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SCOTTISH STATUTORY INSTRUMENTS

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**2015 No. 446**

**The Public Contracts (Scotland) Regulations 2015**

**PART 2**

**RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE**

**CHAPTER 1**

**SCOPE AND GENERAL PRINCIPLES**

*SECTION 1*

*Scope*

**Subject Matter and application of these Regulations**

**3.—(1)** This Part establishes the rules on procedures for the procurement by contracting authorities with respect to public contracts, framework agreements, dynamic purchasing systems and design contests which—

- (a) have a value estimated to be not less than the relevant threshold mentioned in regulation 5 (thresholds); and
- (b) are not excluded from the scope of this Part by any other provision of these Regulations.

(2) This Part is subject to Article 346 of the TFEU.

**Mixed Procurement**

**4.—(1)** Where a procurement has as its subject a mixed contract any part of which is covered by Article 346 of the TFEU <sup>M1</sup> or the Defence and Security Regulations <sup>M2</sup> regulation 17 (mixed procurement involving defence or security aspects) shall apply.

(2) Where a procurement has as its subject a mixed contract including works, supplies or services for the pursuit of an activity within the scope of the Utilities Directive the applicable rules shall be determined by Art 5 and 6 of the Utilities Directive.

(3) The application of these Regulations to a procurement which has as its subject a mixed contract, other than one to which paragraphs (1) or (2) apply, shall be determined by that part of the mixed contract that characterises the main subject of the contract in question. In the case of a mixed contract—

- (a) consisting partly of services of a kind referred to in regulation 74 (award of contracts for social and other specific services) and partly of other services; or
- (b) consisting partly of services and partly of supplies,

the main subject shall be determined by reference to which of the respective services or supplies has the highest estimated value.

**Status:** Point in time view as at 22/07/2016.

**Changes to legislation:** The Public Contracts (Scotland) Regulations 2015, CHAPTER 1 is up to date with all changes known to be in force on or before 11 June 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

(4) Where a contract includes different parts which are objectively separable and the procurement of which, if separate, includes matters that would be subject to the application of these Regulations and matters that would not, a contracting authority may choose to award—

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

(5) Where a contracting authority decides to award separate contracts under [F1]paragraph (4)(a)] the application or otherwise of these Regulations to the procurement of each separate part shall be determined by reference to the characteristics of such part.

(6) Where a contracting authority decides to award a single contract under [F2]paragraph (4)(b)] these Regulations shall apply to the procurement of the single contract irrespective of the value of any parts that would, if separated, have not been subject to the application of these Regulations.

(7) Where a single contract referred to in [F3]paragraph (4)(b)] combines a public contract together with a concession contract the procurement shall be subject to the application of these Regulations where the estimated value of that part of the contract that would be a public contract is equal to or greater than the applicable threshold determined in accordance with regulation 5 (thresholds).

(8) Where a contract includes different parts which are objectively not separable the application or otherwise of these Regulations to the procurement of that contract shall be determined by reference to the main subject-matter of that contract.

#### Textual Amendments

- F1** Words in [reg. 4\(5\)](#) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), regs. 1, [2\(4\)\(a\)](#)
- F2** Words in [reg. 4\(6\)](#) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), regs. 1, [2\(4\)\(b\)](#)
- F3** Words in [reg. 4\(7\)](#) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), regs. 1, [2\(4\)\(b\)](#)

#### Marginal Citations

- M1** OJ C 326, 26.10.2012 p.47.
- M2** [S.I. 2011/1848](#), amended by [S.S.I. 2012/88](#), [S.S.I. 2012/89](#) and [S.I. 2015/102](#).

