
SCOTTISH STATUTORY INSTRUMENTS

2015 No. 446

The Public Contracts (Scotland) Regulations 2015

PART 2

RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE

CHAPTER 2

RULES ON PUBLIC CONTRACTS

SECTION 6

Contract Performance

Conditions for performance of contracts

70.—(1) A contracting authority may lay down special conditions relating to the performance of a contract, provided that they are—

- (a) linked to the subject-matter of the contract within the meaning of regulation 67(6) (contract award criteria); and
- (b) indicated in the call for competition or in the procurement documents.

(2) Such conditions may include economic, innovation-related, environmental, social or employment-related considerations.

[^{F1}Electronic invoicing

70A.—(1) It shall be an implied term of all public contracts that contracting authorities must accept and process electronic invoices for the provision of works, supplies or services in the performance of a contract where such invoices—

- (a) comply with the European standard on electronic invoicing reference to which has been published pursuant to Article 3(2) of [Directive 2014/55/EU](#) of the European Parliament and of the Council on electronic invoicing in public procurement, and
- (b) contain any of the syntaxes on the list published pursuant to Article 3(2) of that Directive.

(2) In this regulation—

“electronic invoice” means an invoice containing the information components referred to in regulation 70A(3) that has been issued, transmitted and received in a structured electronic format which allows for its automatic and electronic processing,

“GDPR” means the General Data Protection Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing [Directive 95/46/EC](#), and

“syntax” means the machine readable language or dialect used to represent the data elements contained in an electronic invoice.

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(3) An electronic invoice referred to in this regulation must contain the following information components—

- (a) process and invoice identifiers,
- (b) the invoice period,
- (c) seller information,
- (d) buyer information,
- (e) payee information,
- (f) seller’s tax representative information,
- (g) contract reference,
- (h) delivery details,
- (i) payment instructions,
- (j) allowance or charge information,
- (k) invoice line item information,
- (l) invoice totals, and
- (m) VAT breakdown.

(4) This regulation is without prejudice to applicable law on data protection.

(5) Subject to any provisions to the contrary in any enactments and without prejudice to the exemptions and restrictions set out in GDPR and the Data Protection Act 2018, personal data obtained for the purpose of electronic invoicing may be used only for that purpose or for purposes compatible with it.

(6) This regulation is without prejudice to any provision made by or under Schedule 11 of the Value Added Tax Act 1994.]

Textual Amendments

- F1** [Reg. 70A](#) inserted (18.4.2019 for specified purposes, 18.4.2020 in so far as not already in force) by [The Electronic Invoicing \(Public Contracts etc.\) Amendment \(Scotland\) Regulations 2019 \(S.S.I. 2019/7\)](#), regs. 1(2), **2(2)**

Subcontracting

71.—(1) In the procurement documents, the contracting authority may ask the tenderer to indicate in its tender any share of the contract that the tenderer may intend to subcontract to third parties and information about any proposed subcontractors including their name and contact details.

(2) Paragraph (1) is without prejudice to the liability of the main contractor under the contract.

(3) Where paragraph (4) applies, the contracting authority must require the main contractor to notify it, at the latest when the performance of the contract commences, of the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at the time.

(4) This paragraph applies in the case of—

- (a) a public works contract;
- (b) a public services contract including services to be provided at a facility under the direct oversight of the contracting authority.

(5) The contracting authority must require the main contractor to notify the authority of—

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- (a) any changes to that information during the course of the contract; and
 - (b) the name, contact details and legal representatives for any new subcontractors which the contractor subsequently involves in such works or services.
- (6) Paragraphs (3) and (5) do not apply to subcontractors who provide only supplies.
- (7) Where necessary for the purposes of paragraph (9), the required information must be accompanied by [F²SPDs] in respect of the subcontractors.
- (8) A contracting authority may require a contractor to provide information of the kind referred to in paragraphs (3) and (5) in respect of any one or more of the following—
- (a) supply contracts or services contracts (other than those concerning services to be provided at the facilities under the direct oversight of the contracting authority);
 - (b) suppliers involved in works or services contracts;
 - (c) subcontractors of the main contractor's subcontractors and other contractors further down the subcontracting chain.
- (9) A contracting authority may, in accordance with [F³regulations 60 (single procurement document: use, content and form of the SPD) and 61 (means of proof)], verify whether there are grounds for exclusion of subcontractors under regulation 58 (exclusion grounds).
- (10) The contracting authority must require the economic operator to replace a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion.
- (11) The contracting authority may require the economic operator to replace a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

Textual Amendments

- F2** Word in [reg. 71\(7\)](#) substituted (31.12.2020) by [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), [regs. 1\(2\), 4\(49\)\(a\)](#) (with [sch. paras. 1-5](#))
- F3** Words in [reg. 71\(9\)](#) substituted (31.12.2020) by [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), [regs. 1\(2\), 4\(49\)\(b\)](#) (with [sch. paras. 1-5](#))

Modification of contracts during their term

- 72.—(1) A contract and framework agreement may be modified without a new procurement procedure—
- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses—
 - (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used; and
 - (ii) do not provide for modifications or options that would alter the overall nature of the contract or framework agreement;
 - (b) to provide for additional works, supplies or services by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor—
 - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and
 - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority,

