
SCOTTISH STATUTORY INSTRUMENTS

2012 No. 89

The Utilities Contracts (Scotland) Regulations 2012

PART 4

QUALIFICATION AND SELECTION OF ECONOMIC OPERATORS

Criteria for rejection of economic operators

26.—(1) Subject to paragraph (2), where a utility is a contracting authority, it must treat as ineligible and must not select an economic operator in accordance with these Regulations if the utility 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 of Council Framework Decision 2008/841/JHA(1) or an offence under sections 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010(2);
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889(3) or section 1 of the Prevention of Corruption Act 1906(4), where the offence relates to active corruption as defined in Article 3 of the Council Act of 26th May 1997(5) and Article 3(1) of Council Joint Action 98/742/JHA(6);
- (c) bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003(7) where the offence relates to active corruption, or bribery within the meaning of sections 1 or 6 of the Bribery Act 2010(8);
- (d) 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 Communities(9), 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;

(1) OJ L 300, 11.11.2008, p.42.

(2) 2010 asp 13.

(3) 1889 c.69. This Act was repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(4) 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Crime and Security Act 2001(c.24) and section 68(2) of the Criminal Justice (Scotland) Act 2003 (asp 7) and repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(5) OJ C 195, 25.6.1997, p.2.

(6) OJ L 358, 31.12.1998, p.2; repealed by Council Framework Decision 2003/568/JHA (OJ L 192, 31.7.2003, p.54).

(7) 2003 asp 7. Sections 68 and 69 were repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(8) 2010 c.23.

(9) OJ C 316, 27.11.95, p.49.

- (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(10) or section 993 of the Companies Act 2006(11);
- (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(12) or section 72 of the Value Added Tax Act 1994(13);
- (vi) an offence in connection with taxation in the European Community within the meaning of section 71 of the Criminal Justice Act 1993(14);
- (vii) the common law offence of uttering; or
- (viii) the common law offence of attempting to pervert the course of justice;
- (e) the common law offence of incitement to commit a crime;
- (f) money laundering within the meaning of section 340(11) of the Proceeds of Crime Act 2002(15) or the Money Laundering Regulations 2007(16), or an offence in connection with proceeds of drug trafficking within the meaning of sections 49, 50 or 51 of the Drug Trafficking Act 1994(17); or
- (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 utility 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) Where a utility is not a contracting authority, the criteria which the utility uses for deciding not to select an economic operator may include the fact 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 offences in paragraph (1).

(4) A utility 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 paragraphs (1) and (3).

(5) A utility 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 a person in respect of whom a debt relief order has been made or is bankrupt or has had a receiving order or administration order or bankruptcy restrictions order or debt relief restrictions order made against that economic operator or has made any composition or arrangement with, or for the benefit of, that economic operator's creditors or has made any conveyance or assignment for the benefit of that economic operator's 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(18), or article 242 of the Insolvency (Northern Ireland) Order 1989(19), or in Scotland has granted a trust

(10) 1985 c.6. Section 458 was modified by regulation 4 of, and Part 1 of schedule 2 to, the Limited Liability Partnerships Regulations 2001 (S.I. 2001/1090) and repealed by Schedule 16 to the Companies Act 2006 (c.46).

(11) 2006, c.46.

(12) 1979 c.2. There are amendments to this Act which are not relevant to these Regulations.

(13) 1994 c.23. Section 72 was amended by section 17 of the Finance Act 2003 (c.14). There are other amendments to this Act which are not relevant to these Regulations.

(14) 1993 c.36. There are amendments to this Act which are not relevant to these Regulations.

(15) 2002 c.29.

(16) S.I. 2007/2157. These Regulations were amended by S.I. 2007/3299, S.I. 2011/1781 and S.I. 2011/2833.

(17) 1994, c.37. Sections 49, 50 and 51 were repealed by Schedules 11 and 12 to the Proceeds of Crime Act 2002 (c.29).

(18) 1986 c.45. There are amendments to this Act which are not relevant to these Regulations.

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

deed for creditors or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of that economic operator'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⁽²⁰⁾ 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; or
- (h) is guilty of serious misrepresentation in providing any information referred to in this regulation or regulation 24 to 27 or has not provided such information in response to a request of a contracting authority.

(6) A utility may require an economic operator to provide such information as it considers it must accept as conclusive evidence that an economic operator does not fall within the grounds specified in paragraphs (1), (3), (5)(a), (b), (c), (d), (f) or (g) if that economic operator provides to the utility—

- (a) in relation to the grounds specified in paragraphs (1), (3), (5)(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 (5)(f) or (g), a certificate issued by the relevant competent authority; and
- (c) in a relevant State where the documentary evidence specified in paragraphs (6)(a) and (b) is not issued in relation to one of the grounds specified in paragraphs (1), (3), (5)(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.

(7) In this regulation, "relevant" in relation to a judicial, administrative or competent authority, notary public or Commissioner for oaths means an authority nominated by, or a notary public or Commissioner for oaths in, the relevant State in which the economic operator is established.

(20) 2002 c.40. There are amendments to this Act which are not relevant to these Regulations.