

---

SCOTTISH STATUTORY INSTRUMENTS

---

**2016 No. 49**

**The Utilities Contracts (Scotland) Regulations 2016**

PART 1

GENERAL

CHAPTER 3

MATERIAL SCOPE

*SECTION 2*

*Excluded contracts and design contests; special provisions  
for procurement involving defence and security aspects*

SUB-SECTION 1 Exclusions applicable to all utilities and special exclusions for the water and energy sectors

**Exclusion: Contracts awarded for the purpose of resale or lease to third parties**

17.—(1) Subject to paragraph (3), these Regulations do not apply to procurement for the award of a contract for the purpose of resale or lease to third parties, provided that the utility enjoys no special or exclusive right to sell or lease the subject of such contracts and other entities are free to sell or lease the subject of such contracts under the same conditions as the utility.

(2) A utility must notify the Commission, if so requested, of all the categories of products or activities which the utility regards as excluded under paragraph (1).

(3) Paragraph (1) does not apply to procurement carried out by a central purchasing body in order to perform a centralised purchasing activity.

**Exclusion: Contracts and design contests awarded or organised for purposes other than the pursuit of a covered activity or for the pursuit of such an activity in a third country**

18.—(1) These Regulations do not apply to procurement for the award of a contract or the organisation of a design contest by a utility—

- (a) for purposes other than the pursuit of its activities as described in regulations 8 to 14; or
- (b) for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the EU.

(2) A utility must notify the Commission, if so requested, of any activities which the utility regards as excluded under paragraph (1).

**Exclusion: Contracts awarded and design contests organised pursuant to international rules**

19.—(1) These Regulations do not apply to procurement for the award of a contract or the organisation of a design contest which the utility is obliged to award or organise in accordance with a procurement which is established by—

- (a) an international agreement or any other legal instrument creating international law obligations, concluded in conformity with the Treaties, between the United Kingdom and one or more third country or any part thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by its signatories; or
- (b) an international organisation.

(2) These Regulations do not apply to procurement for the award of a contract or the organisation of a design contest which the utility undertakes or organises in accordance with procurement rules provided by an international organisation or international financing institution where the contracts or design contests concerned are fully financed by that organisation or institution or are co-financed for the most part by that organisation or institution.

(3) This regulation does not apply to procurement for the award of a contract or the organisation of a design contest involving defence or security aspects which are awarded or organised pursuant to international rules.

### **Exclusion: Specific exclusions for service contracts**

**20.**—(1) These Regulations do not apply to procurement for the award of a service contract, framework agreement or dynamic purchasing system—

- (a) for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or of any estate, right, servitude or other interest in or over such land, buildings or property;
- (b) to an audio-visual or radio media service provider, for broadcasting time or programme provision;
- (c) for arbitration or conciliation services;
- (d) for any of the following legal services—
  - (i) legal representation of a client by a lawyer within the meaning of Article 1 of the Lawyers' Services Directive<sup>(1)</sup> in—
    - (aa) arbitration or conciliation proceedings held in a member State, a third country or before an international arbitration or conciliation instance; or
    - (bb) judicial proceedings before the courts, tribunals or public authorities of a member State or a third country or before international courts, tribunals or institutions;
  - (ii) legal advice given by a lawyer within the meaning of Article 1 of the Lawyers' Services Directive—
    - (aa) in preparation of any proceedings referred to in paragraph (i); or
    - (bb) where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings;
  - (iii) document certification or authentication services which must be provided by a notary public;
  - (iv) legal services provided by trustees or appointed guardians or other legal services the providers of which are designated by a court or tribunal in the member State concerned or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;
  - (v) other legal services which, in the member State concerned, are connected, even occasionally, with the exercise of official authority;

---

(1) OJ L 78, 26.3.1977, p.17, last amended by Council Directive 2013/25/EU (OJ L 158, 10.6.2013, p.368).

- (e) for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of [Directive 2004/39/EC](#) of the European Parliament and of the Council on markets in financial instruments amending Council Directives [85/611/EEC](#) and [93/6/EEC](#) and [Directive 2000/12/EC](#) of the European Parliament and of the Council and repealing Council [Directive 93/22/EEC](#)(2) as amended from time to time;
  - (f) for operations conducted with the European Financial Stability Facility or the European Stability Mechanism;
  - (g) for loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
  - (h) which is an employment contract;
  - (i) for civil defence, civil protection or danger prevention services that are provided by non-profit organisations or associations and which are specified under CPV Codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services; or
  - (j) for public passenger transport services by rail or metro.
- (2) In this regulation—
- (a) “Audio-visual Media Services Directive” means [Directive 2010/13/EU](#) of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in member States concerning the provision of audio-visual media services(3) as amended from time to time;
  - (b) “Lawyers’ Services Directive” means Council [Directive 77/249/EEC](#) to facilitate the effective exercise by lawyers of freedom to provide services(4);
  - (c) “media service provider” has the meaning given by Article 1(1)(d) of the Audio-visual Media Services Directive; and
  - (d) “programme” has the meaning given by Article 1(1)(b) of the Audio-visual Media Services Directive but also includes radio programmes and radio programme materials, and “programme material” is to be construed accordingly.

