STATUTORY INSTRUMENTS

2016 No. 273

PUBLIC PROCUREMENT, ENGLAND AND WALES
PUBLIC PROCUREMENT, NORTHERN IRELAND

The Concession Contracts Regulations 2016

Made - - - -	*11th March 2016*
Laid before Parliament	*17th March 2016*
Coming into force - -	*18th April 2016*

The Minister for the Cabinet Office is designated for the purposes of section 2(2) of the European Communities Act 1972 [F1] in relation to public procurement [F2].

The Minister for the Cabinet Office makes these Regulations in exercise of the powers conferred by section 2(2) of, as read with paragraph 1A [F3] of Schedule 2 to, that Act.

These Regulations make provision for a purpose mentioned in section 2(2) of that Act and it appears to the Minister for the Cabinet Office that it is expedient for certain references to provisions of EU instruments to be construed as references to those provisions as amended from time to time.

F1 1972 c.68; section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c.51), **section 27(1)(a)**, and by the European Union (Amendment) Act 2008 (c.7), **Part 1** of the Schedule.
F2 S.I. 2010/2473.
F3 Paragraph 1A was inserted by the Legislative and Regulatory Reform Act 2006, section 28, and was amended by the European Union (Amendment) Act 2008, Part 1 of the Schedule and by S.I. 2007/1388.

PART 1

General

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Concession Contracts Regulations 2016 and come into force on 18th April 2016.

(2) These Regulations do not extend to Scotland.

Interpretation

2.—(1) In these Regulations—

"bodies governed by public law" means bodies that have all of the following characteristics—

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they have any of the following characteristics—

(i) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;

(ii) they are subject to management supervision by those authorities or bodies; or

(iii) they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

"candidate" means an economic operator that has sought an invitation or has been invited to take part in a concession contract award procedure;

F4 …

"concessionaire" means an economic operator that has been awarded a concession contract;

"concession award notice" means the notice referred to in regulation 32;

"concession contract" has the meaning given by regulation 3;

"concession document" means any document produced or referred to by the contracting authority or utility to describe or determine elements of the concession contract or the concession contract award procedure, including the concession notice, the technical and functional requirements, proposed conditions of concession contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

"concession notice" has the meaning given by regulation 6;

"Concessions Directive" means Directive 2014/23/EU of the European Parliament and of the Council F5;

"contracting authorities" has the meaning given by regulation 4;

[F6"covered by regulation 7(3)", in relation to an activity, an element, a part of a contract, or procurement, means that regulation 7(3)—

(a) applies to that activity, element, part or procurement, or

(b) would do so if these Regulations applied;**]**

"CPV" means the Common Procurement Vocabulary as adopted by Regulation (EC) No 2195/2002 of the European Parliament and of the Council F7 as amended from time to time;

[F8"devolved Northern Ireland authority" means a contracting authority whose functions are wholly or mainly functions which could be conferred by provision included in an Act of the Northern Ireland Assembly made without the consent of the Secretary of State (see sections 6 to 8 of the Northern Ireland Act 1998);

"devolved Welsh authority" has the meaning given by section 157A of the Government of Wales Act 2006;**]**

"Defence and Security Regulations" means the Defence and Security Public Contracts Regulations 2011 F9;

"disabled", in relation to a person, means a disabled person within the meaning of the Equality Act 2010 [F10] and, in relation to a worker, means a disabled person who is a worker;

"economic operator" means any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market;

"electronic means" means electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by any other electromagnetic means;

"exclusive right" means a right granted by a competent authority by means of any law, regulation or published administrative provision which is compatible with the **[**[F11]Retained**]** Treaties, the effect of which is to limit the exercise of an activity to a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity;

"execution of works" means any of the following—

(a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 1;

(b) the execution, or both the design and execution, of a work;

(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority or utility exercising a decisive influence on the type or design of the work;

[[F12]"GPA" means the Agreement on Government Procurement **[**[F13]signed at Marrakesh on 15th April 1994, as amended on or before **[**[F14]16th May 2021**]]**;**]**

[[F15]"GPA party" means any country, state or separate customs territory that is—

(a) listed in Schedule 1A; or

(b) a member State of the EU;**]**

"legal person" means a person, whether governed by private or public law, other than a natural person;

"Official Journal" means the Official Journal of the European Union;

"prior information notice" means the notice referred to in regulation 31(3);

[[F16]"the Retained Treaties" means anything which is retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018 because of the effect which the Treaty on European Union or TFEU had immediately before IP completion day in giving rise to any of the rights, powers, liabilities, obligations, restrictions, remedies and procedures mentioned in that section;**]**

"services concession contract" has the meaning given by regulation 3(3);

"tenderer" means an economic operator that has submitted a tender;

"TFEU" means the Treaty on the Functioning of the European Union [F17];

[F18] [F19]
...

