
SCOTTISH STATUTORY INSTRUMENTS

2012 No. 88

The Public Contracts (Scotland) Regulations 2012

PART 3

PROCEDURES LEADING TO THE AWARD OF A PUBLIC CONTRACT

The competitive dialogue procedure

18.—(1) In this regulation—

“particularly complex contract” means a contract where a contracting authority is not objectively able to—

- (a) define the technical means in accordance with regulation 9(7), (8) and (9) capable of satisfying its needs or objectives; or
- (b) specify either the legal or financial make-up of a project or both; and

“participant” means an economic operator selected by a contracting authority using the procedure referred to in paragraph (2) to participate in the competitive dialogue procedure.

(2) Where a contracting authority wishes to award a particularly complex contract and considers that the use of the open or restricted procedure will not allow the award of that contract, the contracting authority may use the competitive dialogue procedure.

(3) A contracting authority using the competitive dialogue procedure must comply with the following paragraphs of this regulation.

(4) The contracting authority must publicise its intention to seek offers in relation to the public contract by sending to the Official Journal, as soon as possible after forming the intention a notice, in the form of a contract notice in Annex II to [Commission Regulation \(EC\) No 1564/2005\(1\)](#), inviting requests to participate and containing the information therein specified.

(5) The contracting authority must specify its needs and requirements in the contract notice and must define those needs and requirements—

- (a) in the contract notice;
- (b) in the descriptive document; or
- (c) in both those documents.

(6) The contracting authority must indicate that it may provide for the competitive dialogue procedure to take place in successive stages in accordance with paragraph (23)—

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

(7) Subject to paragraph (9), the date which the contracting authority must fix as the last date for the receipt by it of requests to be selected to participate must be specified in the contract notice and must be not less than 37 days from the date of the dispatch of the notice.

(1) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

(8) Subject to any minimum time limit specified by this regulation, the contracting authority must take account of all the circumstances, in particular, the complexity of the contract when fixing time limits for the receipt by it of requests to be selected to participate in the dialogue.

(9) Where the contracting authority has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VIII to the Public Sector Directive, the time limit referred to in paragraph (7) may be reduced by 7 days.

(10) The contracting authority must make its evaluation in accordance with regulations 23 to 26 and may exclude an economic operator from those economic operators from which it will make the selection of economic operators to be invited to participate in the dialogue only if the economic operator—

- (a) may be treated as ineligible on a ground specified in regulation 23; or
- (b) fails to satisfy the minimum standards required of economic operators by the contracting authority of—
 - (i) economic and financial standing; or
 - (ii) technical or professional ability.

(11) The contracting authority must make the selection of the economic operators to be invited to participate in the dialogue in accordance with regulations 23 to 26.

(12) Where there is a sufficient number of economic operators suitable to be selected to participate in the dialogue, the contracting authority may limit the number of economic operators which it intends to invite to participate in the dialogue provided that the contract notice specifies—

- (a) the objective and non-discriminatory criteria to be applied in order to limit the number of economic operators in accordance with this paragraph; and
- (b) the minimum number of economic operators, which must be not less than 3, which the contracting authority intends to invite to participate in the dialogue and, where appropriate, the maximum number.

(13) The contracting authority must ensure that the number of economic operators invited to participate in the dialogue is—

- (a) sufficient to ensure genuine competition; and
- (b) at least equal to the minimum number set by the contracting authority in accordance with paragraph (12)(b).

(14) Subject to paragraph (13)(a), where—

- (a) the contracting authority carries out a selection in accordance with regulations 23 to 26; and
- (b) the number of economic operators selected to be invited to participate in the dialogue is less than the minimum number specified by the contracting authority in the contract notice, that contracting authority may continue the award procedure with the economic operators which have been selected, provided that any economic operator not selected or which did not request to participate is not included.

(15) The contracting authority may require an economic operator to satisfy minimum levels of—

- (a) economic and financial standing; and/or
- (b) technical or professional ability,
 - provided that those minimum levels are specified in the contract notice and are related to and proportionate to the subject matter of the contract.