**Exclusion: Service contracts awarded on the basis of an exclusive right**

21. These Regulations do not apply to procurement for a service contract to be awarded to a contracting authority or to an association of contracting authorities on the basis of an exclusive right which such authority or association of authorities enjoy pursuant to a law, regulation or published administrative provision which is compatible with the TFEU.

**Exclusion: Contracts awarded by certain utilities for the purchase of water and for the supply of energy or of fuels for the production of energy**

22. These Regulations do not apply to procurement for the award of a contract—
- (a) for the purchase of water by a utility engaged in one or both of the activities relating to drinking water referred to in regulation 10(1) (water);
  - (b) by a utility which is active in the energy sector by engaging in an activity referred to in regulation 8(1) (gas and heat), 9(1) (electricity) or 14 (extraction of oil and gas and exploration for, or extraction of, coal or other solid fuel) for the supply of—

---

(2) OJ L 145, 30.4.2004, p.1.

(3) OJ L 95, 15.4.2010, p.1.

(4) OJ L 78, 26.3.1977, p.17, last amended by Council [Directive 2013/25/EU](#) (OJ L 158, 10.6.2013, p.368).

- (i) energy; or
- (ii) fuels for the production of energy.

#### SUB-SECTION 2 Procurement involving defence and security aspects

##### **Defence and security**

**23.**—(1) These Regulations apply to procurement for the award of contracts and to design contests organised in the fields of defence and security, with the exception of procurement or design contests—

- (a) to which the Defence and Security Regulations apply; or
- (b) to which those Regulations do not apply pursuant to regulations 7 or 9 of those Regulations.

(2) These Regulations do not apply to procurement for the award of contracts or design contests, not otherwise exempt by virtue of paragraph (1), to the extent that—

- (a) the protection of the essential security interests of the United Kingdom or another member State cannot be guaranteed by less intrusive measures; or
- (b) the application of these Regulations would oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security.

(3) These Regulations do not apply where—

- (a) the procurement and performance of the contract or design contest are classified as secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in any part of the United Kingdom; and
- (b) the United Kingdom has determined that the protection of the essential interests concerned cannot be guaranteed by less intrusive measures.

(4) In this regulation reference to “less intrusive measures” includes, but is not limited to, imposing requirements aimed at protecting the confidential nature of information which the utility makes available in a contract award procedure as provided for in these Regulations.

##### **Mixed procurement covering the same activity and involving defence and security aspects**

**24.**—(1) This regulation applies where a procurement has as its subject different types of procurement all covering the same activity, any part of which is covered by Article 346 of the TFEU or the Defence and Security Regulations.

(2) Where different parts of a given contract are objectively separable, a utility may decide to undertake procurement for the award of—

- (a) separate contracts for the separate parts; or
- (b) a single contract.

(3) Any decision to undertake a procurement for the award of a single contract must not be made for the purpose of excluding the procurement from the application of these Regulations or the Defence and Security Regulations.

(4) Where a utility decides to undertake procurement for the award of separate contracts for separate parts the applicable law for the procurement of each separate part is to be determined by the characteristics of such part.

(5) Where a utility decides, in accordance with paragraph (6), to undertake a procurement for the award of a single contract and—

- (a) part of the contract is covered by Article 346 of the TFEU, the contract may be awarded without applying these Regulations; or
  - (b) part of the contract is covered by the Defence and Security Regulations, the procurement may be undertaken in accordance with those Regulations, in which event these Regulations will not apply to such procurement.
- (6) A utility may only decide to undertake a procurement for the award of a single contract of a kind referred to in paragraph (5) where—
- (a) different parts of such a contract are not objectively separable; or
  - (b) such decision is justified by objective reasons.
- (7) Paragraph (5)(b) is without prejudice to the thresholds and exclusions provided for by the Defence and Security Regulations.
- (8) Paragraph (5)(a) applies to a mixed contract to which both paragraph (5)(a) and (5)(b) could otherwise apply.

