
SCOTTISH STATUTORY INSTRUMENTS

2016 No. 49

The Utilities Contracts (Scotland) Regulations 2016

PART 2 **S**

RULES APPLICABLE TO CONTRACTS

CHAPTER 1 **S**

PROCEDURES

Conditions relating to the GPA and other international agreements **S**

41. In so far as they are covered by Annexes 3 to 7 to the EU's Appendix I to the GPA and by the other international agreements by which the EU is bound, a utility must accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU.

Commencement Information

II [Reg. 41](#) in force at 18.4.2016, see [reg. 1\(2\)](#)

Choice of procedures **S**

42.—(1) When undertaking a procurement a utility must apply procedures that conform to these Regulations.

(2) A utility must apply one of the following procedures—

- (a) an open procedure;
- (b) a restricted procedure;
- (c) a negotiated procedure with a prior call for competition;
- (d) a competitive dialogue;
- (e) an innovation partnership;
- (f) a negotiated procedure without a prior call for competition.

(3) The procedures referred to in paragraph (2)(a) to (e) must include publication of a call for competition.

(4) The procedure referred to in paragraph (2)(f) does not require publication of a call for competition but it must only be used in one of the cases set out in regulation 48 (use of the negotiated procedure without prior call for competition).

(5) A call for competition may be made by means of—

- (a) a periodic indicative notice in accordance with regulation 65 (periodic indicative notices) but only where the contract is to be awarded following a restricted or negotiated procedure or competitive dialogue;

Status: Point in time view as at 18/04/2016.

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(b) a notice on the existence of a qualification system in accordance with regulation 66 (notices on the existence of a qualification system) but only where the contract is to be awarded following a restricted or negotiated procedure, competitive dialogue or innovation partnership; or

(c) a contract notice in accordance with regulation 67 (contract notices).

(6) When a call for competition is made by the means referred to in paragraph (5)(a), an economic operator which has expressed an interest following the publication of the periodic indicative notice, must subsequently be invited by the utility to confirm its interest in writing by means of an invitation to confirm interest in accordance regulation 72 (invitations to candidates).

(7) Nothing in these Regulations prevents a utility which has commenced a procurement from terminating that procurement at any time.

Commencement Information

I2 [Reg. 42](#) in force at 18.4.2016, see [reg. 1\(2\)](#)

Open Procedure **S**

43.—(1) In an open procedure, a utility must permit any interested economic operator to submit a tender in response to a call for competition within the time period set by the utility in accordance with this regulation.

(2) The tender must be accompanied by the information for qualitative selection that is required by the utility.

(3) Subject to paragraphs (4) to (6), the minimum time period for the receipt of tenders shall be 35 days from the date on which the contract notice is sent for publication.

(4) Where a utility has published a periodic indicative notice which was not itself used as a mean of calling for competition under regulation 42(5)(a) (choice of procedures), the minimum time limit for the receipt of tenders may be reduced to 15 days, provided that—

(a) the periodic indicative notice included all the information required for the contract notice in Section I and II of Part A of Annex VI to the Utilities Contracts Directive, insofar as the information in section II was available at the time the periodic indicative notice was published; and

(b) the periodic indicative notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent for publication.

(5) Where a state of urgency duly substantiated by a utility renders it impracticable to apply the minimum time limit set out in paragraph (3), the utility may fix a time limit which must not be less than 15 days from the date on which the contract notice was sent for publication.

(6) A utility may reduce the minimum time period referred to in paragraph (3) by a period of up to 5 days where it accepts that tenders may be submitted by electronic means in accordance with regulation 38 (rules applicable to communication).

Commencement Information

I3 [Reg. 43](#) in force at 18.4.2016, see [reg. 1\(2\)](#)

Restricted Procedure **S**

44.—(1) In a restricted procedure, a utility must permit any economic operator to submit a request to participate in response to a call for competition within the time period set by the utility in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the utility.

