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SCOTTISH STATUTORY INSTRUMENTS

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**2016 No. 145**

**The Procurement (Scotland) Regulations 2016**

**PART 3**

**GENERAL DUTIES**

**Specification of health or social care services**

**5.—**(1) For the purposes of sections 12(1) and 13(1) of the Act and these Regulations, health or social care services are those services specified in column 1 of the Schedule to these Regulations by reference to their CPV Codes and broadly referred to in column 2 of the said Schedule.

(2) Where the contract is a mixed contract including services of a kind referred to in the Schedule and other services or supplies or both, the contract will be a health or social care service contract for the purpose of the provisions referred to in paragraph (1) where the health or social care service characterises the main subject of the contract.

(3) The main subject of the contract referred to in paragraph (2) shall be determined by reference to which of the services or supplies has the highest estimated value and in the event that the estimated values are equal the main subject shall be deemed to be the health or social care service.

**Circumstances in which a contract can be awarded without competition**

**6.—**(1) A contracting authority may award a public contract without seeking offers in relation to the proposed contract—

- (a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to the publication of a contract notice, provided that the initial conditions of the contract are not substantially altered;
- (b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons—

- (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;

- (ii) competition is absent for technical reasons;

- (iii) the protection of exclusive rights, including intellectual property rights;

but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;

- (c) where (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the authority considers it must proceed to award a contract without delay;

- (d) where the following conditions apply—

- (i) it is for new works, services or both, consisting of the repetition of similar works or services entrusted to the economic operator to which the contracting authority

awarded an original contract, provided that such works or services are in conformity with the project for which the original contract was awarded;

- (ii) the project indicated the extent of possible additional works or services and the conditions under which they would be awarded;
- (iii) the possible use of this procedure was disclosed in the procurement documents and the total estimated cost of subsequent works or services was taken into consideration by the contracting authority when determining the estimated value for the purpose of applying section 3(1)(b) of the Act in relation to the original contract; and
- (iv) not more than three years has elapsed following the conclusion of the original contract.

(2) For the purposes of paragraph (1)(a)—

- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents;
- (b) a request to participate shall be considered not to be suitable where the economic operator concerned—
  - (i) has been or would be excluded under regulation 9; or
  - (ii) does not meet the selection criteria.

(3) For the purposes of paragraph (1)(c), the circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority.

(4) A contracting authority may award a public supply contract without seeking offers in relation to the proposed contract—

- (a) where the products involved are manufactured purely for the purpose of research, experimentation, study or development, but a contract awarded under this sub-paragraph shall not include quantity production to establish commercial viability or to recover research and development costs;
- (b) for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- (c) for supplies quoted and purchased on a commodity market;
- (d) for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.

(5) For the purposes of paragraph (4)(b), the duration of such a contract, as well as that of recurrent contracts must not, save in exceptional circumstances, exceed three years.

(6) A contracting authority may award a public service contract without the publication of a contract notice where the contract concerned—

- (a) follows a design contest organised in accordance with the 2015 Regulations; and
- (b) is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest.