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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 3**

**CONDUCT OF THE PROCEDURE**

*SECTION 1*

*Preparation*

**Preliminary market consultation**

**56.**—(1) Before commencing a procurement, a utility may conduct a market consultation with a view to preparing the procurement and informing economic operators of the utility's procurement plans and requirements.

(2) For this purpose, a utility may act as it considers appropriate, including seeking or accepting advice from independent experts or authorities or from market participants.

(3) Such advice may be used in the planning and conduct of the procurement, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

**Prior involvement of candidates or tenderers**

**57.**—(1) A utility must take appropriate measures to ensure that competition is not distorted by the participation of a candidate or tenderer where that candidate or tenderer, or an undertaking related to that candidate or tenderer—

- (a) has advised the utility, whether in the context of regulation 56 (preliminary market consultation) or not; or
- (b) has otherwise been involved in the preparation of the procurement.

(2) Such measures must include—

- (a) the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement; and
- (b) the fixing of adequate time limits for the receipt of tenders.

(3) A candidate or tenderer in a situation referred to in paragraph (1) may only be excluded from the procedure for the purposes of paragraph (1) where there are no other means to ensure compliance with the duty referred to in regulation 34(1) (principles of procurement).

(4) Prior to any such exclusion, a candidate or tenderer must be given the opportunity to prove that their involvement in preparing the procurement is not capable of distorting competition.

(5) The measures taken must be documented in the report referred to in regulation 96 (reporting and documentation requirements).

### **Technical specifications**

**58.**—(1) The technical specifications must—

- (a) be set out in the procurement documents; and
- (b) lay down the characteristics required of any works, supply or service.

(2) In the case of a works contract, technical specifications define any characteristics required of a material, product or supply so that it fulfils the use for which it is intended by the utility.

(3) The characteristics referred to in paragraph (2) may include—

- (a) levels of environmental and climate performance;
- (b) design for all requirements (including accessibility for disabled persons) and conformity assessment;
- (c) performance, safety or dimensions, including the procedures concerning quality assurance;
- (d) terminology;
- (e) symbols;
- (f) testing and test methods;
- (g) packaging, marking and labelling;
- (h) user instructions;
- (i) production processes and methods at any stage of the life cycle of the works;
- (j) rules relating to design and costing and the test, inspection and acceptance conditions for works; and
- (k) methods or techniques of construction and all other technical conditions which the utility is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

(4) In the case of a supply or service contract, the required characteristics may include—

- (a) quality levels;
- (b) environmental and climate performance levels;
- (c) design for all requirements (including accessibility for disabled persons) and conformity assessment;
- (d) performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold;
- (e) terminology;
- (f) symbols;
- (g) testing and test methods;
- (h) packaging, marking and labelling;
- (i) user instructions;
- (j) production processes and methods at any stage of the life cycle of the supply or service; and
- (k) conformity assessment procedures.

- (5) In the case of any contract, the required characteristics may also refer to—
- (a) the specific process or method of production or provision of the requested works, supplies or services;
  - (b) a specific process for another stage of its life cycle,  
even where such factors do not form part of the contract’s material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.
- (6) The technical specifications may also specify whether the transfer of intellectual property rights will be required.
- (7) Where the subject of the procurement is intended for use by natural persons, whether the general public or staff of the utility, the technical specifications must, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.
- (8) Where mandatory accessibility requirements are adopted by a legal act of the EU, technical specifications must, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.
- (9) Technical specifications must afford equal access of economic operators to the procurement and must not have the effect of creating unjustified obstacles to the opening up of procurement to competition.
- (10) Without prejudice to mandatory national technical rules, to the extent that they are compatible with EU law, the technical specifications must be formulated—
- (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow the utility to award the contract;
  - (b) by reference to any of the following technical specifications in the following order of precedence—
    - (i) national standards transposing European standards;
    - (ii) European Technical Assessments;
    - (iii) common technical specifications;
    - (iv) international standards;
    - (v) other technical reference systems established by the European standardisation bodies; or
    - (vi) when none of the above exist, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies,  
but each reference must be accompanied by the words ‘or equivalent’;
  - (c) in terms of performance or functional requirements as referred to in sub-paragraph (a), with reference to the technical specifications referred to in sub-paragraph (b) as a means of presuming conformity with such performance or functional requirements; or
  - (d) by reference to the technical specifications referred to in sub-paragraph (b) for certain characteristics and by reference to the performance or functional requirements referred to in sub-paragraph (a) for other characteristics.
- (11) Subject to paragraph (12), technical specifications must not, with the effect of favouring or eliminating certain undertakings or certain products, refer to—
- (a) a specific make or source;

- (b) a particular process which characterises the products or services provided by a specific economic operator; or
- (c) trade marks, patents, types, or a specific origin or production.

(12) Reference of a kind referred to in paragraph (11) is permitted in any of the following circumstances—

- (a) where justified by the subject-matter of the contract;
- (b) on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph (10) is not possible, in which case the reference must be accompanied by the words “or equivalent”.

