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SCOTTISH STATUTORY INSTRUMENTS

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**2006 No. 2**

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

**PART 8**

**MISCELLANEOUS**

**Preservation of records**

**37.**—(1) When these Regulations apply to the seeking of offers in relation to a contract, a utility shall keep appropriate information on each contract sufficient to justify decisions taken in connection with—

- (a) the qualification and selection of economic operators and the award of contracts; and
- (b) the use of a procedure without a prior call for competition by virtue of regulation 17.

(2) When a utility decides not to apply these Regulations to the seeking of offers in relation to a contract in accordance with regulation 6, 7, 8, 9 or 11, it shall keep appropriate information on such a contract sufficient to justify that decision.

(3) A utility shall take appropriate steps to document the progress of contract award procedures conducted by electronic means.

(4) The information referred to in paragraphs (1), (2) and (3) shall be preserved for at least 4 years from the date of the award of the contract.

**Statistical and other reports**

**38.**—(1) A utility shall each year, by the date notified to it by the Minister, send to the Minister a report specifying

- (a) the aggregate value (estimated if necessary) of the consideration payable under contracts awarded in the previous year which have been excluded from the operation of these Regulations by regulation 11 for the purpose of carrying out the activities in each Part of Schedule 1 in which the utility is specified; and
- (b) the type of activities for which those contracts were awarded.

(2) A utility when requested shall for the purpose of informing the Commission send to the Minister a report—

- (a) containing such information as the Minister may from time to time require in respect of a particular contract (including contracts excluded or exempted from the application of all or some of these Regulations by regulation 6, 7, 8, 9 or 11);
- (b) specifying which of its activities it considers are not activities specified in the Part of Schedule 1 in which the utility is specified, or are activities outside the territory of the Communities not involving the physical use of a network or geographical area within the Communities; and
- (c) specifying the categories of goods, work, works or services it considers comprise the goods, work, works or services which it acquires in order to sell, hire or provide them

to another person, but which it does not have a special or exclusive right to sell, hire or provide and which other persons are free to sell, hire or provide under the same conditions.

(3) Subject to paragraph (4), a utility specified in Parts A to F, O, P, R or S of Schedule 1 shall, not later than 31st July in each year, send to the Minister a report specifying in relation to each contract awarded by it in the previous year (including contracts excluded or exempted from the application of some or all of these Regulations by regulation 6, 7, 8, 9 or 11)–

- (a) the value (estimated if necessary) of the consideration payable under the contract;
- (b) the principal category of works or services carried out or to be carried out under the contract according to the nomenclature used in Schedule 2 or 3 or the type of goods purchased or hired under the contract; and
- (c) the nationality of the economic operator to which the contract was awarded and the relevant State in which that economic operator is established.

(4) The report referred to in paragraph (3) need not include information concerning contracts for–

- (a) research and development services specified in category 8 of Part A of Schedule 3;
- (b) telecommunications services specified under CPV references 64200000-8 to 64228200-2, 72318000-7, and from 72530000-9 to 72532000-3 within category 5 of Part A of Schedule 3; or
- (c) the services specified in Part B of Schedule 3.

(5) A utility may indicate that any of the information in a report sent to the Minister in accordance with paragraph (2)(c) is of a sensitive commercial nature, and require that it not be published.

### **Provision of reports**

**39.**—(1) Any reference to the Minister in these Regulations shall be deemed to be a reference to the Minister responsible for that utility.

(2) The Minister responsible for a utility shall be in relation to Scotland the Scottish Ministers or the Minister of the Crown whose areas of responsibility are most closely connected with the functions of the utility.

(3) Any question as to which Minister of the Crown's areas of responsibility are most closely connected with the functions of a utility shall be determined by the Office of Government Commerce whose determination shall be final.

(4) The requirement on a utility to send any report in accordance with regulation 7(7), 8(3)(b)(ii)(aa), 30(9) or 38 to the Minister shall be enforceable, on the application of the Minister responsible to the High Court, by mandatory order, or on the application of the Scottish Ministers to the Court of Session, by specific implement.

(5) The Minister to whom a report is sent in accordance with regulation 7(7), 8(3)(b)(ii)(aa), 30(9) or 38 shall send the report to the Office of Government Commerce for onward transmission to the Commission.

### **Publication of notices**

**40.**—(1) Any notice required by these Regulations to be sent to the Official Journal shall be–

- (a) in the correct format and contain the necessary information specified by Commission Regulation EC (No. 1564/2005) and contain any other information which the utility considers useful; and
- (b) sent to the Office for Official Publications of the European Union by electronic means in the format and in accordance with the procedures specified in paragraph (3) of Annex XX to the Utilities Directive or by other means.

(2) Where a notice is not sent by electronic means in accordance with paragraph (1)(b), the utility may in exceptional cases request the Official Journal to publish a contract notice within 5 days of the date of despatch, provided that the notice is sent to the Official Journal by facsimile.

(3) The utility shall not place a notice in any publication—

- (a) before the date on which the notice is despatched in accordance with paragraph (1)(b); or
- (b) which contains any additional information to that contained in the notice despatched in accordance with paragraph (1)(b) or published on the utility's buyer profile in accordance with regulation 15.

