
STATUTORY INSTRUMENTS

2014 No. 3337

The Single Source Contract Regulations 2014

PART 11

Qualifying sub-contracts

Interpretation

57. In this Part, “contracting authority” means the party which is, or would be, liable to pay the contract price under a qualifying sub-contract.

Requirements for qualifying sub-contracts

58.—(1) The amount specified for the purposes of section 28(3)(c) and (4)(c) (minimum value of a qualifying sub-contract) is £25,000,000.

(2) A contract may be a contract to which section 28(3) or (4) applies only if it is neither—

- (a) made within the framework of an international cooperative defence programme; nor
- (b) made wholly for the purposes of one or more of the following—

- (i) the acquisition of land (including existing buildings or other structures, and land covered with water), and any estate, interest, easement, servitude or right in or over such land;
- (ii) the management or maintenance of any land or buildings or other structures; or
- (iii) intelligence activities.

(3) A contract may be a contract to which section 28(3) applies only if the performance of at least 50% by value of the obligations under the contract is required either—

- (a) to enable the primary contractor to perform the qualifying defence contract mentioned in section 28(3)(a); or
- (b) to enable the combined performance of the qualifying defence contract mentioned in section 28(3)(a) and any other qualifying defence contracts or qualifying sub-contracts, or prospective qualifying defence contracts or qualifying sub-contracts, to which the primary contractor (or any person associated with the primary contractor) is or might become party.

(4) A contract may be a contract to which section 28(4) applies only if the performance of at least 50% by value of the obligations under the contract is required either—

- (a) to enable the performance of contract A (within the meaning of section 28(4)(a)); or
- (b) to enable the combined performance of contract A and any other qualifying defence contracts or qualifying sub-contracts, or prospective qualifying defence contracts or qualifying sub-contracts, to which the person for whom anything is to be provided under contract A (or any person associated with that person) is or might become party.

(5) For the purposes of paragraphs (3) and (4), one or more obligations under a contract (“the actual contract”) form 50% by value of the obligations under that contract if, were they to constitute

all the obligations under a contract, the value of that contract would be at least 50% of the value of the actual contract.

(6) Part 2 of the Act, and these Regulations, shall not apply to a qualifying sub-contract in respect of which no notice has been given under section 29(2)(b) or (4)(b).

Competitive process for single sub-contracts

59. For the purposes of section 28, the award of a contract is the result of a competitive process if—

- (a) the contracting authority either—
 - (i) published a notice of intention to seek offers in relation to the provision of goods, works or services; or
 - (ii) invited one or more persons other than the sub-contractor, and not associated with the sub-contractor, to negotiate or provide offers in relation to the provision of goods, works or services;
- (b) the contracting authority conducted a transparent and arms-length procurement process;
- (c) the contracting authority used appropriate evaluation criteria to identify the offer made by the sub-contractor as the best offer;
- (d) the material terms of the contract are wholly or substantially the same as that best offer; and
- (e) at the time of making that offer, the sub-contractor did not consider it likely, or could not reasonably have considered it likely, that its offer would be the only offer reasonably capable of acceptance by the contracting authority.

Competitive process for sub-contracts made under a framework agreement

60.—(1) This regulation applies where the contracting authority—

- (a) has either—
 - (i) published a notice of intention to seek offers in relation to a proposed agreement or other arrangement (“framework agreement”) which establishes terms under which a person (a “framework contractor”) would enter into one or more contracts with the contracting authority in the period during which the framework agreement applies; or
 - (ii) invited two or more persons to negotiate or provide offers in relation to the terms of a proposed framework agreement;
- (b) has entered into a framework agreement with one or more framework contractors; and
- (c) enters into a contract with a framework contractor.

(2) For the purposes of section 28, the award of a contract is the result of a competitive process if—

- (a) the terms governing the price payable under the contract are determined by a framework agreement and the conditions in paragraph (3) are met; or
 - (b) the terms governing the price payable under the contract are determined by a competition between two or more framework contractors and the conditions in paragraph (4) are met.
- (3) The conditions mentioned in paragraph (2)(a) are—
- (a) the procurement process by which the contracting authority entered into the framework agreement with the sub-contractor—
 - (i) was transparent and arms-length; and

- (ii) used appropriate evaluation criteria to determine which sub-contractor or sub-contractors should be awarded a framework agreement;
 - (b) the material terms of the framework agreement are wholly or substantially the same as were offered by the sub-contractor—
 - (i) in a tender submitted in response to the notice mentioned in sub-paragraph (1)(a)(i); or
 - (ii) in negotiations following the invitation mentioned in sub-paragraph (1)(a)(ii);
 - (c) at the time of making that offer, the sub-contractor did not consider it likely, or could not have reasonably considered it likely, that its offer would be the only offer reasonably capable of acceptance by the contracting authority; and
 - (d) where this regulation applies by virtue of paragraph (1)(a)(ii), the persons mentioned in that paragraph included at least one person who was not the sub-contractor (or a person associated with the sub-contractor).
- (4) The conditions mentioned in paragraph (2)(b) are—
- (a) at least one of those framework contractors was not the sub-contractor (or a person associated with the sub-contractor);
 - (b) the competition—
 - (i) was transparent and arms-length; and
 - (ii) used appropriate evaluation criteria to identify the offer made by the sub-contractor as the best offer;
 - (c) the terms governing the price payable under the contract are wholly or substantially the same as were offered by the sub-contractor in that best offer; and
 - (d) at the time of making that offer, the sub-contractor did not consider it likely, or could not have reasonably considered it likely, that its offer in respect of the contract would be the only offer reasonably capable of acceptance by the contracting authority.