(13) Where a utility formulates technical specifications in terms of performance or functional requirements in accordance with paragraph (10)(a), it must not reject a tender for works, supplies or services which complies with a technical specification of a kind mentioned in paragraph (10)(b) (i) to (v), where those specifications address the performance or functional requirements which it has laid down.

(14) Where a utility formulates technical specifications in accordance with paragraph (10)(b), it must not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, where the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 60 (test reports, certificates and other means of proof), that the solution proposed satisfies in an equivalent manner the requirements defined by the technical specifications.

(15) In its tender, the tenderer must prove by any appropriate means, including those referred to in regulation 60 (test reports, certificates and other means of proof), that the works, supply or service in compliance with the standard meets the performance or functional requirements of the utility.

## **Labels**

**59.—**(1) Where a utility intends to purchase works, supplies or services with specific environmental, social or other characteristics the utility may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, supplies or services correspond to the required characteristics, provided that all of the following conditions are fulfilled—

- (a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services;
- (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- (c) the label is established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;
- (d) the label is accessible to all interested parties; and
- (e) the label requirements are set by a third party over whom the economic operator applying for the label cannot exercise a decisive influence.

(2) Where a utility does not require the works, supplies or services to meet all of the label requirements, the utility must indicate which label requirements are required.

(3) A utility requiring a specific label must accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

(4) Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the utility, or an equivalent label, within the relevant time limits for reasons that are not attributable to that economic operator, the utility must accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator

concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the utility.

(5) Where a label fulfils the conditions mentioned in paragraph (1)(b) to (e) but also sets out requirements not linked to the subject-matter of the contract, a utility must not require the label but may define the technical specification by reference to those of the detailed specifications of that label or, parts of it where necessary, that are linked to the subject-matter of the contract and are appropriate to define characteristics of that subject-matter.

### **Test reports, certificates and other means of proof**

**60.**—(1) A utility may require an economic operator to provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

(2) Where a utility requires the submission of certificates drawn up by a specific conformity assessment body, certificates from other equivalent conformity assessment bodies must also be accepted by the utility.

(3) In paragraphs (1) and (2), “conformity assessment body” means a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93<sup>(1)</sup>.

(4) Where the economic operator concerned has no access to the certificates or test reports referred to in paragraphs (1) and (2), or no possibility of obtaining them within the relevant time limits, a utility must accept appropriate means of proof other than those referred to in paragraphs (1) and (2), such as a technical dossier of the manufacturer, provided that—

- (a) the lack of access is not attributable to the economic operator concerned; and
- (b) the means of proof provided by the economic operator concerned proves that the works, supplies or services provided by it meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

### **Communication of technical specifications**

**61.**—(1) On request from an economic operator interested in obtaining a contract, a utility must make available—

- (a) the technical specifications regularly referred to in their works, supplies or services contracts; or
- (b) the technical specifications which they intend to apply to contracts for which the call for competition is a periodic indicative notice.

(2) Subject to paragraph (3), the technical specifications referred to in paragraph (1) must be made available by electronic means of communication through unrestricted and full direct access free of charge.

(3) Technical specifications must be transmitted by means other than electronic means where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered—

- (a) for one of the reasons set out in regulations 38(3) or (5) (rules applicable to communication); or

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(1) OJ L 218, 13.8.2008, p.30.

(b) because the utility intends to apply regulation 37(3) (confidentiality).

(4) Where the technical specifications are based on documents available by electronic means through unrestricted and full direct access free of charge to interested economic operators, the inclusion of a reference to those documents must be sufficient.

### **Variants**

**62.**—(1) A utility may authorise or require tenderers to submit variants which meet the minimum requirements laid down by the utility.

(2) A utility must indicate in the procurement documents whether or not they authorise or require variants.

(3) A utility authorising or requiring variants must state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation, in particular whether variants may be submitted only where the economic operator also submits a tender which is not a variant.

(4) A utility must not take into consideration a variant which—

- (a) has not been authorised or required;
- (b) is not linked to the subject matter of the contract; or
- (c) does not meet the minimum requirements laid down by the utility.

(5) A utility must ensure that the award criteria can be applied to variants meeting those minimum requirements as well as to tenders which are not variants.

(6) In a procedure for awarding a supply contract or service contract, a utility that has authorised or required variants must not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a supply contract or a supply contract rather than a service contract.

### **Division of contracts into lots**

**63.**—(1) A utility may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

(2) Where a utility decides to award a contract in the form of separate lots it must indicate in the contract notice, in the invitation to confirm interest, or, where the means of a call for competition is a notice on the existence of a qualification system, in the invitation to tender or negotiate, whether tenders may be submitted for one, for several or for all of the lots.

(3) A utility may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest, to tender or to negotiate.

(4) A utility must indicate in the procurement documents the objective and non-discriminatory criteria or rules it intends to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

(5) Where more than one lot may be awarded to the same tenderer, a utility may award contracts combining several or all lots where the utility has—

- (a) specified in the contract notice or in the invitation to confirm interest, to tender or to negotiate that it reserves the possibility of doing so; and
- (b) indicated the lots or groups of lots that may be combined.

