
SCOTTISH STATUTORY INSTRUMENTS

2012 No. 89

The Utilities Contracts (Scotland) Regulations 2012

PART 5

THE AWARD OF A CONTRACT

Criteria for the award of a contract

30.—(1) Subject to regulation 31 and paragraphs (6) and (9) of this regulation, a utility must 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) In order to determine that an offer is the most economically advantageous, a utility must use criteria linked to the subject matter of the contract which may include 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 must 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 must 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 TFEU.
- (9) Where a utility rejects an abnormally low offer in accordance with paragraph (8), it must send a report justifying the rejection to the Minister for onward 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 must be determined in accordance with Council Regulation No 450/2008 of the European Parliament and of the Council laying down the Community Customs Code (Modernised 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 must 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) OJ L 145, 4.6.2008, p.1.

Contract award notices

32.—(1) Subject to paragraphs (2) and (3), a utility which has awarded a contract or concluded a framework agreement must, 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](#)(2) 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 is not 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 must send those contract award notices to the Official Journal not later than 2 months after the end of each period of 3 months.

(6) A utility which has awarded a Part B services contract must 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 and standstill period

33.—(1) Subject to paragraphs (4) and (10), a utility must by notice in writing as soon as possible after the decision has been made, inform all tenderers and all candidates concerned (if any) of its decision to—

- (a) award the contract; or
- (b) conclude the framework agreement.

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

(2) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

- (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;
 - (c) the name of the economic operator—
 - (i) to be awarded the contract; or
 - (ii) to become a party to the framework agreement;
 - (d) in the case of an unsuccessful economic operator, a summary of the reasons why the economic operator was unsuccessful;
 - (e) in the case of an unsuccessful tenderer, the characteristics and relative advantages of the successful tender; and
 - (f) a precise statement of the effect of paragraph (3) on the economic operator which is to receive the notice.
- (3) A utility must allow a period of at least the relevant standstill period to elapse between the date of dispatch of the notice referred to in paragraph (1) and the date on which that utility enters into the contract or concludes the framework agreement.
- (4) Paragraphs (1) to (3) do not apply where—
- (a) the only tenderer is the economic operator to be awarded the contract or to become a party to the framework agreement, and there are no candidates concerned; or
 - (b) the contract is a contract awarded under a framework agreement or a dynamic purchasing system.
- (5) Without prejudice to paragraph (4), paragraph (3) does not apply where—
- (a) the contract or framework agreement is exempt from the requirement to make a call for competition; or
 - (b) there are no tenderers concerned or candidates concerned.
- (6) Subject to paragraph (10), a utility must 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) in the case of an unsuccessful tenderer, other than a tenderer which has been informed by notice under paragraph (1), inform that economic operator of the characteristics and relative advantages of the successful tender and the name of—
 - (i) the economic operator to be awarded the contract;
 - (ii) the parties to the framework agreement; or
 - (iii) the economic operators admitted to the dynamic purchasing system.
- (7) The reasons referred to in paragraphs (2)(d) and (6)(a) include any reason for the utility's decision that the economic operator did not meet the technical specifications or their equivalent—
- (a) as specified in regulation 12(6); or
 - (b) in terms of the performance or functional requirements referred to in regulation 12(7).
- (8) Subject to paragraph (10), a utility must as soon as possible after the decision has been made, inform all candidates and tenderers of its decision to abandon or to recommence a contract award procedure in respect of which a call for competition has been made, in relation to—

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

(9) A utility which informs an economic operator of its decision in accordance with paragraph (8) must include the reasons for the decision and, if so requested by the economic operator, must provide the decision and reasons in writing.

(10) A utility may withhold any information to be provided in accordance with paragraph (1), (6) or (8) 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.