
SCOTTISH STATUTORY INSTRUMENTS

2016 No. 65

The Concession Contracts (Scotland) Regulations 2016

PART 2

SCOPE AND PRINCIPLES

CHAPTER 2

EXCLUSIONS

Exclusions: Concession contracts awarded on the basis of an exclusive right

9.—(1) These Regulations do not apply to—

- (a) a concession contract awarded to a contracting authority or utility referred to in regulation 5(1)(a) (meaning of “utility”) or to an association of such contracting authorities or utilities, on the basis of an exclusive right; or
- (b) subject to paragraph (2), a services concession contract awarded to an economic operator on the basis of an exclusive right granted in accordance with the TFEU and European Union legal acts laying down common rules on access to the market applicable to an activity listed in Schedule 2.

(2) If the European Union sectoral legislation referred to in paragraph (1)(b) does not provide for sector-specific transparency obligations, regulation 34 (concession contract award notice) applies.

Exclusions: Concession contracts awarded pursuant to international rules

10.—(1) These Regulations do not apply to procurement for the award of a concession contract which the contracting entity is obliged to award or organise in accordance with procurement procedures which are established by—

- (a) an international agreement or any other legal instrument creating international law obligations, concluded in conformity with the Treaties, between the United Kingdom and one or more third countries or any part thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatories; or
- (b) an international organisation.

(2) These Regulations do not apply to procurement for the award of a concession contract which the contracting entity undertakes or organises in accordance with procurement rules provided by an international organisation or international financing institution, if the concession contract concerned is fully financed by that organisation or institution or is co-financed for the main part by that organisation or institution.

(3) This Regulation does not apply to procurement for the award of a concession contract involving defence or security as referred to in the Defence and Security Regulations.

Exclusions: Concession contracts involving defence or security aspects which are awarded or organised pursuant to international rules

11.—(1) These Regulations do not apply to the procurement for the award of a concession contract in the fields of defence and security as referred to in the Defence and Security Regulations—

- (a) which are governed by specific procedural rules pursuant to an international agreement or arrangement concluded between one or more member States and one or more third countries;
- (b) which are governed by specific procedural rules pursuant to a concluded international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a member State or a third country;
- (c) which are governed by specific procedural rules of an international organisation purchasing for its purposes or which must be awarded by a member State in accordance with those rules;
- (d) in relation to which the application of these Regulations would oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security or the procurement and performance of which is classified as secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in any part of the United Kingdom, provided that the United Kingdom has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in paragraph (2);
- (e) awarded in the framework of a cooperative programme referred to in regulation 7(1)(c) of the Defence and Security Regulations;
- (f) awarded by a government to another government relating to works and services directly linked to military equipment or sensitive equipment, or works and services specifically for military purposes, or sensitive works and sensitive services (and in this sub-paragraph “government” means the State, regional or local government of a member State or a State which is not a member State);
- (g) awarded in a third country, to be carried out when forces are deployed outside the territory of the European Union if operational needs require those concession contracts to be concluded with economic operators located in the area of operations.

(2) These Regulations do not apply to concession contracts not otherwise exempted under paragraph (1) to the extent that the protection of the essential security interests of the United Kingdom or another member State cannot be guaranteed by less intrusive measures, for example by imposing requirements aimed at protecting the confidential nature of information which the contracting entity makes available in a procurement for the award of a concession contract as provided for in these Regulations.

(3) These Regulations do not apply to procurement for the award of a concession contract involving defence or security aspects which the contracting entities carries out in accordance with procurement rules provided by an international organisation or international financing institution if the concession contract concerned is fully financed by that organisation or institution or is co-financed for the most part by such organisation or institution.

Exclusions: Specific service contracts

12.—(1) These Regulations do not apply to procurement for the award of a concession contract—

- (a) for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or of any estate, right, servitude or other interest in or over such land, buildings or property;

- (b) by an audio-visual or radio media services provider, for the acquisition, development production or co-production of programme material intended for audio-visual media services or radio media services;
- (c) to an audio-visual or radio media services provider, for broadcasting time or programme provision;
- (d) for arbitration or conciliation services;
- (e) for any of the following legal services—
 - (i) legal representation of a client by a lawyer within the meaning of Article 1 of Council [Directive 77/249/EEC](#) to facilitate the effective exercise by lawyers of freedom to provide services⁽¹⁾ in—
 - (aa) an arbitration or conciliation proceedings held in a member State, a third country or before an international arbitration or conciliation instance;
 - (bb) judicial proceedings before the courts, tribunals or public authorities of a member State or a third country or before international courts, tribunals or institutions;
 - (ii) legal advice given by a lawyer within the meaning of Article 1 of Council [Directive 77/249/EEC](#)—
 - (aa) in preparation of any proceedings referred to in paragraph (i), or
 - (bb) if there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings;
 - (iii) document certification or authentication services which must be provided by a notary public;
 - (iv) legal services provided by trustees or appointed guardians or other legal services the providers of which are designated by a court or tribunal in the member State concerned or are designated by law to carry out specific tasks under the supervision of such tribunals or courts; or
 - (v) other legal services which, in the member State concerned, are connected, even occasionally, with the exercise of official authority;
- (f) for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of [Directive 2004/39/EC](#) of the European Parliament and of the Council on markets in financial instruments amending Council Directives [85/611/EEC](#) and [93/6/EEC](#) and [Directive 2000/12/EC](#) of the European Parliament and of the Council and repealing Council [Directive 93/22/EEC](#)⁽²⁾ ;
- (g) for central bank services;
- (h) for operations conducted with the European Financial Stability Facility and the European Stability Mechanism;
- (i) for loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
- (j) for civil defence, civil protection or danger prevention services that are provided by non-profit organisations or associations, and which are specified under CPV Codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;