### **Setting time limits**

**64.**—(1) When fixing the time limits for the receipt of tenders and requests to participate, a utility must take account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in regulations 43 to 47.

(2) Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the procurement documents, the time limits for the receipt of tenders, which shall be longer than the minimum time limits set out in regulations 43 to 47, must be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.

(3) A utility must extend the time limits for the receipt of tenders, so that all economic operators concerned may be aware of all the information needed to produce tenders, where—

- (a) for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest 6 days before the time limit fixed for the receipt of tenders; or
- (b) significant changes are made to the procurement documents.

(4) In the case of an accelerated open procedure, the period mentioned in paragraph (3)(a) shall be 4 days.

(5) The length of the extension given pursuant to paragraph (3) must be proportionate to the importance of the information or change.

(6) A utility is not required to extend the time limit where—

- (a) additional information has not been requested in good time; or
- (b) the additional information requested is of insignificant importance with a view to preparing responsive tenders.

## *SECTION 2*

### *Publication and transparency*

#### **Periodic indicative notices**

**65.**—(1) A utility may make known its intentions of a planned procurement through the publication of a periodic indicative notice.

(2) A periodic indicative notice must contain the information set out in section I of Part A of Annex VI to the Utilities Contracts Directive.

(3) A utility wishing to publish a periodic indicative notice must—

- (a) send it for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level); or
- (b) publish it on the utility's buyer profile in accordance with regulation 70 (publication at national level).

(4) Where the utility intends to publish the periodic indicative notice on its buyer profile, the utility must send for publication, in accordance with regulation 69 (form and manner of sending notices for publication at EU level), a notice of the publication on its buyer profile.

(5) The notice of publication referred to in paragraph (4) must contain the information set out in Part B of Annex VI to the Utilities Contracts Directive.

(6) Where a utility uses a periodic indicative notice as a call for competition in respect of either a restricted procedure or a negotiated procedure with prior call for competition, the notice must—

- (a) refer specifically to the works, supplies or services that will be the subject of the contract to be awarded;

- (b) indicate that the contract will be awarded by restricted procedure or negotiated procedure without further publication of a call for competition and invite interested economic operators to express their interest;
- (c) contain, in addition to the information set out in section I of Part A of Annex VI to the Utilities Contracts Directive, the information set out in section II of that Part; and
- (d) have been sent for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level) between 35 days and 12 months prior to the date on which an invitation to confirm interest is sent for the purposes of regulation 72(3) (invitations to candidates).

(7) In addition to sending a periodic indicative notice used for the purpose mentioned in paragraph (6) for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level), a utility may publish such a notice on its buyer profile in accordance with regulation 70 (publication at national level).

(8) Subject to paragraph (9), the period covered by a periodic indicative notice must be a maximum of 12 months from the date on which the notice is sent for publication.

(9) In the case of a contract for social and other specific services referred to in Schedule 2 (social and other specific services), a periodic indicative notice referred to in regulation 89(1)(b) (publication of notices) may cover a period which is longer than 12 months from the date on which the notice is sent for publication.

#### **Notices on the existence of a qualification system**

**66.**—(1) This regulation applies where a utility chooses to set up a qualification system in accordance with regulation 75 (qualification systems).

(2) The qualification system must be the subject of a notice which includes the information set out in Annex X to the Utilities Contracts Directive, indicating the purpose of the qualification system and how to have access to the rules concerning its operation.

(3) The utility must—

- (a) indicate the period of validity of the qualification system in the notice on the existence of the system; and
- (b) notify the EU Publications Office of any change in the period of validity.

(4) The notification in paragraph (3)(b) must be made by using the following standard forms—

- (a) where the period of validity is changed without terminating the system, the form for notices on the existence of qualification systems; and
- (b) where the system is terminated, a contract award notice referred to in regulation 68 (contract award notices).

#### **Contract notices**

**67.** A contract notice must contain the information set out in the relevant part of Annex XI to the Utilities Contracts Directive and must be sent for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level).

#### **Contract award notices**

**68.**—(1) Not later than 30 days after the award of a contract or conclusion of a framework agreement, a utility must send for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level) a contract award notice on the results of the procurement.



(2) A contract award notice must contain the information set out in Annex XII to the Utilities Contracts Directive.

(3) Where the call for competition for the contract concerned has been made in the form of a periodic indicative notice and the utility has decided that it will not award further contracts during the period covered by the periodic indicative notice, the contract award notice must contain a specific indication to that effect.

(4) In accordance with paragraph (5), a utility must send for publication a contract award notice in respect of the award of a supply, service or works contract based on a framework agreement if the estimated value of the contract under the framework is equal to or greater than the threshold referred to in regulation 15(1) (thresholds) applicable to that type of contract.

(5) The utility must send such notices for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level) on a quarterly basis, within 30 days of the end of each quarter.

