
SCOTTISH STATUTORY INSTRUMENTS

2015 No. 446

The Public Contracts (Scotland) Regulations 2015

PART 2

RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE

CHAPTER 2

RULES ON PUBLIC CONTRACTS

SECTION 3

Procedures

Conditions relation to the GPA and other international agreements

26. In so far as they are covered by Annexes 1, 2 and 4 to 7 to the EU's Appendix I to the GPA and by the other international agreements by which the EU is bound, a contracting authority must accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU.

Choice of procedures

27.—(1) When undertaking a procurement a contracting authority must apply a procedure which complies with these Regulations and includes publication of a call for competition except where regulation 33 (use of the negotiated procedure without prior notification) permits a contracting authority to award a contract using negotiated procedure without prior publication.

(2) A call for competition must be made—

- (a) where permitted by paragraph (8), by means of a prior information notice in accordance with regulation 49(6) to (8) (prior information notices); or
- (b) by means of a contract notice in accordance with regulation 50 (contract notices).

(3) A contracting authority may, in accordance with these Regulations, apply—

- (a) an open or a restricted procedure; or
- (b) an innovation partnership.

(4) A contracting authority may apply a competitive procedure with negotiation or a competitive dialogue where—

- (a) the needs of the contracting authority cannot be met without adaptation of readily available solutions;
- (b) the works, supplies or services required include design or innovative solutions;

- (c) the contract cannot be awarded without prior negotiations because of specified circumstances related to the nature or complexity of the works, supplies or services or the legal and financial make-up or because of the risks attaching to any of them;
- (d) the technical specifications of the works, supplies or services cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference; or
- (e) in response to an open or restricted procedure only irregular or unacceptable tenders are submitted.

(5) Where paragraph (4)(e) applies, a contracting authority is not required to publish a contract notice where the authority includes in the procedure all of, and only, the tenderers which satisfy the criteria set out in regulations 57 to 64 and which, during the prior open or restricted procedure submitted tenders in accordance with the formal requirements of the procurement procedure.

(6) A tender must be considered irregular, for the purpose of paragraph (4)(e), where—

- (a) it does not comply with the procurement documents;
- (b) it was received late;
- (c) there is evidence of collusion or corruption; or
- (d) it has been found by the contracting authority to be abnormally low.

(7) A tender must be considered unacceptable, for the purpose of paragraph (4)(e), where—

- (a) it was submitted by a tenderer which does not have the required qualifications; or
- (b) the price tendered exceeds the contracting authority's budget as determined and documented prior to the commencement of the procurement procedure.

(8) Where the contract is to be awarded following a restricted procedure or competitive procedure with negotiation, a sub-central contracting authority may make the call for competition by means of a prior information notice.

(9) Nothing in these Regulations prevents an authority which has commenced a procurement from terminating that procurement at any time.

Open Procedure

28.—(1) In an open procedure, a contracting authority must permit any interested economic operator to submit a tender in response to a call for competition within the time period set by the authority in accordance with this regulation.

(2) The tender must be accompanied by the information for qualitative selection that is required by the contracting authority.

(3) Subject to paragraphs (4) to (6), the minimum time period for the receipt of tenders shall be 35 days from the date on which the contract notice is sent for publication.

(4) Where a contracting authority has published a prior information notice which was not itself used as a means of calling for competition under regulation 27(8) (choice of procedures), the minimum time limit for the receipt of tenders may be reduced to 15 days, provided that—

- (a) the prior information notice included all the information required for the contract notice in section I of Part B of Annex V to the Directive insofar as that information was available at the time the prior information notice was published; and
- (b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent for publication.

(5) Where a state of urgency duly substantiated by a contracting authority renders it impracticable to apply the minimum time limit set out in paragraph (3), the authority may fix a time limit which must not be less than 15 days from the date on which the contract notice was sent for publication.

(6) A contracting authority may reduce the minimum time period referred to in paragraph (3) by a period of up to 5 days where it accepts that tenders may be submitted by electronic means in accordance with regulation 23 (rules applicable to communication).

Restricted Procedure

29.—(1) In a restricted procedure, a contracting authority must permit any economic operator to submit a request to participate in response to a call for competition within the time period set in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the contracting authority.

(3) Subject to paragraph (11), the minimum time period for receipt of requests to participate shall be 30 days from the date on which—

- (a) the contract notice was sent for publication; or
- (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest was sent.

(4) Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender.

