
SCOTTISH STATUTORY INSTRUMENTS

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The Utilities Contracts (Scotland) Regulations 2016

PART 2

RULES APPLICABLE TO CONTRACTS

CHAPTER 2

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

Framework Agreements

49.—(1) A utility may conclude a framework agreement, provided that the utility applies the procedures provided for in these Regulations.

(2) The term of a framework agreement must not exceed 8 years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

(3) A contract based on a framework agreement must be awarded on the basis of objective rules and criteria.

(4) For the purposes of paragraph (3), the objective rules and criteria must—

- (a) be set out in the procurement documents for the framework agreement; and
- (b) ensure equal treatment of the economic operators who are party to the framework agreement.

(5) The award of a contract referred to in paragraph (3) may include reopening the competition among those economic operators party to the framework agreement as concluded and, if so, a utility must—

- (a) set a time limit which is sufficiently long to allow tenders for each specific contract to be submitted; and
- (b) award each contract to the tenderer that has submitted the most economically advantageous tender on the basis of the award criteria set out in the specifications of the framework agreement.

(6) A utility must not use a framework agreement improperly or in such a way as to prevent, restrict or distort competition.

Dynamic Purchasing Systems

50.—(1) A utility may use a dynamic purchasing system for commonly used purchases the characteristics of which, as generally available on the market, meet the utility's requirements.

(2) The dynamic purchasing system must—

- (a) be operated as a completely electronic process; and

- (b) be open, throughout the period of validity of the system, to any economic operator that satisfies the selection criteria.
- (3) The dynamic purchasing system may be divided into categories of works, supplies or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned.
- (4) The characteristics referred to in paragraph (3) may include reference to either or both of—
 - (a) the maximum allowable size of the subsequent specific contracts; and
 - (b) a specific geographic area in which subsequent specific contracts will be performed.
- (5) In order to procure under a dynamic purchasing system, a utility must follow the restricted procedure, and accordingly the provisions of regulation 44 (restricted procedure) apply, subject to the provisions of this regulation.
- (6) Where a utility has divided the system into categories of works, supplies or services in accordance with paragraph (3), the utility must specify the applicable selection criteria for each category.
- (7) A utility must admit to a dynamic purchasing system all of the candidates satisfying the selection criteria and must not limit the number of candidates to be admitted whether under regulation 76(2) (criteria for qualitative selection) or otherwise.
- (8) The minimum time period for receipt of requests to participate—
 - (a) other than in exceptional circumstances, shall be 30 days from the date on which—
 - (i) the contract notice is sent for publication; or
 - (ii) where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest is sent; and
 - (b) shall, in any event, be 15 days from such date.
- (9) No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent.
- (10) The minimum time period for receipt of tenders shall be 10 days from the date on which the invitation to tender is sent.
- (11) A utility must, throughout the period of validity of the dynamic purchasing system, give any economic operator the possibility of requesting to participate in the system under the conditions referred to in paragraphs (5) to (10).
- (12) A utility must finalise evaluation of such requests in accordance with the selection criteria within 10 working days following their receipt.
- (13) The deadline referred to in paragraph (12) may be extended to a maximum of 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or otherwise to verify whether the selection criteria are met.
- (14) Despite paragraphs (12) and (13), as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, a utility may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period.
- (15) Where a utility intends to extend the evaluation period in accordance with paragraph (14), the utility must indicate in the procurement documents the length of the extended period that the utility intends to apply.
- (16) A utility must inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.
- (17) A utility must invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with regulation 72 (invitations to candidates).

(18) Where the dynamic purchasing system has been divided into categories of works, supplies or services pursuant to paragraph (3), a utility must invite every relevant participant to submit a tender.

(19) In paragraph (18), “relevant participants” means economic operators which have been admitted to the dynamic purchasing system in relation to the category corresponding to the specific procurement concerned.

(20) For the purposes of awarding contracts under a dynamic purchasing system, a utility must—

- (a) publish a call for competition which—
 - (i) makes it clear that a dynamic purchasing system is involved; and
 - (ii) indicates the period of validity of the dynamic purchasing system;
- (b) indicate in the procurement documents at least the nature and estimated quantity of the purchases envisaged, as well as all the necessary information concerning the dynamic purchasing system, including how the system operates, the electronic equipment used and the technical connection arrangements and specifications;
- (c) indicate in the procurement documents any division into categories of works, supplies or services and the characteristics defining them; and
- (d) throughout the period of validity of the system, offer unrestricted and full direct access to the procurement documents in accordance with regulation 71 (electronic availability of procurement documents).