(6) In the case of the award of a contract based upon a dynamic purchasing system, a utility must either—

- (a) send for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level) a contract award notice within 30 days after the award of each such contract; or
- (b) group notices referred to in sub-paragraph (a) on a quarterly basis, in which case the utility must send for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level) the grouped notices within 30 days of the end of each quarter.

(7) A utility may withhold from publication information on the contract award or the conclusion of the framework agreement where the release of the information—

- (a) would impede law enforcement or otherwise be contrary to the public interest;
- (b) would prejudice the commercial interests of any person; or
- (c) might prejudice fair competition between economic operators.

(8) In the case of contracts for research and development services, the information in paragraph (2) concerning the nature and quantity of the services may be limited to—

- (a) where the contract has been awarded by a negotiated procedure without a call for competition in accordance with regulation 48(1)(b) (use of the negotiated procedure without prior call for competition), the indication “R & D Services”; and
- (b) where the contract has been awarded by a procedure with a call for competition, information at least as detailed as was indicated in the notice that was used as a means of calling for competition.

### **Form and manner of sending notices for publication at EU level**

**69.**—(1) The notices required by regulations 65 to 68 to be sent for publication in accordance with this regulation must—

- (a) be sent by electronic means to the EU Publications Office for publication; and
- (b) where the Commission has published standard forms for such notices, be set out using such forms.

(2) A utility must ensure that it is able to supply proof of the dates on which notices are sent to the EU Publications Office for publication.

(3) Where the EU Publications Office has given the utility confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication, that confirmation shall constitute proof of publication.

(4) A utility may send notices in respect of works, supply or service contracts to the EU Publications Office for publication even where the utility is not required to do so by these Regulations, provided such notices are sent by electronic means.

### **Publication at national level**

**70.**—(1) In addition to the publication of the notices referred to in regulations 65 to 68 by the EU Publications Office, a utility may publish the information contained in such notices on the internet on a buyer profile.

(2) A buyer profile may also include—

- (a) periodic indicative notices which are published on it pursuant to regulation 65(3)(b) (periodic indicative notices);
- (b) information on on-going invitations to tender, scheduled purchases, contracts concluded, procedures cancelled; and
- (c) any useful general information, such as a contact point, telephone and fax number, postal address and e-mail address.

(3) The notices referred to in regulations 65 to 68, and the information contained in them, must not be published at national level before the notices are published by the EU Publications Office.

(4) Notwithstanding paragraph (3), publication may take place at national level where a utility has not been notified of the publication by the EU Publications Office within 48 hours after confirmation of the receipt of the notice in accordance with Article 71(5) of the Utilities Contracts Directive.

(5) A notice published at national level must not contain information other than that contained in the notice sent to the EU Publications Office or published on a buyer profile, but must indicate the date of sending of the notice to the EU Publications Office or its publication on the buyer profile.

(6) Where a periodic indicative notice is to be published on a buyer profile—

- (a) the periodic indicative notice may not be so published before the utility sends to the EU Publications Office the notice referred to in regulation 65(4) (periodic indicative notices); and
- (b) the periodic indicative notice must indicate the date of that sending.

### **Electronic availability of procurement documents**

**71.**—(1) Subject to paragraph (2), a utility must offer on the internet unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice in accordance with regulation 69 (form and manner of sending notices for publication at EU level) or the date on which an invitation to confirm interest was sent.

(2) Where the means of calling for competition is a notice on the existence of a qualification system, the access referred to in paragraph (1) must be offered as soon as possible and at the latest when the invitation to tender or to negotiate is sent.

(3) The text of the notice or the invitation must specify the internet address at which the procurement documents are accessible.

(4) Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered for one of the reasons set out in regulation 38(3) (rules applicable to communication), a utility may indicate in the notice or the invitation to confirm interest

that the procurement documents concerned will be transmitted by means other than electronic means in accordance with the periods mentioned in paragraphs (7) and (8).

(5) Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered because a utility intends to apply regulation 37(3) (confidentiality), the utility must indicate, in one of the following, which measures, aimed at protecting the confidential nature of the information, the utility requires and how access can be obtained to the documents—

- (a) the notice;
- (b) the invitation to confirm interest; or
- (c) where the means of calling for competition is a notice on the existence of a qualification system, the procurement documents.

(6) Where paragraph (4) or (5) applies, the time limit for the submission of tenders must be extended by 5 days, except—

- (a) in a case of duly substantiated urgency referred to in regulation 43(5) (open procedure); or
- (b) where the time limit is set by mutual agreement in accordance with regulation 44(6) (restricted procedure) or 45(6) (negotiated procedure with prior call for competition).

(7) Provided that it has been requested in good time, a utility must supply to all tenderers taking part in the procurement additional information relating to the specifications and any supporting documents, not later than 6 days before the time limit fixed for the receipt of tenders.

(8) In the case of an accelerated open procedure, the period mentioned in paragraph (7) shall not be later than 4 days before the time limit fixed for the receipt of tenders.

### **Invitations to candidates**

**72.**—(1) In a restricted procedure, a competitive dialogue procedure, an innovation partnership and a negotiated procedure with prior call for competition, an invitation by a utility to selected candidates or to participants to submit a tender must be issued simultaneously and in writing.

