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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 1**

**CONCESSION CONTRACTS TO WHICH THESE REGULATIONS APPLY**

**Subject matter and application of these Regulations**

7.—(1) These Regulations establish rules on procurement for the award of a concession contract by a contracting entity—

- (a) the value of which is estimated to be not less than the threshold mentioned in regulation 8 (thresholds and methods for calculating the estimated value of the concession contract); and
- (b) which is not excluded from the scope of these Regulations by any other provision of this Part.

(2) These Regulations are subject to Article 346 of the TFEU.

**Thresholds and methods for calculating the estimated value of the concession contract**

8.—(1) These Regulations apply to a procurement for the award of a concession contract if the estimated value of the contract to be awarded (not including value added tax) is equal to or greater than the amount specified in Article 8(1) of the Concession Contracts Directive.

(2) The value in pounds sterling of any amount expressed in Euros in any of the provisions of Concession Contracts Directive mentioned in this regulation shall be taken to be the value determined by the European Commission in accordance with Article 8 of the Concession Contracts Directive and published from time to time in the Official Journal in accordance with Article 9(3) of that Directive.

(3) The value of a concession contract shall be the total turnover of the concessionaire generated over the duration of the contract, net of value added tax, as estimated by the contracting entity, in consideration for the works and services which are the object of the concession contract and the supplies incidental to such works and services.

(4) That estimate must be calculated as at the moment at which the concession notice is sent for publication in accordance with regulation 35 (form and manner of publication of notices) or, in cases where such notice is not provided for, at the moment at which the contracting entity commences the procurement for the award of a concession contract.

(5) If the value as estimated at the time of the award is more than 20% higher than the estimate calculated in accordance with paragraph (4), the former shall be used for the purposes of this regulation.

(6) The estimated value of the concession contract must be calculated using an objective method specified in the concession documents.

(7) When calculating the estimated value of the concession contract, the contracting entity must, if applicable, take into account—

- (a) the value of any form of option and any extension of the duration of the concession contract;
- (b) revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting entity;
- (c) payments or any other financial advantages, in any form, from the contracting entity or any other public authority to the concessionaire, including compensation for compliance with a public service obligation and public investment subsidies;
- (d) the value of grants or any other financial advantages, in any form, from third parties for the performance of the concession contract;
- (e) revenue from sales of any assets which are part of the concession contract;
- (f) the value of all the supplies and services that are made available to the concessionaire by the contracting entity, provided that they are necessary for executing the works or providing the services;
- (g) any prizes or payments to candidates or tenderers.

(8) The method used to calculate the estimated value of a concession contract must not be chosen with the intention of excluding it from the scope of these Regulations.

(9) A concession contract must not be subdivided with the effect of preventing it from falling within the scope of these Regulations, unless justified by objective reasons.

(10) If a proposed work or proposed provision of services may result in a concession contract being awarded in the form of separate lots, account must be taken of the total estimated value of all such lots.

(11) If the aggregate value of the lots is equal to or greater than the threshold referred to in paragraph (1), these Regulations apply to the award of each lot.

## 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<sup>(1)</sup> 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;

(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).

- (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;
  - (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

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

(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.

and of the Council on a common regulatory framework for electronic communications networks and services<sup>(6)</sup>.

### **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 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 —

<sup>(6)</sup> 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).

- (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<sup>(7)</sup>;
- (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) 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

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

exposed to competition) of the Utilities Contracts (Scotland) Regulations 2016<sup>(8)</sup> 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—

- (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

<sup>(8)</sup> S.S.I. 2016/49.



- (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”).

## 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.

### **CHAPTER 4**

#### **SPECIFIC SITUATIONS**

##### **Reserved Concession Contracts**

**26.—**(1) A contracting entity may—

- (a) reserve the right to participate in a procurement for the award of a concession contract to supported business; or
  - (b) provide for such concession contracts to be performed in the context of a supported employment programme.
- (2) In this regulation—
- (a) “supported business” means an economic operator whose main aim is the social and professional integration of disabled and disadvantaged persons and where at least 30% of the employees of the economic operator are disabled or disadvantaged persons; and
  - (b) “supported employment programme” means an employment programme operated by an economic operator the main aim of which is the social and professional integration of disabled or disadvantaged persons and where at least 30% of those engaged in the programme are disabled or disadvantaged persons.
- (3) If a contracting entity follows the approach set out in paragraph (1) it must specify that fact in the concession notice or, in the case of a concession contract for social and other specific services listed in Schedule 3, the prior information notice and refer to Article 24 of the Concession Contracts Directive.

