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SCOTTISH STATUTORY INSTRUMENTS

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**2016 No. 65**

**The Concession Contracts (Scotland) Regulations 2016**

**PART 2**

**SCOPE AND PRINCIPLES**

**CHAPTER 3**

**GENERAL PROVISIONS**

**Duration of the concession contract**

**20.**—(1) The duration of a concession contract must be limited.

(2) The contracting entity must estimate the duration on the basis of the works or services requested.

(3) For a concession contract lasting more than 5 years, the maximum duration of the concession contract must not exceed the time that a concessionaire could reasonably be expected to take to recoup the investment made in operating the works or services together with a return on invested capital, taking into account the investment required to achieve the specific contractual objectives.

(4) The investment taken into account for the purposes of the calculation of the time period referred to in paragraph (3) must include both initial investment and investment during the life of the concession contract.

**Social and other specific services**

**21.**—(1) A concession contract for social and other specific services listed in Schedule 3 falling within the scope of these Regulations shall be subject only to the obligations arising from regulations 33(3) (concession notices), 34 (concession award notices) and 49 (notice of decision to award a concession contract) to 59 (financial penalties).

(2) Regulation 26 applies to a concession contract for social and other specific services as it applies to any other concession contract.

**Mixed Procurement**

**22.**—(1) A concession contract which has as its subject-matter both works and services must be awarded in accordance with the provisions applicable to the type of concession contract that characterises the main subject-matter of the contract in question.

(2) In the case of a mixed concession contract consisting partly of social and other specific services listed in Schedule 3 and partly of other services, the main subject-matter must be determined in accordance with which of the estimated values of the respective services is the highest.

(3) If the different parts of a given contract are objectively separable—

- (a) in the case of a contract which has as its subject-matter elements covered by these Regulations as well as other elements, a contracting entity may choose to award separate contracts for the separate parts or to award a single contract;
  - (b) if a contracting entity chooses to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned;
  - (c) if a contracting entity chooses to award a single contract, these Regulations, unless otherwise provided in sub-paragraph (d), apply to the ensuing mixed contract, irrespective of—
    - (i) the value of the parts that would otherwise fall under a different legal regime,
    - (ii) which legal regime those parts would otherwise have been subject to;
  - (d) in the case of a mixed contract containing elements of a concession contract as well as elements of a public contract covered by the Public Contracts (Scotland) Regulations 2015 or a contract covered by the Utilities Contracts (Scotland) Regulations 2016, the mixed contract must be awarded in accordance with regulation 4(7) (mixed procurement) of the Public Contracts (Scotland) Regulations 2015 or regulation 6(6)(b) (procurement covering several activities) of the Utilities Contracts (Scotland) Regulations 2016, respectively.
- (4) If the different parts of a given contract are objectively not separable—
- (a) the applicable legal regime must be determined on the basis of the main subject-matter of that contract; and
  - (b) if that contract involves both elements of a services concession contract and of a supply contract, the main subject-matter shall be determined according to which of the estimated values of the respective services or supplies is the highest.
- (5) If part of a given contract is covered by Article 346 of the TFEU or the Defence and Security Regulations, regulation 23 (mixed procurement involving defence or security aspects) applies instead of paragraphs (1) to (4).
- (6) In the case of a contract intended to cover several activities, one of them being an activity listed in Schedule 2 to these Regulations or subject to the Utilities Contracts (Scotland) Regulations 2016, the applicable provisions shall be established in accordance with regulation 24 (contracts covering both activities listed in Schedule 2 and other activities) of these Regulations and regulation 6 (procurement covering several activities) of the Utilities Contracts (Scotland) Regulations 2016, respectively.

### **Mixed procurement involving defence or security aspects**

**23.—**(1) This regulation applies if a procurement has as its subject a mixed contract, the procurement of any part of which, if separated, would be covered by Article 346 of the Treaty or the Defence and Security Regulations.

(2) In the case of contracts intended to cover several activities, one of them being listed in Schedule 2 to these Regulations or covered by the Utilities Contracts (Scotland) Regulations 2016, and another being covered by Article 346 of the TFEU or the Defence and Security Regulations, the applicable provisions must be established in accordance with regulation 25 (contracts covering both activities listed in Schedule 2 and activities involving defence or security) of these Regulations and regulation 25 of the Utilities Contracts (Scotland) Regulations 2016, respectively.