(4) The utility shall refer in the notice to the date of despatch of that notice to the Official Journal or the date of its publication on its buyer profile where it publishes a notice in the circumstances referred to in paragraph (3).

(5) A utility shall not publish a periodic indicative notice on its buyer profile before the date on which notice of its publication in that form is despatched to the Commission in accordance with regulation 15(3) and the utility shall refer to the date of that despatch on its buyer profile.

(6) A utility shall retain evidence of the date of despatch to the Official Journal of each notice.

(7) When a utility is not required to publish a contract notice in respect of a particular contract, it may nevertheless publish such a notice in accordance with the provisions of this regulation.

### **Confidentiality of information**

**41.**—(1) A utility which makes information available to an economic operator in accordance with these Regulations may impose requirements on that operator for the purpose of protecting the confidentiality of that information.

(2) Subject to the provisions of these Regulations, the utility shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.

(3) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders.

### **Means of communication**

**42.**—(1) A utility may specify that any communications referred to in these Regulations may be made—

- (a) by post;
- (b) by facsimile;
- (c) by electronic means in accordance with paragraphs (4) and (5);
- (d) by telephone in the circumstances referred to in paragraph (8); or
- (e) by a combination of the means of communication.

(2) The means of communication specified by a utility shall be generally available and shall not restrict economic operators' access to the contract award procedures specified in these Regulations.

(3) A utility shall ensure that the specified means of communication and the storage of information enables—

- (a) the integrity of data provided by economic operators and the confidentiality of tenders and requests to be selected to tender for or to negotiate the contract to be maintained; and
- (b) tenders and requests to be selected to tender for or to negotiate the contract to be opened only after the time limit for their submission has expired.

(4) The equipment used for communications made by electronic means shall be—

- (a) non-discriminatory;
  - (b) generally available; and
  - (c) interoperable with information and communication technology products in general use.
- (5) Where a utility requires that tenders and requests to be selected to tender for or to negotiate the contract are to be received by electronic means, it shall ensure that–
- (a) details of the equipment including any software which is necessary for the electronic receipt of tenders and requests to be selected to tender for or to negotiate the contract, including encryption, are available to all interested economic operators; and
  - (b) the equipment for the electronic receipt of tenders and requests to be selected to tender for or to negotiate the contract complies with the requirements of paragraph (6).
- (6) The requirements referred to in paragraph (5)(b) are–
- (a) electronic signatures relating to tenders and requests to participate comply with national provisions adopted in accordance with Directive 1999/93/EC of the European Parliament and of the Council of 13th December 1999 on a Community framework for electronic signatures<sup>(1)</sup>;
  - (b) the exact time and date of the receipt of tenders and requests to participate are capable of being determined precisely;
  - (c) it may reasonably be considered that–
    - (i) data is not capable of being accessed before the time limits specified by the utility; and
    - (ii) any such unauthorised access is clearly detectable;
  - (d) only authorised persons shall set or change the dates for opening data received from economic operators;
  - (e) access to any data is possible only through simultaneous action by authorised persons and only after the prescribed date; and
  - (f) data received and opened in accordance with these requirements must remain accessible only to authorised persons.
- (7) A utility may require any documents, certificates and declarations referred to in regulations 24(2), (3), 25, 26 and 27 which do not exist in electronic format to be submitted before the time limit has expired for the receipt by it of tenders or requests to be selected to tender for or to negotiate the contract.
- (8) Requests to be selected to tender for or to negotiate the contract may be made–
- (a) in writing; or
  - (b) by telephone.
- (9) Where a request to be selected to tender for or to negotiate the contract is made by telephone, an economic operator shall confirm the request in writing before the deadline for receipt of such requests has expired.
- (10) Where a request to be selected to tender for or to negotiate the contract is made by facsimile, a utility–
- (a) may require that the request be confirmed by post or by electronic means where this is necessary for the purposes of legal proof; and
  - (b) shall specify any requirement for such confirmation and the time limit for sending it in the notice used as a means of calling for competition or in the invitation referred to in regulation 16(3)(b).

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(1) O.J. No. L 13, 19.1.2000, p.12.

### **Sub contracting**

- 43.** A utility may require an economic operator to indicate in its tender–
- (a) any part of the contract that the economic operator intends to sub contract to another person; and
  - (b) the identity of any person to whom that economic operator proposes to sub contract any part of the contract.

### **Attestation**

**44.—(1)** A utility which has recourse to an attestation system and obtains an attestation in accordance with Articles 4 and 5 of the Utilities Remedies Directive from an independent person or body accredited in a relevant State for the purpose of attestation in accordance with Article 6 of that Directive may include the following statement in a notice sent to the Official Journal for publication in accordance with regulations 15, 16(2)(b), 25(17) and 32(1)–

“The contracting entity has obtained an attestation in accordance with Council Directive [92/13/EC](#) that, on ... .. , its contract award procedures and practices were in conformity with Community law and the national rules implementing that law.”.

(2) An attestation system established in a relevant State in accordance with the European Attestation Standard<sup>(2)</sup> is presumed to be in accordance with Articles 4 to 6 of the Utilities Remedies Directive.

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(2) The European Attestation Standard EN 45503: 1996D for the assessment of contract award procedures and practices of entities operating in the water, energy and transport sectors was prepared under the mandate of the Commission of the European Communities and of the European Free Trade Association.