(3) The minimum time period for receipt of requests to participate, other than in exceptional circumstances, shall be 30 days from the date on which—

- (a) the contract notice was sent for publication; or
- (b) where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest was sent,

and shall, in any event, not be less than 15 days from such date.

(4) Only those economic operators invited to do so by the utility following its assessment of the information provided may submit a tender.

(5) A utility may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 76(2) (criteria for qualitative selection).

(6) The minimum time limit for the receipt of tenders may be set by agreement between the utility and the economic operators invited to tender, provided that all such economic operators have the same time to prepare and submit their tenders.

(7) If there is no agreement made further to paragraph (6), the minimum time period for the receipt of tenders shall be 10 days from the date on which the invitation to tender is sent.

Commencement Information

I4 [Reg. 44](#) in force at 18.4.2016, see [reg. 1\(2\)](#)

Negotiated procedure with prior call for competition **S**

45.—(1) In a negotiated procedure with a prior call for competition, a utility must permit any economic operator to submit a request to participate in response to a call for competition within the time period set by the utility in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the utility.

(3) The minimum time period for receipt of requests to participate, other than in exceptional circumstances, shall be 30 days from the date on which—

- (a) the contract notice was sent for publication; or
- (b) where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest was sent,

and shall, in any event, not be less than 15 days from such date.

(4) Only those economic operators invited to do so by the utility following its assessment of the information provided may participate in the negotiations.

(5) A utility may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 76(2) (criteria for qualitative selection).

(6) The minimum time limit for the receipt of tenders may be set by agreement between the utility and the economic operators invited to tender, provided that all such economic operators have the same time to prepare and submit their tenders.

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(7) If there is no agreement made further to paragraph (6), the minimum time period for the receipt of tenders shall be 10 days from the date on which the invitation to tender is sent.

Commencement Information

I5 Reg. 45 in force at 18.4.2016, see [reg. 1\(2\)](#)

Competitive Dialogue **S**

46.—(1) In a competitive dialogue, a utility must permit any economic operator to submit a request to participate in response to a call for competition in accordance with regulation 42(5)(b) or (c) (choice of procedures) within the time period set by the utility in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the utility.

(3) The minimum time period for receipt of a request to participate, other than in exceptional circumstances, shall be 30 days from the date on which—

- (a) the contract notice was sent for publication; or
- (b) where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest was sent,

and shall, in any event, not be less than 15 days from such date.

(4) Only those economic operators invited to do so by the utility following its assessment of the information provided may participate in the dialogue.

(5) A utility may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 76(2) (criteria for qualitative selection).

(6) The contract must be awarded on the sole basis of the best price-quality ratio in accordance with regulation 80 (contract award criteria).

(7) A utility must in the call for competition, in a descriptive document or in both—

- (a) set out and define its needs and requirements;
- (b) set out and define the chosen award criteria; and
- (c) set out an indicative timeframe.

(8) A utility—

- (a) must open, with the participants selected in accordance with the relevant provisions of regulations 74 to 79, a dialogue with the aim of identifying and defining the means best suited to satisfying the utility's needs; and
- (b) may discuss all aspects of the procurement with such participants during this dialogue.

(9) During the dialogue, a utility—

- (a) must ensure equal treatment of all participants; and
- (b) must not provide information in a discriminatory manner which may give any participant an advantage over others.

(10) In accordance with regulation 37 (confidentiality), a utility must not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or tenderer participating in the dialogue without the candidate or tenderer's agreement.

(11) Any agreement referred to in paragraph (10) shall not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(12) A utility may conduct a competitive dialogue in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage only by applying the award criteria specified in—

- (a) the call for competition; or
- (b) the descriptive document.

(13) The utility must indicate, in the contract notice or the descriptive document, whether it will use the option described in paragraph (12).

(14) The utility shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

(15) When the utility has declared that the dialogue is concluded and informed the remaining participants, the utility must invite each remaining participant to submit their final tender on the basis of the solution or solutions presented and specified during the dialogue.