(5) A contracting authority may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(6) Subject to paragraphs (7) to (11), the minimum time limit for the receipt of tenders shall be 30 days from the date on which the invitation to tender is sent.

(7) Where a contracting authority has published a prior information notice which was not itself used as a means of calling for competition, the minimum time period for the receipt of tenders referred to in paragraph (6), may be reduced to a minimum of 10 days provided that the prior information notice—

- (a) included all the information required in section I of Part B of Annex V to the Directive, insofar as that information was available at the time the prior information notice was published; and
- (b) was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(8) A sub-central contracting authority may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected candidates, provided that all the selected candidates have the same time to prepare and submit their tenders.

(9) In the absence of such an agreement, the time limit must be at least 10 days from the date on which the invitation to tender was sent.

(10) The time limit for the receipt of tenders provided for by paragraph (6) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 23 (rules applicable to communication).

(11) Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in this regulation, it may fix a time limit—

- (a) for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice was sent; and
- (b) for the receipt of tenders which shall not be less than 10 days from the date on which the invitation to tender was sent.

Competitive procedure with negotiation

30.—(1) In a competitive procedure with negotiation, a contracting authority must permit any economic operator to submit a request to participate in response to a call for competition within the time period set in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the contracting authority.

(3) In the procurement documents, the contracting authority must—

- (a) identify the subject-matter of the procurement by providing a description of the authority's needs and the characteristics required of the works, supplies or services to be procured;
- (b) indicate which elements of the description define the minimum requirements to be met by all tenders; and
- (c) specify the contract award criteria.

(4) The information provided by the contracting authority in accordance with paragraph (3) must be sufficiently precise to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the procedure.

(5) The minimum time period for the receipt of requests to participate shall, subject to paragraph (11), be 30 days from the date on which—

- (a) the contract notice was sent for publication; or
- (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest was sent.

(6) The minimum time period for the receipt of initial tenders shall, subject to paragraphs (7) to (11), be 30 days from the date on which the invitation to tender was sent.

(7) Where a contracting authority has published a prior information notice which was not itself used as a means of calling for competition, the minimum time period for the receipt of initial tenders referred to in paragraph (6), may be reduced to a minimum of 10 days provided that the prior information notice—

- (a) included all the information required in section I of Part B of Annex V, insofar as that information was available at the time the prior information notice was published; and
- (b) was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(8) A sub-central contracting authority may set the time limit for the receipt of initial tenders by mutual agreement between the contracting authority and the selected candidates, provided that all the selected candidates have the same time to prepare and submit their initial tenders.

(9) In the absence of such an agreement, the time limit must be at least 10 days from the date on which the invitation to tender was sent.

(10) The time limit for the receipt of initial tenders provided for by paragraph (6) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 23 (rules applicable to communication).

(11) Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in this regulation, it may fix a time limit—

- (a) for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice was sent;
- (b) for the receipt of initial tenders which shall not be less than 10 days from the date on which the invitation to tender was sent.

(12) A contracting authority may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(13) Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit an initial tender which shall be the basis for the subsequent negotiations.

(14) Subject to paragraph (16), a contracting authority must negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve its content.

(15) A contracting authority must not negotiate the minimum requirements or the award criteria referred to in paragraph (3).

(16) A contracting authority may award a contract on the basis of the initial tender without negotiation where the authority has indicated, in the contract notice or in the invitation to confirm interest, that the authority reserves the possibility of doing so.

(17) During the negotiations, a contracting authority must—

- (a) ensure equal treatment of all tenderers;
- (b) not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (c) inform in writing all tenderers whose tenders have not been eliminated of any changes to the technical specification or other procurement documents; and
- (d) following any such changes, provide sufficient time for all tenderers referred to in paragraph (c) to modify and re-submit amended tenders, as appropriate.

(18) In accordance with regulation 22 (confidentiality), a contracting authority must not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

(19) Such agreement must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(20) A contracting authority may conduct a competitive procedure with negotiation in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in—

- (a) the contract notice;
- (b) the invitation to confirm interest; or
- (c) another procurement document.

(21) The contracting authority must indicate, in the contract notice, the invitation to confirm interest or in another procurement document, whether it will use the option described in paragraph (20).

(22) Where the contracting authority uses the option described in paragraph (20) it must ensure that in the final stage, the number of tenders remaining shall make for genuine competition in so far as there are enough tenders or qualified candidates.