### **Specific situations: Research and development services**

27. These Regulations only apply to procurement for the award of a concession contract for research and development service which are covered by CPV Codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 provided that—

- (a) the benefits accrue exclusively to the contracting entity for use in the conduct of its own affairs; and
- (b) the service provided is wholly remunerated by the contracting entity.

## **CHAPTER 5**

### **PRINCIPLES**

#### **Principles of equal treatment, non-discrimination and transparency**

28.—(1) A contracting entity must, in carrying out a procurement for the award of a concession contract which is subject to the application of these Regulations—

- (a) treat economic operators equally and without discrimination; and
- (b) act in a transparent and proportionate manner.

(2) A contracting entity must not design a procurement for the award of a concession contract, including the estimate of the value of such contract with the intention of excluding it from the application of these Regulations or of unduly favouring or disadvantaging a particular economic operator or certain works, supplies or services.

(3) A contracting entity must aim to ensure the transparency of the award procedure and of the performance of the contract while complying with regulation 31 (confidentiality).

(4) During the procurement for the award of a concession contract, a contracting entity must not provide information in a discriminatory manner which may give a candidate or tenderer an advantage over others.

(5) A contracting entity must include within each concession contract such conditions relating to the performance of the concession contract as meet the requirements mentioned in paragraph (6) and are reasonably necessary to ensure the economic operator complies with environmental, social and employment law including any relative collective agreements or international law measures referred to in Schedule 4.

- (6) The requirements referred to in paragraph (5) are that the conditions are—
- (a) linked to the subject matter of the contract within the meaning of regulation 44(2) (concession contract award criteria);
  - (b) indicated in the concession documents.

### **Economic Operators**

**29.**—(1) An economic operator must not be rejected solely on the ground that under the law of any part of the United Kingdom it would require to be a natural or legal person if such economic operator is entitled to provide the relevant service under the law of the member State in which that operator is established.

(2) A contracting entity may require an economic operator which is a legal person and which is seeking the award of a concession contract to state in its tender or in the application, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract.

(3) A contracting entity must not require a group of economic operators, including temporary associations, to have a specific legal form in order to be able to submit a tender or a request to participate.

(4) A contracting entity may specify in the concession documents the method by which a group of economic operators is to meet the requirements as to economic and financial standing or technical and professional ability referred to in regulation 41 (selection of and qualitative assessment of candidates).

(5) Any method specified as referred to in paragraph (4) must be justified by objective reasons and must be proportionate.

(6) Any conditions for the performance of a contract by a group of economic operators, which are different from those imposed upon individual participants, must be justified by objective reasons and must be proportionate.

(7) A contracting entity may, if it is necessary for the satisfactory performance of the contract, require a group of economic operators to assume a specific legal form for the purpose of the award of the contract.

### **Nomenclatures**

**30.** A contracting entity must, when making any reference to nomenclatures of the subject matter of a concession contract in the conduct of procurement for the award of a concession contract, do so by using the CPV.

### **Confidentiality**

**31.**—(1) A contracting entity must not disclose information forwarded to it by an economic operator which the economic operator designates as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of the tender.

(2) Paragraph (1) is without prejudice to—

- (a) any other provision of these Regulations, including the obligation relating to advertising of awarded contracts and to provision of information to candidates and tenderers set out in regulations 34 (concession contract award notice) and 43 (informing candidates and tenderers);
- (b) the Freedom of Information (Scotland) Act 2002<sup>(9)</sup>;

(9) 2002 asp 13, amended by the Freedom of Information (Amendment) (Scotland) Act 2013 (2013 asp 2).

- (c) the Environmental Information (Scotland) Regulations 2004<sup>(10)</sup>;
- (d) any other enactment to which the contracting entity is subject relating to the disclosure of information.

(3) A contracting entity may impose upon an economic operator requirements aimed at protecting the confidential nature of information which the contracting entity makes available throughout the procurement for the award of a concession contract.

### **Rules applicable to communication**

**32.**—(1) Subject to paragraphs (3), (5) and (8), a contracting entity must ensure that all communication and information exchange, including submission, pursuant to these Regulations is performed using electronic means of communications in accordance with this regulation.

