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SCOTTISH STATUTORY INSTRUMENTS

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**2012 No. 89**

**The Utilities Contracts (Scotland) Regulations 2012 (revoked)**

**PART 4**

**QUALIFICATION AND SELECTION OF ECONOMIC OPERATORS**

**General**

**23.**—(1) Where a utility establishes criteria for the rejection of economic operators in accordance with regulation 26(1), 26(3), 27(1) or 27(2), it must exclude any economic operator which meets those criteria when making its selection of the economic operators to be awarded a contract, to be invited to tender for, or to negotiate the contract.

(2) A utility must make its selection of the economic operators to be awarded a contract, to be invited to tender for, or to negotiate the contract in accordance with the selection criteria established by it in accordance with regulations 26 and 27.

(3) A utility using the restricted or negotiated procedure with a call for competition must reduce, where appropriate and in accordance with regulation 27, the number of economic operators selected in accordance with paragraphs (1) and (2) of this regulation.

(4) Where a utility makes a call for competition in respect of a contract by publishing a notice on the existence of a qualification system, when making its selection of the economic operators to be invited to tender for or to negotiate that contract, the utility must—

- (a) qualify economic operators in accordance with regulation 25; and
- (b) apply the provisions of paragraphs (1), (2) and (3) which are relevant to the restricted procedure or the negotiated procedure to such qualified economic operators.

(5) A utility must verify that the tenders submitted by the economic operators which have been selected by the utility comply with the rules and requirements applicable to tenders and must award the contract on the basis of the criteria referred to in regulation 30.

**Mutual recognition concerning administrative, technical or financial conditions**

**24.**—(1) When using the negotiated procedure or the restricted procedure and in determining what rules and criteria are to be met by economic operators to be invited to tender for, or to negotiate, a contract or to qualify under a qualification system, a utility must not—

- (a) impose conditions of an administrative, technical or financial nature on some economic operators which are not imposed on others; or
- (b) require tests or the submission of evidence which duplicates objective evidence already available.

(2) For the purpose of assessing an economic operator's technical ability, a utility may request that economic operator to provide—

- (a) a certificate—

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- (i) attesting its conformity to quality assurance standards based on the relevant European standard; and
  - (ii) from an independent body established in any relevant State conforming to the European standard concerning certification; or
  - (b) any other evidence of its conformity to quality assurance measures which are equivalent to the standards referred to in sub-paragraph (a)(i).
- (3) Where the contract to be awarded is a works contract or a services contract, for the purposes of verifying the economic operator's technical abilities, a utility may, where appropriate, request an indication of the environmental management measures which the economic operator will apply when performing the contract and a utility may request that economic operator to provide—
- (a) a certificate—
    - (i) attesting its conformity to environmental management standards based on—
      - (aa) the Community Eco-Management and Audit Scheme <sup>M1</sup>; or
      - (bb) the relevant European standard or international standard; and
    - (ii) from an independent body established in any relevant State conforming to EU law or the relevant European standard or international standard concerning certification; or
  - (b) any other evidence of its conformity to environmental management measures which are equivalent to the standards referred to in sub-paragraph (a)(i).

#### **Marginal Citations**

**M1** The Community Eco-Management and Audit Scheme (EMAS) is a management tool for companies and other organisations to evaluate, report and improve their environmental performance; for more information, see [www.europa.eu.int/comm/environment/emas/index-en.htm](http://www.europa.eu.int/comm/environment/emas/index-en.htm).

#### **Qualification system**

**25.**—(1) A utility may establish and operate a system of qualification of economic operators if that system complies with this regulation.

(2) The utility must permit economic operators to apply for qualification under the system at any time during its operation.

(3) The system may involve different stages of qualification and must be based on objective rules and criteria as determined from time to time by the utility and those criteria and rules may include technical specifications in which case the provisions of regulation 12 apply.

(4) The rules and criteria referred to in paragraph (3) may include the rejection criteria referred to in regulation 26(3) and (5).

(5) Where the utility is a contracting authority, the rules and criteria referred to in paragraph (3) include the rejection criteria referred to in regulation 26(1).