(1) OJ L 78, 26.3.1977, p.17, last amended by Council [Directive 2013/25/EU](#) (OJ L 158, 10.6.2013, p.368).

(2) OJ L 145,30.4.2004, p.1.

- (k) air transport services based on the granting of an operating licence within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council on common rules for the operation of air services in the Community⁽³⁾;
 - (l) public passenger transport services within the meaning of Regulation (EC) No 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road⁽⁴⁾;
 - (m) for political campaign services which are specified under CPV Codes 79341400-0, 92111230-3 and 92111240-6, when awarded by a political party in the context of an election campaign;
 - (n) lottery services which are covered by CPV Code 92351100-7 and awarded to an economic operator on the basis of an exclusive right granted otherwise than as described in regulation 5(2) (meaning of “utility”); or
 - (o) by a utility for the pursuit of activities in a third country, in conditions not involving the physical use of a network or geographical area within the European Union.
- (2) In this regulation—
- (a) “audio-visual media services” has the meaning given by Article 1(1)(a) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in member States concerning the provision of audio-visual media services⁽⁵⁾;
 - (b) “media services providers” has the meaning given by Article 1(1)(d) of that Directive;
 - (c) “programme” and “programme material” have the meaning given by Article 1(1)(b) of that Directive but also include radio programmes and radio programme material.

Exclusions: Electronic Communications

13.—(1) These Regulations do not apply to procurement for the award of a concession contract for the principal purpose of permitting the contracting entity to provide or exploit public communications networks or to provide an electronic communications service to the public.

(2) In this regulation, “public communications networks” and “electronic communication service” has the meaning given by Article 2 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services⁽⁶⁾.

Exclusions: Water

14. These Regulations do not apply to—

- (a) a concession contract awarded to provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;
- (b) a concession contract awarded to supply drinking water to such networks;
- (c) a concession contract for either or both of the following—
 - (i) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20% of

⁽³⁾ OJ L 293, 31.10.2008, p. 3.

⁽⁴⁾ OJ L 315, 3.12.2007, p. 1.

⁽⁵⁾ OJ L 95, 15.4.2010, p.1.

⁽⁶⁾ OJ L 108, 24.4.2003, p33, last amended by Directive 2009/140/EC of the European Parliament and of the Council (OJ L 337, 18.12.2009, p.37).

the total volume of water made available by such projects or irrigation or drainage installations; or

(ii) the disposal or treatment of sewage,

if the contract is connected with an activity referred to in paragraph (a) or (b).

Exclusions: Concession contracts awarded to an affiliated undertaking

15.—(1) These Regulations do not apply to a concession contract—

(a) awarded by a utility to an affiliated undertaking; or

(b) awarded by a joint venture, formed exclusively of a number of utilities for the purpose of carrying out activities listed in Schedule 2, to an undertaking which is affiliated with one of those utilities,

provided that the conditions in paragraph (2) are met.

(2) The conditions referred to in paragraph (1) are that—

(a) in respect of a services concession contract, at least 80% of the average total turnover of the affiliated undertaking over the preceding three years, taking into account all services provided by that undertaking, derives from the provision of services to the utility or other undertakings with which it is affiliated;

(b) in respect of a works concession contract, at least 80% of the average total turnover of the affiliated undertaking over the preceding three years, taking into account all works provided by that undertaking, derives from the provision of works to the utility or other undertakings with which it is affiliated.

(3) If, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it shall be sufficient for that undertaking to show that the turnover referred to in paragraph (2) is credible, in particular by means of business projections.

(4) If more than one of a utility's affiliated undertakings provides the same or similar services or works, the percentages referred to in paragraph (2) must be calculated taking into account the total turnover deriving respectively from the provision of services or works by those affiliated undertakings.

(5) In this regulation, “affiliated undertaking”, in relation to a utility, means —

(a) any undertaking whose annual accounts are consolidated with those of the utility in accordance with the requirements of [Directive 2013/34/EU](#) of the European Parliament and of the Council on the annual financial statements and related reports of certain types of undertaking⁽⁷⁾;

(b) in the case of entities which are not subject to that Directive any undertaking that—

(i) may be, directly or indirectly, subject to a dominant influence by the utility;

(ii) may exercise a dominant influence over the utility; or

(iii) in common with the utility, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

(6) For the purposes of paragraph (5)(b), a dominant influence shall be presumed on the part of a utility or, as the case may be, an undertaking in the same circumstances in which it is, in accordance with regulation 5 (meaning of “utility”), presumed on the part of a contracting authority.