(2) In a competitive dialogue procedure, an innovation partnership and a negotiated procedure with or without prior call for competition, an invitation by a utility to selected candidates to participate must be issued simultaneously and in writing.

(3) Where the call for competition is made by means of a periodic indicative notice, as referred to in regulation 42(5)(a) (choice of procedures), the utility must, simultaneously and in writing, invite all economic operators which have expressed their interest following the publication of the periodic indicative notice to confirm their interest in writing.

(4) The invitations required by paragraphs (1) to (3) must—

- (a) include a reference to the electronic address at which the procurement documents have been made directly available by electronic means; or
- (b) be accompanied by the procurement documents, where those documents have not been the subject of unrestricted and full direct access, free of charge, for the reasons referred to in regulation 71(4) or (5) (electronic availability of procurement documents) and have not already been made otherwise available.

(5) The invitations required by paragraphs (1) and (2) must also contain at least the following information—

- (a) where tenders are to be submitted, the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up;

- (b) in the case of competitive dialogue, the date and the address set for the start of consultation and the language or languages to be used;
  - (c) a reference to the call for competition published;
  - (d) an indication of any documents to be attached;
  - (e) the criteria for the award of the contract, where they are not indicated in the notice on the existence of a qualification system used as a means of calling for competition;
  - (f) the relative weighting of criteria for the award of the contract or, where appropriate, the order of importance of such criteria, where they are not given in the contract notice, the notice on the existence of a qualification system or the specifications.
- (6) An invitation to confirm interest referred to in paragraph (3) must also contain at least the following information—
- (a) the nature and quantity, including all options concerning complementary contracts and, if possible, the estimated time available for exercising such options for renewable contracts, the nature and quantity and, if possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;
  - (b) the type of procedure, namely restricted or negotiated procedure;
  - (c) where applicable, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;
  - (d) where electronic access cannot be offered, the address and closing date for the submission of requests for procurement documents and the languages in which they are to be drawn up;
  - (e) the address of the utility;
  - (f) economic and technical conditions, financial guarantees and information required from economic operators;
  - (g) the form of the contract which is the subject of the invitation to tender, namely purchase, lease, hire or hire-purchase, or any combination of these; and
  - (h) the contract award criteria and their relative weighting or, where appropriate, the order of importance of such criteria, if this information is not given in the periodic indicative notice or the specifications or in the invitation to tender or to negotiate.

### **Informing applicants for qualification, candidates and tenderers**

73.—(1) A utility must as soon as possible after reaching a decision concerning the award of a contract, the conclusion of a framework agreement or admittance to a dynamic purchasing system, inform each candidate and tenderer of the decision reached.

(2) Information provided in accordance with paragraph (1) must, where applicable, include the grounds for any decision—

- (a) not to conclude a framework agreement;
- (b) not to award a contract for which there has been a call for competition;
- (c) to recommence the procedure; or
- (d) not to implement a dynamic purchasing system.

(3) On request from the candidate or tenderer concerned, the utility must as soon as possible, and in any event within 15 days from receipt of a written request, inform—

- (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;
- (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in regulation 58(13) and (14) (technical specifications), the reasons for

- its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements;
- (c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement; and
  - (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.
- (4) A utility may decide to withhold certain information referred to in paragraphs (2) and (3), where the release of such information—
- (a) would impede law enforcement or otherwise be contrary to the public interest;
  - (b) would prejudice the commercial interests of any person; or
  - (c) might prejudice fair competition between economic operators.
- (5) A utility which establishes and operates a system of qualification must—
- (a) inform applicants of its decision as to qualification within a period of 6 months;
  - (b) if the decision as to qualification will take longer than 4 months from the presentation of an application, inform the applicant within 2 months of the application of—
    - (i) the reasons justifying the longer period; and
    - (ii) the date by which the application will be accepted or refused;
  - (c) inform applicants whose qualification is refused of the refusal decision and the reasons for that decision as soon as possible and no more than 15 days after the date of the refusal decision.
- (6) A utility which establishes and operates a system of qualification must—
- (a) base its reasons for decisions as to qualification on the criteria for qualification referred to in regulation 75(3) to (5) (qualification systems); and
  - (b) only bring the qualification of an economic operator to an end for reasons based on the criteria for qualification referred to in regulation 75(3) to (5) (qualification systems).
- (7) Any intention to bring the qualification of an economic operator to an end must be notified in writing to the economic operator at least 15 days before the date on which the qualification is due to end, together with the reasons justifying the proposed action.