(21) A utility must award the contract to the tenderer that submitted the most economically advantageous tender on the basis of the award criteria set out in—

- (a) the contract notice for the dynamic purchasing system;
- (b) where a periodic indicative notice is used as a means of calling for competition, in 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.

(22) For the purposes of paragraph (21), those criteria, where appropriate, may be formulated more precisely in the invitation to tender.

(23) A utility which, in accordance with regulation 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations), applies exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations may, at any time throughout the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed ESPD as provided for in regulation 60(1) of those Regulations within 5 working days from the date on which that request is transmitted.

(24) Regulation 60(7) to (10) of the Public Contracts (Scotland) Regulations applies throughout the period of validity of the dynamic purchasing system.

(25) A utility must notify the Commission of any change to the period of validity mentioned in paragraph (20)(a)(ii) using—

- (a) where the period of validity is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
- (b) where the system is terminated, a contract award notice referred to in regulation 68 (contract award notices).

(26) No charges may be made to any economic operators which are interested in or are a party to the dynamic purchasing system.

(27) All communications in the context of a dynamic purchasing system must only be made by electronic means in accordance with regulation 38(1) to (7) and (11) to (20) (rules applicable to communication).

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.

Electronic catalogues

52.—(1) Where the use of electronic means of communication is required, a utility may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

(2) Tenders presented in the form of an electronic catalogue may be accompanied by other documents, completing the tender.

(3) Electronic catalogues must be established by the candidates or tenderers with a view to participating in a given procurement in accordance with the technical specifications and format established by the utility.

(4) Electronic catalogues must also comply with the requirements for electronic communication tools set out in regulation 38 (rules applicable to communication) as well as with any additional requirements set by the utility in accordance with that regulation.

(5) Where the presentation of tenders in the form of electronic catalogues is accepted or required, a utility must—

- (a) state that to be the case in—
 - (i) the contract notice;
 - (ii) the invitation to confirm interest; or
 - (iii) where the means of calling for competition is a notice on the existence of a qualification system, the invitation to tender or negotiate; and
- (b) indicate in the procurement documents all the necessary information pursuant to regulation 38(16) to (25) (rules applicable to communication) concerning the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

(6) Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, a utility may provide that the reopening of competition for a specific contract is to take place on the basis of updated catalogues.

(7) Where a utility requires updated catalogues in accordance with paragraph (6), the utility must—

- (a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the contract in question; or

- (b) notify tenderers that the utility intends to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the contract in question, provided that the use of that method has been indicated in the procurement documents for the framework agreement.
- (8) Where a utility reopens competition for a specific contract in accordance with paragraph (7)(b), the utility must—
 - (a) notify tenderers of the date and time at which the utility intends to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question; and
 - (b) allow tenderers to refuse such collection of information.
- (9) A utility must allow an adequate period of time between the notification referred to in paragraph (8)(a) and the collection of information.
- (10) Before awarding the contract, a utility must present the collected information to the tenderer concerned and give the tenderer the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.
- (11) A utility may award a contract based on a dynamic purchasing system by requiring that offers for a specific contract are to be presented in the format of an electronic catalogue.
- (12) A utility may also award a contract based on a dynamic purchasing system in accordance with paragraphs (7)(b) and (8) to (10) provided that the request for participation in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the utility.
- (13) For the purpose of paragraph (12), the catalogue must be completed subsequently by the candidates, when they are informed of the utility's intention to constitute tenders by means of the procedure set out in paragraph (7)(b).

Centralised purchasing activities and central purchasing bodies

- 53.**—(1) A utility may acquire supplies and services from a central purchasing body offering the centralised purchasing activity referred to in regulation 2(1).
- (2) A utility may acquire works, supplies and services, or any one or more of them, by using—
 - (a) a contract awarded to the utility by a central purchasing body;
 - (b) a dynamic purchasing system operated by a central purchasing body; or
 - (c) a framework agreement concluded by a central purchasing body offering the centralised purchasing activity.
 - (3) Where a dynamic purchasing system which is operated by a central purchasing body may be used by another utility, this must be mentioned in the call for competition setting up that dynamic purchasing system.
 - (4) Subject to paragraph (5), where a utility makes an acquisition in accordance with paragraphs (1) or (2), the utility fulfils its obligations under these Regulations in relation to such acquisition.
 - (5) A utility referred to in paragraph (4) is responsible for fulfilling the obligations imposed by these Regulations in respect of any part of the procedure that the utility conducts itself, such as—
 - (a) awarding a contract under a dynamic purchasing system which is operated by a central purchasing body;
 - (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body.

