
SCOTTISH STATUTORY INSTRUMENTS

2016 No. 49

The Utilities Contracts (Scotland) Regulations 2016

PART 2

RULES APPLICABLE TO CONTRACTS

CHAPTER 3

CONDUCT OF THE PROCEDURE

SECTION 1

Preparation

Preliminary market consultation

56.—(1) Before commencing a procurement, a utility may conduct a market consultation with a view to preparing the procurement and informing economic operators of the utility's procurement plans and requirements.

(2) For this purpose, a utility may act as it considers appropriate, including seeking or accepting advice from independent experts or authorities or from market participants.

(3) Such advice may be used in the planning and conduct of the procurement, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

Prior involvement of candidates or tenderers

57.—(1) A utility must take appropriate measures to ensure that competition is not distorted by the participation of a candidate or tenderer where that candidate or tenderer, or an undertaking related to that candidate or tenderer—

- (a) has advised the utility, whether in the context of regulation 56 (preliminary market consultation) or not; or
- (b) has otherwise been involved in the preparation of the procurement.

(2) Such measures must include—

- (a) the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement; and
- (b) the fixing of adequate time limits for the receipt of tenders.

(3) A candidate or tenderer in a situation referred to in paragraph (1) may only be excluded from the procedure for the purposes of paragraph (1) where there are no other means to ensure compliance with the duty referred to in regulation 34(1) (principles of procurement).

(4) Prior to any such exclusion, a candidate or tenderer must be given the opportunity to prove that their involvement in preparing the procurement is not capable of distorting competition.

(5) The measures taken must be documented in the report referred to in regulation 96 (reporting and documentation requirements).

Technical specifications

58.—(1) The technical specifications must—

- (a) be set out in the procurement documents; and
- (b) lay down the characteristics required of any works, supply or service.

(2) In the case of a works contract, technical specifications define any characteristics required of a material, product or supply so that it fulfils the use for which it is intended by the utility.

(3) The characteristics referred to in paragraph (2) may include—

- (a) levels of environmental and climate performance;
- (b) design for all requirements (including accessibility for disabled persons) and conformity assessment;
- (c) performance, safety or dimensions, including the procedures concerning quality assurance;
- (d) terminology;
- (e) symbols;
- (f) testing and test methods;
- (g) packaging, marking and labelling;
- (h) user instructions;
- (i) production processes and methods at any stage of the life cycle of the works;
- (j) rules relating to design and costing and the test, inspection and acceptance conditions for works; and
- (k) methods or techniques of construction and all other technical conditions which the utility is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

(4) In the case of a supply or service contract, the required characteristics may include—

- (a) quality levels;
- (b) environmental and climate performance levels;
- (c) design for all requirements (including accessibility for disabled persons) and conformity assessment;
- (d) performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold;
- (e) terminology;
- (f) symbols;
- (g) testing and test methods;
- (h) packaging, marking and labelling;
- (i) user instructions;
- (j) production processes and methods at any stage of the life cycle of the supply or service; and
- (k) conformity assessment procedures.

(5) In the case of any contract, the required characteristics may also refer to—

- (a) the specific process or method of production or provision of the requested works, supplies or services;
 - (b) a specific process for another stage of its life cycle,
even where such factors do not form part of the contract's material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.
- (6) The technical specifications may also specify whether the transfer of intellectual property rights will be required.
- (7) Where the subject of the procurement is intended for use by natural persons, whether the general public or staff of the utility, the technical specifications must, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.
- (8) Where mandatory accessibility requirements are adopted by a legal act of the EU, technical specifications must, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.
- (9) Technical specifications must afford equal access of economic operators to the procurement and must not have the effect of creating unjustified obstacles to the opening up of procurement to competition.
- (10) Without prejudice to mandatory national technical rules, to the extent that they are compatible with EU law, the technical specifications must be formulated—
- (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow the utility to award the contract;
 - (b) by reference to any of the following technical specifications in the following order of precedence—
 - (i) national standards transposing European standards;
 - (ii) European Technical Assessments;
 - (iii) common technical specifications;
 - (iv) international standards;
 - (v) other technical reference systems established by the European standardisation bodies; or
 - (vi) when none of the above exist, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies,
but each reference must be accompanied by the words 'or equivalent?';
 - (c) in terms of performance or functional requirements as referred to in sub-paragraph (a), with reference to the technical specifications referred to in sub-paragraph (b) as a means of presuming conformity with such performance or functional requirements; or
 - (d) by reference to the technical specifications referred to in sub-paragraph (b) for certain characteristics and by reference to the performance or functional requirements referred to in sub-paragraph (a) for other characteristics.
- (11) Subject to paragraph (12), technical specifications must not, with the effect of favouring or eliminating certain undertakings or certain products, refer to—
- (a) a specific make or source;
 - (b) a particular process which characterises the products or services provided by a specific economic operator; or

(c) trade marks, patents, types, or a specific origin or production.

(12) Reference of a kind referred to in paragraph (11) is permitted in any of the following circumstances—

- (a) where justified by the subject-matter of the contract;
- (b) on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph (10) is not possible, in which case the reference must be accompanied by the words “or equivalent”.

(13) Where a utility formulates technical specifications in terms of performance or functional requirements in accordance with paragraph (10)(a), it must not reject a tender for works, supplies or services which complies with a technical specification of a kind mentioned in paragraph (10)(b) (i) to (v), where those specifications address the performance or functional requirements which it has laid down.

