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## STATUTORY INSTRUMENTS

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# 2016 No. 273

## The Concession Contracts Regulations 2016

### PART 2

#### Scope and principles

#### CHAPTER 3

#### General Provisions

##### **Duration of the concession contract**

**18.**—(1) The duration of concession contracts shall be limited.

(2) The contracting authority or utility shall estimate the duration on the basis of the works or services requested.

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

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

##### **Social and other specific services**

**19.** Concession contracts 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 24(2), 31(3) to (5), 32 and 46 to 64.

##### **Mixed contracts**

**20.**—(1) Concession contracts which have as their subject-matter both works and services shall 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 mixed concession contracts consisting partly of social and other specific services listed in Schedule 3 and partly of other services, the main subject-matter shall be determined in accordance with which of the estimated values of the respective services is the highest.

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

- (a) in the case of contracts which have as their subject-matter elements covered by these Regulations as well as other elements, contracting authorities and utilities may choose to award separate contracts for the separate parts or to award a single contract;

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- (b) where contracting authorities or utilities choose 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) where contracting authorities or utilities choose 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, and
    - (ii) which legal regime those parts would otherwise have been subject to;
  - (d) in the case of a mixed contract containing elements of concession contracts as well as elements of public contracts covered by the Public Contracts Regulations 2015 <sup>M1</sup> or contracts covered by the Utilities Contracts Regulations 2016, the mixed contract shall be awarded in accordance with the Public Contracts Regulations 2015 or the Utilities Contracts Regulations 2016, respectively.
- (4) Where the different parts of a given contract are objectively not separable—
- (a) the applicable legal regime shall be determined on the basis of the main subject-matter of that contract; and
  - (b) where 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) But where part of a given contract is covered by [<sup>F1</sup>regulation 7(3)] or the Defence and Security Regulations, regulation 21 applies instead of paragraphs (1) to (4).
- (6) In the case of contracts intended to cover several activities, one of them being an activity listed in Schedule 2 or subject to the Utilities Contracts Regulations 2016, the applicable provisions shall be established in accordance with regulation 22 of these Regulations and regulation 7 of the Utilities Contracts Regulations 2016, respectively.
- (7) This regulation is subject to regulation 22.

#### Textual Amendments

- F1** Words in [reg. 20\(5\)](#) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), [regs. 1\(2\)](#), **8(11)** (with [Sch. paras. 3-5](#))

#### Marginal Citations

- M1** [S.I. 2015/102](#), as amended by [S.I. 2016/275](#).

### Mixed procurement contracts involving defence or security aspects

**21.—**(1) This regulation applies in the case of mixed contracts which have as their subject-matter elements of a concession contract covered by these Regulations and procurement or other elements covered by [<sup>F2</sup>regulation 7(3)] 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 or covered by the Utilities Contracts Regulations 2016, and another being covered by [<sup>F3</sup>regulation 7(3)] or the Defence and Security Regulations, the applicable provisions shall be established in accordance with regulation 23 of these Regulations and regulation 26 of the Utilities Contracts Regulations 2016, respectively.

(3) Where the different parts of a given contract are objectively separable, contracting authorities or utilities may choose to award separate contracts for the separate parts or to award a single contract.

(4) The decision to award a single contract shall not, however, be taken for the purpose of excluding contracts from the application of these Regulations or the Defence and Security Regulations.

(5) Where contracting authorities or utilities choose 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.

(6) Where contracting authorities or utilities choose to award a single contract, the following criteria shall apply to determine the applicable legal regime—

- (a) where part of a given contract is covered by [<sup>F4</sup>regulation 7(3)], or different parts are covered by [<sup>F4</sup>regulation 7(3)] and the Defence and Security Regulations respectively, the contract may be awarded without applying these Regulations, provided that the award of a single contract is justified by objective reasons;
- (b) where part of a given contract is covered by the Defence and Security Regulations, the contract may be awarded in accordance with these Regulations or in accordance with the Defence and Security Regulations, provided that the award of a single contract is justified by objective reasons.

(7) Paragraph (6)(b) is without prejudice to the thresholds and exclusions for which the Defence and Security Regulations provide.

(8) Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying these Regulations where it includes elements [<sup>F5</sup>covered by regulation 7(3)]; otherwise it may be awarded in accordance with these Regulations or in accordance with the Defence and Security Regulations.

(9) This regulation is subject to regulation 23.

#### Textual Amendments

- F2** Words in reg. 21(1) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **8(12)(a)** (with Sch. paras. 3-5)
- F3** Words in reg. 21(2) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **8(12)(a)** (with Sch. paras. 3-5)
- F4** Words in reg. 21(6)(a) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **8(12)(a)** (with Sch. paras. 3-5)
- F5** Words in reg. 21(8) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **8(12)(b)** (with Sch. paras. 3-5)

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

**22.**—(1) This regulation applies in the case of contracts intended to cover several activities where one of those activities is listed in Schedule 2.

(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 shall not be made with the objective of excluding the contract or contracts from the scope of these Regulations or, where applicable, the Public Contracts Regulations 2015 or the Utilities Contracts Regulations 2016.

(4) Where utilities choose to award a separate contract, the decision as to which rules apply to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.

(5) Where utilities choose to award a single contract—

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- (a) a contract which is intended to cover several activities shall 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 shall be determined in accordance with the following—
    - (i) the contract shall be awarded in accordance with the provisions of these Regulations applicable to concession contracts awarded by contracting authorities, if one of the activities for which the contract is intended is subject to the provisions of these Regulations applicable to concession contracts awarded by contracting authorities and the other is subject to the provisions of these Regulations applicable to concession contracts awarded by utilities,
    - (ii) the contract shall be awarded in accordance with the Public Contracts 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 Regulation 2015,
    - (iii) the contract shall 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 Regulations 2015 or the Utilities Contracts Regulations 2016.
- (6) But where one of the activities concerned is covered by [F6regulation 7(3)] or the Defence and Security Regulations, regulation 23 applies instead of paragraph (5).

#### Textual Amendments

**F6** Words in [reg. 22\(6\)](#) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), [regs. 1\(2\), 8\(13\)](#) (with [Sch. paras. 3-5](#))

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

**23.—**(1) This regulation applies in the case of contracts intended to cover several activities, one of them being listed in Schedule 2 and another being covered by [F7regulation 7(3)] or the Defence and Security Regulations.

(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 awarding separate contracts shall not, however, 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 contract shall be justified by objective reasons.

(4) Where utilities choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of the separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.

(5) Where utilities choose to award a single contract, the following shall apply—

- (a) in the case of a contract intended to cover an activity which is covered by these Regulations and another which is covered by [F8regulation 7(3)], the utility may award the contract without applying these Regulations;
- (b) in the case of a contract intended to cover an activity which is covered by these Regulations and another which is covered by the Defence and Security Regulations, the utility may

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award the contract either in accordance with these Regulations or in accordance with the Defence and Security Regulations.

(6) Paragraph (5)(b) is without prejudice to the thresholds and exclusions for which the Defence and Security Regulations provide.

(7) Contracts referred to in paragraph (5)(b) which also include procurement or other elements which are covered by [<sup>F9</sup>regulation 7(3)] may be awarded without applying these Regulations.

#### **Textual Amendments**

- F7** Words in [reg. 23\(1\)](#) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **8(14)** (with Sch. paras. 3-5)
- F8** Words in [reg. 23\(5\)\(a\)](#) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **8(14)** (with Sch. paras. 3-5)
- F9** Words in [reg. 23\(7\)](#) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **8(14)** (with Sch. paras. 3-5)

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