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SCOTTISH STATUTORY INSTRUMENTS

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**2012 No. 88**

**The Public Contracts (Scotland) Regulations 2012**

**PART 1**

**GENERAL**

**Interpretation**

**2.—(1) in these Regulations—**

“buyer profile” means a page on the internet set up by a contracting authority containing one or more of the following: prior information notices, information on ongoing invitations to tender, prospective and concluded contracts, cancelled procedures and any useful general information such as a contact point, a telephone number, a facsimile number, a postal address or an e-mail address;

“candidate” means an economic operator (other than a tenderer) which applied to be amongst the economic operators to be selected to tender for or to negotiate a contract or framework agreement, or applied to be included amongst the economic operators to be selected to participate in a dialogue in relation to a contract or framework agreement;

“candidate concerned” means a candidate which has not been informed that they have been unsuccessful;

“carrying out” in relation to a work or works means the construction or the design and construction of that work or those works;

“central purchasing body” means a contracting authority which—

- (a) acquires goods or services intended for one or more contracting authorities;
- (b) awards public contracts intended for one or more contracting authorities; or
- (c) concludes framework agreements for work, works, goods or services intended for one or more contracting authorities;

“the Commission” means the European Commission;

“[Commission Regulation \(EC\) No 1564/2005](#)” means Commission Regulation (EC) No 1564/2005 of 7th September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives [2004/17/EC](#) and [2004/18/EC](#) of the European Parliament and of the Council<sup>(1)</sup> as amended by [Commission Regulation \(EC\) No 1792/2006](#) of 23rd October 2006 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement of persons, competition policy, agriculture (veterinary and phytosanitary legislation), fisheries, transport policy, taxation, statistics, social policy and employment, environment, customs union, and external relations by reason of the accession of Bulgaria and Romania<sup>(2)</sup> and as amended from time to time;

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(1) OJ L 257, 1.10.05, p.1. The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by Commission Regulation (EC) [1150/2009](#), OJ L 313, 29.11.2009, p.3.

(2) OJ L 362, 20.12.2006, p.1.

“Common Procurement Vocabulary” means the reference nomenclature applicable to public contracts as adopted by Regulation (EC) No 2195/2002 of 5th November 2002 of the European Parliament and of the Council on the Common Procurement Vocabulary as amended by Commission regulation (EC) No 213/2008 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV(3);

“competitive dialogue procedure” means a procedure—

- (a) in which any economic operator may make a request to participate; and
- (b) whereby a contracting authority conducts a dialogue with the economic operators admitted to that procedure with the aim of developing one or more suitable alternative solutions capable of meeting its requirements and on the basis of which the economic operators chosen by the contracting authority are invited to tender;

“concessionaire” means a person who has entered into a public works concession contract with a contracting authority;

“contract documents” means the invitation to tender for or to negotiate a contract, the descriptive document (if any), the proposed conditions of contract, the specifications or descriptions of the goods, services, work or works required by the contracting authority and of the materials or goods to be used in or for such work or works, and all documents supplementary thereto;

“contract notice” means, except in regulation 52, a notice sent to the Official Journal in accordance with these Regulations;

“contracting authority” has the meaning given to it by regulation 3;

“contractor” means a person who offers on the market work or works and—

- (a) who sought, who seeks, or would have wished, to be the person to whom a public works contract is awarded; and
- (b) who is a national of a relevant State or established in a relevant State

“CPC” means Central Product Classification of the United Nations(4);

“CPV” means Common Procurement Vocabulary;

“design contest” means a competition, particularly in the fields of planning, architecture, civil engineering and data processing—

- (a) which is conducted by or on behalf of a contracting authority and in which that contracting authority invites the entry by economic operators of plans and designs;
- (b) under the rules of which the plans or designs entered will be judged by a jury;
- (c) under which prizes may or may not be awarded; and
- (d) which enables the contracting authority to acquire the use or ownership of plans or designs selected by the jury;

“disabled person” means any person recognised as disabled within the meaning of the Equality Act 2010(5);

“disability” has the same meaning as in the Equality Act 2010;

“dynamic purchasing system” means a wholly electronic system of limited duration which is—

(3) OJ L 74, 15.3.2008, p.1.

(4) CPC Version 2 (December 2008). Further information may be obtained from the United Nations website at <http://unstats.un.org/unsd/cr/registry/cpc-2.asp>.