(3) If different parts of a given contract are objectively separable, a contracting entity may decide to undertake procurement for the award of—

- (a) separate contracts for the separate parts; or
- (b) a single contract.

(4) The decision to undertake a procurement for the award of a single contract must not be made for the purpose of excluding the procurement from the application of these Regulations or the Defence and Security Regulations.

(5) If a contracting entity decides to undertake procurement for the award of separate contracts for separate parts the applicable law for the procurement of each separate contract will be determined by the characteristics of such contract.

(6) If a contracting entity decides, in accordance with paragraph (7), to undertake a procurement for the award of a single contract, and—

- (a) part of the contract is covered by Article 346 of the TFEU, the contract may be awarded without applying these Regulations; or
- (b) part of the contract is covered by the Defence and Security Regulations, the procurement may be undertaken in accordance with those Regulations, in which event these Regulations will not apply to such procurement.

(7) A contracting entity may only decide to undertake a procurement for the award of a single contract of a kind referred to in paragraph (6) if—

- (a) different parts of such a contract are not objectively separable; or
- (b) such decision is justified by objective reasons.

(8) Paragraph (6)(b) is without prejudice to the thresholds and exclusions provided for by the Defence and Security Regulations.

(9) Paragraph (6)(a) applies to a mixed contract to which both sub-paragraphs (a) and (b) of paragraph (6) could otherwise apply.

### **Contracts covering both activities listed in Schedule 2 and other activities**

**24.**—(1) This regulation applies in the case of a contract intended to cover several activities where one of those activities is listed in Schedule 2, except in a case to which regulation 25 applies.

(2) Utilities may choose to award separate contracts for the purposes of the separate activities or to award a single contract for the purposes of all the activities.

(3) The choice between awarding a single contract or separate contracts must not be made with the objective of excluding the procurement from the scope of these Regulations or, if applicable, the Public Contracts (Scotland) Regulations 2015 or the Utilities Contracts (Scotland) Regulations 2016.

(4) If a utility chooses to award a separate contract, the decision as to which rules apply to each such separate contract must be taken on the basis of the characteristics of the separate activity concerned.

(5) If a utility chooses to award a single contract—

- (a) a contract which is intended to cover several activities must be subject to the rules applicable to the activity for which it is principally intended;
- (b) in the case of a contract where it is objectively impossible to determine for which activity the contract is principally intended, the applicable rules must be determined in accordance with the following—

- (i) the contract must be awarded in accordance with the provisions of these Regulations applicable to procurements for the award of a concession contract by a contracting authority, if one of the activities for which the contract is intended is subject to the provisions of these Regulations applicable to procurement for the award of a concession contract by a contracting authority and the other is subject to the provisions of these Regulations applicable to the procurement for the award of concession contracts by a utility;

- (ii) the contract must be awarded in accordance with the Public Contracts (Scotland) Regulations 2015, if one of the activities for which the contract is intended is subject to these Regulations and the other to the Public Contracts (Scotland) Regulations 2015;
- (iii) the contract must be awarded in accordance with these Regulations, if one of the activities for which the contract is intended is subject to these Regulations and the other is not subject to these Regulations, the Public Contracts (Scotland) Regulations 2015 or the Utilities Contracts (Scotland) Regulations 2016.

**Contracts covering both activities listed in Schedule 2 and activities involving defence or security aspects**

**25.**—(1) This regulation applies in the case of a concession contract intended to cover several activities, one of them being listed in Schedule 2 and one being covered by Article 346 of the TFEU or the Defence and Security Regulations.

(2) A utility may choose to award separate concession contracts for the purposes of the separate activities or to award a single contract for the purposes of all the activities.

(3) The choice between awarding a single contract or awarding separate contracts must not be made with the objective of excluding the contract or contracts from the scope of these Regulations or the Defence and Security Regulations and a decision to award a single concession contract must be justified by objective reasons.

(4) If a utility chooses to award separate concession contracts for separate parts, the decision as to which legal regime applies to any one of the separate concession contracts must be taken on the basis of the characteristics of the separate activity concerned.

(5) If a utility chooses to award a single concession contract, regulation 23(6) to (9) shall apply.