
DRAFT SCOTTISH STATUTORY INSTRUMENTS

2016 No.

The Procurement (Scotland) Regulations 2016

PART 4

SPECIFIC DUTIES

Selection of tenderers: exclusion of economic operators on grounds of criminal activity

8.—(1) A contracting authority must exclude an economic operator from participation in a procurement procedure where the contracting authority has established or is otherwise aware that that economic operator or a person to whom paragraph (2) applies has been convicted of any of the following offences—

- (a) the common law offence of conspiracy where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA on the fight against organised crime⁽¹⁾ or an offence under sections 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010⁽²⁾;
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889⁽³⁾ or section 1 of the Prevention of Corruption Act 1906⁽⁴⁾, where the offence relates to active corruption as defined in Article 3 of the Council Act of 26th May 1997 on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union⁽⁵⁾ and Article 3(1) of Council Joint Action 98/742/JHA on corruption in the private sector⁽⁶⁾;
- (c) bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003⁽⁷⁾, where the offence relates to active bribery or corruption;
- (d) bribery within the meaning of sections 1 or 6 of the Bribery Act 2010⁽⁸⁾;
- (e) where the offence relates to fraud affecting the European Communities' financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities⁽⁹⁾—
 - (i) the offence of cheating the Revenue;
 - (ii) the common law offence of fraud;
 - (iii) the common law offence of theft or fraud;

⁽¹⁾ OJ L 300, 11.11.2008, p.42.

⁽²⁾ 2010 asp 13.

⁽³⁾ 1889 c.69. This Act was repealed by Schedule 2 to the Bribery Act 2010 (c.23).

⁽⁴⁾ 1906 c.34. Section 1 was amended by section 47(2) and (3) of the Criminal Justice Act 1988 (c.33), section 108(2) of the Anti-Terrorism, Crime and Security Act 2001 (c.24) and section 68(2) of the Criminal Justice (Scotland) Act 2003 (asp 7) and repealed by Schedule 2 to the Bribery Act 2010 (c.23).

⁽⁵⁾ OJ C 195, 25.6.1997, p.2.

⁽⁶⁾ OJ L 358, 31.12.1998, p.2; repealed by Council Framework Decision 2003/568/JHA (OJ L 192, 31.7.2003, p.54).

⁽⁷⁾ 2003 asp 7. Sections 68 and 69 were repealed by Schedule 2 to the Bribery Act 2010 (c.23).

⁽⁸⁾ 2010 c.23.

⁽⁹⁾ OJ C 316, 27.11.1995, p.48.

- (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(10), or section 993 of the Companies Act 2006(11);
- (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(12) or section 72 of the Value Added Tax Act 1994(13);
- (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993(14);
- (vii) the common law offence of uttering; or
- (viii) the common law offence of attempting to pervert the course of justice;
- (f) any offence listed in—
 - (i) section 41 of the Counter-Terrorism Act 2008(15); or
 - (ii) Schedule 2 to that Act where the court has determined that there is a terrorist connection.
- (g) money laundering within the meaning of section 340(11) and 415 of the Proceeds of Crime Act 2002(16);
- (h) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988(17);
- (i) any offence under Part 1 of the Human Trafficking and Exploitation (Scotland) Act 2015(18) or under any provision referred to in the Schedule to that Act;
- (j) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994(19);
- (k) any other offence within the meaning of Article 57(1) of the Directive as defined by the law of any EEA state or any part thereof.

(2) This paragraph applies to a person who is a member of the administrative, management or supervisory body of the economic operator referred to in paragraph (1) or has powers of representation, decision or control in relation to such economic operator.

(3) A contracting authority may disregard any of the prohibitions imposed by this regulation, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

(4) A contracting authority must exclude an economic operator where the authority becomes aware, at any time during the procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in this regulation.

(5) Subject to paragraphs (3) and (7), the period during which the economic operator must be excluded under this regulation is five years from the date of the conviction by final judgment.

(10) 1985 c.6. Section 458 was modified by regulation 4 of, and Part 1 of Schedule 2 to, the Limited Liability Partnerships Regulations 2001 (S.I. 2001/1090) and repealed by Schedule 16 to the Companies Act 2006 (c.46).

(11) 2006 c.46.

(12) 1979 c.2. There are amendments to this Act which are not relevant to these Regulations.

(13) 1994 c.23. Section 72 was amended by section 17 of the Finance Act 2004 (c.40). There are other amendments to this Act which are not relevant to these Regulations.

(14) 1993 c.36. There are amendments to this Act which are not relevant to these Regulations.

(15) 2008 c.28

(16) 2002 c.29.

(17) 1998 c.33; sections 93A, 93B and 93C were inserted by sections 29, 30 and 31 of the Criminal Justice Act 1993 (c.36) and repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraph 17(2).

(18) 2015 asp 12.

(19) 1994 c.37; sections 49, 50 and 51 were repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraphs 1 and 25(1) and (2)(a), and by Schedule 12.

(6) Any economic operator that is in one of the situations referred to in this regulation may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

(7) If the contracting authority is satisfied that the evidence proves that the measures are sufficient for the purpose referred to in paragraph (6), the authority must not exclude the economic operator from the procurement procedure.

(8) For the purposes mentioned in paragraph (7), the economic operator must prove that it has—

- (a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence;
- (b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- (c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences.

(9) The measures taken by the economic operator must be evaluated by the contracting authority taking into account the gravity and particular circumstances of the criminal offence.

(10) Where the contracting authority considers that the measures are insufficient, the authority must give to the economic operator a statement of the reasons for that decision.