### Thresholds

5.—(1) These Regulations apply to a procurement where the estimated value of the contract to be awarded (not including value added tax) is equal to or greater than—

- (a) in the case of a public works contract (except a subsidised public works contract), the amount specified in Article 4(a) of the Directive;
- (b) in the case of a public supply contract, except one to which paragraph (2)(b) applies, or a public service contract (except a subsidised public service contract) to be awarded by a central government authority or a design contest organised by such an authority, the amount specified in Article 4(b) of the Directive;
- (c) in the case of a public supply contract, except one to which paragraph (2)(a) applies, or a public service contract (except a subsidised public service contract) to be awarded by a sub-central contracting authority or a design contest organised by such an authority, the amount specified in Article 4(c) of the Directive;
- (d) in the case of a public service contract for a service listed in Schedule 3 (social and other specified services), the amount specified in Article 4(d) of the Directive.

- (2) Where the procurement is for the award of a public supply contract by a contracting authority operating in the field of defence—
- (a) the amount specified in regulation 5(1)(b) applies to contracts concerning products referred to in Schedule 4 even where the contracting authority is a sub-central contracting authority; and
  - (b) the amount specified in regulation 5(1)(c) applies to contracts concerning products not referred to in Schedule 4 even where the contracting authority is a central government authority.
- (3) Where a proposed work, acquisition of supplies or provision of services may be procured in the form of separate lots these Regulations do not apply to the award of a contract for a lot where—
- (a) the estimated value of that lot is less than—
    - (i) 80 000 euros, in the case of supplies or services; or
    - (ii) 1 million euros, in the case of works; and
  - (b) the estimated total aggregate value of all such lots to be awarded without application of these Regulations does not exceed 20% of the estimated aggregate value of all the lots calculated in accordance with regulation 6 (methods for calculating the estimated value).
- (4) In this Regulation reference to a “contract” includes reference to a framework agreement, dynamic purchasing system or design contest.
- (5) References in paragraph (1) to the Directive are references to the Directive as amended from time to time.

### **Methods for calculating the estimated value**

- 6.—(1)** A contracting authority must calculate the estimated value of a contract by reference to the total amount payable under it (regardless of the form of such payment), not including value added tax.
- (2) The total amount payable includes the amount payable as a result of the exercise of any form of option and any renewal of the contract as explicitly set out in the procurement documents.
- (3) Where a contracting authority provides for prizes or payments to candidates or tenderers it must take them into account when calculating the estimated value.
- (4) Where a contracting authority is comprised of separate operational units the authority —
- (a) may calculate the estimated value by reference to each such unit where that unit is independently responsible for its procurement; and
  - (b) must calculate the estimated value by reference to the total for all the operational units which are not so responsible.
- (5) A contracting authority must not choose a method to be used to calculate the estimated value of a contract with the intention of excluding the contract from the application of these Regulations.
- (6) A contracting authority must not sub-divide a contract with the effect of excluding the contract from the application of these Regulations unless such sub-division is justified by objective reasons.
- (7) The estimated value must be the value estimated at the moment at which the procurement is commenced.
- (8) In the case of a framework agreement or dynamic purchasing system the estimated value shall be the total estimated value of all of the contracts envisaged pursuant to and for the total term of the agreement or system.
- (9) In the case of an innovation partnership the estimated value shall be the total estimated value of the research and development activities to take place during all stages of the partnership together with the estimated value of works, supplies or services to be developed and delivered by the partner.

*Status: Point in time view as at 22/07/2016.*

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(10) In the case of a public works contract the estimated value shall include the total estimated value of any supplies and services that are necessary for executing the works and are to be provided by the contracting authority to the contractor.

(11) In the case of a public works contract or public service contract to be awarded in the form of separate lots, the estimated value shall be the total estimated value of all such lots.

(12) In the case of a contract for supplies which may be awarded in the form of separate lots the estimated value shall be the total estimated value of all such lots and these Regulations apply to each lot accordingly where the aggregate value of the lots is equal to or greater than the relevant threshold referred to in regulation 5 (thresholds).

(13) In the case of public supply contracts or public service contracts which are regular in nature or which are intended to be renewed in a given period, the estimated value shall be calculated by reference to—

- (a) the total actual value of contracts of the same type awarded during the period of 12 months or the financial year preceding the proposed award of a further contract but with adjustment of such value, where possible, to take account of the changes in quantity or value which the authority considers likely to occur during the period of 12 months following the award of the contract; or
- (b) the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.

