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SCOTTISH STATUTORY INSTRUMENTS

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**2016 No. 65**

**The Concession Contracts (Scotland) Regulations 2016**

**PART 2**

**SCOPE AND PRINCIPLES**

**CHAPTER 2**

**EXCLUSIONS**

**Exclusions: Concession contracts between entities within the public sector**

- 19.**—(1) These Regulations do not apply to procurement for the award of a concession contract—
- (a) by a contracting entity to a controlled person;
  - (b) by a controlled person to a contracting entity which controls that person; or
  - (c) by a controlled person to another controlled person if both such persons are controlled by the same contracting entity.
- (2) For the purpose of this regulation, a person is a “controlled person” if—
- (a) the contracting entity exercises over that person a control which is similar to that which it exercises over its own departments;
  - (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the contracting entity or by other persons controlled by that contracting entity; and
  - (c) no other person has direct private capital participation in the person with the exception of non-controlling and non-blocking forms of private capital participation required by any enactment, in conformity with the Treaties, which do not exert a decisive influence on the person being awarded the contract.
- (3) For the purpose of paragraph (2)(a) a contracting entity shall be deemed to exercise control over a person similar to the control that it exercises over its own departments if—
- (a) it exercises a decisive influence over the strategic objectives and significant decisions of the person; or
  - (b) such control is exercised by another person which is itself controlled in the same way by the contracting entity.
- (4) These Regulations do not apply to procurement for the award of a concession contract by a contracting entity to a person which is jointly controlled.
- (5) For the purpose of paragraph (4) a person is jointly controlled if—
- (a) the contracting entity, jointly with other contracting entities, exercises over that person a control which is similar to that which the contracting entity exercises over its own departments;
  - (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the contracting entities or by other persons controlled by those entities; and

- (c) no other person has direct private capital participation in the person with the exception of non-controlling and non-blocking forms of private capital participation required by any enactment, in conformity with the Treaties, which do not exert a decisive influence on the person being awarded the contract.
- (6) For the purpose of paragraph (5)(a) the contracting entity shall be deemed to exercise control over a person similar to the control that the entity exercises over its own departments if—
  - (a) the decision making bodies of the person are composed of representatives of all participating contracting entities;
  - (b) those contracting entities jointly exercise a decisive influence over the strategic objectives and significant decisions of the person; and
  - (c) the person does not pursue any interests which are contrary to those of the contracting entities.
- (7) For the purpose of paragraph (6)(a) an individual representative may represent several or all of the contracting entities.
- (8) These Regulations do not apply to procurement for the award of a public contract exclusively between two or more contracting entities if—
  - (a) the contract is for the purpose of establishing or implementing co-operation between the contracting entities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
  - (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and
  - (c) the contracting entities perform on the open market less than 20% of the activities concerned by the co-operation.
- (9) The percentage of activities referred to in paragraphs (2)(b), (5)(b) and (8)(c), must be determined by reference to—
  - (a) the average turnover of the person or, as the case may be, contracting entity for the period of 3 years preceding the date of the proposed concession contract award; or
  - (b) an appropriate alternative activity-based measure such as costs incurred by the relevant person or contracting entity with respect to works and services for such 3 year period.
- (10) If paragraph (11) applies, an alternative credible measurement of activity must be used, and for this purpose use of business projections must be treated as a credible measure.
- (11) This paragraph applies if the turnover or activity based measure are not available for the preceding 3 years or are no longer relevant because of—
  - (a) the date on which the person or contracting entity was created or commenced activities; or
  - (b) a reorganisation of its activities.
- (12) In this regulation, “contracting entity” means a contracting authority or a utility referred to in regulation 5(1)(a) (meaning of “utility”).