
DRAFT SCOTTISH STATUTORY INSTRUMENTS

2016 No.

The Procurement (Scotland) Regulations 2016

PART 4

SPECIFIC DUTIES

Selection of tenderers: exclusion criteria

9.—(1) A contracting authority must exclude an economic operator from participation in a procurement procedure where the contracting authority is aware that the economic operator has committed an act prohibited under the Employment Relations Act 1999 (Blacklists) Regulations 2010⁽¹⁾ and the commission of such an act has been admitted by the economic operator or established by a judicial decision having final and binding effect.

(2) Subject to paragraph (3), a contracting authority may exclude an economic operator from participation in a procurement procedure where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

(3) A contracting authority may not exclude an economic operator pursuant to paragraph (2) where—

- (a) the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines; or
- (b) the obligation to make repayment otherwise ceases.

(4) A contracting authority may disregard the prohibition imposed by paragraph (1), on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

(5) A contracting authority may exclude an economic operator from participation in a procurement procedure where—

- (a) the contracting authority can demonstrate by any appropriate means a violation by the economic operator of applicable obligations referred to in regulation 57(2) (general principles) of the 2015 Regulations;
- (b) the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under laws and regulations to which the economic operator may be subject;
- (c) the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

(1) S.I. 2010/493.

- (d) the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
 - (e) a conflict of interest exists within the meaning of regulation 25 (conflicts of interest) of the 2015 Regulations which cannot be effectively remedied by other less intrusive measures;
 - (f) a distortion of competition may arise from the prior involvement of the economic operator in the preparation of the procurement procedure, as referred to in regulation 42 (prior involvement of candidates or tenderers) of the 2015 Regulations, which cannot be remedied by other, less intrusive measures;
 - (g) the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;
 - (h) the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria;
 - (i) the economic operator has withheld information referred to in sub-paragraph (h); or
 - (j) the economic operator—
 - (i) has or has sought to unduly influence the decision-making process of the contracting authority;
 - (ii) has or has sought to obtain confidential information that may confer upon it undue advantages in the procurement procedure; or
 - (iii) has negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.
- (6) 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 paragraph (1).
- (7) A contracting authority may 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 paragraphs (2) or (5).
- (8) In the cases referred to in paragraph (1) or (5), and subject to paragraph (11), the period during which the economic operator may be excluded is three years from the date of the relevant event.
- (9) Any economic operator that is in one of the situations referred to in paragraph (1) or (5) 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.
- (10) If the contracting authority is satisfied that the evidence proves that the measures are sufficient for the purpose referred to in paragraph (9), the authority must not exclude the economic operator from the procurement procedure.
- (11) For the purpose mentioned in paragraph (10), 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 or misconduct;
 - (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 or misconduct.

(12) 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 or misconduct.

(13) 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.

(14) In this regulation—

“contracting entity” has the meaning given in Article 4 of Directive 2014/25/EU of the European Parliament and of the Council on procurement entities operating in the water, energy, transport and postal services sectors and repealing [Directive 2004/17/EC](#)(2);

“concession contract” has the meaning given in the Concession Contracts (Scotland) Regulations 2016(3).

(2) OJ L 94, 28.3.2014, p.243.

(3) [DN: not got SSI no. yet]