SCOTTISH STATUTORY INSTRUMENTS

2012 No. 89

The Utilities Contracts (Scotland) Regulations 2012

PART 2

TECHNICAL SPECIFICATIONS

Technical specifications in contract documents

12.—(1) In this regulation—

"common technical specification" means a technical specification drawn up in accordance with a procedure recognised by the member States with a view to uniform application in all member States and which has been published in the Official Journal;

"European standard" means a standard adopted by a European standards organisation and made available to the general public;

"European technical approval" means an approval of the fitness for use of a product, issued by an approval body designated for the purpose by a member State, following a technical assessment of whether the product fulfils the essential requirements for building works, having regard to the inherent characteristics of the product and the defined conditions of application and use;

"international standard" means a standard adopted by an international standards organisation and made available to the general public;

"British standard" means a standard adopted by a British standards organisation and made available to the general public;

"recognised bodies" means test and calibration laboratories and certification and inspection bodies which comply with applicable European standards and "recognised body" is interpreted accordingly;

"standard" means a technical specification approved by a recognised standardising body for repeated and continuous application, compliance with which is not compulsory and which is an international standard, a European Standard or a British standard;

"technical reference" means any product produced by European standardisation bodies, other than official standards, according to procedures adopted for the development of market needs; and

"technical specifications" means—

(a) in the case of a services contract or a supply contract, a specification in a document defining the required characteristics of materials, goods or services, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of a product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures; and

(b) in the case of a works contract, the totality of the technical prescriptions contained in particular in the contract documents, defining the characteristics required of the work, works, materials or goods, which permits the work, works, materials or goods to be described in a manner such that it fulfils the use for which it is intended by the utility and these characteristics include—

(i) levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods;

(ii) rules relating to design and costing, the test, inspection and acceptance conditions for work or works and methods or techniques of construction; and

(iii) all other technical conditions which the utility is in a position to prescribe, under general or specific regulations, in relation to the finished work or works and to the materials or parts which they involve.

(2) Where a utility wishes to lay down technical specifications which must be met by—

(a) the services to be provided under a services contract and the materials and goods used in or for it;

(b) the goods to be purchased or hired under a supply contract; or

(c) the work or works to be carried out under a works contract and the materials and goods used in or for it,

it must specify those technical specifications in the contract documents.

(3) When laying down technical specifications in accordance with paragraph (2), a utility must wherever possible take into account accessibility criteria for disabled persons or the suitability of the design for all users.

(4) A utility must ensure that technical specifications afford equal access to economic operators and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(5) Subject to technical requirements which are mandatory in the United Kingdom and to the extent that those requirements are compatible with EU obligations, a utility must define the technical specifications required for a contract in accordance with paragraph (6), (7), (8) or (9).

(6) A utility may define the technical specifications referred to in paragraph (5)—

(a) by reference to technical specifications in the following order of preference—

(i) British standards transposing European standards;

(ii) European technical approvals;

(iii) common technical specifications;

(iv) international standards; or

(v) other technical reference systems established by the European standardisation bodies; or

(b) in the absence of the technical specifications referred to in sub-paragraph (a), by reference to the following technical specifications—

(i) British standards;

(ii) British technical approvals*;* or

(iii) British technical specifications relating to the design, calculation and execution of the work or works and use of the products,

and each reference to a technical specification made in accordance with this paragraph must be accompanied by the words "or equivalent".

(7) A utility may define the technical specifications referred to in paragraph (5) in terms of performance or functional requirements (which may include environmental characteristics) provided that the requirements are sufficiently precise to allow an economic operator to determine the subject of the contract and a utility to award the contract.

(8) A utility may define the technical specifications referred to in paragraph (5) by defining performance and functional requirements as referred to in paragraph (7) with reference to the technical specifications referred to in paragraph (6) as a means of presuming conformity with such performance or functional requirements.

(9) A utility may define the technical specifications referred to in paragraph (5) by reference to technical specifications referred to in paragraph (6) for certain characteristics and by reference to performance or functional requirements referred to in paragraph (7) for other characteristics.

