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SCOTTISH STATUTORY INSTRUMENTS

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**2006 No. 1**

**The Public Contracts (Scotland) Regulations 2006**

**PART 4**

**SELECTION OF ECONOMIC OPERATORS**

**Criteria for the rejection of economic operators**

**23.**—(1) Subject to paragraph (2), a contracting authority shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences—

- (a) the common law offence of conspiracy where that conspiracy relates to participation in a criminal organisation as defined in Article 2(1) of Council Joint Action 98/733/JHA(1);
- (b) corruption within the meaning of section 1 of the Public Bodies Corrupt Practices Act 1889(2) or section 1 of the Prevention of Corruption Act 1906(3);
- (c) bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003(4);
- (d) the common law offence of incitement to commit a crime;
- (e) fraud, where the offence relates to fraud affecting the financial interests of the European Communities as defined by Article 1 of the Convention relating to the protection of the financial interests of the European Union, within the meaning of—
  - (i) the offence of cheating the Revenue;
  - (ii) the common law offence of fraud;
  - (iii) the common law offence of theft or fraud;
  - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(5);
  - (v) defrauding the Customs within the meaning of the Customs and Excise Management Act 1979(6) and the Value Added Tax Act 1994(7);
  - (vi) an offence in connection with taxation in the European Community within the meaning of section 71 of the Criminal Justice Act 1993(8); or
  - (vii) the common law offence of uttering;

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(1) O.J. L 351, 29.12.98, p.1.

(2) 1889 c. 69.

(3) 1906 c. 34. Section 1 was amended by section 47(2) and (3) of the Criminal Justice Act 1988 (c. 33), section 108(2) of the Anti terrorism, Crime and Security Act 2001(c. 24) and section 68(2) of the [Criminal Justice \(Scotland\) Act 2003 \(asp 7\)](#).

(4) 2003 asp 7

(5) 1985 c. 6. There are amendments to this Act which are not relevant to these Regulations.

(6) 1979 c. 2. There are amendments to this Act which are not relevant to these Regulations.

(7) 1994 c. 23. Section 72 was amended by section 17 of the Finance Act 2003 (c. 40). There are other amendments to this Act which are not relevant to these Regulations.

(8) 1993 c. 36. There are amendments to this Act which are not relevant to these Regulations.

- (viii) the criminal offence at common law of attempting to pervert the course of justice;
- (f) money laundering within the meaning of the Money Laundering Regulations 2003<sup>(9)</sup>;
- (g) any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant state.

(2) In any case where an economic operator or its directors or any other person who has powers of representation, decision or control has been convicted of an offence described in paragraph (1), a contracting authority may disregard the prohibition described there if it is satisfied that there are overriding requirements in the general interest which justify doing so in relation to that economic operator.

(3) A contracting authority may apply to the relevant competent authority to obtain further information regarding the economic operator and in particular details of convictions of the offences listed in paragraph (1) if it considers it needs such information to decide on any exclusion referred to in that paragraph.

(4) A contracting authority may treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator—

- (a) being an individual is bankrupt or has had a receiving order or administration order or bankruptcy restrictions order made against that individual or has made any composition or arrangement with or for the benefit of creditors or has made any conveyance or assignment for the benefit of creditors or appears unable to pay, or to have no reasonable prospect of being able to pay, a debt within the meaning of section 268 of the Insolvency Act 1986<sup>(10)</sup>, or article 242 of the Insolvency (Northern Ireland) Order 1989<sup>(11)</sup>, or in Scotland has granted a trust deed for creditors or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of that individual's estate, or is the subject of any similar procedure under the law of any other state;
- (b) being a partnership constituted under Scots law has granted a trust deed or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate;
- (c) being a company or any other entity within the meaning of section 255 of the Enterprise Act 2002<sup>(12)</sup> has passed a resolution or is the subject of an order by the court for the company's winding up otherwise than for the purpose of bona fide reconstruction or amalgamation, or has had a receiver, manager or administrator on behalf of a creditor appointed in respect of the company's business or any part thereof or is the subject of the above procedures or is the subject of similar procedures under the law of any other state;
- (d) has been convicted of a criminal offence relating to the conduct of that economic operator's business or profession;
- (e) has committed an act of grave misconduct in the course of that economic operator's business or profession;
- (f) has not fulfilled obligations relating to the payment of social security contributions under the law of any part of the United Kingdom or of the relevant State in which the economic operator is established;
- (g) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom or of the relevant State in which the economic operator is established;

