
SCOTTISH STATUTORY INSTRUMENTS

2006 No. 2

The Utilities Contracts (Scotland) Regulations 2006

PART 5

THE AWARD OF A CONTRACT

Criteria for the award of a contract

30.—(1) Subject to regulation 31 and paragraph (6) and (9) of this regulation, a utility shall award a contract on the basis of the offer which—

- (a) is the most economically advantageous from the point of view of the utility; or
- (b) offers the lowest price.

(2) A utility shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including delivery date or period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, environmental characteristics, technical merit, after sales service and technical assistance, commitments with regard to parts, security of supplies and price or otherwise.

(3) Where a utility intends to award a contract on the basis of the offer which is the most economically advantageous, it shall state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents.

(4) When stating the weightings referred to in paragraph (3), a utility may give the weighting a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract.

(5) Where, in the opinion of the utility, it is not possible to provide weightings for the criteria referred to in paragraph (3) on objective grounds, the utility shall indicate the criteria in descending order of importance in the contract notice or contract documents.

(6) If an offer for a contract is abnormally low, the utility may reject that offer but only if it has—

- (a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;
- (b) taken account of any evidence provided in response to a request in writing; and
- (c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator.

(7) Where a utility requests an explanation in accordance with paragraph (6), the information requested may in particular, include—

- (a) the economics of the method of construction, the manufacturing process or services provided;
- (b) the technical solutions suggested by the economic operator or the exceptionally favourable conditions available to the economic operator for the execution of the work or works, for the supply of goods or for the provision of the services;
- (c) the originality of the work, works, goods or services proposed by the economic operator;

- (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the contract is to be performed; or
 - (e) the possibility of the economic operator obtaining State aid.
- (8) Where a utility establishes that a tender is abnormally low because the economic operator has obtained State aid, the offer may be rejected on that ground alone only after–
- (a) consultation with the economic operator; and
 - (b) the economic operator is unable to prove within a reasonable time limit fixed by the utility, that the aid has been granted in a way which is compatible with the EC Treaty.
- (9) Where a utility rejects an abnormally low offer in accordance with paragraph (8), it shall send a report justifying the rejection to the Minister for onwards transmission to the Commission.
- (10) In this regulation “offer” includes a bid by one part of a utility to provide services, to carry out work or works or to make goods available to another part of the utility when the former part is invited by the latter part to compete with the offers sought from other persons.

Rejection of third country tenders – supply contracts

- 31.**—(1) In this regulation–
- “an offer of third country origin” means an offer to enter a supply contract under which more than 50% of the total value of the goods offered originate in States with which the Communities have not concluded, multilaterally or bilaterally, an agreement ensuring comparable and effective access for undertakings in member States to the markets of those States or in States to which the benefit of the provisions of the Utilities Directive has not been extended; and
- “goods” includes software used in telecommunications network equipment.
- (2) The origin of the goods shall be determined in accordance with Council Regulation (EC) No. 2913/92 of 12th October 1992 establishing the Community Customs Code⁽¹⁾.
- (3) Notwithstanding regulation 30, a utility need not accept an offer of third country origin.
- (4) Notwithstanding regulation 30, where an offer of third country origin is equivalent to an offer which is not of third country origin a utility shall not accept the offer of third country origin unless not to accept that offer would oblige the utility to acquire–
- (a) goods having technical characteristics different from those of existing goods; or
 - (b) an installation resulting in incompatibility, technical difficulties in operation and maintenance or disproportionate costs.
- (5) In the case of a supply contract to be awarded on the basis of the offer which offers the lowest price, offers are equivalent for the purposes of paragraph (4) if their prices are to be treated as equivalent in accordance with paragraph (7).
- (6) In the case of a supply contract to be awarded on the basis of the offer which is the most economically advantageous to the utility, offers are equivalent for the purposes of paragraph (4) if–
- (a) their prices are to be treated as equivalent in accordance with paragraph (7); and
 - (b) disregarding any difference in price the offer which is not of third country origin is at least as economically advantageous to the utility as the offer of third country origin.
- (7) The prices of offers are to be treated as equivalent for the purposes of paragraphs (5) and (6) if the price of the offer which is not of third country origin is the same as or is not more than 3% greater than the offer of third country origin.

(1) O.J. No. L 302, 19.10.92, p.1; Regulation was last amended by Regulation (EC) No. 648/2005 of the European Parliament and of the Council of 13 April 2005 (O.J. No. L 117, 04.05.05, p.13), Council Regulation (EC) No. 837/2005 of 23rd May 2005 (O.J. L 139, 02.06.05, p.1); and Commission Regulation (EC) No. 883/2005 of 10th June 2005 (O.J. L 148, 11.06.05, p.5).

Contract award notices

32.—(1) Subject to paragraphs (2) and (3), a utility which has awarded a contract or concluded a framework agreement shall, not later than 2 months after the award or conclusion, send to the Official Journal a notice, in the form of the contract award notice in Annex VI to Commission Regulation (EC) No. 1564/2005 including the information therein specified.

(2) When sending the contract award notice to the Official Journal, a utility may indicate that information regarding—

- (a) the number of tenders received;
- (b) the identity of the economic operator; or
- (c) prices;

is of a sensitive commercial nature, and require that it not be published.

(3) A utility shall not be required to send a contract award notice in accordance with paragraph (1) where it awards a contract under a framework agreement.