### SECTION 3

#### *Choice of participants and award of contracts*

#### **General principles**

- 74.—(1) For the purpose of selecting participants in their procurement, a utility—
- (a) which has provided rules and criteria for the exclusion of tenderers or candidates in accordance with regulations 76(1) (criteria for qualitative selection) or 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations), must exclude economic operators identified in accordance with such rules and fulfilling such criteria;
  - (b) must select tenderers and candidates in accordance with the objective rules and criteria mentioned in regulations 76 (criteria for qualitative selection) and 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations);

- (c) must, where appropriate and in accordance with regulation 76(2) and (3) (criteria for qualitative selection), reduce the number of candidates selected in accordance with subparagraphs (a) and (b) in—
- (i) restricted procedures;
  - (ii) negotiated procedures with a call for competition;
  - (iii) competitive dialogues; and
  - (iv) innovation partnerships.
- (2) When a call for competition is made by means of a notice on the existence of a qualification system and for the purpose of selecting participants in a procurement for the specific contracts which are the subject of the call for competition, a utility must—
- (a) qualify economic operators in accordance with regulation 75 (qualification systems);
  - (b) apply to such qualified economic operators those provisions of paragraph (1) that are relevant to restricted or negotiated procedures, to competitive dialogues or to innovation partnerships.
- (3) When selecting participants for a restricted or negotiated procedure, a competitive dialogue or an innovation partnership, in reaching its decision as to qualification or when the criteria and rules are being updated, a utility must not—
- (a) impose administrative, technical or financial conditions on certain economic operators which would not be imposed on others;
  - (b) require tests or evidence which would duplicate objective evidence already available.
- (4) Where information or documentation to be submitted by an economic operator is or appears to be incomplete or erroneous, or where specific documents are missing, a utility may request the economic operator concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.
- (5) A utility must verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in regulations 80 (contract award criteria) and 82 (abnormally low tenders), taking into account regulation 62 (variants).
- (6) A utility may decide not to award a contract to, or conclude a framework agreement with, the tenderer submitting the most economically advantageous tender where the utility has established that the tender does not comply with applicable obligations in the fields of environmental, social and employment law established by EU law, national law, collective agreements or by the international environmental, social and employment law provisions listed in Annex XIV to the Utilities Contracts Directive as amended from time to time.
- (7) In open procedures, a utility may decide to examine tenders before verifying the suitability of tenderers, provided that the relevant provisions of regulations 74 to 82 are observed.
- SUB-SECTION 1 Qualification and qualitative selection

### **Qualification systems**

- 75.—**(1) A utility may establish and operate a system of qualification of economic operators.
- (2) A utility which establishes or operates a system of qualification must ensure that economic operators are at all times able to request qualification.
- (3) The system under paragraph (1) may involve different qualification stages.
- (4) A utility must establish objective rules and criteria for—
- (a) the exclusion and selection of economic operators requesting qualification; and

- (b) the operation of the qualification system, covering matters such as—
  - (i) inscription in the system;
  - (ii) periodic updating of the qualifications, if any; and
  - (iii) the duration of the system.
- (5) Where the rules and criteria referred to in paragraph (4) include technical specifications, regulations 58 to 60 apply.
- (6) The rules and criteria referred to in paragraph (4)—
  - (a) must be made available to economic operators upon request; and
  - (b) may be updated as required and, if so, must be communicated to interested economic operators.
- (7) Where a utility considers that the qualification system of certain other entities or other bodies meets its requirements, it must communicate the names of those entities and bodies to interested economic operators.
- (8) A utility must keep a written record of qualified economic operators, which may be divided into categories according to type of contract for which the qualification is valid.
- (9) When a call for competition is made by means of a notice on the existence of a qualification system, specific contracts for the works, supplies or services covered by the qualification system must be awarded by restricted or negotiated procedure, competitive dialogue or innovation partnership as modified so that all tenderers and participants are selected among the candidates already qualified in accordance with such a system without being required to submit further information for qualitative selection or to submit a request to participate.
- (10) Any charges that are billed to an economic operator by a utility in connection with requests for qualification or with updating or conserving an already obtained qualification in accordance with the system must be proportionate to the generated costs.

### **Criteria for qualitative selection**

- 76.—**(1) A utility—
- (a) may establish objective rules and criteria for the exclusion and selection of tenderers or candidates; and
  - (b) if so, must make those rules and criteria available to interested economic operators.
- (2) Subject to paragraph (3), where a utility needs to ensure an appropriate balance between the particular characteristics of the procurement and the resources required to conduct it, it may, in restricted procedures, negotiated procedures, competitive dialogues or innovation partnerships, establish objective rules and criteria that reflect that need and enable the utility to reduce the number of candidates that will be invited to tender or to negotiate.
- (3) A utility must take account of the need to ensure adequate competition when selecting the number of candidates.

### **Reliance on the capacities of other entities**

- 77.—**(1) This regulation applies where there are objective rules and criteria for the exclusion and selection of—
- (a) economic operators requesting qualification in a qualification system; or
  - (b) candidates and tenderers in open, restricted or negotiated procedures, competitive dialogues or innovation partnerships.

(2) Where the objective rules and criteria for the exclusion and selection of those referred to in paragraph (1) include requirements relating to the economic operator's economic and financial capacity or technical and professional abilities, an economic operator may, where necessary rely upon the capacities of other entities, regardless of the legal nature of the links which it has with them.

