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SCOTTISH STATUTORY INSTRUMENTS

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**2006 No. 1**

**The Public Contracts (Scotland) Regulations 2006**

**PART 2**

**TECHNICAL SPECIFICATIONS**

**Technical specifications in the contract documents**

9.—(1) In this regulation—

“common technical specification” means a technical specification drawn up in accordance with a procedure recognised by the member States with a view to uniform application in all member States and which has been published in the Official Journal;

“European standard” means a standard adopted by a European standards organisation and made available to the general public;

“European technical approval” means an approval of the fitness for use of a product, issued by an approval body designated for the purpose by a member State, following a technical assessment of whether the product fulfils the essential requirements for building works, having regard to the inherent characteristics of the product and the defined conditions of application and use;

“international standard” means a standard adopted by an international standards organisation and made available to the general public;

“British standard” means a standard adopted by a British standards organisation and made available to the general public;

“recognised bodies” means test and calibration laboratories and certification and inspection bodies which comply with applicable European standards and “recognised body” shall be interpreted accordingly;

“standard” means a technical specification approved by a recognised standardisation body for repeated or continuous application, compliance with which is not compulsory and which is an international standard, a European standard, or a British standard;

“technical reference” means any product produced by European standardisation bodies, other than official standards, according to procedures adopted for the development of market needs; and

“technical specifications” means—

- (a) in the case of a public services contract or a public supply contract, a specification in a document defining the required characteristics of materials, goods or services, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of a product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures; and

- (b) in the case of a public works contract, the totality of the technical prescriptions contained, in particular, in the contract documents, defining the characteristics required of the work, works, materials or goods, which permits the work, works, materials or goods to be described in a manner such that it fulfils the use for which it is intended by the contracting authority and these characteristics shall include–
  - (i) levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods;
  - (ii) rules relating to design and costing, the test, inspection and acceptance conditions for work or works and methods or techniques of construction; and
  - (iii) all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished work or works and to the materials or parts which they involve.
- (2) Where a contracting authority wishes to lay down technical specifications which must be met by–
  - (a) the services to be provided under a public services contract and the materials and goods used in or for it;
  - (b) the goods to be purchased or hired under a public supply contract; or
  - (c) the work or works to be carried out under a public works contract and the materials and goods used in or for it;it shall specify those technical specifications in the contract documents.
- (3) When laying down technical specifications in accordance with paragraph (2), a contracting authority shall, wherever possible, take into account accessibility criteria for disabled persons or the suitability of the design for all users.
- (4) A contracting authority shall ensure that technical specifications afford equal access to economic operators and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.
- (5) Subject to technical requirements which are mandatory in the United Kingdom and to the extent that those requirements are compatible with Community obligations, a contracting authority shall define the technical specifications required for a contract in accordance with paragraph (6), (7), (8) or (9).
- (6) A contracting authority may define the technical specifications referred to in paragraph (5)–
  - (a) by reference to technical specifications in the following order of preference–
    - (i) British standards transposing European standards;
    - (ii) European technical approvals;
    - (iii) common technical specifications;
    - (iv) international standards; or
    - (v) other technical reference systems established by the European standardisation bodies; or
  - (b) in the absence of the technical specifications referred to in sub paragraph (a), by reference to the following technical specifications–
    - (i) British standards;
    - (ii) British technical approvals; or

(iii) British technical specifications relating to the design, calculation and execution of the work or works and use of the products;

and each reference to a technical specification made in accordance with this paragraph shall be accompanied by the words “or equivalent”.

(7) A contracting authority may define the technical specifications referred to in paragraph (5) in terms of performance or functional requirements (which may include environmental characteristics) provided that the requirements are sufficiently precise to allow an economic operator to determine the subject of the contract and a contracting authority to award the contract.

(8) A contracting authority may define the technical specifications referred to in paragraph (5) by defining performance and functional requirements as referred to in paragraph (7) with reference to the technical specifications referred to in paragraph (6) as a means of presuming conformity with such performance or functional requirements.