(6) Where the criteria referred to in paragraph (3) includes requirements relating to the economic and financial capacity or the technical or professional abilities of an economic operator—

- (a) the economic operator, or a group of economic operators as referred to in regulation 28, may rely on the capacity or abilities of other entities or members in the group, whatever the legal nature of the link between the economic operator or the group of economic operators and the other entities; and

- (b) the economic operator or the group of economic operators must prove to the utility that the necessary resources will be available to it, and such proof may in particular include an undertaking from those entities to that effect.
- (7) In determining what rules and criteria are to be met by applicants to qualify under the system a utility must comply with regulation 24.
- (8) Where the utility makes a call for competition in respect of a contract by publishing a notice on the existence of a qualification system, it must comply with regulation 23(4).
- (9) The rules of, and criteria applying to, the system must be made available on request to economic operators and any amendment of those rules and criteria must be sent to them as the amendment is incorporated into the system.
- (10) The utility may establish a system of qualification where an economic operator may qualify under the system of, or be certified by, another person, and in those circumstances the utility must inform economic operators, which apply to qualify, of the name of that other person.
- (11) The utility must inform applicants for qualification of the success or failure of their application within 6 months from the date of presentation of an application and, if the decision will take longer than 4 months, the utility must inform the applicant, within 2 months of the date of presentation of the application of—
- (a) the reasons justifying a longer period; and
  - (b) the date by which its application will be accepted or refused.
- (12) The utility must inform any applicant whose application to qualify is refused of the decision, and the reasons for refusal, as soon as possible and under no circumstances later than 15 days after the date of the decision.
- (13) An application may only be refused if the applicant fails to meet the requirements for qualification laid down in accordance with paragraph (3).
- (14) The utility must keep a written record of qualified economic operators which may be divided into categories according to the type of contract for which the qualification is valid.
- (15) The utility may cancel the qualification of an economic operator which has qualified under the qualification system only if it does not continue to meet the rules and criteria laid down in accordance with paragraph (3).
- (16) The utility may not cancel a qualification unless it notifies the economic operator in writing at least 15 days before the qualification is due to be cancelled of the reasons for the proposed cancellation.
- (17) The utility must send a notice in the form of the qualification system notice in Annex VII to Commission Regulation (EC) No 1564/2005<sup>M2</sup> and containing the information relating to the qualification system therein specified to the Official Journal when the system is first established.
- (18) If the utility expects to operate the system for more than 3 years, or if it has operated the system for more than 3 years, it must send a notice as referred to in paragraph (17) on an annual basis after the year in which the system is first established.

#### **Marginal Citations**

- M2** 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.

**Criteria for rejection of economic operators**

26.—(1) Subject to paragraph (2), where a utility is a contracting authority, it must treat as ineligible and must not select an economic operator in accordance with these Regulations if the utility has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences—

- (a) the common law offence of conspiracy where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA<sup>M3</sup> or an offence under sections 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010<sup>M4</sup>;
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889<sup>M5</sup> or section 1 of the Prevention of Corruption Act 1906<sup>M6</sup>, where the offence relates to active corruption as defined in Article 3 of the Council Act of 26th May 1997<sup>M7</sup> and Article 3(1) of Council Joint Action 98/742/JHA<sup>M8</sup>;
- (c) bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003<sup>M9</sup> where the offence relates to active corruption, or bribery within the meaning of sections 1 or 6 of the Bribery Act 2010<sup>M10</sup>;
- (d) fraud, where the offence relates to fraud affecting the financial interests of the European Communities as defined by Article 1 of the Convention relating to the protection of the financial interests of the European Communities<sup>M11</sup>, within the meaning of—
  - (i) the offence of cheating the Revenue;
  - (ii) the common law offence of fraud;
  - (iii) the common law offence of theft;
  - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985<sup>M12</sup> or section 993 of the Companies Act 2006<sup>M13</sup>;
  - (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979<sup>M14</sup> or section 72 of the Value Added Tax Act 1994<sup>M15</sup>;
  - (vi) an offence in connection with taxation in the European Community within the meaning of section 71 of the Criminal Justice Act 1993<sup>M16</sup>;
  - (vii) the common law offence of uttering; or
  - (viii) the common law offence of attempting to pervert the course of justice;
- (e) the common law offence of incitement to commit a crime;
- (f) money laundering within the meaning of section 340(11) of the Proceeds of Crime Act 2002<sup>M17</sup> or the Money Laundering Regulations 2007<sup>M18</sup>, or an offence in connection with proceeds of drug trafficking within the meaning of sections 49, 50 or 51 of the Drug Trafficking Act 1994<sup>M19</sup>; or
- (g) any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant State.

(2) In any case where an economic operator or its directors or any other person who has powers of representation, decision or control has been convicted of an offence described in paragraph (1), a utility may disregard the prohibition described there if it is satisfied that there are overriding requirements in the general interest which justify doing so in relation to that economic operator.

