
SCOTTISH STATUTORY INSTRUMENTS

2016 No. 49

The Utilities Contracts (Scotland) Regulations 2016

PART 1

GENERAL

CHAPTER 1

CITATION, COMMENCEMENT, EXTENT, DEFINITIONS AND SUBJECT-MATTER

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Utilities Contracts (Scotland) Regulations 2016.

Commencement

(2) Subject to paragraphs (3) and (4), these Regulations come into force on 18th April 2016.

(3) Regulation 38(1) to (7) (rules applicable to communication) comes into force—

- (a) for the purposes of regulations 50 (dynamic purchasing systems), 51 (electronic auctions), 52 (electronic catalogues), 61 (communication of technical specifications), 69(1) (form and manner of sending notices for publication at EU level) and 71 (electronic availability of procurement documents) on 18th April 2016;
- (b) for the purposes of regulation 53(6) (centralised purchasing activities and central purchasing bodies) on 18th April 2017; and
- (c) for all other purposes on 18th October 2018.

(4) Regulation 53(6) (centralised purchasing activities and central purchasing bodies) comes into force on 18th April 2017.

Extent

(5) These Regulations extend to Scotland only.

Interpretation

2.—(1) In these Regulations—

“accelerated open procedure” means an open procedure in which the utility has exercised the power conferred by regulation 43(5) (open procedure) to fix a time limit for the receipt of tenders which is shorter than the minimum specified in regulation 43(3) (open procedure);

“ancillary purchasing activity” means activity consisting of the provision of support to a purchasing activity, in particular in any of the following forms—

- (a) technical infrastructure enabling a utility to award a contract or to conclude a framework agreement for works, supplies or services;
- (b) advice on the conduct or design of procurement;

(c) preparation and management of procurement for and on behalf of the utility concerned;
 “buyer profile” means a page on the internet set up by a utility containing one or more of the following: periodic indicative notices, information on on-going invitations to tender, prospective and concluded contracts, cancelled procedures and any useful general information such as a contact point, telephone number, facsimile number, postal address or e-mail address;
 “body governed by public law” means a body that has legal personality, is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and which—

- (a) is financed for the most part by the State, regional or local authorities, or by any other body governed by public law;
- (b) is subject to management supervision by any such authority or body; or
- (c) has an administrative, managerial or supervisory board more than half the members of which were appointed by any body referred to in sub-paragraph (a);

“call for competition” means a call for competition made in a manner permitted by regulation 42(5) (choice of procedures) or, where relevant, one of the notices referred to in regulation 89(1) (publication of notices) or a contest notice;

“candidate” means an economic operator that has sought an invitation or has been invited to take part in—

- (a) a restricted procedure;
- (b) a negotiated procedure with prior call for competition;
- (c) a negotiated procedure without prior call for competition;
- (d) a competitive dialogue procedure; or
- (e) an innovation partnership;

“central purchasing body” means a utility or contracting authority which provides one or more centralised purchasing activities whether or not including an ancillary purchasing activity;

“centralised purchasing activity” means activity conducted on a permanent basis in one of the following forms—

- (a) the acquisition of supplies or services intended for a utility;
- (b) the award of contracts or the conclusion of framework agreements for works, supplies or services intended for a utility;

“commenced”, in relation to procurement, except where otherwise provided, means—

- (a) where a contract notice has been sent to the Official Journal in order to invite offers or requests to be selected to tender for or to negotiate, or be selected to participate in a dialogue in relation to a contract, in respect of a proposed contract, framework agreement or dynamic purchasing system;
- (b) where a periodic indicative notice has been sent to the Official Journal, in which case the contract award procedure that has commenced is the procedure for the award of any proposed contract the intention to award which was indicated in the notice, but only if the requirements in regulation 65(3)(a) or (b) (periodic indicative notices) are satisfied;
- (c) where the utility has dispatched any form of advertisement seeking offers or expressions of interest in the proposed contract, framework agreement or dynamic purchasing system;
- (d) in any case where there is no such advertising, where the utility has contacted any economic operator—

- (i) in order to seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system; or
 - (ii) in response to an unsolicited expression of interest or offer in respect of a proposed contract, framework agreement or dynamic purchasing system; or
- (e) where the utility has sent a notice to the Official Journal in order to hold a design contest;
- “Commission” means the European Commission;

“common technical specification” means a technical specification in the field of information and communication technology laid down in accordance with Articles 13 and 14 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council on European standardisation, amending Council Directives [89/686/EEC](#) and [93/15/EEC](#) and Directives [94/9/EC](#), [94/25/EC](#), [95/16/EC](#), [97/23/EC](#), [98/34/EC](#), [2004/22/EC](#), [2007/23/EC](#), [2009/23/EC](#) and [2009/105/EC](#) of the European Parliament and of the Council and repealing Council [Decision 87/95/EEC](#) and Decision No [1673/2006/EC](#) of the European Parliament and of the Council⁽¹⁾ as amended from time to time;