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<sup>(9)</sup> S.I.2003/3075.

<sup>(10)</sup> 1986 c. 45. There are amendments to this Act which are not relevant to these Regulations.

<sup>(11)</sup> S.I. 1989/2405 (N.I. 19). There are amendments to this Order which are not relevant to these Regulations.

<sup>(12)</sup> 2002 c. 40. There are amendments to this Act which are not relevant to these Regulations.

- (h) is guilty of serious misrepresentation in providing any information required of that economic operator under this regulation;
- (i) in relation to procedures for the award of a public services contract, is not licensed in the relevant State in which the economic operator is established or is not a member of an organisation in that relevant State when the law of that relevant State prohibits the provision of the services to be provided under the contract by a person who is not so licensed or who is not such a member; or
- (j) subject to paragraphs (7), (8) and (9), is not registered on the professional or trade register of the relevant State specified in Schedule 6 in which that economic operator is established under conditions laid down by that State.

(5) The contracting authority may require an economic operator to provide such information as it considers it needs to make the evaluation in accordance with paragraphs (1) and (4) except that it shall accept as conclusive evidence that an economic operator does not fall within the grounds specified in paragraphs (1) and (4)(a), (b), (c), (d), (f) or (g) if that economic operator provides to the contracting authority–

- (a) in relation to the grounds specified in paragraphs (1) and (4)(a), (b), (c) or (d)
  - (i) an extract from the judicial record; or
  - (ii) in a relevant State which does not maintain such a judicial record, a document issued by the relevant judicial or administrative authority;
- (b) in relation to the grounds specified in paragraphs (4)(f) or (g), a certificate issued by the relevant competent authority; and
- (c) in a relevant State where the documentary evidence specified in paragraphs (5)(a) and (b) is not issued in relation to one of the grounds specified in paragraphs (1), (4)(a), (b), (c), (d), (f) or (g), a declaration on oath made by the economic operator before the relevant judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths.

(6) In this regulation, “relevant” in relation to a judicial, administrative or competent authority, notary public or commissioner for oaths means an authority designated by, or a notary public or commissioner for oaths in the relevant State in which the economic operator is established.

(7) An economic operator established in the United Kingdom or Ireland shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(j) if the economic operator–

- (a) is established in Ireland and is certified as registered with the Registrar of Friendly Societies; or
- (b) is established in either State and is either–
  - (i) certified as incorporated by their respective Registrar of Companies, or
  - (ii) is certified as having declared on oath that it is carrying on business in the trade in question in the State in which it is established at a specific place of business and under a specific trading name.

(8) In relation to procedures for the award of a public services contract, an economic operator established in Greece shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(j)–

- (a) when the services to be provided under the contract are specified in category 8 of Schedule 3 and when Greek legislation requires persons who provide those services to be registered on the professional register (Μητρώο Μελετητών and Μητρώο Γραφείων Μελετών), if it is registered on that register; and
- (b) in any other case, in accordance with paragraph (9).

(9) An economic operator established in a relevant State, other than the United Kingdom or Ireland, which either has an equivalent professional or trade register which is not listed in Schedule 6 or which does not have an equivalent professional or trade register shall be treated as registered on a professional or trade register for the purposes of paragraph (4)(j) on production of either a certificate that the economic operator is registered on the equivalent professional or trade register or where no such register exists, a declaration on oath, or in a relevant State which does not provide for a declaration on oath a solemn declaration, made by the economic operator before the relevant judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths, that the economic operator exercises the particular profession or trade.