(3) Where a utility is not a contracting authority, the criteria which the utility uses for deciding not to select an economic operator may include the fact that the economic operator or its directors

or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the offences in paragraph (1).

(4) A utility may apply to the relevant competent authority to obtain further information regarding the economic operator and, in particular, details of convictions of the offences listed in paragraph (1) if it considers it needs such information to decide on any exclusion referred to in paragraphs (1) and (3).

(5) A utility may treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator—

- (a) being an individual is a person in respect of whom a debt relief order has been made or is bankrupt or has had a receiving order or administration order or bankruptcy restrictions order or debt relief restrictions order made against that economic operator or has made any composition or arrangement with, or for the benefit of, that economic operator's creditors or has made any conveyance or assignment for the benefit of that economic operator's creditors or appears unable to pay, or to have no reasonable prospect of being able to pay, a debt within the meaning of section 268 of the Insolvency Act 1986 <sup>M20</sup>, or article 242 of the Insolvency (Northern Ireland) Order 1989 <sup>M21</sup>, or in Scotland has granted a trust deed for creditors or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of that economic operator's estate, or is the subject of any similar procedure under the law of any other State;
- (b) being a partnership constituted under Scots law has granted a trust deed or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate;
- (c) being a company or any other entity within the meaning of section 255 of the Enterprise Act 2002 <sup>M22</sup> has passed a resolution or is the subject of an order by the court for the company's winding up otherwise than for the purpose of bona fide reconstruction or amalgamation, or has had a receiver, manager or administrator on behalf of a creditor appointed in respect of the company's business or any part thereof or is the subject of the above procedures or is the subject of similar procedures under the law of any other State;
- (d) has been convicted of a criminal offence relating to the conduct of that economic operator's business or profession;
- (e) has committed an act of grave misconduct in the course of that economic operator's business or profession;
- (f) has not fulfilled obligations relating to the payment of social security contributions under the law of any part of the United Kingdom or of the relevant State in which the economic operator is established;
- (g) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom or of the relevant State in which the economic operator is established; or
- (h) is guilty of serious misrepresentation in providing any information referred to in this regulation or regulation 24 to 27 or has not provided such information in response to a request of a contracting authority.

(6) A utility may require an economic operator to provide such information as it considers it needs to make the evaluation in accordance with paragraphs (1), (3) and (5) except that it must accept as conclusive evidence that an economic operator does not fall within the grounds specified in paragraphs (1), (3), (5)(a), (b), (c), (d), (f) or (g) if that economic operator provides to the utility—

- (a) in relation to the grounds specified in paragraphs (1), (3), (5)(a), (b), (c) or (d)—
  - (i) an extract from the judicial record; or

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- (ii) in a relevant State which does not maintain such a judicial record, a document issued by the relevant judicial or administrative authority;
- (b) in relation to the grounds specified in paragraphs (5)(f) or (g), a certificate issued by the relevant competent authority; and
- (c) in a relevant State where the documentary evidence specified in paragraphs (6)(a) and (b) is not issued in relation to one of the grounds specified in paragraphs (1), (3),(5) (a), (b), (c), (d), (f) or (g) a declaration on oath made by the economic operator before the relevant judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths.

(7) In this regulation, “relevant” in relation to a judicial, administrative or competent authority, notary public or Commissioner for oaths means an authority nominated by, or a notary public or Commissioner for oaths in, the relevant State in which the economic operator is established.