#### **Procurement covering several activities and involving defence or security aspects**

**25.**—(1) This regulation applies where a procurement has as its subject a contract covering more than one activity, where one or more of those activities are covered by Article 346 of the TFEU or the Defence and Security Regulations.

- (2) A utility may decide to undertake procurement for the award of—
- (a) separate contracts for the separate activities; or
  - (b) a single contract.
- (3) Any decision to undertake a procurement for the award of a single contract must not be made for the purpose of excluding the procurement from the application of these Regulations or the Defence and Security Regulations.
- (4) Where a utility decides to undertake procurement for the award of separate contracts for separate activities the applicable law for the procurement of each separate activity will be determined by the characteristics of such activity.
- (5) Where a utility decides, in accordance with paragraph (6), to undertake a procurement for the award of a single contract and—
- (a) part of the contract is intended to cover an activity which is covered by Article 346 of the TFEU, the contract may be awarded without applying these Regulations; or
  - (b) part of the contract is intended to cover an activity which is covered by the Defence and Security Regulations, the procurement may be undertaken in accordance with those Regulations, in which event these Regulations do not apply to such procurement.
- (6) A utility may only decide to undertake a procurement for the award of a single contract of a kind referred to in paragraph (5) where such decision is justified by objective reasons.
- (7) Paragraph (5)(b) is without prejudice to the thresholds and exclusions provided for by the Defence and Security Regulations.
- (8) Paragraph (5)(a) applies to a mixed contract to which both paragraph (5)(a) and (5)(b) could otherwise apply.

### **Contracts and design contests involving defence and security aspects which are awarded or organised pursuant to international rules**

**26.**—(1) These Regulations do not apply to procurement for the award of a contract or to a design contest involving defence or security aspects which the utility is obliged to award or organise in accordance with a procurement which is established by—

- (a) an international agreement or arrangement, concluded in conformity with the Treaties, between the United Kingdom and one or more third country or part thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;
- (b) an international agreement or arrangement relating to the stationing of troops and concerning the undertakings of the United Kingdom or a third country; or
- (c) an international organisation.

(2) These Regulations do not apply to procurement for the award of a contract or to the organisation of a design contest involving defence or security aspects which the utility carries out in accordance with procurement rules provided by an international organisation or international financing institution where the contract or design contest concerned is fully financed by that organisation or institution or is co-financed for the most part by such organisation or institution.

SUB-SECTION 3Special relations (cooperation, affiliated undertakings and joint ventures)

### **Exclusion: contracts between contracting authorities**

**27.**—(1) These Regulations do not apply to procurement for the award of a contract—

- (a) by a contracting authority to a controlled person;
- (b) by a controlled person to a contracting authority which controls that person; or
- (c) by a controlled person to another controlled person where both such persons are controlled by the same contracting authority.

(2) For the purpose of this regulation, a person is a “controlled person” where—

- (a) the contracting authority exercises over that person control similar to that which it exercises over its own departments;
- (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the authority or by other persons controlled by that authority; and
- (c) no other person has direct private capital participation in the person with the exception of non-controlling and non-blocking forms of private capital participation required by any enactment, in conformity with the Treaties, which do not exert a decisive influence on the person being awarded the contract.

(3) For the purpose of paragraph (2)(a) an authority shall be deemed to exercise control over a person similar to the control that it exercises over its own departments where—

- (a) it exercises a decisive influence over the strategic objectives and significant decisions of the person; or
- (b) such control is exercised by another person which is itself controlled in the same way by the contracting authority.

(4) These Regulations do not apply to procurement for the award of a contract by a contracting authority to a person which is jointly controlled.

(5) For the purpose of paragraph (4) a person is jointly controlled where—

- (a) the contracting authority, jointly with other contracting authorities, exercises over that person control similar to that which the authorities exercise over their own departments;

- (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the contracting authorities or by other persons controlled by those authorities; and
  - (c) no other person has direct private capital participation in the person with the exception of non-controlling and non-blocking forms of private capital participation required by any enactment, in conformity with the Treaties, which do not exert a decisive influence on the person being awarded the contract.
- (6) For the purpose of paragraph (5)(a) contracting authorities shall be deemed to exercise control over a person similar to the control that they exercise over their own departments where—
- (a) the decision making bodies of the person are composed of representatives of all participating contracting authorities;
  - (b) those contracting authorities jointly exercise a decisive influence over the strategic objectives and significant decisions of the person; and
  - (c) the person does not pursue any interests which are contrary to those of the contracting authorities.
- (7) For the purpose of paragraph (6)(a) individual representatives may represent several or all of the contracting authorities.
- (8) These Regulations do not apply to procurement for the award of a contract exclusively between two or more contracting authorities where—
- (a) the contract is for the purpose of establishing or implementing co-operation between those contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
  - (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and
  - (c) the contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.
- (9) The percentage of activities referred to in paragraphs (2)(b), (5)(b) and (8)(c), shall be determined by reference to—
- (a) the average turnover of the person or, as the case may be, contracting authority for the period of 3 years preceding the date of the proposed contract award; or
  - (b) an appropriate alternative activity-based measure such as costs incurred by the relevant person or contracting authority with respect to works, supplies and services for such 3 year period.
- (10) Where paragraph (11) applies, an alternative credible measurement of activity shall be used and for this purpose use of business projections shall be treated as a credible measure.
- (11) This paragraph applies where the turnover or an appropriate activity-based measure is not available for the preceding 3 years or is no longer relevant because of—
- (a) the date on which the person or contracting authority was created or commenced activities; or
  - (b) a reorganisation of its activities.