(10) Where a utility defines technical specifications as referred to in paragraph (6), it must not reject an offer on the basis that the materials, goods or services offered do not comply with those technical specifications if an economic operator proves to the satisfaction of the utility by any appropriate means that the one or more solutions that economic operator proposes in its tender satisfy the requirements of the technical specifications in an equivalent manner.

(11) Where a utility defines technical specifications in terms of performance or functional requirements as referred to in paragraph (7), it must not reject an offer for materials, goods, services, work or works which complies with—

(a) a British standard transposing a European standard;

(b) a European technical approval;

(c) a common technical specification;

(d) an international standard; or

(e) a technical reference system established by a European standardisation body,

if those technical specifications address the performance or functional requirements referred to by the utility and the economic operator proves in its tender to the satisfaction of the utility by any appropriate means that the work, works, materials, goods or services meet the performance or functional requirements of the utility.

(12) Where a utility lays down environmental characteristics in terms of performance or functional requirements as referred to in paragraph (7), it may use the detailed technical specifications, or if necessary, parts thereof, as defined by European, national or multi-national eco-labels or by any other eco-label, provided that—

(a) those technical specifications are appropriate to define the characteristics of the materials, goods or services that are the object of the contract;

(b) the eco-label requirements are drawn up on the basis of scientific information;

(c) the eco-label is adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, are able to participate; and

(d) the technical specifications are accessible to any party interested.

(13) A utility may indicate in the contract documents that the materials, goods or services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents and must accept any other appropriate means of proof that the materials, goods or services comply with those technical specifications.

(14) The term "appropriate means" referred to in paragraphs (10), (11) and (13) includes a technical dossier of a manufacturer or a test report from a recognised body.

(15) A utility must accept certificates from recognised bodies established in other member States when considering whether a tender for a contract conforms with the technical specifications laid down by the utility in accordance with paragraph (2).

(16) Subject to paragraph (17), a utility must not lay down technical specifications in the contract documents which refer to—

(a) materials or goods of a specific make or source or to a particular process; or

(b) trademarks, patents, types, origin or means of production,

which have the effect of favouring or eliminating particular economic operators.

(17) Exceptionally, a utility may incorporate the references referred to in paragraph (16) into the technical specifications in the contract documents, provided that the references are accompanied by the words "or equivalent", where—

(a) the subject of the contract makes the use of such references indispensable; or

(b) the subject of the contract cannot otherwise be described by reference to technical specifications which are sufficiently precise and intelligible to all economic operators.

(18) Subject to paragraph (19), a utility must provide to any economic operator which is interested in obtaining a contract and which makes such a request, a copy of the technical specifications which are regularly laid down as terms of the contracts which that utility awards or which it intends to lay down as terms of a contract and which has been indicated in a periodic indicative notice sent to the Official Journal in accordance with regulation 15.

(19) Where the technical specifications referred to in paragraph (18) are based on documents which are separately available to economic operators, the obligation in paragraph (18) must be satisfied by informing any economic operator which makes a request of the documents which include those technical specifications.

Variants

13.—(1) Where a utility intends to award a contract on the basis of the offer which is the most economically advantageous in accordance with regulation 30(1)(a), it must indicate in the contract notice whether or not it authorises economic operators to submit offers which contain variants on the requirements specified in the contract documents and a utility must not accept an offer which contains a variant without that indication.

(2) Where a utility authorises a variation in accordance with paragraph (1), it must state in the contract notice the minimum requirements to be met by the variants and any specific requirements for the presentation of an offer which contains variants.

(3) A utility must only consider variants which meet its minimum requirements as stated in the contract documents in accordance with paragraph (2).

(4) A utility must not reject an offer which contains variants on the requirements specified in the contract documents on the ground that—

(a) where it intends to award a services contract, the offer would lead to the award of a supply contract; or

(b) where it intends to award a supply contract, the offer would lead to the award of a services contract.