(14) Where a utility formulates technical specifications in accordance with paragraph (10)(b), it must not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, where the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 60 (test reports, certificates and other means of proof), that the solution proposed satisfies in an equivalent manner the requirements defined by the technical specifications.

(15) In its tender, the tenderer must prove by any appropriate means, including those referred to in regulation 60 (test reports, certificates and other means of proof), that the works, supply or service in compliance with the standard meets the performance or functional requirements of the utility.

Labels

59.—(1) Where a utility intends to purchase works, supplies or services with specific environmental, social or other characteristics the utility may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, supplies or services correspond to the required characteristics, provided that all of the following conditions are fulfilled—

- (a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services;
- (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- (c) the label is established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;
- (d) the label is accessible to all interested parties; and
- (e) the label requirements are set by a third party over whom the economic operator applying for the label cannot exercise a decisive influence.

(2) Where a utility does not require the works, supplies or services to meet all of the label requirements, the utility must indicate which label requirements are required.

(3) A utility requiring a specific label must accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

(4) Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the utility, or an equivalent label, within the relevant time limits for reasons that are not attributable to that economic operator, the utility must accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the utility.

(5) Where a label fulfils the conditions mentioned in paragraph (1)(b) to (e) but also sets out requirements not linked to the subject-matter of the contract, a utility must not require the label but may define the technical specification by reference to those of the detailed specifications of that label or, parts of it where necessary, that are linked to the subject-matter of the contract and are appropriate to define characteristics of that subject-matter.

Test reports, certificates and other means of proof

60.—(1) A utility may require an economic operator to provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

(2) Where a utility requires the submission of certificates drawn up by a specific conformity assessment body, certificates from other equivalent conformity assessment bodies must also be accepted by the utility.

(3) In paragraphs (1) and (2), “conformity assessment body” means a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93⁽¹⁾.

(4) Where the economic operator concerned has no access to the certificates or test reports referred to in paragraphs (1) and (2), or no possibility of obtaining them within the relevant time limits, a utility must accept appropriate means of proof other than those referred to in paragraphs (1) and (2), such as a technical dossier of the manufacturer, provided that—

- (a) the lack of access is not attributable to the economic operator concerned; and
- (b) the means of proof provided by the economic operator concerned proves that the works, supplies or services provided by it meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

Communication of technical specifications

61.—(1) On request from an economic operator interested in obtaining a contract, a utility must make available—

- (a) the technical specifications regularly referred to in their works, supplies or services contracts; or
- (b) the technical specifications which they intend to apply to contracts for which the call for competition is a periodic indicative notice.

(2) Subject to paragraph (3), the technical specifications referred to in paragraph (1) must be made available by electronic means of communication through unrestricted and full direct access free of charge.

(3) Technical specifications must be transmitted by means other than electronic means where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered—

- (a) for one of the reasons set out in regulations 38(3) or (5) (rules applicable to communication); or
- (b) because the utility intends to apply regulation 37(3) (confidentiality).

(1) OJ L 218, 13.8.2008, p.30.

(4) Where the technical specifications are based on documents available by electronic means through unrestricted and full direct access free of charge to interested economic operators, the inclusion of a reference to those documents must be sufficient.

Variants

62.—(1) A utility may authorise or require tenderers to submit variants which meet the minimum requirements laid down by the utility.

(2) A utility must indicate in the procurement documents whether or not they authorise or require variants.

(3) A utility authorising or requiring variants must state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation, in particular whether variants may be submitted only where the economic operator also submits a tender which is not a variant.

(4) A utility must not take into consideration a variant which—

- (a) has not been authorised or required;
- (b) is not linked to the subject matter of the contract; or
- (c) does not meet the minimum requirements laid down by the utility.

(5) A utility must ensure that the award criteria can be applied to variants meeting those minimum requirements as well as to tenders which are not variants.

(6) In a procedure for awarding a supply contract or service contract, a utility that has authorised or required variants must not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a supply contract or a supply contract rather than a service contract.

Division of contracts into lots

63.—(1) A utility may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

(2) Where a utility decides to award a contract in the form of separate lots it must indicate in the contract notice, in the invitation to confirm interest, or, where the means of a call for competition is a notice on the existence of a qualification system, in the invitation to tender or negotiate, whether tenders may be submitted for one, for several or for all of the lots.

(3) A utility may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest, to tender or to negotiate.

(4) A utility must indicate in the procurement documents the objective and non-discriminatory criteria or rules it intends to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

(5) Where more than one lot may be awarded to the same tenderer, a utility may award contracts combining several or all lots where the utility has—

- (a) specified in the contract notice or in the invitation to confirm interest, to tender or to negotiate that it reserves the possibility of doing so; and
- (b) indicated the lots or groups of lots that may be combined.

Setting time limits

64.—(1) When fixing the time limits for the receipt of tenders and requests to participate, a utility must take account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in regulations 43 to 47.

(2) Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the procurement documents, the time limits for the receipt of tenders, which shall be longer than the minimum time limits set out in regulations 43 to 47, must be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.

(3) A utility must extend the time limits for the receipt of tenders, so that all economic operators concerned may be aware of all the information needed to produce tenders, where—

- (a) for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest 6 days before the time limit fixed for the receipt of tenders; or
- (b) significant changes are made to the procurement documents.

(4) In the case of an accelerated open procedure, the period mentioned in paragraph (3)(a) shall be 4 days.

(5) The length of the extension given pursuant to paragraph (3) must be proportionate to the importance of the information or change.

(6) A utility is not required to extend the time limit where—

- (a) additional information has not been requested in good time; or
- (b) the additional information requested is of insignificant importance with a view to preparing responsive tenders.