(3) With regard to criteria relating to the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff or to relevant professional experience, economic operators may only rely upon the capacities of other entities where the latter will perform the works or services for which these capacities are required.

(4) Where an economic operator wants to rely upon the capacities of other entities, it must prove to the utility that the necessary resources will be available to it, for example by producing a commitment by those entities to that effect.

(5) For the purposes of paragraph (4), an economic operator requesting qualification in a qualification system must prove that the necessary resources will be available to it throughout the period of the qualification system.

(6) Where, in accordance with regulation 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations), a utility has referred to exclusion or selection criteria provided for under the Public Contracts (Scotland) Regulations, the utility must verify, in accordance with the provisions applied by regulation 78(4)—

- (a) whether the other entities upon whose capacity the economic operator intends to rely fulfil the relevant selection criteria; or
- (b) whether there are grounds for exclusion, to which the utility has referred, under regulation 58 of the Public Contracts (Scotland) Regulations.

(7) The utility—

- (a) must require the economic operator to replace an entity which does not meet a relevant selection criterion or in respect of which there are compulsory grounds for exclusion; and
- (b) may require the economic operator to substitute an entity in respect of which there are non-compulsory grounds for exclusion.

(8) Where an economic operator relies upon the capacities of other entities with regard to criteria relating to economic and financial standing, the utility may require the economic operator and those entities to be jointly liable for the performance of the contract.

(9) A group of economic operators as referred to in regulation 35(4) (economic operators) may rely upon the capacities of participants in the group or of other entities, and paragraphs (1) to (8) apply in relation to such a group in the same way that they apply in relation to an economic operator.

(10) In the case of works contracts, supply contracts requiring siting or installation work and services contracts, a utility may require certain critical tasks to be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in regulation 35(4) (economic operators), by a participant in that group.

### **Use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations**

**78.**—(1) This regulation applies to objective rules and criteria for the exclusion and selection of—

- (a) economic operators requesting qualification in a qualification system; and
- (b) candidates and tenderers in open, restricted or negotiated procedures, competitive dialogues or innovation partnerships.

(2) The objective rules and criteria may include—

- (a) the exclusion grounds referred to in regulation 58 of the Public Contracts (Scotland) Regulations on the terms set out in that regulation;



(b) the selection criteria listed in regulation 59 of the Public Contracts (Scotland) Regulations on the terms set out in that regulation, including as regards the limits to requirements concerning yearly turnovers as provided for under regulation 59(9) and (10) of those Regulations.

(3) Where the utility is a contracting authority, the criteria and rules referred to in paragraph (1) must include the exclusion grounds listed in regulation 58(1) to (3) of the Public Contracts (Scotland) Regulations on the terms set out in that regulation.

(4) For the purposes of applying paragraphs (1) to (3), regulations 60 to 62 of the Public Contracts (Scotland) Regulations apply.

(5) For the purposes of paragraphs (2) and (4), any reference to a contracting authority in regulations 58 to 62 of the Public Contracts (Scotland) Regulations must be read as a reference to a utility.

### **Quality assurance standards and environmental management standards**

**79.**—(1) A utility must, where it requires the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for disabled persons, refer to quality assurance systems based on the relevant European standards series certified by accredited bodies.

(2) A utility must recognise equivalent certificates from bodies established in other member States.

(3) A utility must also accept other evidence of equivalent quality assurance measures where the economic operator concerned had no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator, provided that the economic operator proves that the proposed quality assurance measures comply with the required quality assurance standards.

(4) Where a utility requires the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, the utility must refer to the Eco-Management and Audit Scheme of the EU—

- (a) referred to in Regulation (EC) No 1221/2009 of the European Parliament and of the Council on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC(2);
- (b) other environmental management systems as recognised in accordance with Article 45 of that Regulation; or
- (c) other environmental management standards based on the relevant European or international standards by accredited bodies,

and must recognise equivalent certificates from bodies established in other member States.

(5) Where an economic operator had demonstrably no access to such certificates referred to in paragraph (4) or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the utility must accept other evidence of environmental management measures, provided that the economic operator proves that these measures are equivalent to those required under the applicable environmental management system or standard.

### **SUB-SECTION 2 Award of the Contract**

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(2) OJ L 342, 22.12.2009, p.1, amended by Council Regulation (EU) No 517/2013 (OJ L 158, 10.6.2013, p.1).

**Contract award criteria**

**80.**—(1) A utility must base the award of contracts on the most economically advantageous tender assessed from the point of view of the utility.

(2) Where the utility is a person mentioned in regulation 4(1)(a) (utilities) it must not use price only or cost only as the sole award criteria.

(3) A utility must identify the most economically advantageous tender on the basis of the price or cost using a cost-effectiveness approach (such as life-cycle costing in accordance with regulation 81 (life-cycle costing)) and may include the best price-quality ratio which must be assessed on the basis of criteria linked to the subject-matter of the contract in question.

(4) Criteria referred to in paragraph (3) may comprise or include—

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; and
- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion and commitments with regard to parts and security of supply.

