

2008 No. 94

PUBLIC PROCUREMENT

**The Public Contracts and Utilities Contracts (Scotland)
Amendment Regulations 2008**

Made - - - - - *26th February 2008*

Laid before the Scottish Parliament *7th March 2008*

Coming into force - - - *31st March 2008*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(a).

Citation, commencement, interpretation and extent

1.—(1) These Regulations may be cited as the Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2008 and come into force on 31st March 2008.

(2) In these Regulations, the “Public Contracts Regulations” means the Public Contracts (Scotland) Regulations 2006(b) and the “Utilities Contracts Regulations” means the Utilities Contracts (Scotland) Regulations 2006(c).

(3) These Regulations extend to Scotland only.

Amendments to the Public Contracts Regulations

2.—(1) The Public Contracts Regulations are amended as follows.

(2) In regulation 3 (contracting authorities)—

(a) in paragraph (1)(j) after “scheme” insert “or administration scheme”; and

(b) after paragraph (1)(l) insert—

“(la) a joint fire and rescue board constituted by an amalgamation scheme under section 2 of the Fire (Scotland) Act 2005(d);”.

(3) In regulation 5 (application)—

(a) in paragraph (1)—

(i) omit “and regulation 8(21)”; and

(ii) after “dynamic purchasing system” where it second appears insert “referred to in paragraph (2) or”; and

(a) 1972 c.68. Section 2(2) was amended by the Scotland Act 1998 (c.46), Schedule 8, paragraph 15 and the Legislative and Regulatory Reform Act 2006 (c.51), section 27(1). The function conferred upon the Minister of the Crown under section 2(2) of the European Communities Act 1972, insofar as within devolved competence, was transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998.

(b) S.S.I. 2006/1 as amended by S.S.I. 2007/565.

(c) S.S.I. 2006/2 as amended by S.S.I. 2007/565.

(d) 2005 asp 5.

- (b) in paragraph (2), after “Part B services contract” insert “or a framework agreement or dynamic purchasing system in respect of which only Part B services contracts can be based or awarded”.
- (4) In regulation 8 (thresholds)–
- (a) in paragraph (1), after “These Regulations” insert “, except paragraph (21) of this regulation.”;
 - (b) for paragraph (4)(b) substitute–
 - “(b) for telecommunications services specified under CPV references 64221000-1, 64227000-3, 64228000-0, 64228100-1 and 64228200-2 within category 5 of Part A of Schedule 3.”; and
 - (c) in paragraph (21) after “advertising” insert “and follow a procedure leading to the award of the contract”.
- (5) In regulation 13(a)(ii) (use of the negotiated procedure with prior publication of a contract notice) for “or 16(7)” substitute “, 16(7) or 18(10)”.
- (6) In regulation 14 (use of the negotiated procedure without prior publication of a contract notice)–
- (a) for paragraph (1)(a)(i) substitute–
 - “(i) when a contracting authority is using the negotiated procedure in accordance with regulation 13(a) and invites to negotiate the contract all of, and only, those economic operators which submitted a tender following an invitation made during the course of the discontinued open procedure, restricted procedure or competitive dialogue procedure (not being a tender or economic operator which was excluded in accordance with regulation 15(11), 16(7) or 18(10));”; and
 - (b) in paragraph (5)(b) for “regulation 11” substitute “regulation 8”.
- (7) In regulation 23 (criteria for the rejection of economic operators)–
- (a) in paragraph (4)(j) for “(7), (8) and (9)” substitute “(7), (7A), (7B), (8), (8A), (8B) and (9)”;
 - (b) after paragraph (7) insert–
 - “(7A) An economic operator established in Cyprus shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(j) if–
 - (a) in relation to procedures for the award of a public services contract or a public supply contract the economic operator is either–
 - (i) certified as incorporated by the Registrar of Companies and Official Receiver (Εφορος Εταιρειών και Επίσημος Παραλήπτης); or
 - (ii) certified as having declared on oath that it is carrying on business in the trade in question in Cyprus at a specific place of business and under a specific trading name; or
 - (b) in relation to procedures for the award of a public works contract the economic operator is certified by the Council for the Registration and Audit of Civil Engineering and Building Contractors (Συμβούλιο Εγγραφής και Ελέγχου Εργοληπτών Οικοδομικών και Τεχνικών Έργων) according to the Registration and Audit of Civil Engineering and Building Contractors Law of Cyprus.
 - (7B) An economic operator established in Malta shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(j) if–
 - (a) the economic operator produces its “numru ta' registrazzjoni tat- Taxxa tal- Valur Miżjud (VAT) u n- numru tal-licenzja ta' kummerċ”;
 - (b) where the economic operator is a member of a partnership or is a company, it produces the relevant registration number as issued by the Malta Financial Services Authority.”; and