“concession contract” means a “works concession” or “services concession” as defined in paragraph (1) of Article 5 of the Concession Contracts Directive and which includes the transfer of an operating risk as set out in that paragraph;

“Concession Contracts Directive” means [Directive 2014/23/EU](#) of the European Parliament and Council on the award of concession contracts⁽²⁾;

“contest notice” means the notice referred to in regulation 92(1) (notices);

“contract”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), and except where otherwise provided, means any works, supplies or services contract for pecuniary interest concluded in writing between one or more economic operators and one or more utilities;

“contract notice”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means the notice referred to in regulation 67 (contract notices) or, where relevant, 89(1)(a) (publication of notices);

“contracting authority” means the State, a regional or local authority, a body governed by public law or an association formed by one or more such authorities or bodies;

“CPV” means the Common Procurement Vocabulary as adopted by Regulation (EC) [No. 2195/2002](#) of the European Parliament and of the Council on the Common Procurement Vocabulary⁽³⁾ as amended from time to time and “CPV Code” shall be construed accordingly;

“Defence and Security Regulations” means the Defence and Security Public Contracts Regulations 2011⁽⁴⁾;

“design contest”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means those procedures which enable a utility to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes;

“disabled”, in relation to a person, means a disabled person within the meaning of the Equality Act 2010⁽⁵⁾ and, in relation to a worker, means a disabled person who is a worker;

(1) OJ L 316, 14.11.2012, p.1.

(2) OJ L 94, 28.3.2014, p.1.

(3) OJ L 340, 16.12.2002, p.1.

(4) S.I. 2011/1848, amended by [S.S.I. 2012/88](#), [S.S.I. 2012/89](#), [S.I. 2015/102](#) and [S.S.I. 2015/446](#).

(5) 2010 c.15.

“dynamic purchasing system”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means the system referred to in regulation 50 (dynamic purchasing systems);

“economic operator”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means a person or a utility, or a group of such persons or utilities or both, including any temporary associations of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market;

“electronic means” means electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, radio, optical or other electromagnetic means;

“ESPD” means the European Single Procurement Document referred to in regulation 60 of the Public Contracts (Scotland) Regulations;

“European standard” means a standard adopted by a European standardisation organisation and made available to the general public;

“European Technical Assessment” means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the relevant European Assessment Document as defined in point 12 of Article 2 of Regulation (EU) No 305/2011 of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC(6) as amended from time to time;

“EU Publications Office” means the Publications Office of the EU;

“financial year” except where the context otherwise requires, means the period of 12 months ending on the date in any year in respect of which the accounts of a utility are prepared;

“framework agreement”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means an agreement between one or more utilities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular, terms with regard to price and, where appropriate, the quantity envisaged;

“GPA” means the Agreement on Government Procurement between certain parties to the World Trade Organisation signed in Marrakesh on 15th April 1994 as amended(7);

“innovation” means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations including with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy(8) for smart, sustainable and inclusive growth;

“international standard” means a standard adopted by an international standardisation organisation and made available to the general public;

“invitation to confirm interest” means an invitation which a utility sends in order to comply with regulation 72(3) (invitations to candidates);

“label” means any document, certificate or attestation confirming that the works, products, services, processes or procedures in question meet certain requirements;

(6) OJ L 88, 4.4.2011, p.5, last amended by Commission Delegated Regulation (EU) No 574/2014 (OJ L 159, 28.5.2014, p.41).

(7) All the substantive provisions of the Agreement were substituted by the Protocol which was approved, on behalf of the EU, by Council Decision 2014/115/EU (OJ L 68, 7.3.2014, p.1), to which the text of the Protocol is attached (at OJ L 68, 7.3.2014, p.2). In accordance with Article 3 of the Protocol, the Protocol has entered into force in the EU.

(8) European Commission COM(2010) 2020 3.3.2010.

“label requirements” means the requirements to be met by the works, products, services, processes or procedures in question in order to obtain the label concerned;

“life cycle” means all stages which are consecutive or interlinked, or both, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation;

“main contractor” means an economic operator to which a utility has awarded a contract or framework agreement;

“national standard” means a standard adopted by a national standardisation organisation and made available to the general public;

“Official Journal” means the Official Journal of the European Union;

“periodic indicative notice”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means the notice referred to in regulation 65 (periodic indicative notices), or where relevant, 89(1)(b) (publication of notices);

“procurement” means the process leading to the award of a contract or framework agreement or establishment of a dynamic purchasing system for the acquisition of works, supplies or services from an economic operator;

“procurement document” means a document produced or referred to by the utility to describe or determine elements of the procurement or the procedure, including the contract notice, the periodic indicative notice or the notices on the existence of a qualification system where they are used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

