
SCOTTISH STATUTORY INSTRUMENTS

2012 No. 89

The Utilities Contracts (Scotland) Regulations 2012

PART 1

GENERAL

Interpretation

2.—(1) In these Regulations—

“buyer profile” means a page on the internet set up by a utility containing one or more of the following: periodic indicative notices, information on ongoing invitations to tender, prospective and concluded contracts, cancelled procedures and useful general information, such as a contact point, a telephone number, a facsimile number, a postal address or an e-mail address;

“candidate” means an economic operator (other than a tenderer) which applied to be included amongst the economic operators to be selected to tender for, or to negotiate, a contract or framework agreement;

“candidate concerned” means a candidate which has not been informed that they have been unsuccessful;

“carrying out” in relation to a work or works means the construction, or the design and construction, of that work or those works;

“central purchasing body” means a contracting authority and which—

- (a) acquires goods or services intended for one or more utilities;
- (b) awards contracts intended for one or more utilities; or
- (c) concludes framework agreements for work, works, goods or services intended for one or more utilities;

“the Commission” means the European Commission;

“[Commission Regulation \(EC\) No 1564/2005](#)” means Commission Regulation (EC) No 1564/2005 of 7th September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives [2004/17/EC](#) and [2004/18/EC](#) of the European Parliament and of the Council⁽¹⁾ as amended by [Commission Regulation \(EC\) No 1792/2006](#) of 23rd October 2006 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement of persons, competition policy, agriculture (veterinary and phytosanitary legislation), fisheries, transport policy, taxation, statistics, social policy and employment, environment, customs union, and external relations by reason of the accession of Bulgaria and Romania⁽²⁾ and as amended from time to time;

(1) OJ L 257, 1.10.05, p.1. The annex to Commission Regulation [\(EC\) 1564/2005](#) was amended by Commission Regulation [\(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

(2) OJ L 362, 20.12.2006, p.1.

“Common Procurement Vocabulary” means the reference nomenclature applicable to contracts as adopted by Regulation (EC) No 2195/2002 of 5th November 2002 of the European Parliament and of the Council on the Common Procurement Vocabulary as amended by Commission Regulation (EC) No 213/2008 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV(3);

“contract” means any services contract, supply contract or works contract;

“contract documents” means the invitation to tender for, or to negotiate, the contract, the proposed conditions of contract, the specifications or descriptions of the goods, services, work or works required by the utility and of the materials or goods to be used in or for such work or works, and all documents supplementary thereto;

“contract notice” means, except in regulation 49, a contract notice sent to the Official Journal in accordance with regulation 16(2)(b);

“contracting authority” has the meaning given to it by regulation 3 of the Public Contracts (Scotland) Regulations 2012(4);

“contractor” means a person who offers on the market work or works and—

- (a) who either sought, seeks, or would have wished, to be the person to whom a works contract is awarded; and
- (b) who is a national of a relevant State or established in a relevant State;

“CPC” means Central Product Classification of the United Nations(5);

“CPV” means Common Procurement Vocabulary;

“design contest” means a competition, particularly in the fields of planning, architecture, civil engineering and data processing—

- (a) which is conducted by or on behalf of a utility and in which that utility invites the entry by the economic operator of plans and designs;
- (b) under the rules of which the plans or designs entered will be judged by a jury;
- (c) under which prizes may or may not be awarded; and
- (d) which enables the utility to acquire the use or ownership of plans or designs selected by the jury;

“disabled person” means any person recognised as disabled within the meaning of the Equality Act 2010(6);

“disability” has the same meaning as in the Equality Act 2010;

“dynamic purchasing system” means a wholly electronic system of limited duration which is—

- (a) established by a utility to purchase commonly used goods, work, works or services; and
- (b) open throughout its duration for the admission of economic operators which—
 - (i) satisfy the selection criteria specified by the utility; and
 - (ii) submit an indicative tender to the utility or person operating the system on its behalf which complies with the specification required by that utility or person;

“economic operator” has the meaning given to it by regulation 4;

(3) OJ L 340, 16.12.02, p.1. Commission Regulation (EC) 1564/2005 was amended by Commission Regulation (EC) No 2151/2003 OJ L 329, 17.12.03, p.1.