(14) In the case of a public supply contract relating to the leasing, rental, hire or hire purchase of products the estimated value shall be—

- (a) in the case of a fixed term contract for a period of less than or equal to 12 months, the total estimated value of the contract;
- (b) in the case of a fixed term contract for a period of more than 12 months, the total value including the estimated residual value; and
- (c) in the case of a contract without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.

(15) In the case of a public service contract for a service of a kind mentioned in this paragraph, the estimated value shall be calculated by reference to—

- (a) for insurance services, the premium payable and any other form of remuneration;
- (b) for banking and other financial services, the fees, commissions payable, interest and any other form of remuneration; and
- (c) for design contracts, the fees, commissions payable and any other form of remuneration.

(16) In the case of a public service contract which does not indicate a total price, the estimated value must be calculated by reference to—

- (a) in the case of a contract for a fixed term of less than or equal to 48 months, the total value of the contract for its full term; and
- (b) in the case of a contract for a fixed term of more than 48 months or a contract without a fixed term, the monthly value multiplied by 48.

### **Exclusions: Utilities**

7. These Regulations do not apply to procurement for the award of a contract or to the organisation of a design contest by a contracting entity where—

- (a) the contract or design contest is for the purpose of carrying out any of the activities referred to in Articles 8 to 14 of the Utilities Directive (gas and heat; electricity; water; transport

- services; ports and airports; postal services; extraction of oil and gas and exploration for or extraction of coal or other solid fuels);
- (b) the contract or design contest is excluded from the application of the Utilities Directive—
- (i) under Articles 18 (resale), 23 (water, energy or fuels) and 34 (activities directly exposed to competition); or
  - (ii) by reason of the value being less than the threshold provided for in Article 15, of that Directive;
- (c) the contracting entity is a contracting authority providing postal services within the meaning of paragraph (b) of Article 13(2) of the Utilities Directive as amended from time to time and the contract is for the purpose of—
- (i) added value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail);
  - (ii) financial services specified under CPV Codes 66100000-1 to 66720000-3, within the meaning of paragraph (d) of Article 21 of the Utilities Directive and including in particular postal money orders and postal giro transfers;
  - (iii) philatelic services; or
  - (iv) logistics services (services combining physical delivery, warehousing or both with other non-postal functions).

#### **Exclusions: Concessions**

**8.—(1)** These Regulations do not apply to procurement for the award of works or services concessions which—

- (a) are subject to the application of the Concessions Directive; or
- (b) would be subject to the application of that Directive but for any provision contained therein.

(2) In this regulation—

“concession” has the meaning given by Article 5 of the Concessions Directive; and

“Concessions Directive” means Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts as amended from time to time <sup>M3</sup>.

#### **Marginal Citations**

**M3** OJ L 94, 28.3.2014, p.1.

#### **Exclusions: Electronic Communications**

**9.—(1)** These Regulations do not apply to procurement for the award of a public contract or to the organisation of a design contest for the principal purpose of permitting the contracting authority 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” have the same meanings as in Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services <sup>M4</sup> as amended from time to time.

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#### Marginal Citations

**M4** OJ No L 108, 24.4.2003, p.33, last amended by Directive 2009/140/EC of the European Parliament and of the Council (OJ No L 337, 18.12.2009, p.37).

### Exclusions: Public contracts awarded, and design contests organised, pursuant to international rules

**10.—(1)** These Regulations do not apply to procurement for the award of a public contract or the organisation of a design contest which the contracting authority 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 country 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 public contract or the organisation of a design contest which the contracting authority undertakes or organises in accordance with procurement rules provided by an international organisation or international financing institution, where the contract or design contest 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 contract or the organisation of a design contest involving defence or security aspects awarded or organised pursuant to international rules.