(23) Where the contracting authority intends to conclude the negotiations, it must—

- (a) inform the remaining tenderers and set a common deadline to submit any new or revised tenders;
- (b) verify that the final tenders are in conformity with the minimum requirements and comply with regulation 57(1) (general principles);
- (c) assess the final tenders on the basis of the award criteria; and
- (d) award the contract in accordance with regulations 67 to 69.

Competitive Dialogue

31.—(1) In a competitive dialogue, a contracting authority must permit any economic operator to submit a request to participate in response to a contract notice within the time period set in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the contracting authority.

(3) The minimum time period for receipt of a request to participate shall be 30 days from the date on which the contract notice was sent for publication.

(4) A contracting authority may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(5) Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may participate in the dialogue.

(6) The contract must be awarded on the sole basis of the best price-quality ratio in accordance with regulation 67 (contract award criteria).

(7) A contracting authority must—

- (a) in the contract notice, set out its needs and requirements; and
- (b) in the contract notice, in a descriptive document or in both—
 - (i) define those needs and requirements;
 - (ii) set out and define the chosen award criteria; and
 - (iii) set out an indicative timeframe.

(8) A contracting authority—

- (a) must open, with the participants selected in accordance with the relevant provisions of regulations 57 to 66, a dialogue with the aim of identifying and defining the means best suited to satisfying its needs; and
- (b) may discuss all aspects of the procurement with the chosen participants during this dialogue.

(9) During the dialogue, a contracting authority—

- (a) must ensure equal treatment of all participants; and
- (b) must not provide information in a discriminatory manner which may give any participant an advantage over others.

(10) In accordance with regulation 22 (confidentiality), a contracting authority must not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or tenderer participating in the dialogue without its agreement.

(11) Any agreement referred to in paragraph (10) shall not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(12) A contracting authority may conduct a competitive dialogue in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage only by applying the award criteria specified in—

- (a) the contract notice; or
- (b) the descriptive document.

(13) The contracting authority must indicate, in the contract notice or the descriptive document, whether it will use the option described in paragraph (12).

(14) The contracting authority shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

(15) Where the contracting authority uses the option described in paragraph (12) it must ensure that in the final stage, the number of solutions remaining shall make for genuine competition in so far as there are enough solutions or qualified candidates.

(16) When the contracting authority has declared that the dialogue is concluded and informed the remaining participants, the authority must invite each remaining participant to submit their final tender on the basis of the solution or solutions presented and specified during the dialogue.

(17) The final tenders—

- (a) shall contain all the elements required and necessary for the performance of the project; and
- (b) may, subject to paragraph (18), be clarified, specified and optimised at the request of the contracting authority.

(18) Any clarification, specification, optimisation or additional information provided pursuant to a request referred to in paragraph (17)(b) must not involve changes to the essential aspects of the tender or the procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where such changes are likely to distort competition or cause discrimination.

(19) A contracting authority must assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document.

(20) At the request of the contracting authority, and subject to paragraph (21), negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 67 (contract award criteria) may be carried out to confirm financial commitments or other terms contained in the tender in order to finalise the terms of the contract.

(21) Any negotiation and finalisation of the terms of the contract referred to in paragraph (20) must not involve changes to the essential aspects of the tender or the procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where such changes are likely to distort competition or cause discrimination.

(22) A contracting authority may specify prizes or payments to the participants in the dialogue.

Innovation Partnership

32.—(1) A contracting authority may establish an innovation partnership with one partner or with several partners conducting separate research and development activities.

(2) The innovation partnership must aim at the development of innovative works, products or services and the subsequent purchase of the resulting works, supplies or services provided that they correspond to the performance levels and maximum costs agreed between the contracting authority and the partners.

(3) The estimated value of works, supplies or services must not be disproportionate in relation to the investment required for their development.

(4) The innovation partnership must be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works.

(5) The innovation partnership must set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

(6) Based on those targets, the contracting authority may decide after each phase to—

- (a) terminate the innovation partnership; or

(b) in the case of an innovation partnership with several partners, reduce the number of partners by terminating individual contracts,
provided that the contracting authority has indicated in the procurement documents those possibilities and the conditions for their use.

(7) In the procurement of an innovation partnership, a contracting authority must permit any economic operator to submit a request to participate in response to a contract notice within the time period set in accordance with this regulation.

