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SCOTTISH STATUTORY INSTRUMENTS

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**2016 No. 65**

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

PART 2

SCOPE AND PRINCIPLES

CHAPTER 5

PRINCIPLES

**Principles of equal treatment, non-discrimination and transparency**

**28.**—(1) A contracting entity must, in carrying out a procurement for the award of a concession contract which is subject to the application of these Regulations—

- (a) treat economic operators equally and without discrimination; and
- (b) act in a transparent and proportionate manner.

(2) A contracting entity must not design a procurement for the award of a concession contract, including the estimate of the value of such contract with the intention of excluding it from the application of these Regulations or of unduly favouring or disadvantaging a particular economic operator or certain works, supplies or services.

(3) A contracting entity must aim to ensure the transparency of the award procedure and of the performance of the contract while complying with regulation 31 (confidentiality).

(4) During the procurement for the award of a concession contract, a contracting entity must not provide information in a discriminatory manner which may give a candidate or tenderer an advantage over others.

(5) A contracting entity must include within each concession contract such conditions relating to the performance of the concession contract as meet the requirements mentioned in paragraph (6) and are reasonably necessary to ensure the economic operator complies with environmental, social and employment law including any relative collective agreements or international law measures referred to in Schedule 4.

(6) The requirements referred to in paragraph (5) are that the conditions are—

- (a) linked to the subject matter of the contract within the meaning of regulation 44(2) (concession contract award criteria);
- (b) indicated in the concession documents.

**Economic Operators**

**29.**—(1) An economic operator must not be rejected solely on the ground that under the law of any part of the United Kingdom it would require to be a natural or legal person if such economic operator is entitled to provide the relevant service under the law of the member State in which that operator is established.

(2) A contracting entity may require an economic operator which is a legal person and which is seeking the award of a concession contract to state in its tender or in the application, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract.

(3) A contracting entity must not require a group of economic operators, including temporary associations, to have a specific legal form in order to be able to submit a tender or a request to participate.

(4) A contracting entity may specify in the concession documents the method by which a group of economic operators is to meet the requirements as to economic and financial standing or technical and professional ability referred to in regulation 41 (selection of and qualitative assessment of candidates).

(5) Any method specified as referred to in paragraph (4) must be justified by objective reasons and must be proportionate.

(6) Any conditions for the performance of a contract by a group of economic operators, which are different from those imposed upon individual participants, must be justified by objective reasons and must be proportionate.

(7) A contracting entity may, if it is necessary for the satisfactory performance of the contract, require a group of economic operators to assume a specific legal form for the purpose of the award of the contract.

## **Nomenclatures**

**30.** A contracting entity must, when making any reference to nomenclatures of the subject matter of a concession contract in the conduct of procurement for the award of a concession contract, do so by using the CPV.

## **Confidentiality**

**31.—(1)** A contracting entity must not disclose information forwarded to it by an economic operator which the economic operator designates as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of the tender.

(2) Paragraph (1) is without prejudice to—

- (a) any other provision of these Regulations, including the obligation relating to advertising of awarded contracts and to provision of information to candidates and tenderers set out in regulations 34 (concession contract award notice) and 43 (informing candidates and tenderers);
- (b) the Freedom of Information (Scotland) Act 2002(1);
- (c) the Environmental Information (Scotland) Regulations 2004(2);
- (d) any other enactment to which the contracting entity is subject relating to the disclosure of information.

(3) A contracting entity may impose upon an economic operator requirements aimed at protecting the confidential nature of information which the contracting entity makes available throughout the procurement for the award of a concession contract.

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(1) 2002 asp 13, amended by the Freedom of Information (Amendment) (Scotland) Act 2013 (2013 asp 2).

(2) S.S.I. 2004/520, amended by the Environmental Information (Scotland) Amendment Regulations 2013, S.S.I. 2013/127.

## **Rules applicable to communication**

**32.**—(1) Subject to paragraphs (3), (5) and (8), a contracting entity must ensure that all communication and information exchange, including submission, pursuant to these Regulations is performed using electronic means of communications in accordance with this regulation.

(2) Subject to paragraph (13), the tools and devices to be used for electronic means of communication, and their technical characteristics, must—

- (a) be non-discriminatory;
- (b) be generally available;
- (c) be interoperable with the information and communication technology products in general use; and
- (d) not restrict economic operators' access to the procurement.