(4) S.S.I. 2012/88.

(5) CPC Version 2 (December 2008). Further information may be obtained from the United Nations website at <http://unstats.un.org/unsd/cr/registry/cpc-2.asp>.

(6) 2010 c.15.

“electronic auction” means a repetitive electronic process for the presentation of prices to be revised downwards or of new and improved values of quantifiable elements of tenders, including price, which—

- (a) takes place after the initial evaluation of tenders; and
- (b) enables tenders to be ranked using automatic evaluation methods;

“electronic means” means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

“established” has the same meaning as in the EU Treaties;

“European standard” has the meaning given to it by regulation 12(1);

“financial year” except where the context otherwise requires, means the period of 12 months ending on the date in any year in respect of which the accounts of a utility are prepared;

“framework agreement” means an agreement or other arrangement between one or more utilities and one or more economic operators which establishes the terms (in particular the terms as to price and where appropriate quantity) under which the economic operator will enter into one or more contracts with a utility in the period during which the framework agreement applies;

“goods” includes electricity, substances, growing crops and things attached to or forming part of the land which are agreed to be severed before the purchase or hire under a supply contract and any ship, aircraft or vehicle;

“Government Procurement Agreement” means the Agreement on Government Procurement between certain parties to the World Trade Organisation (WTO) signed in Marrakesh on 15th April 1994(7);

“GPA” means the Government Procurement Agreement;

“indicative tender” means a tender prepared by an economic operator seeking admission to a dynamic purchasing system which sets out the terms on which it would be prepared to enter into a contract with a utility under the system should that utility propose to award a contract under the system;

“international standard” has the meaning given to it by regulation 12(1);

“Minister” has the meaning given to it by regulation 39;

“Minister of the Crown” means the holder of an office in Her Majesty’s Government in the United Kingdom, and includes the Treasury;

“national of a relevant State” means, in the case of a person who is not an individual, a person formed in accordance with the laws of a relevant State and which has its registered office, central administration or principal place of business in a relevant State;

“negotiated procedure” means a procedure leading to the award of a contract whereby the utility negotiates the terms of the contract with one or more economic operators selected by it;

“Official Journal” means the Official Journal of the European Union;

“open procedure” means a procedure leading to the award of a contract whereby all interested economic operators may tender for the contract;

“periodic indicative notice” means a notice sent to the Official Journal in accordance with regulation 15;

(7) Cm 2575. As at 1st January 2012, parties to the Government Procurement Agreement other than Member States were Armenia, Aruba, Canada, Chinese Taipei, Hong Kong China, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Norway, Singapore, Switzerland and the United States of America.

“Public Sector Directive” means Directive [2004/18/EC](#) of the European Parliament and of the Council of 31st March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended from time to time⁽⁸⁾;

“relevant standstill period” means—

- (a) where the notice referred to in regulation 33(1) or 46(9)(a) is sent to all tenderers and all candidates concerned (if any) by facsimile or by electronic means, 10 days from the date on which the last notice is sent to those economic operators; or
- (b) where any such notice is sent to any tenderers or candidates concerned only by other means, 15 days from the date on which the last notice is sent to those economic operators;

“relevant State” has the meaning given to it by regulation 4(4);

“restricted procedure” means a procedure leading to the award of a contract whereby only economic operators selected by the utility may submit tenders for the contract;

“services contract” means a contract, in writing, for consideration (whatever the nature of the consideration) under which a utility engages an economic operator to provide services but does not include either—

- (a) a works contract; or
- (b) a supply contract,

but a contract for both goods and services is a services contract if the value of those services exceeds that of the goods covered by the contract and a contract for services which includes activities specified in Schedule 2 that are only incidental to the principal object of the contract is a services contract;

“services concession contract” means a services contract under which the consideration given by the utility consists of, or includes, the right to exploit the service or services to be provided under the contract;

“services provider” means a person who offers on the market services and—

- (a) who either sought, seeks, or who would have wished—
 - (i) to be the person to whom a services contract is awarded; or
 - (ii) to participate in a design contest; and
- (b) who is a national of a relevant State or established in a relevant State;