### Exclusions: Specific service contracts

**11.—(1)** These Regulations do not apply to procurement for the award of a public service contract, framework agreement or dynamic purchasing system—

- (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 service 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 service 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 the Lawyers' Services Directive in—
    - (aa) an arbitration or conciliation held in a member State, a third country or before an international arbitration or conciliation instance; or
    - (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 the Lawyers' Services Directive—

- (aa) in preparation of any proceedings referred to in paragraph (i); or
  - (bb) where 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;
  - (v) other legal services which, in the member State concerned, are connected, even occasionally, with the exercise of official authority;
  - (f) for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC<sup>M5</sup> as amended from time to time;
  - (g) for central bank services;
  - (h) for operations conducted with the European Financial Stability Facility or 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) which is an employment contract;
  - (k) 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;
  - (l) for public passenger transport services by rail or metro; or
  - (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.
- (2) In this Regulation—
- (a) “audio-visual media services” has the meaning given by Article 1(1)(a) of the Audio-visual Media Services Directive;
  - (b) “Audio-visual Media Services Directive” means 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 as amended from time to time<sup>M6</sup>;
  - (c) “Lawyers' Services Directive” means Council Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services<sup>M7</sup>;
  - (d) “media service provider” has the meaning given by Article 1(1)(d) of the Audio-visual Media Services Directive; and
  - (e) “programme” and “programme material” have the meaning given by Article 1(1)(b) of the Audio-visual Media Services Directive but also include radio programmes and radio programme material.

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#### **Marginal Citations**

- M5** OJ L 145, 30.4.2004, p.1.  
**M6** OJ L 95, 15.4.2010, p.1.  
**M7** OJ No L 78, 26.3.1977, p.17, last amended by Council Directive 2013/25/EU (OJ No L 158, 10.6.2013, p.368).

#### **Exclusions: Service contracts awarded on the basis of an exclusive right**

**12.** These Regulations do not apply to procurement for a public service contract to be awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which such authority or association of authorities enjoys pursuant to law, regulation or published administrative provision which is compatible with the TFEU.

#### **Exclusions: Public contracts between entities within the public sector**

- 13.—**(1) These Regulations do not apply to procurement for the award of a public contract—
- (a) by a contracting authority to a controlled person;
  - (b) by a controlled person to a contracting authority which controls that person; or
  - (c) by a controlled person to another controlled person where both such persons are controlled by the same contracting authority.
- (2) For the purpose of this regulation, a person is a “controlled person” where—
- (a) the contracting authority exercises over that person control 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 authority or by other persons controlled by that authority; 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) an authority shall be deemed to exercise control over a person similar to the control that it exercises over its own departments where—
- (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 authority.
- (4) These Regulations do not apply to procurement for the award of a public contract by a contracting authority to a person which is jointly controlled.
- (5) For the purpose of paragraph (4) a person is jointly controlled where—
- (a) the contracting authority, jointly with other contracting authorities, exercises over that person control similar to that which the authorities exercise over their own departments;
  - (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the contracting authorities or by other persons controlled by those authorities; and
  - (c) no other person has direct 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.



(6) For the purpose of paragraph (5)(a) contracting authorities shall be deemed to exercise control over a person similar to the control that they exercise over their own departments where—

- (a) the decision making bodies of the person are composed of representatives of all participating contracting authorities;
- (b) those contracting authorities jointly exercise a decisive influence over the strategic objectives and significant decisions of the person; and
- (c) the person does not pursue any interests which are contrary to those of the contracting authorities.

(7) For the purpose of paragraph (6)(a) individual representatives may represent several or all of the contracting authorities.

(8) These Regulations do not apply to procurement for the award of a public contract exclusively between two or more contracting authorities where—

- (a) the contract is for the purpose of establishing or implementing co-operation between the contracting authorities 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 authorities 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), shall be determined by reference to—

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

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

(11) This paragraph applies where 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 authority was created or commenced activities; or
- (b) a reorganisation of its activities.