(5) 2010 c.15.

- (a) established by a contracting authority to purchase commonly used goods, work, works or services; and
- (b) open throughout its duration for the admission of economic operators which—
  - (i) satisfy the selection criteria specified by the contracting authority; and
  - (ii) submit an indicative tender to the contracting authority or person operating the system on its behalf which complies with the specification required by that contracting authority or person;

“economic operator” has the meaning given to it by regulation 4;

“electronic auction” means a repetitive electronic process for the presentation of prices to be revised downwards or of new and improved values of quantifiable elements of tenders, including price, which—

- (a) takes place after the initial evaluation of tenders; and
- (b) enables tenders to be ranked using automatic evaluation methods;

“electronic means” means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

“established”, unless the context otherwise requires, has the same meaning as in the EU Treaties;

“European standard” has the meaning given to it in regulation 9(1);

“financial year” unless the context otherwise requires, means the period of 12 months ending on the date in any year in respect of which the accounts of any person are prepared;

“framework agreement” means an agreement or other arrangement between one or more contracting authorities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the framework agreement applies;

“goods” includes electricity, substances, growing crops and things attached to or forming part of the land which are agreed to be severed before the purchase or hire under a public supply contract and any ship, aircraft or vehicle;

“government department” includes a Northern Ireland department or the head of such department;

“Government Procurement Agreement” means the Agreement on Government Procurement between certain parties to the World Trade Organisation (WTO) Agreement signed in Marrakesh on 15th April 1994<sup>(6)</sup>;

“GPA” means the Government Procurement Agreement;

“indicative tender” means a tender prepared by an economic operator seeking admission to a dynamic purchasing system which sets out the terms on which it would be prepared to enter into a contract with a contracting authority should that contracting authority propose to award a contract under the system;

“international standard” has the meaning given to it in regulation 9(1);

“Minister of the Crown” means the holder of an office in Her Majesty’s Government in the United Kingdom and includes the Treasury;

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(6) Cmnd 2575. As at 1st January 2012, parties to the Government Procurement Agreement other than member States were Armenia, Aruba, Canada, Chinese Taipei, Hong Kong China, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Norway, Singapore, Switzerland and the United States of America.

“national of a relevant State” means, in the case of a person who is not an individual, a person formed in accordance with the laws of a relevant State and which has its registered office, central administration or principal place of business in a relevant State;

“negotiated procedure” means a procedure leading to the award of a contract whereby the contracting authority negotiates the terms of the contract with one or more economic operators selected by it;

“Official Journal” means the Official Journal of the European Union;

“open procedure” means a procedure leading to the award of a contract whereby all interested economic operators may tender for the contract;

“prior information notice” means a notice sent to the Official Journal in accordance with regulation 11;

“public contract” means a public services contract, a public supply contract or a public works contract;

“Public Sector Directive” means Directive [2004/18/EC](#) of the European Parliament and of the Council of 31st March 2004 in the co-ordination of procedures for the award of public works contracts, public supply contracts and public services contracts, as amended from time to time(7);

“public services contract” means a contract, in writing, for consideration (whatever the nature of the consideration) under which a contracting authority engages a person to provide services but does not include—

- (a) a public works contract; or
- (b) a public supply contract,

but a contract for both goods and services is considered to be a public services contract if the value attributable to those services exceeds that of the goods covered by the contract and a contract for services which includes activities specified in Schedule 2 that are only incidental to the principal object of the contract is considered to be a public services contract.

“public supply contract” means a contract, in writing, for consideration (whatever the nature of the consideration)—

- (a) for the purchase of goods by a contracting authority (whether or not the consideration is given in instalments and whether or not the purchase is conditional upon the occurrence of a particular event), or
- (b) for the hire of goods by a contracting authority (both where the contracting authority becomes the owner of the goods after the end of the period of hire and where it does not); and for any siting or installation of those goods, but where under such a contract services are also to be provided, the contract is only a public supply contract where the value of the consideration attributable to the goods and any siting or installation of the goods is equal to or greater than the value attributable to the services;

“public telecommunications services” means telecommunications services the provision of which the relevant States have specifically assigned, in particular, to one or more telecommunications entities;

“public works concession contract” means a public works contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the work or works to be carried out under the contract;

“public works contract” means a contract, in writing, for consideration (whatever the nature of the consideration)—