(2) Subject to paragraph (13), the tools and devices to be used for electronic means of communication, and their technical characteristics, must—

- (a) be non-discriminatory;
- (b) be generally available;
- (c) be interoperable with the information and communication technology products in general use; and
- (d) not restrict economic operators' access to the procurement.

(3) A contracting entity is not obliged to require electronic means of communication in the submission process where—

- (a) due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;
- (b) the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licencing scheme and cannot be made available by the contracting entity for downloading or remote use;
- (c) the use of electronic means of communication would require specialised office equipment that is not generally available to the contracting entity; or
- (d) the concession documents require the submission of physical or scale models which cannot be transmitted using electronic means.

(4) If, in accordance with paragraph (3), electronic means of communication is not required, communication must be carried out—

- (a) by post or by other suitable carrier; or
- (b) by a combination of post or other suitable carrier and, to the extent that electronic means of communication is possible, by such means.

(5) A contracting entity is not obliged to require electronic means of communication in the submission process to the extent that the use of means of communication other than electronic means is necessary—

- (a) because of a breach of security of the electronic means of communication; or
- (b) for the protection of information of a particularly sensitive nature which requires such a high level of protection that it cannot properly be ensured by using electronic tools and devices that are either generally available to economic operators or that can be

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<sup>(10)</sup> [S.S.I. 2004/520](#), amended by the Environmental Information (Scotland) Amendment Regulations 2013, [S.S.I. 2013/127](#).

made available to them by suitable alternative means of access in accordance with paragraph (14).

(6) If, in accordance with this regulation, a contracting entity requires means of communication in the submission process other than electronic means, the contracting entity must state the reason for this in the individual report referred to in regulation 60 (reporting requirements).

(7) If electronic means of communication is not required for a reason referred to in paragraph (5), the contracting entity must state in the individual report the reasons why use of means of communication other than electronic means has been considered necessary under that paragraph.

(8) Notwithstanding paragraph (1), oral communication may be used in respect of communications other than those concerning the essential elements of a procurement, provided that the content of the oral communication is documented by the contracting entity.

(9) In paragraph (8) reference to “the essential elements of a procurement” includes the concession documents, requests for participation, applications and tenders.

(10) A contracting entity must, to a sufficient extent and by appropriate means, document oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders, in particular, by preparing written or audio records or summaries of the main elements of the communication.

(11) In all communication, exchange and storage of information, a contracting entity must ensure that the integrity of data and the confidentiality of tenders, requests to participate and applications are preserved.

(12) A contracting entity must examine the content of tenders, applications and requests to participate only after the time limit set for submitting them has expired.

(13) A contracting entity may, where necessary, require the use of tools and devices which are not generally available, provided that the contracting entity offers suitable alternative means of access.

(14) A contracting entity shall be deemed to offer suitable alternative means of access if the contracting entity—

- (a) offers unrestricted and full direct access free of charge by electronic means to those tools and devices from the date of publication of a concession notice or a prior information notice in accordance with regulation 35 (form and manner of publication of notices);
- (b) ensures that tenderers having no access to the tools and devices concerned, or no possibility of obtaining such tools or devices within the relevant time limits (provided that the lack of access is not attributable to the tenderer), may access the procurement for the award of a concession contract through the use of provisional tokens made available free of charge online; or
- (c) supports an alternative channel for electronic submission of tenders.

(15) A contracting entity must specify in the concession notice or prior information notice, referred to in paragraph (14)(a), the internet address at which those tools and devices are accessible.

(16) Tools and devices for the electronic receipt of tenders, applications and requests to participate must—

- (a) enable the precise determination of the exact time and date of the receipt of tenders, applications and requests to participate;
- (b) to the extent reasonably possible, ensure that, before the time limit referred to in paragraph (12) has expired, no-one can have access to data transmitted to the contracting entity using the tools and devices;
- (c) ensure that only authorised persons may set or change the dates for opening data received;
- (d) ensure that, during the different stages of the procurement, only authorised persons may have access to data submitted or to part of such data;



- (e) ensure that only authorised persons may give access to data transmitted and only after the time limit referred to in paragraph (12) has expired;
- (f) ensure that data received and opened in accordance with the requirements in sub-paragraphs (a) to (e) remains accessible only to persons authorised to acquaint themselves with the data; and
- (g) to the extent reasonably possible, ensure that any infringement, or attempted infringement, of the conditions referred to in sub-paragraphs (b) to (f) is clearly detectable.