#### **Specific situations: Contracts subsidised by a contracting authority**

**14.—**(1) These Regulations apply to procurement for the award of—

- (a) a works contract which is subsidised directly by a contracting authority by more than 50% and the estimated value of which, net of value added tax, is equal to or greater than the sum specified in Article 13(a) of the Directive as amended from time to time, where those contracts involve one of the following activities—
  - (i) civil engineering activities listed in Schedule 2; or
  - (ii) building works for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes; or
- (b) a service contract which is subsidised directly by a contracting authority by more than 50% and the estimated value of which, net of value added tax, is equal to or greater than the

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sum specified in Article 13(b) of the Directive as amended from time to time and which is connected to a works contract as referred to in paragraph (a).

(2) The contracting authority providing a subsidy referred to in paragraph (1) must ensure compliance with these Regulations where the authority does not itself award the subsidised contract or where the authority awards that contract for and on behalf of another person.

(3) The contracting authority providing the subsidy referred to in paragraph (1) must notify the recipient of the subsidy that these Regulations apply in the circumstances referred to in this regulation.

### Specific situations: Research and development services

15. These Regulations only apply to procurement for the award of public service contracts for research and development service which are covered by CPV Codes 73000000-2 to 73120000-9, 73300000-5, [F<sup>4</sup>73420000-2] and 73430000-5 provided that—

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

#### Textual Amendments

**F4** Word in [reg. 15](#) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), [regs. 1, 2\(5\)](#)

### Specific situations: Defence and security

16.—(1) These Regulations apply to procurement for the award of public contracts and to design contests organised in the fields of defence and security, with the exception of procurement or design contests—

- (a) to which the Defence and Security Regulations apply; or
- (b) to which those Regulations do not apply pursuant to regulations 7 or 9 of those Regulations.

(2) These Regulations do not apply to procurement for the award of public contracts or design contests, not otherwise exempt by virtue of paragraph (1), to the extent that—

- (a) the protection of the essential security interests of the United Kingdom or another member State cannot be guaranteed by less intrusive measures; or
- (b) 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.

(3) These Regulations do not apply where—

- (a) the procurement and performance of the public contract or design contest are 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; and
- (b) the United Kingdom has determined that the protection of the essential interests concerned cannot be guaranteed by less intrusive measures.

(4) In this regulation reference to “less intrusive measures” includes, but is not limited to, imposing requirements aimed at protecting the confidential nature of information which the contracting authority makes available in a contract award procedure as provided for in these Regulations.

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

17.—(1) This regulation applies where 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 TFEU or the Defence and Security Regulations.

(2) Where different parts of a given contract are objectively separable, a contracting authority may decide to undertake procurement for the award of—

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

(3) Any 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.

(4) Where a contracting authority decides to undertake procurement for the award of separate contracts for separate parts the applicable law for the procurement of each separate contract is to be determined by the characteristics of such contract.

(5) Where a contracting authority decides, in accordance with paragraph (6), 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 do not apply to such procurement.

(6) A contracting authority may only decide to undertake a procurement for the award of a single contract of a kind referred to in paragraph (5) where—

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

(7) Paragraph (5)(b) is without prejudice to the thresholds and exclusions provided for by the Defence and Security Regulations.

(8) Paragraph (5)(a) applies to a mixed contract to which both paragraph (5)(a) and (5)(b) could otherwise apply.

### **Public contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules**

18.—(1) These Regulations do not apply to procurement for the award of a public contract or to a design contest involving defence or security aspects which the contracting authority is obliged to award or organise in accordance with procurement procedures which are established by—

- (a) an international agreement or arrangement, concluded in conformity with the Treaties, between the United Kingdom and one or more third country or part thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;
- (b) an international agreement or arrangement relating to the stationing of troops and concerning the undertakings of the United Kingdom or a third country; or
- (c) an international organisation.

(2) These Regulations do not apply to procurement for the award of a public contract or to the organisation of a design contest involving defence or security aspects which the contracting authority carries out in accordance with procurement rules provided by an international organisation or international financing institution where the public contract or design contest concerned is fully

financed by that organisation or institution or is co-financed for the most part by such organisation or institution.

## *SECTION 2*

### *General Rules*

#### **Principles of procurement**

**19.**—(1) A contracting authority must, in carrying out any procurement or design contest 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 authority must not design a procurement or design contest with the intention of excluding it from the application of these Regulations or of artificially narrowing competition.

