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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 2**

**RULES ON PUBLIC CONTRACTS**

*Choice of Participants and Awarding Contracts*

**Exclusion grounds**

**58.**—(1) A contracting authority must exclude an economic operator from participation in a procurement procedure where the authority has established, by verifying in accordance with regulations 60 (European Single Procurement Document: use, content and form of the ESPD), 61 (means of proof) and 62 (recourse to e-Certis), or is otherwise aware that that economic operator or a person to whom paragraph (2) applies has been convicted of any of the following offences—

- (a) the common law offence of conspiracy where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA on the fight against organised crime <sup>M1</sup> or an offence under sections 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010 <sup>M2</sup>;
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889 <sup>M3</sup> or section 1 of the Prevention of Corruption Act 1906 <sup>M4</sup>, where the offence relates to active corruption as defined in Article 3 of the Council Act of 26th May 1997 <sup>M5</sup> and Article 3(1) of Council Joint Action 98/742/JHA <sup>M6</sup>;
- (c) bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003 <sup>M7</sup>, where the offence relates to active bribery or corruption;
- (d) bribery within the meaning of sections 1 or 6 of the Bribery Act 2010 <sup>M8</sup>;
- <sup>F1</sup>(e) .....
- (f) any offence listed in—
  - (i) section 41 of the Counter-Terrorism Act 2008 <sup>M9</sup>; or
  - (ii) Schedule 2 to that Act where the court has determined that there is a terrorist connection.
- (g) money laundering within the meaning of sections 340(11) and 415 of the Proceeds of Crime Act 2002 <sup>M10</sup>;
- (h) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988 <sup>M11</sup>;

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- (i) any offence under Part 1 of the Human Trafficking and Exploitation (Scotland) Act 2015<sup>M12</sup> or under any provision referred to in the Schedule to that Act;
  - (j) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994<sup>M13</sup>;
  - (k) any other offence within the meaning of [F2Article 57(1)(a), (b), (d), (e) or (f)] of the Directive as defined by the law of any EEA state or any part thereof.
- (2) This paragraph applies to a person who is a member of the administrative, management or supervisory body of the economic operator referred to in paragraph (1) or has powers of representation, decision or control in relation to such economic operator.
- (3) A contracting authority must exclude an economic operator from participation in a procurement procedure where—
- (a) subject to paragraphs (5) to (7), the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or in accordance with those of any of the jurisdictions of the United Kingdom; or
  - (b) the contracting authority is aware that the economic operator has committed an act prohibited under the Employment Relations Act 1999 (Blacklists) Regulations 2010<sup>M14</sup> and the commission of such an act has been admitted by the economic operator or established by a judicial decision having final and binding effect.
- (4) Subject to paragraph (5), a contracting authority may exclude an economic operator from participation in a procurement procedure where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.
- (5) A contracting authority may not exclude an economic operator pursuant to paragraph (3)(a) or (4) where—
- (a) the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines; or
  - (b) the obligation to make repayment otherwise ceases.
- (6) A contracting authority may disregard any of the prohibitions imposed by paragraphs (1) to (3), on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.
- (7) A contracting authority may also disregard the prohibition imposed by paragraph (3)(a) where an exclusion would be clearly disproportionate, in particular—
- (a) where only minor amounts of taxes or social security contributions are unpaid; or
  - (b) where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of fulfilling its obligations in a manner described in paragraph (5) before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.
- (8) A contracting authority may exclude an economic operator from participation in a procurement procedure where—
- (a) the contracting authority can demonstrate by any appropriate means a violation by the economic operator of applicable obligations referred to in regulation 57(2) (general principles);

- (b) the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under laws and regulations to which the economic operator may be subject;
  - (c) the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
  - (d) the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
  - (e) a conflict of interest exists within the meaning of regulation 25 (conflicts of interest) which cannot be effectively remedied by other less intrusive measures;
  - (f) a distortion of competition from the prior involvement of the economic operator in the preparation of the procurement procedure, as referred to in regulation 42 (prior involvement of candidates or tenderers), cannot be remedied by other, less intrusive measures;
  - (g) the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;
  - (h) the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria;
  - (i) the economic operator has withheld information referred to in sub-paragraph (h) or is not able to submit the supporting documents required under regulation 60 (<sup>F3</sup>... Single Procurement Document: use, content and form of the [<sup>F4</sup>SPD]); or
  - (j) the economic operator—
    - (i) has or has sought to unduly influence the decision-making process of the contracting authority,
    - (ii) has or has sought to obtain confidential information that may confer upon it undue advantages in the procurement procedure; or
    - (iii) has negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.
- (9) A contracting authority must exclude an economic operator where the authority becomes aware, at any time during the procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (1) to (3).
- (10) A contracting authority may exclude an economic operator where the authority becomes aware, at any time during the procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (4) or (8).
- (11) In the cases referred to in paragraph (1) and subject to paragraph (6), the period during which the economic operator must be excluded is 5 years from the date of the conviction by final judgment.
- (12) In the cases referred to in paragraph (3)(b) or (8), and subject to paragraph (14), the period during which the economic operator may be excluded is 3 years from the date of the relevant event.