(17) In addition to the requirements set out in paragraph (16), a contracting entity must comply with all of the following requirements in relation to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of applications or requests to participate:—

- (a) information on specifications for the electronic submission of tenders, applications and requests to participate, including encryption and time-stamping, must be available to interested parties;
- (b) a contracting entity must specify the level of security required for the electronic means of communication in the various stages of the specific procurement;
- (c) the level of security specified must be proportionate to the risks attached;
- (d) if paragraph (18) applies, the contracting entity must accept advanced electronic signatures supported by a qualified certificate, created with or without a secure signature creation device, subject to compliance with all of the following conditions—
  - (i) the contracting entity must establish the required advanced electronic signature format on the basis of formats established in Electronic Signature Commission [Decision 2011/130/EU](#)(11) and must put in place necessary measures to be able to process these formats technically;
  - (ii) if a different format of electronic signature is used, the electronic signature or the electronic document carrier must include information on existing validation possibilities;
  - (iii) the validation possibilities must allow the contracting entity to validate the received electronic signature as an advanced electronic signature supported by a qualified certificate, such validation to be online, free of charge and in a way that is understandable for non-English speakers;
  - (iv) if a tender is signed with an advanced electronic signature with the support of a qualified certificate from a provider that is included on a trusted list provided for in the Trusted Lists Commission [Decision 2009/767/EC](#)(12), the contracting entity must not apply additional requirements that may hinder the use of the signature by the tenderer.

(18) This paragraph applies where a contracting entity concludes that the level of risk assessed in accordance with paragraphs (20) and (21) is such that advanced electronic signatures as defined by [Directive 1999/93/EC](#) of the European Parliament and of the Council on a Community framework for Electronic signatures(13), as amended from time to time, are required.

(19) A contracting entity must assess the certificate referred to in paragraph (17)(d) by taking into account whether the certificate is provided by a certificate services provider, which is on a trusted list provided for in the Trusted Lists Commission Decision.

(20) In deciding the level of security required at each stage of a procurement for the award of a concession contract and in concluding whether the level of risk is such that advanced electronic signatures are required, a contracting entity must assess the risks having regard to—

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(11) OJ L 53, 26.2.2011, p.66, amended by Commission Implementing [Decision 2014/148/EU](#) (OJ L 80, 19.3.2014, p.7).

(12) OJ L 274, 20.10.2009, p.36, last amended by Commission [Decision 2013/662/EU](#) (OJ L 306, 16.11.2013, p.21).

(13) OJ L 13, 19.1.2000, p.12, amended by Regulation (EC) No 1137/2008 (OJ L 311, 21.11.2008, p.1).

- (a) the likelihood of particular risks materialising;
  - (b) the potential adverse consequences if those risks materialise;
  - (c) the need for consistency as between similar procurements performed by the same contracting entity; and
  - (d) the need for proportionality between the expected benefits of any particular security requirements (in terms of eliminating or reducing any of the risks referred to in paragraph (21) and the costs, burdens and obligations which those requirements may impose upon an economic operator.
- (21) A contracting entity must assess all relevant risks, including, in particular, where applicable—
- (a) the risk to the proper functioning and integrity of the specific procurement process, including risks of breach of these Regulations;
  - (b) risks to national security;
  - (c) the risk of inadvertent or unauthorised disclosure of, or access to, any economic operator's confidential information;
  - (d) the risk of inadvertent or unauthorised disclosure of, or access to, information held by the contracting entity including information relating to the specific procurement;
  - (e) the risk that use of electronic communications could provide opportunity for malicious attacks on the electronic systems of, or data held by, the entity, any economic operator or any other person, including introduction of malware or denial of service attacks; and
  - (f) any other material risk relating to the procurement in question.
- (22) Paragraph (23) applies where a contracting entity located in Scotland signs and issues a document for use in the procurement for the award of concession contract within the scope of the Concession Contracts Directive, whether the procurement is under these Regulations or under the law of any member State.
- (23) The contracting entity may establish the required advanced signature format in accordance with the requirements set out in Article 1(2) the Electronic Signature of Commission [Decision 2011/130/EU\(14\)](#), and, where it does so—
- (a) it must put in place the necessary measures to be able to process that format technically by including the information required for the purpose of processing the signature in the document concerned; and
  - (b) the documents must contain, in the electronic signature or in the electronic document carrier, information on existing validation possibilities that allow the validation of the received electronic signature online, free of charge and in a way that is understandable for non-English speakers.

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(14) OJ L 53, 26.2.2011 p.66.