(3) Without prejudice to the generality thereof, competition shall be deemed to be artificially narrowed for the purpose of paragraph (2) where the design of the procurement or design contest is made with the intention of unduly favouring or disadvantaging any particular economic operator.

(4) A contracting authority must include in each public contract or framework agreement such conditions relating to the performance of the contract or framework as meet the requirements mentioned in paragraph (5) and are reasonably necessary to ensure that the economic operator complies with environmental, social and employment law, including any relevant collective agreements or international law measures referred to in Annex X of the Directive as amended from time to time.

(5) The requirements referred to in paragraph (4) are that the conditions are—

- (a) linked to the subject matter of the contract or framework within the meaning of regulation 70 (conditions for performance of contracts); and
- (b) indicated in the call for competition or in the procurement documents.

#### **Economic Operators**

**20.**—(1) A contracting authority must not reject an economic operator 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) Where paragraph (3) applies, a contracting authority may require an economic operator to state, in its tender or request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract.

(3) This paragraph applies where an economic operator which is a legal person is seeking the award of—

- (a) a public works contract;
- (b) a public supply contract which includes services or siting and installation operations; or
- (c) a public services contract.

(4) A contracting authority 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.

(5) A contracting authority may specify in the procurement 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 59 (selection criteria).

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

(7) 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.

(8) A contracting authority 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.

(9) In this Regulation reference to a “contract” includes reference to a framework agreement, dynamic purchasing system or design contest.

### **Reserved contracts**

**21.**—(1) A contracting authority may—

- (a) reserve the right to participate in procurement for the award of a public contract or framework agreement to a supported business; or
- (b) provide for such a contract or framework agreement to be performed in the context of a supported employment programme.

(2) In this regulation—

“supported business” means an economic operator whose main aim is the social and professional integration of disabled or disadvantaged persons and where at least 30% of the employees of the economic operator are disabled or disadvantaged persons; and

“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) Where a contracting authority is following the approach set out in paragraph (1), it must specify that fact in the contract notice and refer to Article 20 of the Directive.

### **Confidentiality**

**22.**—(1) A contracting authority must not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

(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 51 (contract award notices) and 56 (informing candidates and tenderers);
- (b) the Freedom of Information (Scotland) Act 2002 <sup>M8</sup>;
- (c) the Environmental Information (Scotland) Regulations 2004 <sup>M9</sup>; and
- (d) any other enactment to which the contracting authority is subject relating to the disclosure of information.

(3) A contracting authority may impose upon an economic operator requirements aimed at protecting the confidential nature of information which the contracting authority makes available throughout the procurement procedure.

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### Marginal Citations

- M8** 2002 asp 13, amended by the Freedom of Information (Amendment) (Scotland) Act 2013 (2013 asp 2).  
**M9** S.S.I. 2004/520, amended by the Environmental Information (Scotland) Amendment Regulations 2013, S.S.I. 2013/127.

### Rules applicable to communication

**23.**—(1) Subject to paragraphs (3), (5) and (8), a contracting authority 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 procedure.

(3) A contracting authority 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 authority 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 authority; or
- (d) the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means.

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

(6) Where, in accordance with this regulation, a contracting authority requires means of communication in the submission process other than electronic means, the authority must state the reason for this in the individual report referred to in regulation 83 (reporting and documentation requirements).

(7) Where electronic means of communication is not required for a reason referred to in paragraph (5), the contracting authority 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 procedure, provided that the content of the oral communication is documented by the contracting authority.

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

(10) A contracting authority 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 authority must ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved.

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

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

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

- (a) offers unrestricted and full direct access free of charge by electronic means to those tools and devices from the date of publication of the call for competition or from the date when the invitation to confirm interest is sent;
- (b) ensures that tenderers having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits (provided that the lack of access is not attributable to the tenderer) may access the procurement procedure through the use of provisional tokens made available free of charge online; or
- (c) supports an alternative channel for electronic submission of tenders.