(c) after paragraph (8) insert–

“(8A) In relation to procedures for the award of a public services contract, an economic operator established in Hungary shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(j) if it is certified as being entitled to be engaged in the trade in question in Hungary.

(8B) In relation to procedures for the award of a public supply contract, an economic operator established in Spain shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(j) if it is certified as having declared on oath that it is entitled to be engaged in the trade in question in Spain.”

(8) In regulation 31(3) (contract award notice) omit “which has been concluded in accordance with regulation 19”.

(9) In regulation 32(2)(a) (information about contract award procedures) omit “or”.

(10) In regulation 33(5) (design contests), for sub-paragraph (a) substitute–

“(a) for telecommunications services specified under CPV references 64221000-1, 64227000-3, 64228000-0, 64228100-1 and 64228200-2 within category 5 of Part A of Schedule 3;”.

(11) In regulation 37 (sub-contracting the work or works to be carried out under a public works concession contract)–

(a) for paragraph (4)(b) substitute–

“(b) which the concessionaire does not intend to enter into with an economic operator–

(i) which is a member of the group of economic operators which acted jointly for the purpose of obtaining the public works concession contract; or

(ii) related to it or any member of the group mentioned in paragraph (i); and”.

(b) for paragraph (13) substitute–

“(13) A contracting authority shall require applicants for a public works concession contract to submit with the application a list of–

(a) all economic operators which are related to the applicant, and

(b) all economic operators which are related to the economic operators referred to in sub-paragraph (a),

and to update the list from time to time to take account of any changes in the economic operators referred to in sub-paragraphs (a) and (b).”.

(12) In Schedule 1 (GPA annex 1 contracting authorities) under the entry for the Department for Culture, Media and Sport, for “National History Museum” substitute “Natural History Museum”.

(13) In Schedule 3 (categories of services) in category 24 of Part B, for “Educational and vocational health services”, substitute “Educational and vocational education services”.

(14) In Schedule 4 (extension to non-member states) in the table, omit the entries for Bulgaria and Romania.

(15) For Schedule 6 (professional or trade registers), substitute the Schedule set out in the Schedule to these Regulations.

Amendments to the Utilities Contracts Regulations

3.—(1) The Utilities Contracts Regulations are amended as follows.

(2) In regulation 2(1) (interpretation), in the definition of “central purchasing body”, for “a utility which is a contracting authority and”, substitute “a contracting authority”.

(3) In regulation 5(1) (application) for “Subject to regulation 11(20), these Regulations” substitute “These Regulations”.

(4) In regulation 7(4) (exclusion of contracts awarded to affiliated undertakings or joint ventures) for “may” substitute “shall”.

- (5) In regulation 11 (thresholds)–
- (a) in paragraph (1) after “These Regulations” insert “, except paragraph (20) of this regulation,”; and
 - (b) in paragraph (20) after “advertising” insert “and follow a procedure leading to the award of the contract”.
- (6) In regulation 34 (design contests)–
- (a) in paragraph (2), for “the relevant threshold described in paragraph (4)” substitute “the amount set out in Article 61(1)”;
 - (b) in paragraph (3)(b), for “the relevant threshold described in paragraph (4)” substitute “the amount set out in Article 61(2).”; and
 - (c) omit paragraph (4).
- (7) In regulation 38(4) (statistical and other reports), for sub-paragraph (b) substitute–
- “(b) telecommunications services specified under CPV references 64221000-1, 64227000-3, 64228000-0, 64228100-1 and 64228200-2 within category 5 of Part A of Schedule 3; or”.
- (8) In Schedule 4 (extension to non-member states), in the table, omit the entries for Bulgaria and Romania.