(6) A procurement conducted by a central purchasing body must be performed using electronic means of communication, in accordance with the requirements set out in regulation 38 (rules applicable to communication).

(7) A utility may, without applying the procedures provided for in these Regulations, award a service contract for the provision of centralised purchasing activities to a central purchasing body.

(8) A service contract referred to in paragraph (7) may also include the provision of an ancillary purchasing activity.

(9) Procurement carried out by a central purchasing body in order to perform a centralised purchasing activity shall be deemed to be procurement for the pursuit of an activity referred to in regulations 8 to 14.

Occasional joint procurement

54.—(1) Two or more utilities may agree to perform a certain specific procurement jointly.

(2) A utility shall be jointly responsible for fulfilling their obligations under these Regulations where—

- (a) the conduct of a procurement in its entirety is carried out jointly in the name of and on behalf of all the utilities concerned; or
- (b) one utility manages the procedure, acting on its own behalf and on behalf of the other utilities concerned.

(3) Where the conduct of a procurement is not in its entirety carried out in the name of and on behalf of the utilities concerned—

- (a) the utilities shall be jointly responsible only for those parts carried out jointly; and
- (b) each utility shall have sole responsibility for fulfilling its obligations under these Regulations in respect of the parts it conducts in its own name and on its own behalf.

Procurement involving utilities from different member States

55.—(1) Without prejudice to regulations 27 to 30, a utility may act jointly with a utility from another member State in the award of a contract by using one of the means provided for in this regulation.

(2) A utility must not use the means provided for in this regulation for the purpose of avoiding the application of mandatory public law provisions in the applicable law of the jurisdiction to which the utility is subject, where those provisions are in conformity with EU law.

(3) A utility may use centralised purchasing activities offered by a central purchasing body located in another member State.

(4) A utility may only use the provision of centralised purchasing activities by a central purchasing body located in another member State where they are conducted in accordance with the national provisions of the member State where the central purchasing body is located.

(5) The national provisions of the member State where the central purchasing body is located also apply to—

- (a) the award of a contract under a dynamic purchasing system; and
- (b) the conduct of a reopening of competition under a framework agreement.

(6) In the circumstances set out in paragraph (7), several utilities from different member States may—

- (a) jointly award a contract, conclude a framework agreement or operate a dynamic purchasing system; and

- (b) award contracts based on the framework agreement or award contracts under the dynamic purchasing system.
- (7) The circumstances referred to in paragraph (6) are that—
- (a) unless the necessary elements have been regulated by an international agreement concluded between the member States concerned, the participating utilities have concluded an agreement that determines—
- (i) the responsibilities of the parties and the relevant applicable national provisions; and
- (ii) the internal organisation of the procurement, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts; and
- (b) the allocation of responsibilities and the applicable national law have been referred to in the procurement documents.
- (8) When determining responsibilities and the applicable national law as referred to in paragraph (7)(a)(i), the participating utilities may allocate specific responsibilities among them and determine the applicable provisions of the national laws of any of their respective member States.
- (9) A participating utility fulfils its obligations under these Regulations when it purchases works, supplies or services from a utility which is responsible for the procurement.
- (10) Utilities from different member States may set up a joint entity for the purpose of paragraph (1), subject to compliance with paragraph (11).
- (11) The participating utilities must, before undertaking any given procurement, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules of one of the following—
- (a) the member State where the joint entity has its registered office; or
- (b) the member State where the joint entity is carrying out its activities.
- (12) The agreement referred to in paragraph (11) may either apply for an undetermined period, when fixed in the constitutive act of the joint entity, or may be limited to a certain period of time, to certain types of contract or to one or more individual contract awards.
- (13) The other provisions of these Regulations apply to procurement by the joint entity only where they are the national provisions applicable in accordance with paragraph (11).
- (14) In this regulation—
- “central purchasing body located in another member State” means any person which is a central purchasing body for the purposes of paragraph (12) of Article 2 of the Utilities Contracts Directive in the member State in which it is located;
- “joint entity” includes European groupings of territorial cooperation under Regulation (EC) No 1082/2006 of the European Parliament and of the Council on a European grouping of territorial cooperation⁽¹⁾ and other entities established under EU law; and
- “utility from another member State” means any person which is a contracting entity for the purposes of Article 4 of the Utilities Contracts Directive in a member State other than the United Kingdom; and references to “participating utilities” to the extent that they are from another member State shall be interpreted accordingly.

(1) OJ L 210, 31.7.2006, p.19.