### **Information as to economic and financial standing**

**24.**—(1) Subject to regulation 27 and paragraph (2), in assessing whether an economic operator meets any minimum standards of economic and financial standing required of economic operators by the contracting authority—

- (a) for the purposes of regulations 15(11), 16(7) and 17(9) or 18(10); and
- (b) in selecting the economic operators to be invited to tender for or to negotiate the contract, in accordance with regulations 16(8), 17(10) or 18(11);

a contracting authority may take into account any of the following information—

- (i) appropriate statements from the economic operator’s bankers or where appropriate, evidence of relevant professional risk indemnity insurance;
- (ii) statements of accounts or extracts from those accounts relating to the business of the economic operator where publication of the statement is required under the law of the relevant State in which the economic operator is established; or
- (iii) where appropriate, a statement, covering the 3 previous financial years of the economic operator, of—
  - (aa) the overall turnover of the business of the economic operator; and
  - (bb) where appropriate, the turnover in respect of the work, works, goods or services which are of a similar type to the subject matter of the public contract.

(2) Where the information specified in paragraph (1) is not appropriate in a particular case, a contracting authority may require an economic operator to provide other information to demonstrate the economic operator’s economic and financial standing.

(3) A contracting authority which requires information to be provided in accordance with paragraphs (1) and (2) shall specify in the contract notice or in the invitation to tender the information which the economic operator must provide.

(4) Where appropriate—

- (a) an economic operator or a group of economic operators as referred to in regulation 28 may rely on the capacities of other entities or members in the group, regardless of the legal nature of the link between the economic operator or group of economic operators and the other entities; and
- (b) the economic operator or the group of economic operators shall prove to the contracting authority that the resources necessary to perform the contract will be available and the contracting authority may, in particular, require the economic operator to provide an undertaking from the other entities to that effect.

(5) Where an economic operator is unable for a valid reason to provide the information which the contracting authority has required, the contracting authority shall accept such other information provided by the economic operator as the contracting authority considers appropriate.

### **Information as to technical or professional ability**

**25.**—(1) Subject to regulation 27, in assessing whether an economic operator meets any minimum standards of technical or professional ability required of economic operators by the contracting authority—

- (a) for the purposes of regulation 15(11), 16(7), 17(9) or 18(10); and
- (b) in selecting the economic operators to be invited to tender for or to negotiate the contract in accordance with regulation 16(8), 17(10) or 18(11),

a contracting authority may have regard to any means listed in paragraph (2) according to the purpose, nature, quantity or importance of the contract.

(2) The means referred to in paragraph (1) are—

- (a) in the case of a public services contract, a public works contract or a public supply contract requiring the siting or installation of work, the economic operator's technical ability, taking into account in particular that economic operator's skills, efficiency, experience and reliability;
- (b) a list of works carried out over the past 5 years together with (unless the contracting authority specifies that the following certificate should be submitted direct to the contracting authority by the person certifying) certificates of satisfactory completion for the most important of those works indicating in each case—
  - (i) the value of the consideration received;
  - (ii) when and where the work or works were carried out; and
  - (iii) specifying whether they were carried out according to the rules of the trade or profession and properly completed;
- (c) a statement of the principal goods sold or services provided by the supplier or the services provider in the past 3 years and—
  - (i) the dates on which the goods were sold or the services provided;
  - (ii) the consideration received;
  - (iii) the identity of the person to whom the goods were sold or the services were provided;
  - (iv) any certificate issued or countersigned by that person confirming the details of the contract for those goods sold or services provided; and
  - (v) where—
    - (aa) that person was not a contracting authority; and
    - (bb) the certificate referred to in sub paragraph (c)(iv) is not available;any declaration by the economic operator attesting the details of the goods sold or services provided;
- (d) a statement of the technicians or technical services available to the economic operator to—
  - (i) carry out the work under the contract; or
  - (ii) be involved in the production of goods or the provision of services under the contract; particularly those responsible for quality control, whether or not they are independent of the economic operator;
- (e) in relation to the goods to be purchased or hired or the services to be provided under the contract, a statement of the supplier's or services provider's—
  - (i) technical facilities;
  - (ii) measures for ensuring quality; and
  - (iii) study and research facilities;