(16) The contracting authority must send invitations in writing simultaneously to each economic operator selected to participate in the dialogue and the invitation must—

- (a) be accompanied by the contract documents;
 - (b) specify the internet address which offers unrestricted and full direct access by electronic means to the contract documents; or
 - (c) where the contract documents are held by an entity other than the contracting authority, specify the address to which requests for contract documents should be sent including any final date for making such requests and the amount and any method of payment of any fee which may be charged for supplying that information.
- (17) Where the contract documents are held by an entity other than the contracting authority, the contracting authority must ensure that the contract documents are sent to economic operators by the most rapid means of communication possible.
- (18) The contracting authority must include the following information in the invitation—
- (a) the date specified for the commencement of the competitive dialogue, the address to which replies must be sent and the one or more languages in which they must be drawn up;
 - (b) a reference to the contract notice published in accordance with paragraph (4);
 - (c) an indication of the information to be included with the reply which the contracting authority may require to be provided in accordance with regulations 24, 25 and 26; and
 - (d) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice published in accordance with paragraph (4).
- (19) The contracting authority or entity referred to in paragraph (16)(c) must supply such further information to the economic operator relating to the contract documents or the descriptive document as may reasonably be requested by that economic operator provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than 6 days before the date specified in the invitation to tender as the final date of the receipt by it of tenders.
- (20) The contracting authority must by notice in writing as soon as reasonably practicable after sending the invitations referred to in paragraph (16), inform any candidates that have not been selected to be invited to participate in the dialogue that they have been unsuccessful.
- (21) The contracting authority must open with the participants selected in accordance with regulations 23 to 26 a dialogue the aim of which is to identify and define the means best suited to satisfying its needs.
- (22) During the competitive dialogue procedure, a contracting authority—
- (a) may discuss all aspects of the contract with the participants selected;
 - (b) must ensure equality of treatment among all participants and, in particular, must not provide information in a discriminatory manner which may give some participants an advantage over others; and
 - (c) must not reveal to the other participants solutions proposed or any confidential information communicated by a participant without that participant's agreement.
- (23) The contracting authority may provide for the competitive dialogue procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or in the descriptive document.
- (24) Where the contracting authority provides for the competitive dialogue procedure to take place in successive stages in accordance with paragraph (23), it must—
- (a) ensure that the number of economic operators to be invited to participate at the final stage is sufficient to ensure genuine competition to the extent that there is a sufficient number of economic operators to do so; and

- (b) by notice in writing as soon as reasonably practicable after reducing the number of solutions to be discussed, inform the affected economic operators that they have been excluded from the competition.
- (25) The contracting authority may continue the competitive dialogue procedure until it can identify one or more solutions, if necessary after comparing them, capable of meeting its needs.
- (26) Where the contracting authority declares that the dialogue is concluded, it must—
 - (a) inform each participant that the dialogue is concluded;
 - (b) request each participant to submit a final tender containing all the elements required and necessary for the performance of the project on the basis of any solution presented and specified during the dialogue; and
 - (c) specify in the invitation to submit a tender the final date for the receipt by it of tenders, the address to which they must be sent and the language or languages in which they must be drawn up.
- (27) The contracting authority may request a participant to clarify, specify or fine-tune a tender referred to in paragraph (26)(b), but such clarification, specification, fine-tuning or additional information must not involve changes to the basic features of the tender or the call for tender when those variations are likely to distort competition or have a discriminatory effect.
- (28) The contracting authority must assess the tenders received on the basis of the award criteria specified in the contract notice or descriptive document and must award the contract to the participant which submits the most economically advantageous tender in accordance with regulation 30(1)(a).
- (29) The contracting authority may request the participant identified as having submitted the most economically advantageous tender to clarify aspects of that tender or confirm commitments contained in the tender provided that this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.
- (30) The contracting authority may specify that payments may be made to a participant in respect of the participant's expenses incurred in participating in the competitive dialogue procedure.