(7) OJ L 182, 29.6.2013, p.19.

(7) This regulation applies despite the provisions of regulation 19 (exclusions: concession contracts between entities within the public sector).

Exclusions: Concession contracts awarded to a joint venture or to a utility forming part of a joint venture

16.—(1) These Regulations do not apply to a concession contract—

- (a) awarded by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities listed in Schedule 2, to one of these utilities; or
- (b) awarded by a utility to such a joint venture of which it forms part,

provided that the joint venture has been set up to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that the utilities which form it will be part of the joint venture for at least the same period.

(2) This provision applies despite the provisions of regulation 19 (exclusions: concession contracts between entities within the public sector).

Notification of information by utilities

17. Utilities must provide the European Commission with the following information if the Commission so requests—

- (a) the name of any undertaking or joint venture referred to in regulation 15 (exclusions: concession contracts awarded to an affiliated undertaking) or regulation 16 (exclusions: concession contracts awarded to a joint venture or to a utility forming part of a joint venture);
- (b) the nature and value of any concession contract referred to in those regulations;
- (c) proof, as considered necessary by the European Commission, that the relationship between the undertaking, joint venture or utility to which the concession contract is awarded and the utility or, as the case may be, joint venture, complies with the requirements of those regulations.

Exclusion of activities which are directly exposed to competition

18. These Regulations do not apply to the procurement for the award of a concession contract by a utility if the contract is intended to enable an activity referred to in regulation 32 (activities directly exposed to competition) of the Utilities Contracts (Scotland) Regulations 2016⁽⁸⁾ to be carried out and that activity is or is established to be directly exposed to competition in accordance with that regulation.

Exclusions: Concession contracts between entities within the public sector

19.—(1) These Regulations do not apply to procurement for the award of a concession contract—

- (a) by a contracting entity to a controlled person;
- (b) by a controlled person to a contracting entity which controls that person; or
- (c) by a controlled person to another controlled person if both such persons are controlled by the same contracting entity.

(2) For the purpose of this regulation, a person is a “controlled person” if—

(8) [S.S.I. 2016/49](#).

- (a) the contracting entity exercises over that person a control which is similar to that which it exercises over its own departments;
 - (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the contracting entity or by other persons controlled by that contracting entity; and
 - (c) no other person has direct private capital participation in the person with the exception of non-controlling and non-blocking forms of private capital participation required by any enactment, in conformity with the Treaties, which do not exert a decisive influence on the person being awarded the contract.
- (3) For the purpose of paragraph (2)(a) a contracting entity shall be deemed to exercise control over a person similar to the control that it exercises over its own departments if—
- (a) it exercises a decisive influence over the strategic objectives and significant decisions of the person; or
 - (b) such control is exercised by another person which is itself controlled in the same way by the contracting entity.
- (4) These Regulations do not apply to procurement for the award of a concession contract by a contracting entity to a person which is jointly controlled.
- (5) For the purpose of paragraph (4) a person is jointly controlled if—
- (a) the contracting entity, jointly with other contracting entities, exercises over that person a control which is similar to that which the contracting entity exercises over its own departments;
 - (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the contracting entities or by other persons controlled by those entities; and
 - (c) no other person has direct private capital participation in the person with the exception of non-controlling and non-blocking forms of private capital participation required by any enactment, in conformity with the Treaties, which do not exert a decisive influence on the person being awarded the contract.
- (6) For the purpose of paragraph (5)(a) the contracting entity shall be deemed to exercise control over a person similar to the control that the entity exercises over its own departments if—
- (a) the decision making bodies of the person are composed of representatives of all participating contracting entities;
 - (b) those contracting entities jointly exercise a decisive influence over the strategic objectives and significant decisions of the person; and
 - (c) the person does not pursue any interests which are contrary to those of the contracting entities.
- (7) For the purpose of paragraph (6)(a) an individual representative may represent several or all of the contracting entities.
- (8) These Regulations do not apply to procurement for the award of a public contract exclusively between two or more contracting entities if—
- (a) the contract is for the purpose of establishing or implementing co-operation between the contracting entities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
 - (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and
 - (c) the contracting entities perform on the open market less than 20% of the activities concerned by the co-operation.

(9) The percentage of activities referred to in paragraphs (2)(b), (5)(b) and (8)(c), must be determined by reference to—

- (a) the average turnover of the person or, as the case may be, contracting entity for the period of 3 years preceding the date of the proposed concession contract award; or
- (b) an appropriate alternative activity-based measure such as costs incurred by the relevant person or contracting entity with respect to works and services for such 3 year period.

(10) If paragraph (11) applies, an alternative credible measurement of activity must be used, and for this purpose use of business projections must be treated as a credible measure.

(11) This paragraph applies if the turnover or activity based measure are not available for the preceding 3 years or are no longer relevant because of—

- (a) the date on which the person or contracting entity was created or commenced activities; or
- (b) a reorganisation of its activities.

(12) In this regulation, “contracting entity” means a contracting authority or a utility referred to in regulation 5(1)(a) (meaning of “utility”).