(16) The final tenders—

- (a) shall contain all the elements required and necessary for the performance of the project; and
- (b) may, subject to paragraph (17), be clarified, specified and optimised at the request of the utility.

(17) Any clarification, specification, optimisation or additional information provided pursuant to a request referred to in paragraph (16)(b) must not involve changes to the essential aspects of the tender or the procurement, including the needs and requirements set out in the call for competition or in the descriptive document, where such changes are likely to distort competition or cause discrimination.

(18) A utility must assess the tenders received on the basis of the award criteria laid down in the call for competition or in the descriptive document.

(19) At the request of the utility, and subject to paragraph (20), negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 80 (contract award criteria) may be carried out to confirm financial commitments or other terms contained in the tender in order to finalise the terms of the contract.

(20) Any negotiation and finalisation of the terms of the contract referred to in paragraph (19) must not involve changes to the essential aspects of the tender or the procurement, including the needs and requirements set out in the call for competition or in the descriptive document, where such changes are likely to distort competition or cause discrimination.

(21) A utility may specify prizes or payments to the participants in the dialogue.

Commencement Information

16 [Reg. 46](#) in force at 18.4.2016, see [reg. 1\(2\)](#)

Innovation Partnership **S**

47.—(1) A utility may establish an innovation partnership with one partner or with several partners conducting separate research and development activities.

(2) The innovation partnership must aim at the development of innovative works, products or services and the subsequent purchase of the resulting works, supplies or services provided that they correspond to the performance levels and maximum costs agreed between the utility and the partners.

(3) The estimated value of works, supplies or services must not be disproportionate in relation to the investment required for their development.

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(4) The innovation partnership must be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works.

(5) The innovation partnership must set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

(6) Based on those targets, the utility may decide after each phase to—

- (a) terminate the innovation partnership; or
- (b) in the case of an innovation partnership with several partners, reduce the number of partners by terminating individual contracts,

provided that the utility has indicated in the procurement documents those possibilities and the conditions for their use.

(7) In the procurement of an innovation partnership, a utility must permit any economic operator to submit a request to participate in response to a call for competition in accordance with regulation 42(5)(b) or (c) (choice of procedures) within the time period set by the utility in accordance with this regulation.

(8) A request by an economic operator referred to in paragraph (7) must be accompanied by the information for qualitative selection that is requested by the utility.

(9) In the procurement documents, the utility must—

- (a) identify the subject matter of the procurement by providing the description of the utility's need for innovative works, products or services that cannot be met by purchasing works, products or services already available on the market;
- (b) indicate which elements of this description define the minimum requirements to be met by all tenders;
- (c) specify the award criteria; and
- (d) define the arrangements applicable to intellectual property rights.

(10) The information provided by the utility in accordance with paragraph (9) must be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

(11) The minimum time period for the receipt of requests to participate—

- (a) other than in exceptional circumstances, shall be 30 days from the date on which the contract notice is sent for publication; and
- (b) shall, in any event, not be less than 15 days from that date.

(12) A utility may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 76(2) (criteria for qualitative selection).

(13) In selecting candidates, a utility must, in particular, apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

(14) Only those economic operators invited to do so by the utility following its assessment of the requested information may participate in the procedure and submit research and innovation projects aimed at meeting the needs identified by the utility that cannot be met by existing solutions.

(15) A utility must negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

(16) A utility must not negotiate the minimum requirements or the award criteria referred to in paragraph (9).

(17) During the negotiations, a utility—

- (a) must ensure equal treatment of all tenderers;
- (b) must not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (c) must, in writing, inform all tenderers whose tenders have not been eliminated of any changes to the technical specifications or other procurement documents; and
- (d) must provide sufficient time following any such changes for all tenderers referred to in paragraph (c) to modify and re-submit amended tenders as appropriate.