(3) A contracting entity is not obliged to require electronic means of communication in the submission process where—

- (a) due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;
- (b) the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licencing scheme and cannot be made available by the contracting entity for downloading or remote use;
- (c) the use of electronic means of communication would require specialised office equipment that is not generally available to the contracting entity; or
- (d) the concession documents require the submission of physical or scale models which cannot be transmitted using electronic means.

(4) If, in accordance with paragraph (3), electronic means of communication is not required, communication must be carried out—

- (a) by post or by other suitable carrier; or
- (b) by a combination of post or other suitable carrier and, to the extent that electronic means of communication is possible, by such means.

(5) A contracting entity is not obliged to require electronic means of communication in the submission process to the extent that the use of means of communication other than electronic means is necessary—

- (a) because of a breach of security of the electronic means of communication; or
- (b) for the protection of information of a particularly sensitive nature which requires such a high level of protection that it cannot properly be ensured by using electronic tools and devices that are either generally available to economic operators or that can be made available to them by suitable alternative means of access in accordance with paragraph (14).

(6) If, in accordance with this regulation, a contracting entity requires means of communication in the submission process other than electronic means, the contracting entity must state the reason for this in the individual report referred to in regulation 60 (reporting requirements).

(7) If electronic means of communication is not required for a reason referred to in paragraph (5), the contracting entity must state in the individual report the reasons why use of means of communication other than electronic means has been considered necessary under that paragraph.

(8) Notwithstanding paragraph (1), oral communication may be used in respect of communications other than those concerning the essential elements of a procurement, provided that the content of the oral communication is documented by the contracting entity.

(9) In paragraph (8) reference to “the essential elements of a procurement” includes the concession documents, requests for participation, applications and tenders.

(10) A contracting entity must, to a sufficient extent and by appropriate means, document oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders, in particular, by preparing written or audio records or summaries of the main elements of the communication.

(11) In all communication, exchange and storage of information, a contracting entity must ensure that the integrity of data and the confidentiality of tenders, requests to participate and applications are preserved.

(12) A contracting entity must examine the content of tenders, applications and requests to participate only after the time limit set for submitting them has expired.

(13) A contracting entity may, where necessary, require the use of tools and devices which are not generally available, provided that the contracting entity offers suitable alternative means of access.

(14) A contracting entity shall be deemed to offer suitable alternative means of access if the contracting entity—

- (a) offers unrestricted and full direct access free of charge by electronic means to those tools and devices from the date of publication of a concession notice or a prior information notice in accordance with regulation 35 (form and manner of publication of notices);
- (b) ensures that tenderers having no access to the tools and devices concerned, or no possibility of obtaining such tools or devices within the relevant time limits (provided that the lack of access is not attributable to the tenderer), may access the procurement for the award of a concession contract through the use of provisional tokens made available free of charge online; or
- (c) supports an alternative channel for electronic submission of tenders.

(15) A contracting entity must specify in the concession notice or prior information notice, referred to in paragraph (14)(a), the internet address at which those tools and devices are accessible.

(16) Tools and devices for the electronic receipt of tenders, applications and requests to participate must—

- (a) enable the precise determination of the exact time and date of the receipt of tenders, applications and requests to participate;
- (b) to the extent reasonably possible, ensure that, before the time limit referred to in paragraph (12) has expired, no-one can have access to data transmitted to the contracting entity using the tools and devices;
- (c) ensure that only authorised persons may set or change the dates for opening data received;
- (d) ensure that, during the different stages of the procurement, only authorised persons may have access to data submitted or to part of such data;
- (e) ensure that only authorised persons may give access to data transmitted and only after the time limit referred to in paragraph (12) has expired;
- (f) ensure that data received and opened in accordance with the requirements in sub-paragraphs (a) to (e) remains accessible only to persons authorised to acquaint themselves with the data; and
- (g) to the extent reasonably possible, ensure that any infringement, or attempted infringement, of the conditions referred to in sub-paragraphs (b) to (f) is clearly detectable.