(4) A utility which has awarded a contract under a dynamic purchasing system in accordance with regulation 19 may—

- (a) send the contract award notice in accordance with paragraph (1); or
- (b) retain any notice it is proposing to send to the Official Journal in accordance with paragraph (1) for a period of 3 months commencing on the date that the first notice was retained.

(5) Where a utility retains contract award notices in accordance with paragraph (4)(b), it shall send those contract award notices to the Official Journal not later than 48 days after the end of each period of 3 months.

(6) A utility which has awarded a Part B services contract shall state in the contract award notice whether or not it agrees to its publication.

(7) Where a utility has awarded a research and development services contract it may, if the contract was awarded without a call for competition in accordance with regulation 17(1)(b), insert in section II.1.4 of the form of contract award notice in Annex VI to Commission Regulation (EC) No. 1564/2005 only the title of the category of services.

(8) Where the services contract referred to in paragraph (7) was not awarded in accordance with regulation 17(1)(b), the utility may provide limited information at section II.1.4 of the form of contract award notice in Annex VI to Commission Regulation (EC) No. 1564/2005 if the information which would otherwise be given is of a commercially sensitive nature, provided that the information given is no less detailed than that already provided in either its call for competition in accordance with regulation 16(2), or where a qualification system is used, than that recorded in accordance with regulation 25(14).

Information about contract award procedures

33.—(1) Subject to paragraph (13) a utility shall as soon as possible after the decision has been made, inform any economic operator which submitted an offer or which applied to be included amongst the economic operators to be selected to tender for or to negotiate the contract, or applied to be a party to a framework agreement, of its decision in relation to—

- (a) the award of the contract; or
- (b) the conclusion of the framework agreement;

and shall do so by notice in writing by the most rapid means of communication practicable.

(2) The notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the contract;
- (b) where practicable, the score obtained by–
 - (i) the economic operator which is to receive the notice; and
 - (ii) the economic operator–
 - (aa) to be awarded the contract; or
 - (bb) to become a party to the framework agreement; and
- (c) the name of the economic operator–
 - (i) to be awarded the contract; or
 - (ii) to become a party to the framework agreement.

(3) A utility shall allow a period of at least 10 calendar days to elapse between the date of despatch of the notice under paragraph (1) and the date on which that utility proposes to enter into the contract or to conclude the framework agreement.

(4) Subject to paragraph (13) if by midnight at the end of the second working day of the period referred to in paragraph (3) a utility receives a request in writing, from an economic operator which was sent a notice under paragraph (1), for the reasons why that economic operator was unsuccessful, the utility shall inform that economic operator of the characteristics and relative advantages of the successful tender.

(5) A utility shall give the information set out in paragraph (4) at least 3 working days before the end of the period referred to in paragraph (3), or where that is not possible the period referred to in paragraph (3) shall be extended to allow at least 3 working days between the provision of the information set out in paragraph (4) and the date the utility proposes to enter into the contract or concludes the framework agreement.

(6) Where a utility is seeking offers without a call for competition in accordance with regulation 17(1)(d) and there is only one tender for the contract, that utility need not comply with paragraphs (1) to (5).

(7) Where a utility awards a contract under a framework agreement, that utility need not comply with paragraphs (1) to (5).

(8) Where a utility is seeking to establish a dynamic purchasing system in accordance with regulation 19 that utility need not comply with paragraphs (1) to (5) but, subject to paragraph (13), shall as soon as possible after a decision has been made, inform any economic operator which applied to be admitted to the dynamic purchasing system of its decision in relation to admittance to that system and shall do so in writing if requested by the economic operator.

(9) Except for a request made in accordance with paragraph (4) which shall be dealt with in accordance with paragraphs (4) to (5) and subject to paragraph (13), a utility shall within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful–

- (a) inform that economic operator of the reasons why it was unsuccessful; and
- (b) if the economic operator submitted an admissible tender, the utility shall inform that economic operator of the characteristics and relative advantages of the successful tender and–
 - (i) the name of the economic operator to be awarded the contract;
 - (ii) the names of the parties to the framework agreement; or
 - (iii) the names of the economic operators admitted to the dynamic purchasing system.

(10) The reasons referred to in paragraph (9)(a) shall include any reason for the utility's decision that the economic operator did not meet the technical specifications

- (a) as specified in regulation 12(6) by an equivalent means; or
- (b) in terms of the performance or functional requirements in regulation 12(7) by an equivalent means.

(11) Subject to paragraph (13) a utility shall as soon as possible after the decision has been made, inform any economic operator which submitted an offer, which applied to be included amongst the economic operators to be selected to tender for, to negotiate the contract or to be admitted to a dynamic purchasing system, of its decision to abandon or to recommence a contract award procedure in respect of which a contract notice has been published, in relation to–

- (a) the award of a contract;
- (b) the conclusion of a framework agreement; or
- (c) admittance to a dynamic purchasing system.

(12) A utility which informs an economic operator of its decision in accordance with paragraph (11) shall–

- (a) include the reasons for the decision; and
- (b) provide the decision and reasons in writing if requested by the economic operator.

(13) A utility may withhold any information to be provided in accordance with paragraph (1), (2), (4), (8), (9), (11) or (12) where the disclosure of such information

- (a) would impede law enforcement;
- (b) would otherwise be contrary to the public interest;
- (c) would prejudice the legitimate commercial interests of any economic operator; or
- (d) might prejudice fair competition between economic operators.