(15) For the purpose of paragraph (14)(a) “date of publication of the call for competition” means the date of publication in the Official Journal after being sent in accordance with regulation 52 (form and manner of sending notices for publication at EU level).

(16) A contracting authority must specify in the call for competition or the invitation to confirm interest, referred to in paragraph (14)(a), the internet address at which those tools and devices are accessible.

(17) Tools and devices for the electronic receipt of tenders, requests to participate and, in design contests, plans and projects, must—

- (a) enable the precise determination of the exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects;

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- (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 authority 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 procedure, 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.
- (18) In addition to the requirements set out in paragraph (17), a contracting authority 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 requests to participate—
- (a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, must be available to interested parties;
  - (b) a contracting authority must specify the level of security required for the electronic means of communication in the various stages of the specific procurement procedure;
  - (c) the level of security specified in accordance with sub-paragraph (b) must be proportionate to the risks attached;
  - (d) where paragraph (19) applies, the contracting authority 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 authority must establish the required advanced electronic signature format on the basis of formats established in Commission Decision 2011/130/EU establishing minimum requirements for the cross-border processing of documents signed electronically by competent authorities under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (notified under document C(2011) 1081)<sup>M10</sup> and must put in place necessary measures to be able to process these formats technically;
    - (ii) where 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 authority 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) where 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 Commission Decision 2009/767/EC setting out measures facilitating the use of procedures by electronic means through the points of single contact under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (notified under document C(2009) 7806)<sup>M11</sup>, as amended from time to time (in this regulation “the Commission Decision”), the contracting authority



must not apply additional requirements that may hinder the use of the signature by the tenderer.

(19) This paragraph applies where a contracting authority concludes that the level of risk assessed in accordance with paragraphs (21) and (22) is such that advanced electronic signatures as defined by [F5Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market] as amended from time to time, are required.

(20) A contracting authority shall assess the certificate referred to in paragraph (18)(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 Commission Decision.

(21) In deciding the level of security required at each stage of a procurement procedure, and in concluding whether the level of risk is such that advanced electronic signatures are required, a contracting authority must assess the risks having regard to—

- (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 authority; 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 (22)), and the costs, burdens and obligations which those requirements may impose upon an economic operator.

(22) A contracting authority 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 authority 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 authority, 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 procedure in question.

(23) Paragraph (24) applies where—

- (a) a competent authority of the United Kingdom located in Scotland; or
- (b) another issuing entity located in Scotland,

signs and issues a document for use in a procurement with the scope of the Directive, whether the procedure is under these Regulations or under the law of any member State.

(24) The competent authority or issuing entity may establish the required advanced signature format in accordance with the requirements set out in Article 1(2) of Commission Decision 2011/130/EU establishing minimum requirements for the cross-border processing of documents signed electronically by competent authorities under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (notified under document C(2011) 1081) <sup>M12</sup>, as amended from time to time, and, where it does so—

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- (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.

#### Textual Amendments

- F5** Words in reg. 23(19) substituted (22.7.2016) by [The Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 \(S.I. 2016/696\)](#), reg. 1, **Sch. 3 para. 18**

#### Marginal Citations

- M10** OJ L 53, 26.2.2011, p.66, amended by Commission Implementing Decision 2014/148/EU (OJ L 80, 19.3.2014, p.7).
- M11** OJ L 274, 20.10.2009, p36, last amended by Commission Decision 2013/662/EU (OJ L 306, 16.11.2013, p.21).
- M12** OJ L 53, 26.2.2011 p.66.

#### Nomenclatures

**24.** A contracting authority must, when making any reference to nomenclatures of the subject matter of a public contract in the conduct of a procurement, do so by using the CPV.

#### Conflicts of Interest

**25.—(1)** A contracting authority must take appropriate measures to prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

(2) Without prejudice to the generality thereof, reference to “conflicts of interest” in paragraph (1) includes any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

(3) In paragraph (2)—

“relevant staff members” means staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure; and

“procurement service provider” means a public or private body which offers ancillary purchasing activities on the market.

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