#### Marginal Citations

- M3** OJ L 300, 11.11.2008, p.42.
- M4** 2010 asp 13.
- M5** 1889 c.69. This Act was repealed by Schedule 2 to the [Bribery Act 2010 \(c.23\)](#).
- M6** 1906 c.34. Section 1 was amended by section 47(2) and (3) of the [Criminal Justice Act 1988 \(c.33\)](#), [section 108\(2\)](#) of the Anti-terrorism, Crime and Security Act 2001(c.24) and section 68(2) of the [Criminal Justice \(Scotland\) Act 2003 \(asp 7\)](#) and repealed by Schedule 2 to the [Bribery Act 2010 \(c.23\)](#).
- M7** OJ C 195, 25.6.1997, p.2.
- M8** OJ L 358, 31.12.1998, p.2; repealed by Council Framework Decision 2003/568/JHA (OJ L 192, 31.7.2003, p.54).
- M9** 2003 asp 7. Sections 68 and 69 were repealed by Schedule 2 to the [Bribery Act 2010 \(c.23\)](#).
- M10** 2010 c.23.
- M11** OJ C 316, 27.11.95, p.49.
- M12** 1985 c.6. Section 458 was modified by regulation 4 of, and Part 1 of schedule 2 to, the [Limited Liability Partnerships Regulations 2001 \(S.I. 2001/1090\)](#) and repealed by Schedule 16 to the [Companies Act 2006 \(c.46\)](#).
- M13** 2006, c.46.
- M14** 1979 c.2. There are amendments to this Act which are not relevant to these Regulations.
- M15** 1994 c.23. Section 72 was amended by section 17 of the [Finance Act 2003 \(c.14\)](#). There are other amendments to this Act which are not relevant to these Regulations.
- M16** 1993 c.36. There are amendments to this Act which are not relevant to these Regulations.
- M17** 2002 c.29.
- M18** S.I. 2007/2157. These Regulations were amended by S.I. 2007/3299, S.I. 2011/1781 and S.I. 2011/2833.
- M19** 1994, c.37. Sections 49, 50 and 51 were repealed by Schedules 11 and 12 to the [Proceeds of Crime Act 2002 \(c.29\)](#).
- M20** 1986 c.45. There are amendments to this Act which are not relevant to these Regulations.
- M21** S.I. 1989/2405 (N.I. 19). There are amendments to this Order which are not relevant to these Regulations.
- M22** 2002 c.40. There are amendments to this Act which are not relevant to these Regulations.

#### Criteria for selection of economic operators

27.—(1) A utility using the open procedure must establish selection criteria on the basis of objective criteria and rules which it determines and which it makes available to economic operators which request them.

(2) A utility using the restricted procedure or the negotiated procedure, with or without a call for competition, must make the selection of the economic operators to be invited to tender for or to negotiate the contract on the basis of objective criteria and rules which it determines and which it makes available to economic operators which request them.

(3) Where the criteria referred to in paragraphs (1) and (2) include requirements relating to the economic and financial capacity or the technical or professional abilities of the economic operator—

- (a) the economic operator, or a group of economic operators as referred to in regulation 28 may rely on the capacity or abilities of other entities or members in the group, regardless of the legal nature of the link between the economic operator or the group of economic operators and the other entities; and
- (b) the economic operator, or the group of economic operators must prove to the utility that the resources necessary to perform the contract will be available to it, and such proof may in particular include an undertaking from those entities to that effect.

(4) Without prejudice to the generality of paragraph (2), the criteria may be based on the need of the utility to reduce the number of economic operators selected to tender for or to negotiate the contract to a level which is justified by the characteristics of the award procedure and the resources required to complete it.

(5) The utility must take account of the need to ensure adequate competition in determining the number of economic operators selected to tender for or to negotiate the contract.

### **Consortia**

**28.**—(1) In this regulation a “consortium” means two or more persons, at least one of whom is an economic operator, acting jointly for the purpose of being awarded a contract.

(2) Subject to paragraph (3), a utility must not treat the tender of a consortium as ineligible nor decide not to include a consortium amongst those economic operators from which it will make the selection of economic operators to be invited to tender for, or to negotiate, a contract or be admitted to a dynamic purchasing system on the grounds that the consortium has not formed a legal entity for the purpose of tendering for, or negotiating, the contract or being admitted to a dynamic purchasing system.

(3) Where a utility awards a contract to a consortium it may, if to do so is justified for the satisfactory performance of the contract, require the consortium to form a legal entity before entering into, or as a term of, the contract.

(4) In these Regulations, references to an economic operator where the economic operator is a consortium include a reference to each person who is a member of that consortium.

### **Corporations**

**29.**—(1) A utility must not treat the tender of a services provider as ineligible or decide not to include a services provider amongst those services providers from which it will make the selection of services providers to be invited to tender for or to negotiate a contract or to be admitted to a dynamic purchasing system on the ground that under the law of any part of the United Kingdom the services provider is required to be an individual, corporation or other type of body, if under the law of the relevant State in which the services provider is established, that services provider is authorised to provide such services.

(2) In the case of—

- (a) a services contract;
- (b) a works contract; or
- (c) a supply contract which includes services or siting and installation of operations,

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a utility may require an economic operator which is not an individual to indicate in the tender, the indicative tender or in the request to be selected to tender for or to negotiate the contract, the names and relevant professional qualifications of the staff who will be responsible for the performance of the contract.



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