- (a) for the carrying out of a work or works for a contracting authority, or
- (b) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements;

“relevant standstill period” means—

- (a) where the notice referred to in regulation 32(1) or 49(9)(a) is sent to all tenderers and all candidates concerned (if any) by facsimile or by electronic means, 10 days from the date on which the last notice is sent to those economic operators; or
- (b) where any such notice is sent to any tenderers or candidates concerned only by other means, 15 days from the date on which the last notice was sent to those economic operators;

“relevant State” has the meaning given to it by regulation 4(4);

“restricted procedure” means a procedure leading to the award of a contract whereby only economic operators selected by the contracting authority may submit tenders for the contract;

“Schedule 1 entity” means an entity specified in Schedule 1 pursuant to its inclusion in the list of central government bodies in Annex I to the GPA, and for which these Regulations make particular provision;

“services concession contract” means a public services contract under which the consideration given by the contracting authority consists of or includes the right to exploit the service or services to be provided under the contract;

“services provider” means a person who offers on the market, services and—

- (a) who either sought, seeks, or would have wished—
  - (i) to be the person to whom a public services contract is awarded, or
  - (ii) to participate in a design contest, and
- (b) who is a national of a relevant State or established in a relevant State;

“ship” includes any boat and other description of a vessel used in navigation;

“substance” means any natural or artificial substance, whether in solid, liquid or gaseous form or in the form of vapour;

“supplier” means a person who offers on the market goods for purchase or hire and—

- (a) who either sought, seeks, or would have wished, to be the person to whom a public supply contract is awarded, and
- (b) who is a national of a relevant State or established in a relevant State;

“telecommunications services” means services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of broadcasting and television;

“tenderer” means an economic operator which has submitted an offer to perform a contract or to be party to a framework agreement, or participated in a dialogue in relation to a contract or framework agreement;

“tenderer concerned” means a tenderer which—

- (a) has not been informed that they have been excluded from the competition; or
- (b) has been informed that they have been excluded from the competition and where—
  - (i) that exclusion is not prevented from being the subject of proceedings under Part 9 by virtue of regulation 47(6)(b); and

- (ii) no such proceedings have been brought, or such proceedings have been brought and it has not been determined that the exclusion was lawful;

“TFEU” means the Treaty on the Functioning of the European Union<sup>(8)</sup>;

“Utilities Directive” means Directive [2004/17/EC](#) of the European Parliament and of the Council of 31st March 2004 co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as amended from time to time<sup>(9)</sup>;

“work” means the outcome of any works which is sufficient of itself to fulfil an economic and technical function;

“working day” means a day other than a Saturday, Sunday or Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971<sup>(10)</sup>;

“works” means any of the activities specified in Schedule 2;

“written” or “in writing” means any expression consisting of words or figures that can be read, reproduced and subsequently communicated and it may include information transmitted and stored by electronic means; and

“year” means a calendar year.

(2) In these Regulations references to Article 7, 56 or 67 are references to Article 7, 56 or, as the case may be, 67 of the Public Sector Directive as amended from time to time.

(3) In these Regulations, unless the context otherwise requires, any reference to a numbered Part, regulation, paragraph or Schedule is a reference to the Part, regulation, paragraph or Schedule bearing that number in these Regulations.

(4) Subject to paragraph (5), in these Regulations—

- (a) “a Part A services contract” is a contract under which services specified in Part A of Schedule 3 are to be provided;
- (b) “a Part B services contract” is a contract under which services specified in Part B of Schedule 3 are to be provided.

(5) Where services specified in both Parts A and B of Schedule 3 are to be provided under a single contract, then the contract is treated as—

- (a) a Part A services contract if the value of the consideration attributable to the services specified in Part A is greater than that attributable to those specified in Part B; and
- (b) a Part B services contract if the value of the consideration attributable to the services specified in Part B is equal to or greater than that attributable to those specified in Part A.

(6) Except in regulation 47(7)(b), where these Regulations refer to a period of time—

- (a) where the period follows an action taken, the day on which the action is taken is not counted in the calculation of the period; and
- (b) where the last day of the period is not a working day, the period is extended to include the next working day.

<sup>(8)</sup> OJ C 115, 9.5.2008, p.47.

<sup>(9)</sup> OJ L 134, 30.4.04, p.1.

<sup>(10)</sup> [1971 c.80](#). There are amendments to this Act which are not relevant to these Regulations.