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SCOTTISH STATUTORY INSTRUMENTS

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**2015 No. 446**

**The Public Contracts (Scotland) Regulations 2015**

**PART 2**

**RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE**

**CHAPTER 2**

**RULES ON PUBLIC CONTRACTS**

*SECTION 3*

*Procedures*

**Use of the negotiated procedure without prior publication**

**33.**—(1) A contracting authority may award a public contract following negotiated procedure without prior publication of a contract notice or prior information notice 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 an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent [<sup>F1</sup>to the Scottish Ministers if they so request];
  - (b) 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; or
  - (c) where (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for open procedure, restricted procedure or competitive procedure with negotiation 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 contracting authority'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 58 (exclusion grounds); or

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**Changes to legislation:** *The Public Contracts (Scotland) Regulations 2015, Section 33 is up to date with all changes known to be in force on or before 23 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

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(ii) does not meet the selection criteria.

(3) For the purposes of paragraph (1)(c), the circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority.

(4) A contracting authority may award a public supply contract following negotiated procedure without prior publication in any of the following cases—

- (a) where the products involved are manufactured purely for the purpose of research, experimentation, study or development, but a contract awarded in reliance upon this subparagraph shall not include quantity production to establish commercial viability or to recover research and development costs;
- (b) for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- (c) for supplies quoted and purchased on a commodity market;
- (d) for the purchase of supplies on particularly advantageous terms, 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.

(5) For the purposes of paragraph (4)(b), the duration of such a contract, as well as that of recurrent contracts must not, save in exceptional circumstances, exceed 3 years.

(6) A contracting authority may award a public service contract following negotiated procedure without prior publication where the contract concerned—

- (a) follows a design contest organised in accordance with these Regulations; and
- (b) is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest.

(7) Where there is more than one winner of the design contest referred to in paragraph (6), all of them must be invited to participate in the negotiation.

(8) A contracting authority may award a public contract following negotiated procedure without prior publication where—

- (a) it is for new works, services or both, consisting of the repetition of similar works or services entrusted to the economic operator to which the contracting authority awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded following a procedure in accordance with regulation 27(1) and (2) (choice of procedures);
- (b) the basic project indicated the extent of possible additional works or services and the conditions under which they would be awarded;
- (c) the possible use of this procedure was disclosed in the procurement documents and the total estimated cost of subsequent works or services was taken into consideration by the contracting authority when applying regulation 5 (thresholds) in relation to the original contract; and
- (d) not more than 3 years has elapsed following the conclusion of the original contract.

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**Textual Amendments**

- F1** Words in [reg. 33\(1\)\(a\)](#) substituted (31.12.2020) by [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), regs. 1(2), **4(28)** (with sch. paras. 1-5)

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**Changes and effects yet to be applied to :**

- Regulations applied by [2023 c. 54 s. 119\(2\)\(a\)](#)
- reg. 33(1)(a) words substituted by [S.S.I. 2019/112 reg. 3\(27\)](#) (This amendment not applied to [legislation.gov.uk](#). S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))

**Changes and effects yet to be applied to the whole Instrument associated Parts and Chapters:**

Whole provisions yet to be inserted into this Instrument (including any effects on those provisions):

- reg. 11(1)(e)(i)(aa) words substituted by [S.S.I. 2019/112 reg. 3\(11\)\(a\)\(i\)](#) (This amendment not applied to [legislation.gov.uk](#). S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 11(1)(e)(i)(bb) words substituted by [S.S.I. 2019/112 reg. 3\(11\)\(a\)\(ii\)](#) (This amendment not applied to [legislation.gov.uk](#). S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 78(1)(i)(ii) and words inserted by [S.S.I. 2019/112 reg. 3\(52\)\(a\)](#) (This amendment not applied to [legislation.gov.uk](#). S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))