(9) A contracting authority may define the technical specifications referred to in paragraph (5) by reference to technical specifications referred to in paragraph (6) for certain characteristics and by reference to performance or functional requirements referred to in paragraph (7) for other characteristics.

(10) Where a contracting authority defines technical specifications as referred to in paragraph (6), it shall not reject an offer on the basis that the materials, goods or services offered do not comply with those technical specifications if an economic operator proves to the satisfaction of the contracting authority by any appropriate means that the one or more solutions that economic operator proposes in its tender satisfy the requirements of those technical specifications in an equivalent manner.

(11) Where a contracting authority defines technical specifications in terms of performance or functional requirements as referred to in paragraph (7), it shall not reject an offer for materials, goods, services, work or works which complies with–

- (a) a British standard transposing a European standard;
- (b) a European technical approval;
- (c) a common technical specification;
- (d) an international standard; or
- (e) a technical reference system established by a European standardisation body;

if those technical specifications address the performance or functional requirements referred to by the contracting authority and the economic operator proves in its tender to the satisfaction of the contracting authority by any appropriate means that the work, works, materials, goods or services meet the performance or functional requirements of the contracting authority.

(12) Where a contracting authority lays down environmental characteristics in terms of performance or functional requirements as referred to in paragraph (7), it may use the detailed technical specifications, or if necessary, parts thereof, as defined by European, national or multi national eco-labels or by any other eco-label, provided that–

- (a) those technical specifications are appropriate to define the characteristics of the materials, goods or services that are the object of the contract;
- (b) the eco label requirements are drawn up on the basis of scientific information;
- (c) the eco label is adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, are able to participate; and
- (d) the technical specifications are accessible to any party interested.

(13) A contracting authority may indicate in the contract documents that the materials, goods or services bearing the eco-label are presumed to comply with the technical specifications laid down

in the contract documents and shall accept any other appropriate means of proof that the materials, goods or services comply with those technical specifications.

(14) The term “appropriate means” referred to in paragraphs (10), (11) and (13) includes a technical dossier of a manufacturer or a test report from a recognised body.

(15) A contracting authority shall accept certificates from recognised bodies established in other member States when considering whether a tender for a contract conforms with the technical specifications laid down by the contracting authority in accordance with paragraph (2).

(16) Subject to paragraph (17), a contracting authority shall not lay down technical specifications in the contract documents which refer to—

- (a) materials or goods of a specific make or source or to a particular process; or
- (b) trademarks, patents, types, origin or means of production;

which have the effect of favouring or eliminating particular economic operators.

(17) Notwithstanding paragraph (16), exceptionally, a contracting authority may incorporate the references referred to in paragraph (16) into the technical specifications in the contract documents provided that the references are accompanied by the words “or equivalent”, where—

- (a) the subject of the contract makes the use of such references indispensable; or
- (b) the subject of the contract cannot otherwise be described by reference to technical specifications which are sufficiently precise and intelligible to all economic operators.

## **Variants**

**10.**—(1) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous in accordance with regulation 30(1)(a), it shall indicate in the contract notice whether or not it authorises economic operators to submit offers which contain variants on the requirements specified in the contract documents and a contracting authority shall not accept an offer which contains a variant without that indication.

(2) Where a contracting authority authorises a variant in accordance with paragraph (1) it shall state in the contract documents the minimum requirements to be met by the variant and any specific requirements for the presentation of an offer which contains variants.

(3) A contracting authority shall only consider variants which meet its minimum requirements as stated in the contract documents in accordance with paragraph (2).

(4) A contracting authority shall not reject an offer which contains variants on the requirements specified in the contract documents on the ground that—

- (a) where it intends to award a public services contract, the offer would lead to the award of a public supply contract; or
- (b) where it intends to award a public supply contract, the offer would lead to the award of a public services contract.