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SCOTTISH STATUTORY INSTRUMENTS

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**2016 No. 49**

**The Utilities Contracts (Scotland) Regulations 2016**

**PART 2**

**RULES APPLICABLE TO CONTRACTS**

**CHAPTER 2**

**TECHNIQUES AND INSTRUMENTS FOR  
ELECTRONIC AND AGGREGATED PROCUREMENT**

**Electronic Auctions**

**51.**—(1) A utility may use electronic auctions, in which economic operators present one or both of the following—

- (a) new prices, revised downwards;
- (b) new values concerning certain elements of tenders.

(2) A utility must structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

(3) Electronic auctions must not be used for works or service contracts which have as their subject-matter intellectual activities (such as the design of works) which cannot be ranked using automatic evaluation methods.

(4) A utility which decides to hold an electronic auction must state that fact in the—

- (a) contract notice;
- (b) the invitation to confirm interest; or
- (c) where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender.

(5) In open or restricted procedures or negotiated procedures with a prior call for competition, when the content of the procurement documents, in particular the technical specifications, can be established with precision, a utility may—

- (a) decide that the award of a contract shall be preceded by an electronic auction;
- (b) hold an electronic auction—
  - (i) on the reopening of competition among the parties to a framework agreement as provided for in regulation 49(5) (framework agreements); or
  - (ii) on the opening for competition of contracts to be awarded under a dynamic purchasing system.

(6) The electronic auction must be based—

- (a) on prices only where the contract is awarded on the basis of price only; and

- (b) on prices, on the new values of the features of the tenders indicated in the procurement documents or on both, where the contract is awarded on the basis of the best price-quality ratio or to the tender with the lowest cost using a cost effectiveness approach.
- (7) Where a utility has decided to hold an electronic auction, the procurement documents must include at least the following—
- (a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
  - (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;
  - (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
  - (d) relevant information concerning the electronic auction process;
  - (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding; and
  - (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.
- (8) Before proceeding with an electronic auction, a utility must make a full initial evaluation of the tenders in accordance with the award criteria and the weighting fixed for them.
- (9) A tender must be considered admissible where—
- (a) it has been submitted by a tenderer who has not been excluded pursuant to regulation 76(1) (criteria for qualitative selection) or 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations) and who meets the selection criteria; and
  - (b) it is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.
- (10) A tender must be considered to be irregular for the purposes of paragraph (9)(b) where—
- (a) it does not comply with the procurement documents;
  - (b) it was received late;
  - (c) there is evidence of collusion or corruption; or
  - (d) it has been found by the utility to be abnormally low.
- (11) A tender must be considered to be unacceptable for the purposes of paragraph (9)(b) where—
- (a) it was submitted by a tenderer which does not have the required qualifications; or
  - (b) the price tendered exceeds the utility's budget as determined and documented prior to the commencement of the procurement.
- (12) A tender must be considered unsuitable for the purpose of paragraph (9)(b) where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the utility's needs and requirements as specified in the procurement documents.
- (13) All tenderers that have submitted admissible tenders must be invited simultaneously, by electronic means, to participate in the electronic auction using, as of the date and time specified in the invitation, the technical connection arrangements referred to in accordance with the instructions set out in the invitation.
- (14) The electronic auction may take place in a number of successive phases.
- (15) The electronic auction must not start sooner than 2 working days after the date on which invitations are sent out.

(16) The invitation must be accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in regulation 80(9) to (11) (contract award criteria).

(17) The invitation must also state the mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices or new values submitted, or both.

(18) The formula referred to in paragraph (17) must incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in other procurement documents.

(19) For the purpose of paragraph (18), any ranges of weightings must be reduced beforehand to a specified value.

(20) Where variants are authorised in accordance with regulation 62 (variants) a separate formula must be provided for each variant.

(21) Throughout each phase of an electronic auction the utility must instantaneously communicate to all tenderers at least sufficient information to enable the tenderers to ascertain their relative rankings at any moment.

(22) A utility may, where this has been previously indicated, communicate information concerning other prices or values submitted.

(23) A utility may also, at any time, announce the number of participants in the current phase of the auction.

(24) In no case, however, may a utility disclose the identities of the tenderers during any phase of an electronic auction.

(25) A utility must close an electronic auction—

- (a) at the previously indicated date and time;
- (b) when the utility receives no more new prices or new values which meet the requirements concerning minimum differences specified in accordance with paragraph (7)(e), provided that the utility has previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction;
- (c) when all of the previously indicated number of phases in the auction have been completed.

(26) Where the utility intends to close an electronic auction in accordance with paragraph (25) (c), whether or not in combination with any arrangements laid down in paragraph (25)(b), the utility must indicate in the invitation to participate in the auction the timetable for each phase of the auction.

(27) After closing an electronic auction, a utility shall award the contract in accordance with regulation 80 (contract award criteria) on the basis of the results of the electronic auction.