**Exclusion: contracts awarded to an affiliated undertaking**

- 28.**—(1) Provided that the conditions in paragraphs (2) to (4) are met, these Regulations do not apply to procurement for the award of a contract—
- (a) by a utility to an affiliated undertaking; or

- (b) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities described in regulations 8 to 14, to an affiliated undertaking of one of its members.

(2) The conditions are that:—

- (a) in respect of service contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all services provided by that undertaking, derives from the provision of services to the utility or one or more of the utility's affiliated undertakings;
- (b) in respect of supply contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all supplies provided by that undertaking, derives from the provision of supplies to the utility or one or more of the utility's affiliated undertakings;
- (c) in respect of works contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all works provided by that undertaking, derives from the provision of works to the utility or one or more of the utility's affiliated undertakings.

(3) Where the turnover referred to in paragraph (2) is not available for the preceding 3 years because of the date on which an affiliated undertaking was created or commenced activities an alternative credible measurement of turnover shall be used for paragraph (2) and for this purpose use of business projections shall be treated as a credible measure.

(4) Where more than one affiliated undertaking of a utility form an economic group and provide the same or similar works, supplies or services, the percentages referred to in paragraph (2) shall be calculated taking into account the total turnover deriving respectively from the provision of works, supplies or services by those affiliated undertakings.

(5) In this regulation, “affiliated undertaking” means—

- (a) any undertaking the annual accounts of which are consolidated with those of the utility in accordance with the requirements of [Directive 2013/34/EU](#) of the European Parliament and of the Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending [Directive 2006/43/EC](#) of the European Parliament and of the Council and repealing Council Directives [78/660/EEC](#) and [83/349/EEC](#)(5); or
- (b) in the case of an undertaking which is not subject to that Directive, any undertaking that—
  - (i) may be, directly or indirectly, subject to a dominant influence by the utility;
  - (ii) may exercise a dominant influence over the utility; or
  - (iii) in common with the utility, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation or the rules which govern it.

(6) For the purposes of paragraph (5)(b), a dominant influence has the same meaning as in regulation 4(3) (utilities).

(7) This regulation applies despite the provisions of regulation 27 (exclusions: contracts between contracting authorities).



### **Exclusion: Contracts awarded to a joint venture or to a utility forming part of a joint venture**

**29.**—(1) Subject to paragraphs (2) and (3), these Regulations do not apply to procurement for the award of a contract—

- (a) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities within the meaning of regulations 8 to 14, to one of those utilities; or
- (b) by a utility to such a joint venture of which it forms part.

(2) The joint venture must have been set up in order to carry out the activity concerned over a period of at least 3 years and the instrument setting up the joint venture must stipulate that the utilities which form it will be part of the joint venture for at least the same period.

(3) This regulation applies despite the provisions of regulation 27 (exclusions: contracts between contracting authorities).

### **Notification of information**

**30.** A utility must notify to the Commission, if it so requests, the following information—

- (a) the names of the undertakings or joint ventures referred to in regulation 28 (exclusions: contracts awarded to an affiliated undertaking) or 29 (contracts awarded to a joint venture or to a utility forming part of a joint venture);
- (b) the nature and value of the contracts referred to in those regulations;
- (c) proof, as considered necessary by the Commission, that the relationship between the undertaking or joint venture, to which the contracts are awarded, and the utility complies with the requirements of those regulations.

SUB-SECTION 4 Specific situations

### **Research and development services**

**31.** These Regulations only apply to procurement for the award of service contracts for research and development services which are covered by CPV Codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 provided that—

- (a) the benefits accrue exclusively to the utility for use in the conduct of its own affairs; and
- (b) the service provided is wholly remunerated by the utility.