- (f) where the goods to be sold or hired or the services to be provided under the contract are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the relevant State in which the supplier or services provider is established—
    - (i) on the technical capacity of the supplier or services provider in relation to the goods to be purchased or hired or the services to be provided under the contract; and
    - (ii) if relevant, on the supplier's or services provider's study and research facilities and quality control measures;
  - (g) the services provider's or contractor's educational and professional qualifications where the services provider or contractor is an individual and—
    - (i) if any, those of the services provider's or contractor's managerial staff; and
    - (ii) those of the one or more persons who would be responsible for providing the services, or carrying out the work or works under the contract;
  - (h) the environmental management measures, evidenced in accordance with paragraph (4), that the services provider or contractor is able to apply when performing the contract, but only where it is necessary for the performance of that contract;
  - (i) a statement of the services provider's or contractor's average annual number of staff and managerial staff over the previous 3 years;
  - (j) a statement of the tools, plant and technical equipment available to the services provider or contractor for performing the contract;
  - (k) a statement of any proportion of the contract which the services provider intends to sub contract to another person;
  - (l) any samples, descriptions and photographs of the goods to be purchased or hired under the public supply contract and certification of the authenticity of such samples, descriptions or photographs;
  - (m) certification by official quality control institutes or agencies of recognised competence, attesting that the goods to be purchased or hired under the public supply contract conform to standards and technical specifications (within the meaning of regulation 9(1)) identified by the contracting authority;
  - (n) a certificate—
    - (i) attesting conformity to quality assurance standards based on the relevant European standard; and
    - (ii) from an independent body established in any relevant State conforming to the European standard concerning certification; or
  - (o) any other evidence of conformity to quality assurance measures which are equivalent to the standards referred to in sub paragraph (n)(i).
- (3) Where appropriate—
- (a) an economic operator or a group of economic operators as referred to in regulation 28 may rely on the capacities of other entities or members in the group, regardless of the legal nature of the link between the economic operator or group of economic operators and the other entities; and
  - (b) the economic operator or the group of economic operators shall prove to the contracting authority that the resources necessary to perform the contract will be available and the contracting authority may, in particular, require the economic operator to provide an undertaking from the other entities to that effect.
- (4) The evidence referred to in paragraph (2)(h) is—

- (a) a certificate—
  - (i) attesting conformity to environmental management standards based on—
    - (aa) the Community Eco Management and Audit Scheme (13); or
    - (bb) the relevant European or international standards; and
  - (ii) from an independent body established in any relevant State conforming to Community law or the relevant European or international standards concerning certification; or
- (b) any other evidence of environmental management measures which are equivalent to the standards referred to in sub paragraph (a)(i).

(5) A contracting authority which requires information to be provided in accordance with paragraph (2) shall specify in the contract notice or in the invitation to tender the information which the economic operator must provide.

### **Supplementary information**

26. Subject to regulation 27, the contracting authority may require an economic operator to provide information supplementing the information provided in accordance with regulation 23, 24 or 25 or to clarify that information, provided that the information so required relates to the matters specified in regulation 23, 24 or 25.

### **Official lists of approved economic operators**

27.—(1) This regulation applies where an economic operator is registered in accordance with paragraph (2) or certified in accordance with paragraph (3).

(2) An economic operator is registered in accordance with this regulation where it is registered on the official list of approved contractors, services providers or suppliers in a relevant State which maintains such lists and in which the economic operator is established.

(3) An economic operator is certified in accordance with this regulation where it is certified by a certification body complying with European certification standards in a relevant State which maintains such certification and in which the economic operator is established.