"utilities" has the meaning given by regulation 5;

[[F20]the UK e-notification service" has the meaning mentioned in regulation 33(5), and references (in whatever terms) to the submission of notices to that service are to be construed in accordance with the provisions applied (and adapted) by regulation 33(5);**]**

"a work" means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function; but "works" is to be interpreted in accordance with paragraph (2);

"working day" means a day other than a Saturday, Sunday, Christmas Day, Good Friday or bank holiday within the meaning of the Banking and Financial Dealings Act 1971 [F21];

"works concession contract" has the meaning given by regulation 3(2); and

"in writing" means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information which is transmitted and stored by electronic means.

(2) Any other expression used both in these Regulations (other than in Part 5) and in the Concessions Directive has the meaning that it bears in that Directive.

(3) In these Regulations (except regulation 33(3)), any reference to a period of time, however expressed, is to be interpreted subject to the requirement that where the period—

(a) is to be calculated by counting forwards in time from a given date or event, and

(b) would (but for this paragraph) have ended on a day which is not a working day,

the period is to end at the end of the next working day.

(4) Any reference in Part 3 to a period of time, however expressed, is to be interpreted subject to the following additional requirements—

(a) the period must include at least 2 working days;

(b) where the period is to be calculated from the moment at which an action takes place or other event occurs, the day during which that action takes place or that event occurs is not to be counted in the calculation of that period.

F4 Words in reg. 2(1) omitted (31.12.2020) by virtue of The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1319), regs. 1(2), **8(2)(a)** (with Sch. paras. 3-5)

F5 OJ No L 94, 28.3.2014, p1, last amended by Commission Delegated Regulation (EU) 2015/2172 (OJ No L 307, 25.11.2015, p9).

F6 Words in reg. 2(1) inserted (31.12.2020) by The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1319), regs. 1(2), **8(2)(b)** (with Sch. paras. 3-5)

F7 OJ No L 340, 16.12.2002, p1, last amended by Regulation (EC) No 596/2009 of the European Parliament and of the Council (OJ No L 188, 18.7.2009, p14).

F8 Words in reg. 2(1) inserted (31.12.2020) by The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1319), regs. 1(2), **8(2)(c)** (with Sch. paras. 3-5)

F9 S.I. 2011/1848, amended by S.I. 2011/2053, 2013/1431 and 2015/102.

F10 2010 c.15.

F11 Word in reg. 2(1) inserted (31.12.2020) by The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1319), regs. 1(2), **8(2)(d)** (with Sch. paras. 3-5)

F12 Words in reg. 2(1) inserted (31.12.2020) by The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1319), regs. 1(2), **8(2)(e)** (with Sch. paras. 3-5)

F13 Words in reg. 2(1) substituted (11.6.2021) by The Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021 (S.I. 2021/573), regs. 1(1), **3(2)(a)**

F14 Words in reg. 2(1) substituted (16.8.2021) by The Public Procurement (Agreement on Government Procurement) (Amendment) (No. 2) Regulations 2021 (S.I. 2021/872), regs. 1(1), **3(2)**

F15 Words in reg. 2(1) inserted (11.6.2021) by The Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021 (S.I. 2021/573), regs. 1(1), **3(2)(b)**

F16 Words in reg. 2(1) inserted (31.12.2020) by The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1319), regs. 1(2), **8(2)(f)** (with Sch. paras. 3-5)

F17 OJ No C 115, 9.5.2008, p47.

F18 Words in reg. 2(1) omitted (31.12.2020) by virtue of The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1319), regs. 1(2), **8(2)(g)** (with Sch. paras. 3-5)
F19 OJ No C 115, 9.5.2008, p13.
F20 Words in reg. 2(1) inserted (31.12.2020) by The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1319), regs. 1(2), **8(2)(h)** (with Sch. paras. 3-5)
F21 1971 c.80.

Meaning of "concession contract"

3.—(1) In these Regulations, "concession contract" means a works concession contract or a services concession contract within the meaning of this regulation.

(2) A "works concession contract" means a contract—

(a) for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the execution of works to one or more economic operators, the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment; and

(b) that meets the requirements of paragraph (4).

(3) A "services concession contract" means a contract—

(a) for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the provision and the management of services (other than the execution of works) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment; and

(b) that meets the requirements of paragraph (4).

(4) The requirements are—

(a) the award of the contract shall involve the transfer to the concessionaire of an operating risk in exploiting the works or services encompassing demand or supply risk or both; and

(b) the part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

(5) For the purposes of paragraph (4)(a), the concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession contract.

Meaning of "contracting authorities"

4. In these Regulations, "contracting authorities" means State, regional or local authorities (including the Crown but not including Her Majesty in her private capacity), bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law other than those authorities, bodies or associations which pursue one of the activities listed in Schedule 2 and award a concession contract for the pursuit of one of those activities.

Meaning of "utilities"

5.—(1) In these Regulations, "utilities" means entities which pursue one of the activities listed in Schedule 2 and award a concession contract for the pursuit of one of those activities, and which are one of the following—