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- provided that any increase in price does not exceed 50% of the initial contract value;
- (c) where all of the following conditions are fulfilled—
- (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;
 - (ii) the modification does not alter the overall nature of the contract or framework;
 - (iii) any increase in price does not exceed 50 % of the initial contract value or framework agreement;
- (d) where a new contractor replaces one to which the contracting authority had initially awarded the contract or framework as a consequence of—
- (i) an unequivocal review clause or option in conformity with sub-paragraph (a); or
 - (ii) complete or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, by another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract or framework and is not aimed at circumventing the application of this Part;
- (e) where the modifications, irrespective of their value, are not substantial (as defined in paragraph (8)); or
- (f) where paragraph (5) applies.
- (2) Where several successive modifications are made—
- (a) the limitations imposed by the proviso at the end of paragraph (1)(b) and in paragraph (1)(c)(iii) shall apply to the value of each modification; and
 - (b) such successive modifications must not be aimed at circumventing these Regulations.
- (3) A contracting authority which has modified a contract or framework in either of the cases described in paragraph (1)(b) and (c) must [^{F4}submit] a notice to that effect for publication in accordance with regulation 52 ([^{F5}publication on the UK e-notification service]).
- (4) Such a notice must contain the information set out in Part G of Annex V to the Directive [^{F6}, but as if—
- (a) paragraph 9 (financing by EU funds) were omitted,
 - (b) in paragraph 11, “in the *Official Journal of the European Union*” read “on the UK e-notification service (within the meaning of the Public Contracts (Scotland) Regulations 2015)”, and
 - (c) in paragraph 12, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations].
- (5) This paragraph applies where the value of the modification is below both of the following values—
- (a) the relevant threshold mentioned in regulation 5 (thresholds); and
 - (b) 10 % of the initial contract value for service and supply contracts or frameworks and 15% of the initial contract value for works contracts or frameworks,
- provided that the modification does not alter the overall nature of the contract or framework agreement.
- (6) For the purposes of paragraph (5), where several successive modifications are made, the value must be the net cumulative value of the successive modifications.
- (7) For the purpose of the calculation of—
- (a) the price mentioned in paragraph (1)(b) and (c); and

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(b) the values mentioned in paragraph (5)(b),
the updated figure shall be the reference figure when the contract or framework includes an indexation clause.

(8) A modification of a contract or a framework agreement during its term must be considered substantial for the purpose of paragraph (1)(e) where—

- (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
- (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—
 - (i) allowed for the admission of candidates other than those initially selected;
 - (ii) allowed for the acceptance of a tender other than that originally accepted; or
 - (iii) attracted additional participants in the procurement procedure;
- (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- (d) the modification extends the scope of the contract or framework agreement considerably;
or
- (e) a new contractor replaces one to which the contracting authority had initially awarded the contract or framework in cases other than those provided for in paragraph (1)(d).

(9) A new procurement procedure in accordance with these Regulations is required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation.

Textual Amendments

- F4** Word in reg. 72(3) substituted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), 4(50)(a)(i) (with sch. paras. 1-5)
- F5** Words in reg. 72(3) substituted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), 4(50)(a)(ii) (with sch. paras. 1-5)
- F6** Reg. 72(4)(a)-(c) and words inserted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), 4(50)(b) (with sch. paras. 1-5)

Termination of contracts

73.—(1) A contracting authority must ensure that every public contract or framework which the authority awards contains provisions enabling the authority to terminate the contract or framework where—

- (a) the contract or framework has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72(9) (modification of contracts during their term); [^{F7}or]
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 58(1) (exclusion grounds), including as a result of the application of regulation 58(2), and should therefore have been excluded from the procurement procedure; ^{F8} ...

^{F9}(c)

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(2) Those provisions may address the basis on which the power is to be exercisable in those circumstances, for example by providing for notice of termination to be given and by addressing consequential matters that will or might arise from the termination.

(3) To the extent that a public contract or framework does not contain provisions enabling the contracting authority to terminate the contract or framework on any of the grounds mentioned in paragraph (1), a power for the contracting authority to do so on giving notice to the contractor shall be an implied term of that contract or framework.

[^{F10}(4) A contracting authority must not terminate a public contract in a manner that circumvents the obligations under these Regulations.]

Textual Amendments

- F7** Word in reg. 73(1) inserted (31.12.2020) by [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), regs. 1(2), **4(51)(a)** (with sch. paras. 1-5)
- F8** Word in reg. 73(1) omitted (31.12.2020) by virtue of [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), regs. 1(2), **4(51)(b)** (with sch. paras. 1-5)
- F9** Reg. 73(1)(c) omitted (31.12.2020) by virtue of [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), regs. 1(2), **4(51)(c)** (with sch. paras. 1-5, 7)
- F10** Reg. 73(4) inserted (30.5.2023) by [The Public Procurement \(Miscellaneous Amendments\) \(Scotland\) Regulations 2023 \(S.S.I. 2023/124\)](#), regs. 2, **4(15)** (with reg. 3)

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Changes and effects yet to be applied to :

- Regulations applied by [2023 c. 54 s. 119\(2\)\(a\)](#)

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))