(18) In accordance with regulation 37 (confidentiality), a utility must not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without the candidate or tenderer's agreement.

(19) Any agreement referred to in paragraph (18) must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(20) A utility may conduct negotiations during innovation partnership procedures in successive stages in order to reduce the number of tenders to be negotiated only by applying the award criteria specified in the contract notice, the invitation to confirm interest or another procurement document.

(21) The utility must indicate in the contract notice or in another procurement document whether it will use the option described in paragraph (20).

(22) The contracts must be awarded on the sole basis of the best price-quality ratio in accordance with regulation 80 (contract award criteria).

(23) The utility must ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market.

(24) In the case of an innovation partnership with several partners, the utility must not, in accordance with regulation 37 (confidentiality), reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement.

(25) Any agreement referred to in paragraph (24) must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

Commencement Information

I7 Reg. 47 in force at 18.4.2016, see [reg. 1\(2\)](#)

Use of the negotiated procedure without prior call for competition **S**

48.—(1) A utility may award a contract following a negotiated procedure without prior publication of a call for competition in any of the following cases—

- (a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to a procedure with a call for competition, provided that the initial conditions of the contract are not substantially altered;
- (b) where the contract is—
 - (i) purely for the purpose of research, experiment, study or development; and
 - (ii) not for the purpose of securing a profit or of recovering research and development costs,

insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek the ends referred to in paragraph (ii); or

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- (c) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons—
 - (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
 - (ii) competition is absent for technical reasons;
 - (iii) the protection of exclusive rights, including intellectual property rights, but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;
 - (d) where (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by the utility, the time limits for open procedure, restricted procedure or negotiated procedure with prior call for competition cannot be complied with.
- (2) For the purposes of paragraph (1)(a)—
- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the utility's needs and requirements as specified in the procurement documents; and
 - (b) a request to participate shall be considered not to be suitable where the economic operator concerned—
 - (i) has been or would be excluded under regulation 76(1) (criteria for qualitative selection) or 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations); or
 - (ii) does not meet the selection criteria.
- (3) For the purposes of paragraph (1)(d), the circumstances invoked to justify extreme urgency must not, in any event, be attributable to the utility.

Specific rules based on type of contract

- (4) A utility may award a contract following a negotiated procedure without prior publication of a call for competition—
- (a) in the case of supply contracts, where the products involved are for additional deliveries by the original supplier which are intended either as—
 - (i) a partial replacement of supplies or installations; or
 - (ii) the extension of existing supplies or installations,
 where a change of supplier would require the utility to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
 - (b) for supplies quoted and purchased on a commodity market;
 - (c) for purchases of supplies or services on particularly advantageous conditions, from either a supplier which is definitively winding up its business activities or the liquidator in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws or regulations;
 - (d) for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;
 - (e) for new works, services or both, consisting of the repetition of similar works or services entrusted to the contractor to which the utility awarded an original contract, provided that such works or services are in conformity with a basic project for which the original

contract was awarded pursuant to a procedure in accordance with regulation 42(1) (choice of procedures);

- (f) for a service contract which follows a design contest organised in accordance with these Regulations and which is to be awarded, under the rules provided for in the design contest, to the winner or to one of the winners of the design contest.
- (5) For the purposes of paragraph (4)(e)—
- (a) the basic project must have indicated the extent of possible additional works or services and the conditions under which they would be awarded;
 - (b) the possible use of this procedure must have been disclosed in the procurement documents; and
 - (c) the total estimated cost of these subsequent works or services must have been taken into consideration by the utility when applying regulations 15 (thresholds) and 16 (methods for calculating the estimated value) in relation to the original contract.
- (6) For the purposes of paragraph (4)(f), where there is more than one winner of the design contest all of the winners must be invited to participate in the negotiation.

Commencement Information

18 [Reg. 48](#) in force at 18.4.2016, see [reg. 1\(2\)](#)

Status:

Point in time view as at 18/04/2016.

Changes to legislation:

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