
SCOTTISH STATUTORY INSTRUMENTS

2016 No. 65

The Concession Contracts (Scotland) Regulations 2016

PART 1

GENERAL

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Concession Contracts (Scotland) Regulations 2016.

(2) Subject to paragraph (3), these Regulations come into force on 18th April 2016.

(3) Regulation 32(1) to (7) (rules applicable to communication) comes into force on—

(a) 18th April 2017 in relation to procurement by a central purchasing body; and

(b) 18th October 2018 in relation to procurement by any other contracting entity.

(4) These Regulations extend to Scotland only.

Interpretation

2.—(1) In these Regulations—

“body governed by public law” means a body that has legal personality, is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character and which—

(a) is financed for the most part by the State, regional or local authorities, or by any other body governed by public law;

(b) is subject to management supervision by any such authority or body; or

(c) has an administrative, managerial or supervisory board more than half the members of which were appointed by any body referred to in sub-paragraph (a);

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

“central purchasing body” means a contracting entity providing purchasing activity conducted on a permanent basis in one of the following forms—

(d) the acquisition of supplies or services for contracting entities;

(e) the award of a concession contract for works, supplies or services intended for contracting entities;

“commenced” in relation to procurement means—

(f) if a concession notice has been sent to the Official Journal in accordance with regulation 33 (concession notice);

(g) if a prior information notice has been published in accordance with regulation 33; or

- (h) in any case where there is no such advertising, if the contracting entity has contacted any economic operator—
 - (i) in order to seek expressions of interest or offers in respect of a proposed concession contract; or
 - (ii) in response to an unsolicited expression of interest or offer in respect of a proposed concession contract;

“Commission” means European Commission;

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

“concession contract award notice” means the notice referred to in regulation 34 (concession contract award notice);

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

“Concession Contracts Directive” means [Directive 2014/23/EU](#) of the European Parliament and of the Council on the award of concession contracts⁽¹⁾;

“concession document” means any document produced or referred to by the contracting entity to describe or determine elements of the concession contract or the procurement procedure, including the concession notice, the technical and functional requirements, proposed conditions of the 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 (meaning of “concession notice”);

“contracting body” (except in regulation 19 (Exclusions: concession contracts between entities within the public sector)) means a contracting authority or utility;

“CPV” means the Common Procurement Vocabulary as adopted by Regulation [\(EC\) No 2195/2002](#) of the European Parliament and of the Council on the Common Procurement Vocabulary ⁽²⁾ and “CPV Code” shall be construed accordingly;

“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 or both 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 processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, radio, optical or other electromagnetic means;

“exclusive right” means a right granted by a competent authority of a member State 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—

(1) OJ L 94, 28.3.2014, p.1.

(2) OJ L 340, 16.12.2002, p.1, last amended by [Commission Regulation \(EC\) No. 213/2008](#) (OJ L 74, 15.3.2008, p.1).

(3) [S.I. 2011/1848](#) amended by [S.S.I. 2012/88](#), [S.S.I. 2012/89](#), [S.I. 2015/102](#), [S.S.I 2015/446](#) and [S.S.I 2016/49](#).

(4) [2010 c.15](#).

- (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 entity exercising a decisive influence on the type or design of the work;

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

“prior information notice” means the notice referred to in regulation 33(3) (concession notice);

“procurement” means the process undertaken by a contracting entity leading to the award of a concession contract for the acquisition of works, supplies or services from an economic operator;

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

“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 the TFEU;

“utility” has the meaning given by regulation 5 (meaning of “utility”);

“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;

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

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

“written” or “in writing” means any expression which can be read by a person, reproduced and subsequently communicated, including information transmitted and stored by electronic means.

(2) Unless the context otherwise requires, any other expression used both in these Regulations (other than in Part 5) and in the Concession Contracts Directive has the meaning that it bears in that Directive.

(3) Except in regulation 52(4) (enforcement of duties through the courts) where these Regulations refer to a period of time—

- (a) where the period follows an action taken, the day on which the action taken is not counted in the calculation of the period; and
- (b) the period must include at least 2 working days; and
- (c) where the last day of the period is not a working day, the period is extended to include the next working day.

Meaning of “concession contract”

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

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

⁽⁵⁾ OJ C 115, 9.5.2008, p.47.

⁽⁶⁾ OJ C 115, 9.5.2008, p.13.

⁽⁷⁾ 1971 c.80

- (a) for pecuniary interest concluded in writing by means of which one or more contracting entities 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 entities 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 referred to in paragraphs (2)(b) and (3)(b) are—
 - (a) the award of the contract involves 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 involves real exposure to changing market conditions, such that any potential estimated loss incurred by the concessionaire is not merely nominal or negligible.
- (5) For the purposes of paragraph (4)(a) the concessionaire shall be deemed to assume operating risk if, 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 authority”

4. In these Regulations, “contracting authority” 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 bodies 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 “utility”

5.—(1) In these Regulations, “utility” means an entity which pursues one of the activities listed in Schedule 2 and awards a concession contract for the pursuit of one of those activities, and which is 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 bodies;
 - (b) a public undertaking;
 - (c) any other entity which operates on the basis of special rights or exclusive rights, granted for the exercise of one of the activities listed in Schedule 2.
- (2) An entity is not a utility within the meaning of paragraph (1) if special rights or exclusive rights are granted to that entity following a procedure mentioned in paragraph (3) in which adequate publicity was ensured and the granting of the rights was based on objective criteria.
- (3) The procedures referred to in paragraph (2) include—

- (a) procurement with a prior call for competition in conformity with these Regulations, the Public Contracts (Scotland) Regulations 2015⁽⁸⁾, the Utilities Contracts (Scotland) Regulations 2016⁽⁹⁾ or the Defence and Security Regulations;
 - (b) procedures pursuant to the legal acts of the European Union listed in Annex III to the Concession Contracts Directive, 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 a contracting authority 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 of a member State 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.
- (5) For the purposes of the definition of “public undertaking” in paragraph (4), a dominant influence on the part of the contracting authority shall be presumed if that authority, directly or indirectly—
- (a) holds the majority of the undertaking’s subscribed capital;
 - (b) controls 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, subject to paragraph (2), “concession notice” means the notice referred to in regulation 33(1) (concession notice).

(2) In Part 5 of these Regulations, “concession notice”—

- (a) in relation to a procurement for the award of a concession contract by a contracting entity includes a prior information notice; and
- (b) in relation to a procurement for the award of a concession contract by a contracting authority, has the same meaning as “contract notice” in Council Directive 89/665/EEC on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts⁽¹⁰⁾.
- (c) in relation to a procurement for the award of a concession contract by a utility, has the same meaning as “notice” in Council Directive 92/13/EEC on the coordination of laws, regulations and administrative provisions relating to the application rules on procurement procedures for entities operating in the water, energy, transport and telecommunication sectors⁽¹¹⁾.

⁽⁸⁾ S.S.I. 2015/446.

⁽⁹⁾ S.S.I. 2016/49.

⁽¹⁰⁾ OJ L 395, 30.12.1090, p.33, as amended by OJ L 209, 24.7.1992, p.1 and OJ L 335, 20.12.2007, p.31.

⁽¹¹⁾ OJ L 76, 23.3.1992, p. 14 as amended by Council Directive by Directive 2007/66/EEC of the European Parliament and Council with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p.31) and by Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts (OJ 94, 28.3.2014, p.1).

Status: *This is the original version (as it was originally made).*