(5) The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

(6) Award criteria must be considered to be linked to the subject-matter of the contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in—

- (a) the specific process of production, provision or trading of those works, supplies or services; or
- (b) a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance.

(7) Award criteria must—

- (a) not have the effect of conferring an unrestricted freedom of choice upon the utility;
- (b) ensure the possibility of effective competition; and
- (c) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

(8) In case of doubt, the utility must verify effectively the accuracy of the information and proof provided by the tenderers.

(9) The utility must specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

(10) The weightings referred to in paragraph (9) may be expressed by providing for a range with an appropriate maximum spread.

(11) Where weighting is not possible for objective reasons, the utility must indicate the criteria in descending order of importance.

**Life-cycle costing**

**81.**—(1) Life-cycle costing must, to the extent relevant, cover part or all of the following costs over the life cycle of a product, service or works—

- (a) costs, borne by the utility or other users, such as—
    - (i) costs relating to acquisition;
    - (ii) costs of use, such as consumption of energy and other resources;
    - (iii) maintenance costs;
    - (iv) end of life costs, such as collection and recycling costs; and
  - (b) costs imputed to environmental externalities linked to the works, product or service during its life cycle, provided their monetary value can be determined and verified.
- (2) The costs mentioned in paragraph (1)(b) may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.
- (3) The method used for the assessment of costs imputed to environmental externalities must fulfil all of the following conditions—
- (a) it is based on objectively verifiable and non-discriminatory criteria and, in particular, where it has not been established for repeated or continuous application, it must not unduly favour or disadvantage certain economic operators;
  - (b) it is accessible to all interested parties;
  - (c) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the EU is bound.
- (4) Where a utility assesses costs using a life-cycle costing approach, the utility must indicate in the procurement documents—
- (a) the data to be provided by the tenderers; and
  - (b) the method which the utility will use to determine the life-cycle costs on the basis of those data.
- (5) Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the EU, that common method must be applied for the assessment of life-cycle costs.
- (6) Legislative acts referred to in paragraph (5) include those set out in Annex XV to the Utilities Contracts Directive as amended from time to time.

### **Abnormally low tenders**

- 82.**—(1) A utility must require a tenderer to explain the price or costs proposed in the tender where the tender appears to be abnormally low in relation to the works, supplies or services.
- (2) The explanations given in accordance with paragraph (1) may, in particular, relate to—
- (a) the economics of the manufacturing process, of the services provided or of the construction method;
  - (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the execution of the works or for the supply of the products or services;
  - (c) the originality of the works, supplies or services proposed by the tenderer;
  - (d) compliance with obligations referred to in regulation 34(4) (principles of procurement);
  - (e) compliance with obligations referred to in regulation 85 (subcontracting);
  - (f) the possibility of the tenderer obtaining State aid.
- (3) The utility must assess the information provided by consulting the tenderer.

(4) The utility may only reject the tender where the explanations given and any evidence supplied do not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).

(5) The utility must reject the tender where the utility has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 34(4) (principles of procurement).

(6) Where the utility establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only—

- (a) after consultation with the tenderer; and
- (b) where the tenderer is unable to prove, within a sufficient time limit fixed by the utility, that the aid in question was compatible with the internal market within the meaning of Article 107 of the TFEU.

(7) Where the utility rejects a tender in the circumstances referred to in paragraph (6), it must inform the Commission.

#### *SECTION 4*

##### *Tenders comprising products originating in third countries and relations with those countries*

#### **Tenders comprising products originating in third countries**

**83.**—(1) This regulation applies to tenders covering products originating in third countries with which the EU has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for EU undertakings to the markets of those third countries.

(2) For the purposes of this regulation—

- (a) the origin of products must be determined in accordance with [Council Regulation \(EEC\) No 2913/92](#) establishing the Community Customs Code<sup>(3)</sup> as amended from time to time;
- (b) software used in telecommunications network equipment must be regarded as products; and
- (c) those third countries to which the benefits of the Utilities Contracts Directive has been extended by an EU Council Decision, must not be taken into account by a utility for determining the proportion, referred to in paragraph (3), of products originating in third countries.

(3) A utility may reject any tender submitted for the award of a supply contract where the proportion of the products originating in third countries is greater than 50% of the total estimated value of the products constituting the tender.

(4) Subject to paragraph (5), where two or more tenders are equivalent in the light of the contract award criteria defined in accordance with regulation 80 (contract award criteria) the utility must give preference to those tenders which may not be rejected in accordance with paragraph (3).

(5) Paragraph (4) does not apply where acceptance of such tender would oblige the utility to acquire equipment having technical characteristics different from those of existing equipment, resulting in—

- (a) incompatibility;
- (b) technical difficulties in operation and maintenance; or
- (c) disproportionate costs.

(3) OJ L 302, 19.10.1992, p.1; Regulation as last amended by Council Regulation (EU) No 517/2013 of 13th May 2013 (OJ L 158, 10.6.2013, p.1.

(6) For the purposes of paragraph (4), tenders must be considered equivalent if the price difference between those tenders does not exceed 3%.