
STATUTORY INSTRUMENTS

2016 No. 273

The Concession Contracts Regulations 2016

PART 1

General

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Concession Contracts Regulations 2016 and come into force on 18th April 2016.

(2) These Regulations do not extend to Scotland.

Interpretation

2.—(1) In these Regulations—

“bodies governed by public law” means bodies that have all of the following characteristics—

- (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) they have legal personality; and
- (c) they have any of the following characteristics—
 - (i) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;
 - (ii) they are subject to management supervision by those authorities or bodies; or
 - (iii) they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

“candidate” means an economic operator that has sought an invitation or has been invited to take part in a concession contract award procedure;

“the Commission” means the European Commission;

“concessionaire” means an economic operator that has been awarded a concession contract;

“concession award notice” means the notice referred to in regulation 32;

“concession contract” has the meaning given by regulation 3;

“concession document” means any document produced or referred to by the contracting authority or utility to describe or determine elements of the concession contract or the concession contract award procedure, including the concession notice, the technical and functional requirements, proposed conditions of concession contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

“concession notice” has the meaning given by regulation 6;

“Concessions Directive” means Directive 2014/23/EU of the European Parliament and of the Council(1);

“contracting authorities” has the meaning given by regulation 4;

“CPV” means the Common Procurement Vocabulary as adopted by Regulation (EC) No 2195/2002 of the European Parliament and of the Council(2) as amended from time to time;

“Defence and Security Regulations” means the Defence and Security Public Contracts Regulations 2011(3);

“disabled”, in relation to a person, means a disabled person within the meaning of the Equality Act 2010(4) and, in relation to a worker, means a disabled person who is a worker;

“economic operator” means any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market;

“electronic means” means 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 any other electromagnetic means;

“exclusive right” means a right granted by a competent authority 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 a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity;

“execution of works” means any of the following—

- (a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 1;
- (b) the execution, or both the design and execution, of a work;
- (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority or utility exercising a decisive influence on the type or design of the work;

“legal person” means a person, whether governed by private or public law, other than a natural person;

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

“prior information notice” means the notice referred to in regulation 31(3);

“services concession contract” has the meaning given by regulation 3(3);

“tenderer” means an economic operator that has submitted a tender;

“TFEU” means the Treaty on the Functioning of the European Union(5);

“the Treaties” means the Treaty on European Union(6) and TFEU;

“utilities” has the meaning given by regulation 5;

“a work” means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function; but “works” is to be interpreted in accordance with paragraph (2);

(1) OJ No L 94, 28.3.2014, p1, last amended by Commission Delegated Regulation (EU) 2015/2172 (OJ No L 307, 25.11.2015, p9).

(2) OJ No L 340, 16.12.2002, p1, last amended by Regulation (EC) No 596/2009 of the European Parliament and of the Council (OJ No L 188, 18.7.2009, p14).

(3) S.I. 2011/1848, amended by S.I. 2011/2053, 2013/1431 and 2015/102.

(4) 2010 c.15.

(5) OJ No C 115, 9.5.2008, p47.

(6) OJ No C 115, 9.5.2008, p13.

“working day” means a day other than a Saturday, Sunday, Christmas Day, Good Friday or bank holiday within the meaning of the Banking and Financial Dealings Act 1971(7);

“works concession contract” has the meaning given by regulation 3(2); and

“in writing” means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information which is transmitted and stored by electronic means.

(2) Any other expression used both in these Regulations (other than in Part 5) and in the Concessions Directive has the meaning that it bears in that Directive.

(3) In these Regulations (except regulation 33(3)), any reference to a period of time, however expressed, is to be interpreted subject to the requirement that where the period—

(a) is to be calculated by counting forwards in time from a given date or event, and

(b) would (but for this paragraph) have ended on a day which is not a working day,

the period is to end at the end of the next working day.

(4) Any reference in Part 3 to a period of time, however expressed, is to be interpreted subject to the following additional requirements—

(a) the period must include at least 2 working days;

(b) where the period is to be calculated from the moment at which an action takes place or other event occurs, the day during which that action takes place or that event occurs is not to be counted in the calculation of that period.

Meaning of “concession contract”

3.—(1) In these Regulations, “concession contract” means a works concession contract or a services concession contract within the meaning of this regulation.

(2) A “works concession contract” means a contract—

(a) for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the execution of works to one or more economic operators, the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment; and

(b) that meets the requirements of paragraph (4).

(3) A “services concession contract” means a contract—

(a) for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the provision and the management of services (other than the execution of works) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment; and

(b) that meets the requirements of paragraph (4).

(4) The requirements are—

(a) the award of the contract shall involve the transfer to the concessionaire of an operating risk in exploiting the works or services encompassing demand or supply risk or both; and

(b) the part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

(5) For the purposes of paragraph (4)(a), the concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession contract.

Meaning of “contracting authorities”

4. In these Regulations, “contracting authorities” means 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 one or more such bodies governed by public law other than those authorities, bodies or associations which pursue one of the activities listed in Schedule 2 and award a concession contract for the pursuit of one of those activities.

Meaning of “utilities”

5.—(1) In these Regulations, “utilities” means entities which pursue one of the activities listed in Schedule 2 and award a concession contract for the pursuit of one of those activities, and which are 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 one or more such bodies governed by public law;
- (b) public undertakings;
- (c) any other entities which operate on the basis of special rights or exclusive rights, granted for the exercise of one of the activities listed in Schedule 2.

(2) But entities within the meaning of paragraph (1)(c) which have been granted special or exclusive rights by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute “utilities”.

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

- (a) procurement procedures with a prior call for competition in conformity with these Regulations, the Public Contracts Regulations 2015(8), the Utilities Contracts Regulations 2016(9) or the Defence and Security Regulations;
- (b) procedures pursuant to the legal acts of the EU listed in Annex III to the Concessions Directive, as amended from time to time, 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 contracting authorities 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 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.

(8) S.I. 2015/102, as amended by S.I. 2016/275.

(9) S.I. 2016/274.

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

- (a) hold the majority of the undertaking’s subscribed capital;
- (b) control 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.

Meaning of “concession notice”

6.—(1) In these Regulations, “concession notice” means the notice referred to in regulation 31(1).

(2) In Part 5, “concession notice”—

- (a) in relation to a concession contract awarded by a utility, includes a prior information notice; and
- (b) in relation to a concession contract awarded by a contracting authority, has the same meaning that “contract notice” has in relation to it in Council Directive 89/665/EEC(10).

(10) OJ No L 395, 30.12.1989, p33, last amended by Directive 2014/23/EU of the European Parliament and of the Council (OJ No L 94, 28.3.2014, p1).