Assessing whether a contract would be a qualifying sub-contract

61.—(1) Where either—

- (a) a primary contractor (“A”) proposes to enter into a contract with another person (“B”), and the proposed contract involves the provision by B of anything for the purposes of a qualifying defence contract to which A is a party, or
- (b) a person (“C”) proposes to enter into a contract with another person (“D”), and the proposed contract involves the provision by D of anything for the purposes of a qualifying sub-contract to which C is a party,

A or C (as the case may be) must assess whether the proposed contract would be a qualifying sub-contract if it were entered into.

(2) A or C (as the case may be) must keep a record of the assessment for the purpose of its inclusion in the records which A or C (as the case may be) would be required by regulation 20 to keep if the contract were entered into.

(3) Where the assessment is that the proposed contract would be a qualifying sub-contract if it were entered into, A or C (as the case may be) must give notice in writing of that fact to the Secretary of State and to B or D (as the case may be).

(4) Where—

- (a) a person (“E”) proposes to enter into a qualifying defence contract or a qualifying sub-contract (“the proposed contract”),

- (b) E also proposes to enter into a contract (“the proposed sub-contract”) with another person (“F”), and
- (c) the proposed sub-contract involves the provision by F of anything for the purposes of the proposed contract,

E must assess whether the proposed sub-contract would be a qualifying sub-contract if it and the proposed contract were entered into.

(5) E must keep a record of the assessment for the purpose of its inclusion in the records which E would be required by regulation 20 to keep if the proposed contracts were entered into.

(6) Where the assessment is that the proposed sub-contract would be a qualifying sub-contract if it were entered into, E must give notice in writing of that fact to the Secretary of State and to F.

Appeal against assessment

62.—(1) Where an assessment is made under regulation 61(1) that a proposed contract would be a qualifying sub-contract if it were entered into, B or D (as the case may be) may appeal to the SSRO against the assessment.

(2) Where an assessment is made under regulation 61(4) that a proposed sub-contract would be a qualifying sub-contract if it and the proposed contract were entered into, F may appeal to the SSRO against the assessment.

(3) No appeal may be brought—

- (a) under paragraph (1) after the proposed contract is entered into;
- (b) under paragraph (2) after the proposed sub-contract is entered into.

(4) An appeal must be commenced by a written notice (“notice of appeal”) containing the following information—

- (a) the name and contact details of the person bringing the appeal;
- (b) if the person bringing the appeal is a company, its registered name and company number, and the address of its registered office;
- (c) the name and contact details of the person which made the assessment;
- (d) if the person which made the assessment is a company, its registered name and company number, and the address of its registered office; and
- (e) the grounds for the appeal.

(5) A notice of appeal must be—

- (a) accompanied by a copy of the notice of assessment given under regulation 61(3) or (6);
- (b) received by the SSRO no later than six months after the person bringing the appeal received the notice of assessment; and
- (c) copied to the person which made the assessment and to the Secretary of State at the same time that it is sent to the SSRO.

(6) The Secretary of State or the person which made the assessment may, within 20 working days of receipt of the copy of the notice of appeal, make a written submission to the SSRO on any matters to which they wish the SSRO to have regard in determining the appeal.

(7) Within 40 working days of receiving the notice of appeal, the SSRO must—

- (a) determine the appeal; and
- (b) notify in writing its determination to—
 - (i) the person bringing the appeal;
 - (ii) the person which made the assessment; and

(iii) the Secretary of State.

Cessation of application to qualifying sub-contracts

63.—(1) If a sub-contractor is of the opinion—

- (a) that neither the condition in regulation 58(3) nor the condition in regulation 58(4) is now met in relation to the qualifying sub-contract, and
- (b) that Part 2 of the Act, and these Regulations, should therefore cease to apply to that qualifying sub-contract,

it may give the SSRO notice to that effect.

(2) A notice under paragraph (1) must—

- (a) be received by the SSRO no later than the contract completion date of the qualifying sub-contract;
- (b) be in writing;
- (c) state the date at which the sub-contractor believes that neither the condition in regulation 58(3) nor the condition in regulation 58(4) were met in relation to the qualifying sub-contract;
- (d) explain the sub-contractor's reasons for that view; and
- (e) be copied to the other party to the qualifying sub-contract and the Secretary of State at the same time that it is sent to the SSRO.

(3) The other party to the qualifying sub-contract or the Secretary of State may, within ten working days of receiving a copy of the notice, advise the SSRO in writing of any matters to which they consider the SSRO should have regard in deciding whether to overrule the notice.

(4) The SSRO must consider the notice and any matters to which the other party to the qualifying sub-contract or the Secretary of State have advised that it should have regard.