JOHN SWINNEY
A member of the Scottish Executive

St Andrew’s House,
Edinburgh
26th February 2008

SCHEDULE

Regulation 2(15)

SCHEDULE TO BE SUBSTITUTED FOR SCHEDULE 6 TO THE PUBLIC CONTRACTS REGULATIONS

“SCHEDULE 6

Regulation 23(4)(j)

PROFESSIONAL OR TRADE REGISTERS

PUBLIC SERVICES CONTRACTS

1. In relation to procedures for the award of a public services contract, the following are the appropriate professional or trade registers for the purposes of regulation 23(4)(j)–

in Austria, the Firmenbuch, the Gewerberegister or the Mitgliederverzeichnisse der Landeskammern;

in Belgium, the Registre du commerce/Handelsregister or the Ordres Professionnels/Beroepsorden;

in Bulgaria, the Търговски регистър;

in the Czech Republic, the obchodní rejstřík;

in Denmark, the Erhvervs- og Selskabsstyrelsen;

in Estonia, the Keskäriregister;

in Finland, the Kaupparekisteri or the Handelsregistret;

in France, the Registre du commerce et des sociétés or the Répertoire des métiers;

in Germany, the Handelsregister, the Handwerksrolle, the Vereinsregister, Partnerschaftsregister or the Mitgliedsverzeichnisse der Berufskammern der Ländern;

in Hungary, the Cégnyelvántartás, the egyéni vállalkozók jegyzői nyilvántartása, or the a szakmai kamarák nyilvántartása;

in Iceland, the Firmaskrá or the Hlutfélagaskrá;

in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato, the Registro delle commissioni provinciali per l'artigianato or the Consiglio nazionale degli ordini professionali;

in Latvia, the Uzņēmumu reģistrs (Enterprise Register);

in Lithuania, the Juridinių asmenų registras;

in Luxembourg, the Registre aux firmes or the Rôle de la chambre des métiers;

in the Netherlands, the Handelsregister;

in Norway, the Foretaksregisteret;

in Poland, the Krajowy Rejestr Sądowy (National Court Registry);

in Portugal, the Registo nacional das Pessoas Colectivas;

in Romania, the Registrul Comerțului;

in Slovakia, the Obchodný register;

in Slovenia, the Sodni register or the obrtni register;

in Spain, the Registro Oficial de Empresas Clasificadas del Ministerio de Hacienda; and

in Sweden, the aktiebolags-, handels- eller föreningsregistren.

PUBLIC WORKS CONTRACTS

2. In relation to procedures for the award of a public works contract the following are the appropriate professional or trade registers for the purposes of regulation 23(4)(j)–

in Austria, the Firmenbuch, the Gewerberegister or the Mitgliederverzeichnisse der Landeskammern;

in Belgium, the Registre du commerce/Handelsregister;

in Bulgaria, the Търговски регистър;

in the Czech Republic, the obchodní rejstřík;

in Denmark, the Erhvervs- og Selskabsstyrelsen;

in Estonia, the Keskäriregister;

in Finland, the Kaupparekisteri or the Handelsregistret;

in France, the Registre du commerce et des sociétés or the Répertoire des métiers;

in Germany, the Handelsregister or the Handwerksrolle;

in Greece, the registrar of contractors' enterprises (Μητρώο Εργοληπτικών Επιχειρήσεων) of the Ministry for Environment, Town and Country Planning and Public Works (ΥΠΕΧΩΔΕ);

in Hungary, the Cégnylvántartás or the egyéni vállalkozók jegyzői nyilvántartása;

in Iceland, the Firmaskrá;

in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato;

in Latvia, the Uzņēmumu reģistrs (Enterprise Register);

in Lithuania, the Juridinių asmenų registras;

in Luxembourg, the Registre aux firmes or the Rôle de la chambre des métiers;

in the Netherlands, the Handelsregister;

in Norway, the Foretaksregisteret;

in Poland, the Krajowy Rejestr Sądowy (National Court Registry);

in Portugal, the Instituto dos Mercados de Obras Públicas e Particulares e do Imobiliário (IMOPPI) (CAEOPP);

in Romania, the Registrul Comerțului;

in Slovakia, the Obchodný register;

in Slovenia, the Sodni register or the obrtni register;

in Spain, the Registro Oficial de Empresas Clasificadas del Ministerio de Hacienda; and

in Sweden, the aktiebolags-, handels- eller föreningsregistren.