“Public Contracts (Scotland) Regulations” means the Public Contracts (Scotland) Regulations 2015⁽⁹⁾;

“selection criteria”, except in regulation 93 (rules on the organisation of design contests and the selection of participants and the jury), means selection criteria set out by the utility in accordance with regulations 76 (criteria for qualitative selection) or 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations);

“service contract” means a contract which has as its object the provision of services other than those referred to in the definition of “works contract”;

“standard” means a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory, and which is an international standard, a European standard or a national standard;

“supply contract” means a contract which has as its object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products, whether or not the contract also includes, as an incidental matter, siting and installation operations;

“technical reference” means any deliverable produced by European standardisation bodies, other than European standards, according to procedures adapted to the development of market needs;

“technical specification” has the meaning given by regulation 58 (technical specifications);

“tenderer” means an economic operator that has submitted a tender;

“TFEU” means the Treaty on the Functioning of the European Union⁽¹⁰⁾;

⁽⁹⁾ S.S.I. 2015/446.

⁽¹⁰⁾ OJ C 326, 26.10.2012, p.47.

“Utilities Contracts Directive” means [Directive 2014/25/EU](#) of the European Parliament and of the Council on procurement entities operating in the water, energy, transport and postal services sectors and repealing [Directive 2004/17/EC](#)(**11**);

“utility”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), has the meaning given to it by regulation 4 (utilities);

“VAT” means value added tax charged in accordance with the Value Added Tax Act 1994(**12**);

“a work” means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;

“works” means activities within the meaning of Schedule 1 (activities constituting works) and activities related to these;

“working day” means a day other than a Saturday, Sunday or bank holiday in Scotland within the meaning of the Banking and Financial Dealings Act 1971(**13**);

“works contract” means a contract which has as its object one of the following—

- (a) the execution, or both the design and execution, of works related to one of the activities specified in Schedule 1;
- (b) the execution, or both the design and execution, of a work;
- (c) the realisation by whatever means of a work corresponding to the requirements specified by the utility exercising decisive influence on the type or design of the work; and

“written” or “in writing” means any expression which can be read by a person, reproduced and subsequently communicated, including information transmitted and stored by electronic means.

(2) Unless the context otherwise requires, any expression used both in these Regulations and in the Utilities Contracts Directive has the meaning that it bears in that Directive.

(3) The value in pounds sterling of any amount expressed in Euros in these Regulations, except in regulation 95 (retention of contract copies), or any of the provisions of the Utilities Contracts Directive mentioned in these Regulations shall be taken to be the value determined by the Commission in accordance with Article 17 of the Utilities Contracts Directive and published from time to time in the Official Journal.

(4) In these Regulations (except regulation 101(4) (enforcement of duties through the courts)), where these Regulations refer to a period of time—

- (a) where the period follows an action taken, the day on which the action takes place is not counted in the calculation of the period;
- (b) the period must include at least 2 working days; and
- (c) where the last day of the period is not a working day, the period is extended to include the next working day.

Subject-matter and application of these Regulations

3.—(1) Parts 1 to 4 establish rules on the procedures for procurement for the award of a contract, or to the organisation of a design contest, by a utility which—

- (a) has a value estimated to be not less than the threshold mentioned in regulation 15 (thresholds); and
- (b) is not excluded from the scope of Parts 1 to 4 by any other provision in Chapters 2 and 3 of this Part.

(11) OJ L 94, 28.3.2014, p.243.

(12) 1994 c.23.

(13) 1971 c.80.

(2) Parts 1 to 4 are subject to Article 346 of the TFEU.

(3) The scope of Parts 1 to 4 does not include non-economic services of general interest.

Utilities

4.—(1) For the purpose of these Regulations, a utility is a person which—

- (a) is a contracting authority or public undertaking and which pursues one of the activities referred to in regulations 8 to 14;
- (b) is not a contracting authority or public undertaking but whose activities include an activity referred to in regulations 8 to 14 which operate on the basis of special or exclusive rights granted by a competent authority.

(2) In this regulation, “public undertaking” means a person over which one or more contracting authorities are able to exercise, directly or indirectly, a dominant influence by virtue of one or more of the following—

- (a) their ownership of that person;
- (b) their financial participation in that person;
- (c) the rights accorded to them by the rules which govern that person.

(3) For the purposes of paragraph (2), a contracting authority is considered to be able to exercise a dominant influence over a person in any one or more of the following cases where it, directly or indirectly—

- (a) possesses the majority of the undertaking’s subscribed capital;
- (b) controls the majority of the voting power attached to the issued share capital of that person;
- (c) can appoint—
 - (i) more than half of the individuals who are ultimately responsible for managing that person’s affairs;
 - (ii) more than half of its members; or
 - (iii) in the case of a group of individuals, more than half of those individuals.