(17) In addition to the requirements set out in paragraph (16), a contracting entity must comply with all of the following requirements in relation to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of applications or requests to participate:—

- (a) information on specifications for the electronic submission of tenders, applications and requests to participate, including encryption and time-stamping, must be available to interested parties;
- (b) a contracting entity must specify the level of security required for the electronic means of communication in the various stages of the specific procurement;
- (c) the level of security specified must be proportionate to the risks attached;
- (d) if paragraph (18) applies, the contracting entity must accept advanced electronic signatures supported by a qualified certificate, created with or without a secure signature creation device, subject to compliance with all of the following conditions—
  - (i) the contracting entity must establish the required advanced electronic signature format on the basis of formats established in Electronic Signature Commission [Decision 2011/130/EU](#)(<sup>3</sup>) and must put in place necessary measures to be able to process these formats technically;
  - (ii) if a different format of electronic signature is used, the electronic signature or the electronic document carrier must include information on existing validation possibilities;
  - (iii) the validation possibilities must allow the contracting entity to validate the received electronic signature as an advanced electronic signature supported by a qualified certificate, such validation to be online, free of charge and in a way that is understandable for non-English speakers;
  - (iv) if a tender is signed with an advanced electronic signature with the support of a qualified certificate from a provider that is included on a trusted list provided for in the Trusted Lists Commission [Decision 2009/767/EC](#)(<sup>4</sup>), the contracting entity must not apply additional requirements that may hinder the use of the signature by the tenderer.

(18) This paragraph applies where a contracting entity concludes that the level of risk assessed in accordance with paragraphs (20) and (21) is such that advanced electronic signatures as defined by [Directive 1999/93/EC](#) of the European Parliament and of the Council on a Community framework for Electronic signatures(<sup>5</sup>), as amended from time to time, are required.

(19) A contracting entity must assess the certificate referred to in paragraph (17)(d) by taking into account whether the certificate is provided by a certificate services provider, which is on a trusted list provided for in the Trusted Lists Commission Decision.

(20) In deciding the level of security required at each stage of a procurement for the award of a concession contract and in concluding whether the level of risk is such that advanced electronic signatures are required, a contracting entity must assess the risks having regard to—

- (a) the likelihood of particular risks materialising;
- (b) the potential adverse consequences if those risks materialise;
- (c) the need for consistency as between similar procurements performed by the same contracting entity; and
- (d) the need for proportionality between the expected benefits of any particular security requirements (in terms of eliminating or reducing any of the risks referred to in

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(3) OJ L 53, 26.2.2011, p.66, amended by Commission Implementing [Decision 2014/148/EU](#) (OJ L 80, 19.3.2014, p.7).

(4) OJ L 274, 20.10.2009, p.36, last amended by Commission [Decision 2013/662/EU](#) (OJ L 306, 16.11.2013, p.21).

(5) OJ L 13, 19.1.2000, p.12, amended by Regulation (EC) No 1137/2008 (OJ L 311, 21.11.2008, p.1).

paragraph (21) and the costs, burdens and obligations which those requirements may impose upon an economic operator.

(21) A contracting entity must assess all relevant risks, including, in particular, where applicable—

- (a) the risk to the proper functioning and integrity of the specific procurement process, including risks of breach of these Regulations;
- (b) risks to national security;
- (c) the risk of inadvertent or unauthorised disclosure of, or access to, any economic operator's confidential information;
- (d) the risk of inadvertent or unauthorised disclosure of, or access to, information held by the contracting entity including information relating to the specific procurement;
- (e) the risk that use of electronic communications could provide opportunity for malicious attacks on the electronic systems of, or data held by, the entity, any economic operator or any other person, including introduction of malware or denial of service attacks; and
- (f) any other material risk relating to the procurement in question.

(22) Paragraph (23) applies where a contracting entity located in Scotland signs and issues a document for use in the procurement for the award of concession contract within the scope of the Concession Contracts Directive, whether the procurement is under these Regulations or under the law of any member State.

(23) The contracting entity may establish the required advanced signature format in accordance with the requirements set out in Article 1(2) the Electronic Signature of Commission [Decision 2011/130/EU\(6\)](#), and, where it does so—

- (a) it must put in place the necessary measures to be able to process that format technically by including the information required for the purpose of processing the signature in the document concerned; and
- (b) the documents must contain, in the electronic signature or in the electronic document carrier, information on existing validation possibilities that allow the validation of the received electronic signature online, free of charge and in a way that is understandable for non-English speakers.

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(6) OJ L 53, 26.2.2011 p.66.