PUBLIC SUPPLY CONTRACTS

3. In relation to procedures for the award of a public supply contract the following are the appropriate professional or trade registers for the purposes of regulation 23(4)(j)–

in Austria, the Firmenbuch, the Gewerberegister or the Mitgliederverzeichnisse der Landeskammern;

in Belgium, the Registre du commerce/Handelsregister;

in Bulgaria, the Търговски регистър;

in the Czech Republic, the obchodní rejstřík;

in Denmark, the Erhvervs- og Selskabsstyrelsen;

in Estonia, the Keskäriregister;

in Finland, the Kaupparekisteri or the Handelsregistret;

in France, the Registre du commerce et des sociétés or the Répertoire des métiers;

in Germany, the Handelsregister or the Handwerksrolle;

in Greece, the Βιοτεχνικό ή Εμπορικό ή Βιομηχανικό Επιμελητήριο;

in Hungary, the Cégnylvántartás or the egyéni vállalkozók jegyzői nyilvántartása;

in Iceland, the Firmaskrá;

in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato or the Registro delle Commissioni provinciali per l'artigianato;

in Latvia, the Uzņēmumu reģistrs (Enterprise Register);

in Lithuania, the Juridinių asmenų registras;

in Luxembourg, the Registre aux firmes or the Rôle de la chambre des métiers;

in Norway, the Foretaksregisteret;

in the Netherlands, the Handelsregister;

in Poland, the Krajowy Rejestr Sądowy (National Court Registry);

in Portugal, the Registo Nacional das Pessoas Colectivas;

in Romania, the Registrul Comerțului

in Slovakia, the Obchodný register;

in Slovenia, the Sodni register or the obrtni register;

in Spain, the Registro Mercantil; and

in Sweden, the aktiebolags-, handels- eller föreningsregistren.”

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Public Contracts (Scotland) Regulations 2006 (the “Public Contracts Regulations”) and the Utilities Contracts (Scotland) Regulations 2006 (the “Utilities Contracts Regulations”). The Public Contracts Regulations and the Utilities Contracts Regulations have been amended by the Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2007.

Directive 2004/18/EC of the European Parliament and of the Council (O.J. L134 30.4.2004, p.114) concerns the co-ordination of the procedures for the award of public works contracts, public supply contracts and public services contracts. Directive 2004/17/EC of the European Parliament and of the Council (O.J. L134 30.4.2004, p.1) concerns the co-ordination of procurement procedures of entities operating in the water, energy, transport and postal service sectors. Those Directives have been implemented for Scotland by the Public Contracts Regulations and the Utilities Contracts Regulations respectively.

Regulation 2 amends regulation 3(1) of the Public Contracts Regulations to provide that fire and rescue authorities and joint fire and rescue boards under the Fire (Scotland) Act 2005 are contracting authorities.

Regulation 2 also makes minor amendments to the Public Contracts Regulations to clarify the application of the Regulations to a framework agreement or dynamic purchasing system in relation to which only Part B services contracts can be based or awarded; to the use of the negotiated procedure without prior publication of a contract notice; to the subcontracting of work under a public works concession contract; and to public services contracts for certain telecommunications services which are subject to the same threshold as Part B services contracts.

There is a minor amendment to regulation 8(21) of the Public Contracts Regulations in order to clarify the Community obligations which are imposed upon contracting authorities even when the estimated value of a contract falls below the thresholds set out in regulation 8 (regulation 2(4)(c)).

There are also amendments made to the lists of professional and trade registers within the Public Contracts Regulations, so as to include professional and trade registers from Member States who joined the European Union in:

(i) May 2004 (as set out in the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the treaties on which the European Union is founded, (O.J. L236 23.9.2003, p.33)); and

(ii) January 2007 (as set out in Council Directive 2006/97/EC adapting certain Directives in the field of free movement of goods, by reason of the accession of Bulgaria and Romania, (O.J. L363 20.12.2006, p.107)).

Regulation 2 makes a further consequential amendment to Schedule 4 to the Public Contracts Regulations following the accession of Bulgaria and Romania.

Regulation 3 makes a minor amendment to the Utilities Contracts Regulations to clarify the calculation of turnover by a utility in respect of its affiliated undertakings. There is also a further consequential amendment to the Utilities Contracts Regulations following the accession of Bulgaria and Romania.

Regulation 3 also amends the Utilities Contracts Regulations to clarify the threshold values in Directive 2004/17/EC which apply to design contests.

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