SUB-SECTION 5 Activities directly exposed to competition and related procedural provisions

### **Activities directly exposed to competition**

**32.**—(1) These Regulations do not apply to procurement for the award of a contract or a design contest intended to enable an activity mentioned in regulations 8 to 14 to be carried out where that activity is directly exposed to competition on markets to which access is not restricted.

(2) For the purposes of paragraph (1), the activity is directly exposed to competition on markets to which access is not restricted only if—

- (a) the activity is covered by the following Commission decisions—
  - (i) Commission [Decision 2006/211/EC](#) establishing that Article 30(1) of [Directive 2004/17/EC](#) of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to electricity generation in England, Scotland and Wales (notified under document number C(2006) 690)(6);

- (ii) Commission [Decision 2007/141/EC](#) establishing that Article 30(1) of [Directive 2004/17/EC](#) of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to the supply of electricity and gas in England, Scotland and Wales (notified under document number C(2007) 559)(7); and
  - (iii) Commission [Decision 2010/192/EU](#) exempting exploration for and exploitation of oil and gas in England, Scotland and Wales from the application of [Directive 2004/17/EC](#) of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (notified under document C(2010) 1920)(8); or
- (b) the procedure specified in regulation 33 (procedure for establishing whether regulation 32(2)(b) is applicable) is followed and regulation 33(2) applies.
- (3) The activity referred to in paragraph (1) may form a part of a larger sector or be exercised only in certain parts of the United Kingdom.

#### **Procedure for establishing whether regulation 32(2)(b) is applicable**

**33.**—(1) The procedure referred to in regulation 32(2)(b) (activities directly exposed to competition) is as follows—

- (a) the Scottish Ministers or a utility submit a request to the Commission, where appropriate together with the position adopted by an independent national authority that is competent in relation to the activity concerned, demonstrating that the activity in question is directly exposed to competition on markets to which access is not restricted on the basis of criteria that are in conformity with the provisions on competition of the TFEU; and
  - (b) the request must specify—
    - (i) all the relevant facts including any law, regulation, administrative provision or agreement concerning compliance with the condition that the activity is directly exposed to competition on markets to which access is not restricted;
    - (ii) that the activity concerned is subject to the EU legislation listed in Annex III to the Utilities Contracts Directive where it is and, if so, the request must also specify the relevant implementing legislation applied in the United Kingdom giving rise to a presumption that access to the market is not restricted;
  - (c) if free access to a given market cannot be presumed on the basis of paragraph (b)(ii), it must be demonstrated in the request referred to in sub-paragraph (b) that access to the market in question is free as a matter of fact and law;
- (2) This paragraph applies if, subject to paragraph (8), the Commission—
- (a) has adopted an implementing act establishing that the activity is directly exposed to competition on markets to which access is not restricted within the time limits specified in Annex IV to the Utilities Contracts Directive; or
  - (b) has not adopted an implementing act establishing whether or not the activity is directly exposed to competition on markets to which access is not restricted within the time limits specified in Annex IV to the Utilities Contracts Directive.
- (3) The request referred to in paragraph (1)(a) and (b) may concern activities which are part of a larger sector or which are exercised in certain parts of the United Kingdom.
- (4) The criteria referred to in paragraph (1)(a) may include—

(7) OJ L 62, 1.3.2007, p.23.

(8) OJ L 84, 31.3.2010, p.52.

- (a) the characteristics of the products or services concerned;
  - (b) the existence of alternative products or services considered to be substitutable on the supply side or demand side;
  - (c) the prices; and
  - (d) the actual or potential presence of more than one supplier of the products or provider of the services in question;
- (5) The geographical reference market on the basis of which exposure to competition is assessed shall consist of the area in which the utility concerned is involved in the supply and demand of products or services in which the conditions of competition—
- (a) are sufficiently homogenous; and
  - (b) can be distinguished from neighbouring areas (including because conditions of competition are appreciably different in those areas).
- (6) The assessment in paragraph (5) shall take into account, among other factors—
- (a) the nature and characteristics of the products or services concerned;
  - (b) the existence of entry barriers;
  - (c) the existence of consumer preferences;
  - (d) appreciable differences of the utility's market shares between the area concerned and neighbouring areas; and
  - (e) substantial price differences.
- (7) After the submission of a request, the Scottish Ministers or the utility may, with the Commission's agreement, substantially modify its request, including as regards the activities or the geographical area concerned.
- (8) Where a request has been modified, a new period for the adoption of the implementing act shall be calculated in accordance with paragraph 1 of Annex IV to the Utilities Contracts Directive unless a shorter period is agreed on between the Commission and either the Scottish Ministers or the utility which has submitted the request.