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(13) Any economic operator that is in one of the situations referred to in paragraph (1), (3)(b) or (8) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

(14) If the contracting authority is satisfied that the evidence proves that the measures are sufficient for the purpose referred to in paragraph (13), the authority must not exclude the economic operator from the procurement procedure.

(15) For the purpose mentioned in paragraph (14), the economic operator must prove that it has—

- (a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- (b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- (c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

(16) The measures taken by the economic operator must be evaluated by the contracting authority taking into account the gravity and particular circumstances of the criminal offence or misconduct.

(17) Where the contracting authority considers that the measures are insufficient, the authority must give to the economic operator a statement of the reasons for that decision.

#### Textual Amendments

- F1** Reg. 58(1)(e) omitted (31.12.2020) by virtue of The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), **4(40)(a)(i)** (with sch. paras. 1-5)
- F2** Words in reg. 58(1)(k) substituted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), **4(40)(a)(ii)** (with sch. paras. 1-5)
- F3** Word in reg. 58(8)(i) omitted (31.12.2020) by virtue of The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), **4(40)(b)(i)** (with sch. paras. 1-5)
- F4** Word in reg. 58(8)(i) substituted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), **4(40)(b)(ii)** (with sch. paras. 1-5)

#### Modifications etc. (not altering text)

- C1** Reg. 58 modified by SSI 2013/50, Sch. 3 para. 10(2)(a) (as substituted (18.4.2016) by The Utilities Contracts (Scotland) Regulations 2016 (S.S.I. 2016/49), reg. 1, **sch. 3 para. 3(2)(c)**)
- C2** Regs. 58-62 modified (18.4.2016) by The Utilities Contracts (Scotland) Regulations 2016 (S.S.I. 2016/49), regs. 1, **78(5)**

#### Marginal Citations

- M1** OJ L 300, 11.11.2008, p.42.
- M2** 2010 asp 13.
- M3** 1889 c.69. This Act was repealed by Schedule 2 to the Bribery Act 2010 (c.23).
- M4** 1906 c.34. Section 1 was amended by section 47(2) and (3) of the Criminal Justice Act 1988 (c.33), **section 108(2)** of the Anti-Terrorism, Crime and Security Act 2001 (c.24) and section 68(2) of the Criminal Justice (Scotland) Act 2003 (asp 7) and repealed by Schedule 2 to the Bribery Act 2010 (c.23).
- M5** OJ C 195, 25.6.1997, p.2.
- M6** OJ L 358, 31.12.1998, p.2; repealed by Council Framework Decision 2003/568/JHA (OJ L 192, 31.7.2003, p.54).
- M7** 2003 asp 7. Sections 68 and 69 were repealed by Schedule 2 to the Bribery Act 2010 (c.23).
- M8** 2010 c.23.
- M9** 2008 c.28

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**M10** 2002 c.29.

**M11** 1988 c.33; sections 93A, 93B and 93C were inserted by sections 29, 30 and 31 of the [Criminal Justice Act 1993 \(c.36\)](#) and repealed by the [Proceeds of Crime Act 2002 \(c.29\)](#), [Schedule 12](#).

**M12** 2015 asp 12.

**M13** 1994 c.37; sections 49, 50 and 51 were repealed by the [Proceeds of Crime Act 2002 \(c.29\)](#), [Schedule 12](#).

**M14** S.I. 2010/493.

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**Changes and effects yet to be applied to :**

- Regulations applied by [2023 c. 54 s. 119\(2\)\(a\)](#)
- reg. 58(1)(e) omitted by [S.S.I. 2019/112 reg. 3\(39\)\(a\)\(i\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 58(1)(k) words substituted by [S.S.I. 2019/112 reg. 3\(39\)\(a\)\(ii\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 58(8)(i) word omitted by [S.S.I. 2019/112 reg. 3\(39\)\(b\)\(i\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 58(8)(i) word substituted by [S.S.I. 2019/112 reg. 3\(39\)\(b\)\(ii\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))

**Changes and effects yet to be applied to the whole Instrument associated Parts and Chapters:**

Whole provisions yet to be inserted into this Instrument (including any effects on those provisions):

- reg. 11(1)(e)(i)(aa) words substituted by [S.S.I. 2019/112 reg. 3\(11\)\(a\)\(i\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 11(1)(e)(i)(bb) words substituted by [S.S.I. 2019/112 reg. 3\(11\)\(a\)\(ii\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 78(1)(i)(ii) and words inserted by [S.S.I. 2019/112 reg. 3\(52\)\(a\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))