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DRAFT SCOTTISH STATUTORY INSTRUMENTS

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**2016 No.**

**The Procurement (Scotland) Regulations 2016**

**PART 4**

**SPECIFIC DUTIES**

**Technical specifications**

- 11.**—(1) The technical specifications in a regulated procurements must—
- (a) be set out in the procurement documents; and
  - (b) lay down the characteristics required of any works, supply or service.
- (2) In the case of a public works contract, technical specifications define any characteristics required of a material, product or supply so that it fulfils the use for which it is intended by the contracting authority.
- (3) The characteristics referred to in paragraph (2) may include—
- (a) levels of environmental and climate performance;
  - (b) design for all requirements (including accessibility for disabled persons) and conformity assessment;
  - (c) performance, safety or dimensions, including the procedures concerning quality assurance;
  - (d) terminology;
  - (e) symbols;
  - (f) testing and test methods;
  - (g) packaging, marking and labelling;
  - (h) user instructions;
  - (i) production processes and methods at any stage of the life cycle of the works;
  - (j) rules relating to design and costing, and the test, inspection and acceptance conditions for works; and
  - (k) methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.
- (4) In the case of a public supply or public service contract, the required characteristics may include—
- (a) quality levels;
  - (b) environmental and climate performance levels;
  - (c) design for all requirements (including accessibility for disabled persons) and conformity assessment;

- (d) performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold;
  - (e) terminology;
  - (f) symbols;
  - (g) testing and test methods;
  - (h) packaging, marking and labelling;
  - (i) user instructions;
  - (j) production processes and methods at any stage of the life cycle of the supply or service; and
  - (k) conformity assessment procedures.
- (5) In the case of any public contract, the required characteristics may also refer to—
- (a) the specific process or method of production or provision of the requested works, supplies or services; or
  - (b) a specific process for another stage of its life cycle,
- even where such factors do not form part of their material substance, provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.
- (6) The technical specifications may also specify whether the transfer of intellectual property rights will be required.
- (7) Where the subject of the procurement is intended for use by natural persons, whether the general public or staff of the contracting authority, the technical specifications must, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.
- (8) Where mandatory accessibility requirements are adopted by a legal act of the EU, technical specifications must, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference to those accessibility requirements.
- (9) Technical specifications must afford equal access of economic operators to the procurement procedure and must not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.
- (10) Without prejudice to mandatory national technical rules, to the extent that they are compatible with EU law, the technical specifications must be formulated—
- (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow the contracting authority to award the contract;
  - (b) by reference to technical specifications in the following order of precedence:—
    - (i) national standards transposing European standards;
    - (ii) European Technical Assessments;
    - (iii) common technical specifications;
    - (iv) international standards;
    - (v) other technical reference systems established by the European standardisation bodies; or
    - (vi) when none of the above exist, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies,but each reference must be accompanied by the words ‘or equivalent’;

- (c) in terms of performance or functional requirements as referred to in sub-paragraph (a), with reference to the technical specifications referred to in sub-paragraph (b) as a means of presuming conformity with such performance or functional requirements; or
  - (d) by reference to the technical specifications referred to in sub-paragraph (b) for certain characteristics, and by reference to the performance or functional requirements referred to in sub-paragraph (a) for other characteristics.
- (11) Subject to paragraph (12), technical specifications must not, with the effect of favouring or eliminating certain undertakings or certain products, refer to—
- (a) a specific make or source;
  - (b) a particular process which characterises the products or services provided by a specific economic operator; or
  - (c) trade marks, patents, types, or a specific origin or production.
- (12) Reference or a kind referred to in paragraph (11) is permitted—
- (a) where justified by the subject-matter of the contract; and
  - (b) on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph (10) is not possible, in which case the reference must be accompanied by the words “or equivalent”.
- (13) Where a contracting authority formulates technical specifications in terms of performance or functional requirements accordance with paragraph (10)(a), it must not reject a tender for works, supplies or services which complies with a technical specification of a kind mentioned in paragraph (10)(b)(i) to (v), where those specifications address the performance or functional requirements which it has laid down.
- (14) Where a contracting authority formulates technical specifications in accordance with paragraph (10)(b), it must not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, where the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 45 of the 2015 Regulations (test reports, certificates and other means of proof), that the solution proposed satisfies in an equivalent manner the requirements defined by the technical specifications.
- (15) In its tender, the tenderer must prove by any appropriate means, including those referred to in regulation 45 of the 2015 Regulations (test reports, certificates and other means of proof), that the works, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.
- (16) In this regulation, “European Technical Assessment” means the document assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the respective European Assessment Document, as defined in point 12 of Article 2 of Regulation (EU) No 305/2011 of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products and repealing Council [Directive 89/106/EEC](#)<sup>(1)</sup>.

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(1) OJ L 88, 4.4.2011, p.5.