(5) If the SSRO does not agree that neither the condition in regulation 58(3) nor the condition in regulation 58(4) is met, it must overrule the notice.

(6) If the SSRO agrees that neither the condition in regulation 58(3) nor the condition in regulation 58(4) is met, it must—

- (a) confirm the date on which neither the condition in regulation 58(3) nor the condition in regulation 58(4) were met in relation to the qualifying sub-contract; and
- (b) confirm that Part 2 of the Act, and these Regulations, no longer apply to that qualifying sub-contract.

(7) The SSRO must—

- (a) notify the sub-contractor, the other party to the qualifying sub-contract and the Secretary of State in writing of its decision;
- (b) if the effect of the fact that Part 2 of the Act and these Regulations have ceased to apply to the qualifying sub-contract is that any other contract may also cease to be a qualifying sub-contract, notify the parties to that other qualifying sub-contract in writing of its decision.

Modifications of Part 2 of the Act

64.—(1) In their application to qualifying sub-contracts (and to sub-contractors) by virtue of section 30(1), the following provisions of Part 2 of the Act are modified as described in this regulation.

(2) Section 16(2)(a) has effect as if for “between the Secretary of State, or an authorised person, and the primary contractor” there were substituted “between the contracting authority and the sub-contractor”.

(3) Section 16(2)(b) has effect as if for “or the primary contractor” there were substituted “,the contracting authority or the sub-contractor”.

(4) Section 17(4)(a) has effect as if for “by the Secretary of State, or an authorised person, and the primary contractor” there were substituted “by the contracting authority and the sub-contractor”.

(5) Section 18(1) has effect as if for “The Secretary of State or an authorised person, and the primary contractor” there were substituted “The contracting authority and the sub-contractor”.

(6) Section 21(5) (direction excluding final price adjustment) does not apply.

(7) Section 35(1) has effect as if—

(a) the contracting authority (in the case of a qualifying sub-contract), and

(b) the person who proposes to enter into the qualifying sub-contract,

were persons mentioned in section 35(2).

(8) Section 35(3)(b) has effect as if for “other proposed party to the contract” there were substituted “proposed sub-contractor”;

(9) Section 35(4)(a) has effect as if for “by one party to the contract to the other” there were substituted “by the sub-contractor to the Secretary of State, or by the Secretary of State to the sub-contractor”;

(10) Section 35(4)(b) has effect as if for that subsection there were substituted—

“(b) in the case of a proposed qualifying sub-contract—

(i) by the proposed sub-contractor to the Secretary of State; or

(ii) by the Secretary of State to the proposed sub-contractor.”

(11) Section 43(1) has effect as if after the definition of “authorised person” there were inserted—

“contracting authority” means the party which is, or would be, liable to pay the contract price under a qualifying sub-contract.”

Modifications of these Regulations

65.—(1) In their application to qualifying sub-contracts (and to sub-contractors) by virtue of section 30(1), these Regulations are modified as described in this regulation.

(2) Regulation 2(1) has effect as if after the definition of “contract completion date” there were inserted—

“contracting authority” means the party which is, or would be, liable to pay the contract price under a qualifying sub-contract.”

(3) Part 2 (qualifying defence contracts) does not apply.

(4) Regulation 11 (steps in determining profit rate) has effect as if—

(a) in paragraph (6), for each “Secretary of State” there were substituted “contracting authority”;

(b) in paragraph (8), for “Secretary of State” there were substituted “contracting authority”.

(5) Regulation 12 (calculation of POCO) has effect as if in paragraphs (2) and (3) for “Secretary of State” there were substituted “contracting authority”.

(6) Regulation 13 (rates agreed on a group basis) does not apply.

(7) Regulation 14(1) (re-determination of contract price) has effect as if for “Secretary of State” there were substituted “contracting authority”.

- (8) Regulation 16 (final price adjustment) has effect as if—
 - (a) in paragraph (1)—
 - (i) for “£5,000,000” there were substituted “£50,000,000”;
 - (ii) for “Secretary of State” there were substituted “contracting authority”;
 - (b) paragraphs (2) and (3) were omitted.
- (9) Regulation 18 (determination of contract profit rate adjustments) has effect as if—
 - (a) in paragraph (1), the words “(including an adjustment agreed on a group basis under regulation 13)” were omitted;
 - (b) in paragraph (5), for the words “the contract price is to be adjusted by a specified amount” there were substituted “a payment of a specified amount must be made to or by the Secretary of State”.
- (10) In regulation 22 (general requirements and interpretation), sub-paragraphs (2)(a)(iii) and (2)(e) do not apply.
- (11) Regulation 23 (contract pricing statement) has effect as if in sub-paragraph (2)(e)(ii) for “by the Secretary of State” there were substituted “by either the contracting authority or the Secretary of State”.
- (12) In regulation 25 (contract notification report), sub-paragraphs (2)(g) to (i) do not apply.
- (13) In regulation 27 (interim contract report), sub-paragraphs (4)(j) to (l) do not apply.
- (14) In regulation 28 (contract completion report), sub-paragraphs 2(l) to (n) do not apply.