).

3. In respect of the points raised above, does the Scottish Government propose to take any corrective action?

The Scottish Government responded as follows:

1. The definition of “contracting authority” is a broad one which accords with the terminology used in Directive 2014/24/EU. All of the central government authorities fall within that definition with the result that they are all contracting authorities. We do not think that it is necessary to define central government authorities as contracting authorities. Accordingly we are content that the definitions are sufficiently clear as they are drafted.

2. The Scottish Government acknowledges that, notwithstanding the normal checking process, the cross references were not all correct. In relation to each we clarify as follows:

a) Regulation 4(5), (6) and (7) should cross refer to paragraphs (4)(a), (4)(b) and (4)(c).

b) Regulation 38(1) refers to “central purchasing activity”, the definition of which had appeared in an earlier draft as paragraph (9) before being moved to the interpretation provision at regulation 2(1). The intention was to refer to paragraph (a) of the definition. On further reflection it is not necessary to refer to a specific paragraph and an amendment will be made accordingly.

c) Regulation 85(3)(a) and (b) should indeed refer to regulation 43(14) and 43(13) respectively.

d) Regulation 91(2) should cross refer to regulation 92(1)(b).

e) In regulation 99(5) “the Utilities amendments” are in paragraph 8 of Schedule 6 and the reference should therefore be to that paragraph.

f) In the substitutions made by paragraph 10 of Schedule 6 the references to regulation 80 of the 2015 Regulations should have been references to regulation 79. On correction of these the related point will fall as the cross-reference referred to these will, in fact, be correct.

3. The Scottish Government intends to make an amending instrument to address the points raised at paragraph 2. This will come into force at the same time as the principal instrument.