(4) In this regulation, “special or exclusive rights” mean rights granted by a competent authority by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of activities specified in regulations 8 to 14 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

(5) For the purposes of paragraph (4), rights do not constitute “special or exclusive rights” if they are granted by means of a procedure in which—

- (a) there was adequate publicity; and
- (b) the granting of those rights was based on objective criteria.

(6) The procedures referred to in paragraph (5) include—

- (a) procurement with a prior call for competition in accordance with—
 - (i) these Regulations or the Utilities Contracts (Scotland) Regulations 2012(14);
 - (ii) the Public Contracts (Scotland) Regulations or the Public Contracts (Scotland) Regulations 2012(15);
 - (iii) the Concession Contracts Directive; or
 - (iv) the Defence and Security Regulations; and

(14) S.S.I. 2012/89.

(15) S.S.I. 2012/88.

- (b) procedures in accordance with other legal acts of the EU as mentioned in Annex II of the Utilities Contracts Directive, as amended from time to time.

Mixed procurement covering the same activity

5.—(1) Where a procurement has as its subject different types of procurement all covering the same activity any part of which is covered by Article 346 of the TFEU or the Defence and Security Regulations, regulation 24 (mixed procurement covering the same activity and involving defence and security aspects) applies.

(2) Where a procurement has as its subject a mixed contract including works, supplies or services for the pursuit of a single activity covered by these Regulations, the application of these Regulations to the procurement is determined by that part of the contract that characterises the main subject of the contract in question.

(3) For the purposes of paragraph (2), in the case of a mixed contract—

- (a) consisting partly of services of a kind referred to in Chapter 1 of Part 3 and partly of other services; or
- (b) consisting partly of supplies and partly of services,

the main subject shall be determined by reference to which of the respective supplies or services has the highest estimated value.

(4) Where a procurement has as its subject a mixed contract intended to cover a single activity but which includes different parts which are objectively separable and the procurement of which, if separate, would include matters that would be subject to the application of these Regulations and matters that would not, a utility may choose to award—

- (a) separate contracts for the separate parts; or
- (b) a single contract.

(5) Where a utility decides to award separate contracts under paragraph (4)(a) the application or otherwise of these Regulations to the procurement of each separate part shall be determined by reference to the characteristics of such part.

(6) Where a utility decides to award a single contract under paragraph (4)(b) these Regulations shall apply to the procurement of the single contract irrespective of the estimated value of any parts that, if separated, would not have been subject to the application of these Regulations.

(7) Where a single contract referred to in paragraph (4)(b) combines elements of works, supplies or service contracts together with a concession contract, the procurement shall be subject to the application of these Regulations where the estimated value of the part of the contract that would constitute a contract covered by these Regulations, calculated in accordance with regulation 16 (methods for calculating the estimated value), is equal to or greater than the applicable threshold determined in accordance with regulation 15 (thresholds).

(8) Where a mixed contract includes different parts which are objectively not separable the application or otherwise of these Regulations to the procurement of that contract shall be determined by reference to the main subject-matter of that contract.

Procurement covering several activities

6.—(1) Where a procurement has as its subject a contract intended to cover several activities and includes an activity which is covered by Article 346 of the TFEU or the Defence and Security Regulations, regulation 25 (procurement covering several activities and involving defence and security aspects) applies.

(2) Where a procurement has as its subject a contract intended to cover several activities, a utility may decide to undertake procurement for the award of—

- (a) separate contracts for the separate activities; or
- (b) a single contract.

(3) For the purposes of paragraph (2), the choice between awarding a single contract or a number of separate contracts must not be made with the objective of excluding any such contract from the scope of (where applicable)—

- (a) these Regulations;
- (b) the Public Contracts (Scotland) Regulations; or
- (c) the Concession Contracts Directive.

(4) Where a utility decides to award separate contracts under paragraph (2)(a), the application or otherwise of these Regulations to the procurement of each separate activity is determined by reference to the characteristics of such activity.

(5) Where a utility decides to award a single contract under paragraph (2)(b) the application of these Regulations to the procurement of the contract is determined by the activity for which the contract is principally intended.

(6) Where it is objectively impossible to determine for which activity the contract is principally intended pursuant to paragraph (5), the application of these Regulations to the procurement of the contract is determined in accordance with the following—

- (a) if one of the activities for which the contract is intended is subject to these Regulations and another is subject to the Public Contracts (Scotland) Regulations, the procurement of the contract is subject to the Public Contracts (Scotland) Regulations;
- (b) if one of the activities for which the contract is intended is subject to these Regulations and another is subject to the Concession Contracts Directive, the procurement of the contract is subject to these Regulations;
- (c) if one of the activities for which the contract is intended is subject to these Regulations and the other is not subject to these Regulations, the Public Contracts (Scotland) Regulations nor the Concession Contracts Directive, the procurement of the contract is subject to these Regulations.