
SCOTTISH STATUTORY INSTRUMENTS

2016 No. 65

The Concession Contracts (Scotland) Regulations 2016

PART 1

GENERAL

Meaning of “utility”

5.—(1) In these Regulations, “utility” means an entity which pursues one of the activities listed in Schedule 2 and awards a concession contract for the pursuit of one of those activities, and which is one of the following:—

- (a) State, regional or local authorities (including the Crown but not including Her Majesty in her private capacity), bodies governed by public law or associations formed by one or more such authorities or bodies;
- (b) a public undertaking;
- (c) any other entity which operates on the basis of special rights or exclusive rights, granted for the exercise of one of the activities listed in Schedule 2.

(2) An entity is not a utility within the meaning of paragraph (1) if special rights or exclusive rights are granted to that entity following a procedure mentioned in paragraph (3) in which adequate publicity was ensured and the granting of the rights was based on objective criteria.

(3) The procedures referred to in paragraph (2) include—

- (a) procurement with a prior call for competition in conformity with these Regulations, the Public Contracts (Scotland) Regulations 2015(1), the Utilities Contracts (Scotland) Regulations 2016(2) or the Defence and Security Regulations;
- (b) procedures pursuant to the legal acts of the European Union listed in Annex III to the Concession Contracts Directive, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

(4) In this regulation—

- (a) “public undertaking” means any undertaking over which a contracting authority may exercise, directly or indirectly, a dominant influence by virtue of—
 - (i) their ownership of that undertaking;
 - (ii) their financial participation in that undertaking; or
 - (iii) the rules which govern that undertaking;
- (b) “special right” means a right granted by a competent authority of a member State by means of any law, regulation or published administrative provision which is compatible with the Treaties, the effect of which is to limit the exercise of an activity to two or more economic operators and which substantially affects the ability of other economic operators to carry out such an activity.

(1) S.S.I. 2015/446.

(2) S.S.I. 2016/49.

(5) For the purposes of the definition of “public undertaking” in paragraph (4), a dominant influence on the part of the contracting authority shall be presumed if that authority, directly or indirectly—

- (a) holds the majority of the undertaking’s subscribed capital;
- (b) controls the majority of the votes attached to shares issued by the undertaking; or
- (c) can appoint more than half of the undertaking’s administrative, management or supervisory body.