(4) Where an economic operator which is registered or certified submits to the contracting authority—

- (a) a certificate of registration issued by the authority administering the official list referred to in paragraph (2); or
- (b) a certificate issued by the body administering the certification referred to in paragraph (3);

which specifies the information submitted to that authority or body which enabled the economic operator to be registered or certified and which states the classification given, the contracting authority shall accept the certificate as evidence of the matters referred to in paragraph (5).

(5) Subject to paragraph (6), where the certificate referred to in paragraph (4) deals with the grounds referred to in regulations 23(1), (4)(a) to(e), (h) and (j), 24(1)(b)(ii) and (iii) and—

- (a) in the case of a contractor, regulation 25(2)(b), (d), (g), (i) and (j);
- (b) in the case of a services provider, regulation 25(2)(c), (e), (f), (g), (h), (i), (j) and (k); or
- (c) in the case of a supplier, regulation 25(2)(c), (d), (e), (f), (l) and (m),

the contracting authority shall—

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(13) The Community Eco Management and Audit Scheme (EMAS) is a management tool for companies and other organisations to evaluate, report and improve their environmental performance; for more information see [www.europa.eu.int/comm/environment/emas/index-en.htm](http://www.europa.eu.int/comm/environment/emas/index-en.htm).

- (i) accept the certificate as evidence that the economic operator does not fall within the grounds specified in regulation 23(1), (4)(a) to (e), (h) and (j) and shall not be entitled to require the economic operator to submit such information relating to those grounds as is specified in regulation 23;
  - (ii) not be entitled to require the economic operator to provide information specified in regulation 24(1)(b)(ii) and (iii) and—
    - (aa) in the case of a contractor, regulation 25(2)(b), (d), (g), (i) and (j);
    - (bb) in the case of a services provider, regulation 25(2)(c), (e), (f), (g), (h), (i), (j) and (k); and
    - (cc) in the case of a supplier, regulation 25(2)(c), (d), (e), (f), (l) and (m); and
  - (iii) not be entitled to seek any supplementary information in accordance with regulation 26 in relation to the matters specified in sub paragraphs (c)(i) and (ii).
- (6) A contracting authority is not to be required to comply with paragraph (5) where it considers that it has justification for not doing so.

### **Consortia**

**28.—**(1) In this regulation a “consortium” means two or more persons, at least one of whom is an economic operator, acting jointly for the purpose of being awarded a public contract.

(2) Subject to paragraph (3), a contracting authority shall not treat the tender of a consortium as ineligible nor decide not to include a consortium amongst those economic operators from which it will make the selection of economic operators to be invited to tender for or to negotiate a public contract or to be admitted to a dynamic purchasing system on the grounds that the consortium has not formed a legal entity for the purposes of tendering for or negotiating the contract or being admitted to a dynamic purchasing system.

(3) Where a contracting authority awards a public contract to a consortium it may, if it is justified for the satisfactory performance of the contract, require the consortium to form a legal entity before entering into, or as a term of, the contract.

(4) In these Regulations references to an economic operator where the economic operator is a consortium includes a reference to each person who is a member of that consortium.

### **Corporations**

**29.—**(1) A contracting authority shall not treat the tender of a services provider as ineligible nor decide not to include a services provider amongst those services providers from which it will make the selection of services providers to be invited to tender for or to negotiate a contract or to be admitted to a dynamic purchasing system on the ground that under the law of any part of the United Kingdom the services provider is required to be an individual, a corporation or other type of body, if under the law of the relevant State in which the services provider is established, that services provider is authorised to provide such services.

(2) In the case of—

- (a) a public services contract;
- (b) a public works contract; or
- (c) a public supply contract which includes services or siting and installation operations;

a contracting authority may require an economic operator which is not an individual to indicate in the tender, the indicative tender or in the request to be selected to tender for or to negotiate the contract, the names and relevant professional qualifications of the staff who will be responsible for the performance of the contract.