“ship” includes any boat and any description of a vessel used in navigation;

“substance” means any natural or artificial substance, whether in solid, liquid or gaseous form or in the form of vapour;

“supplier” means a person who offers on the market goods for purchase or hire and—

- (a) who either sought, seeks, or would have wished, to be the person to whom a supply contract is awarded; and
- (b) who is a national of a relevant State or established in a relevant State;

“supply contract” means a contract, in writing, for consideration (whatever the nature of the consideration)—

- (a) for the purchase of goods by a utility (whether or not the consideration is given in instalments and whether or not the purchase is conditional upon the occurrence of a particular event); or

(8) OJ L 134, 30.4.04, p.114.

(b) for the hire of goods by a utility (both where the utility becomes the owner of the goods after the end of the period of hire and where it does not),

and for any siting and installation of those goods, but where, under such a contract, services are also to be provided, the contract is only a supply contract where the value of the consideration attributable to the goods and any siting or installation of the goods, is equal to or greater than the value attributable to the services;

“tenderer” means an economic operator which submitted an offer to perform a contract or to be party to a framework agreement;

“tenderer concerned” means a tenderer which—

- (a) has not been informed that they have been excluded from the competition; or
- (b) has been informed that they have been excluded from the competition and where—
 - (i) that exclusion is not prevented from being the subject of proceedings under Part 9 by virtue of regulation 44(5)(b); and
 - (ii) no such proceedings have been brought, or such proceedings have been brought and it has not been determined that the exclusion was lawful;

“TFEU” means the Treaty on the Functioning of the European Union(9);

“Utilities Directive” means Directive 2004/17/EC of the European Parliament and of the Council of 31st March 2004 co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as amended from time to time(10);

“utility” has the meaning given to it by regulation 3;

“work” means the outcome of any works which is sufficient of itself to fulfil an economic and technical function;

“working day” means a day other than a Saturday, Sunday or Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971(11);

“works” means any of the activities specified in Schedule 2;

“works concession contract” means a works contract under which the consideration given by a utility consists of or includes the grant of a right to exploit the work or works to be carried out under the contract;

“works contract” means a contract, in writing, for consideration (whatever the nature of the consideration)—

- (a) for the carrying out of a work or works for a utility; or
- (b) under which a utility engages a person to procure by any means the carrying out for the utility of a work corresponding to specified requirements;

“written” or “in writing” means any expression consisting of words or figures that can be read, reproduced and subsequently communicated and may include information transmitted and stored by electronic means; and

“year” means a calendar year.

(2) In these Regulations references to Article 16 or 61 are references to Article 16 or, as the case may be, 61 of the Utilities Directive as amended from time to time.

(3) In these Regulations, unless the context otherwise requires, any reference to a numbered Part, regulation, paragraph or Schedule is a reference to the Part, regulation, paragraph or Schedule bearing that number in these Regulations.

(9) OJ C 115, 9.5.2008, p.47.

(10) OJ L 134, 30.4.04, p.1.

(11) 1971 c.80. There are amendments to this Act which are not relevant to these Regulations.

- (4) Subject to paragraph (5), in these Regulations—
 - (a) “a Part A services contract” is a contract under which services specified in Part A of Schedule 3 are to be provided;
 - (b) “a Part B services contract” is a contract under which services specified in Part B of Schedule 3 are to be provided.
- (5) Where services specified in both Parts A and B of Schedule 3 are to be provided under a single contract, then the contract is treated as—
 - (a) a Part A services contract if the value of the consideration attributable to the services specified in Part A is greater than that attributable to those specified in Part B; and
 - (b) a Part B services contract if the value of the consideration attributable to the services specified in Part B is equal to, or greater than, that attributable to those specified in Part A.
- (6) Except in regulation 44(6)(b), where these Regulations refer to a period of time—
 - (a) where the period follows an action taken, the day on which the action is taken is not counted in the calculation of the period; and
 - (b) where the last day of the period is not a working day, the period is extended to include the next working day.