(8) A request by an economic operator referred to in paragraph (7) must be accompanied by the information for qualitative selection that is requested by the contracting authority

(9) In the procurement documents, the contracting authority must—

- (a) identify the subject matter of the procurement by providing the description of the authority's need for innovative works, products or services that cannot be met by purchasing works, products or services already available on the market;
- (b) indicate which elements of this description define the minimum requirements to be met by all tenders;
- (c) specify the award criteria; and
- (d) define the arrangements applicable to intellectual property rights.

(10) The information provided by the contracting authority in accordance with paragraph (9) must be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

(11) The minimum time period for the receipt of requests to participate shall be 30 days from the date on which the contract notice is sent for publication.

(12) A contracting authority may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(13) In selecting candidates, a contracting authority must, in particular, apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

(14) Only those economic operators invited to do so by the contracting authority following its assessment of the requested information may participate in the procedure and submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions.

(15) A contracting authority must negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve its content.

(16) A contracting authority must not negotiate the minimum requirements or the award criteria referred to in paragraph (9).

(17) During the negotiations, a contracting authority—

- (a) must ensure equal treatment of all tenderers;
- (b) must not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (c) must, in writing, inform all tenderers whose tenders have not been eliminated of any changes to the technical specifications or other procurement documents; and
- (d) must provide sufficient time following any such changes for all tenderers referred to in paragraph (c) to modify and re-submit amended tenders, as appropriate.

(18) In accordance with regulation 22 (confidentiality), a contracting authority must not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

(19) Any agreement referred to in paragraph (18) must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(20) A contracting authority may conduct negotiations during innovation partnership procedures in successive stages in order to reduce the number of tenders to be negotiated only by applying the award criteria specified in the contract notice or another procurement document.

(21) The contracting authority must indicate in the contract notice or in another procurement document, whether it will use the option described in paragraph (20).

(22) The contracts must be awarded on the sole basis of the best price-quality ratio in accordance with regulation 67 (contract award criteria).

(23) The contracting authority must ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market.

(24) In the case of an innovation partnership with several partners, the contracting authority must not, in accordance with regulation 22 (confidentiality), reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement.

(25) Any agreement referred to in paragraph (24) must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

Use of the negotiated procedure without prior publication

33.—(1) A contracting authority may award a public contract following negotiated procedure without prior publication of a contract notice or prior information notice in any of the following cases—

- (a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests;
 - (b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons—
 - (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
 - (ii) competition is absent for technical reasons;
 - (iii) the protection of exclusive rights, including intellectual property rights, but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement; or
 - (c) where (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for open procedure, restricted procedure or competitive procedure with negotiation cannot be complied with.
- (2) For the purposes of paragraph (1)(a)—
- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents; and

- (b) a request to participate shall be considered not to be suitable where the economic operator concerned—
 - (i) has been or would be excluded under regulation 58 (exclusion grounds); or
 - (ii) does not meet the selection criteria.
- (3) For the purposes of paragraph (1)(c), the circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority.
- (4) A contracting authority may award a public supply contract following negotiated procedure without prior publication in any of the following cases—
 - (a) where the products involved are manufactured purely for the purpose of research, experimentation, study or development, but a contract awarded in reliance upon this subparagraph shall not include quantity production to establish commercial viability or to recover research and development costs;
 - (b) for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
 - (c) for supplies quoted and purchased on a commodity market;
 - (d) for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.
- (5) For the purposes of paragraph (4)(b), the duration of such a contract, as well as that of recurrent contracts must not, save in exceptional circumstances, exceed 3 years.
- (6) A contracting authority may award a public service contract following negotiated procedure without prior publication where the contract concerned—
 - (a) follows a design contest organised in accordance with these Regulations; and
 - (b) is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest.
- (7) Where there is more than one winner of the design contest referred to in paragraph (6), all of them must be invited to participate in the negotiation.
- (8) A contracting authority may award a public contract following negotiated procedure without prior publication where—
 - (a) it is for new works, services or both, consisting of the repetition of similar works or services entrusted to the economic operator to which the contracting authority awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded following a procedure in accordance with regulation 27(1) and (2) (choice of procedures);
 - (b) the basic project indicated the extent of possible additional works or services and the conditions under which they would be awarded;
 - (c) the possible use of this procedure was disclosed in the procurement documents and the total estimated cost of subsequent works or services was taken into consideration by the contracting authority when applying regulation 5 (thresholds) in relation to the original contract; and
 - (d) not more than 3 years has elapsed following the conclusion of the original contract.