
STATUTORY INSTRUMENTS

2006 No. 6

The Utilities Contracts Regulations 2006

PART 4

QUALIFICATION AND SELECTION OF ECONOMIC OPERATORS

General

23.—(1) Where a utility establishes criteria for the rejection of economic operators in accordance with regulations 26(1), 26(3), 27(1) or 27(2), it shall exclude any economic operator which meets those criteria when making its selection of the economic operators to be awarded a contract, to be invited to tender for, or to negotiate the contract.

(2) A utility shall make its selection of the economic operators to be awarded a contract, to be invited to tender for, or to negotiate the contract in accordance with the selection criteria established by it in accordance with regulations 26 and 27.

(3) A utility using the restricted or negotiated procedure with a call for competition shall reduce, where appropriate and in accordance with regulation 27, the number of economic operators selected in accordance with paragraphs (1) and (2) of this regulation.

(4) Where a utility makes a call for competition in respect of a contract by publishing a notice on the existence of a qualification system, when making its selection of the economic operators to be invited to tender for or to negotiate that contract, the utility shall—

- (a) qualify economic operators in accordance with regulation 25; and
- (b) apply the provisions of paragraphs (1), (2) and (3) which are relevant to the restricted procedure or the negotiated procedure to such qualified economic operators.

(5) A utility shall verify that the tenders submitted by the economic operators which have been selected by the utility comply with the rules and requirements applicable to tenders and shall award the contract on the basis of the criteria referred to in regulation 30.

Mutual recognition concerning administrative, technical or financial conditions

24.—(1) When using the negotiated procedure or the restricted procedure and in determining what rules and criteria are to be met by economic operators to be invited to tender for or to negotiate a contract or to qualify under a qualification system, a utility shall not—

- (a) impose conditions of an administrative, technical or financial nature on some economic operators which are not imposed on others; or
- (b) require tests or the submission of evidence which duplicates objective evidence already available.

(2) For the purpose of assessing an economic operator's technical ability, a utility may request that economic operator to provide—

- (a) a certificate—

- (i) attesting its conformity to quality assurance standards based on the relevant European standard; and
 - (ii) from an independent body established in any relevant State conforming to the European standard concerning certification; or
- (b) any other evidence of its conformity to quality assurance measures which are equivalent to the standards referred to in sub-paragraph (a)(i).
- (3) Where the contract to be awarded is a works contract or a services contract, for the purposes of verifying the economic operator's technical abilities, a utility may, where appropriate, request an indication of the environmental management measures which the economic operator will apply when performing the contract and a utility may request that economic operator to provide—
- (a) a certificate—
 - (i) attesting its conformity to environmental management standards based on—
 - (aa) the Community Eco-Management and Audit Scheme⁽¹⁾; or
 - (bb) the relevant European standard or international standard; and
 - (ii) from an independent body established in any relevant State conforming to Community law or the relevant European standard or international standard concerning certification; or
 - (b) any other evidence of its conformity to environmental management measures which are equivalent to the standards referred to in sub-paragraph (a)(i).

Qualification system

25.—(1) A utility may establish and operate a system of qualification of economic operators if that system complies with this regulation.

(2) The utility shall permit economic operators to apply for qualification under the system at any time during its operation.

(3) The system may involve different stages of qualification and shall be based on objective rules and criteria as determined from time to time by the utility and those criteria and rules may include technical specifications in which case the provisions of regulation 12 apply.

(4) The rules and criteria referred to in paragraph (3) may include the rejection criteria referred to in regulation 26(3) and (5).

(5) Where the utility is a contracting authority, the rules and criteria referred to in paragraph (3) shall include the rejection criteria referred to in regulation 26(1).

(6) Where the criteria referred to in paragraph (3) includes requirements relating to the economic and financial capacity or the technical or professional abilities of an economic operator—

- (a) the economic operator, or a group of economic operators as referred to in regulation 28, may rely on the capacity or abilities of other entities or members in the group, whatever the legal nature of the link between the economic operator or the group of economic operators and the other entities; and
- (b) the economic operator or the group of economic operators shall prove to the utility that the necessary resources will be available to it, and such proof may in particular include an undertaking from those entities to that effect.

(7) In determining what rules and criteria are to be met by applicants to qualify under the system a utility shall comply with regulation 24.

(1) The Community Eco-Management and Audit Scheme (EMAS) is a management tool for companies and other organisations to evaluate, report and improve their environmental performance; for more information, see www.europa.eu.int/comm/environment/emas/index_en.htm.

(8) Where the utility makes a call for competition in respect of a contract by publishing a notice on the existence of a qualification system, it shall comply with regulation 23(4).

(9) The rules of and criteria applying to the system shall be made available on request to economic operators and any amendment of those rules and criteria shall be sent to them as the amendment is incorporated into the system.

(10) The utility may establish a system of qualification where an economic operator may qualify under the system of, or be certified by, another person, and in those circumstances the utility shall inform economic operators which apply to qualify the name of that other person.

(11) The utility shall inform applicants for qualification of the success or failure of their application within 6 months from the date of presentation of an application and, if the decision will take longer than 4 months, the utility shall inform the applicant, within 2 months of the date of presentation of the application of—

- (a) the reasons justifying a longer period; and
- (b) the date by which its application will be accepted or refused.

(12) The utility shall inform any applicant whose application to qualify is refused of the decision and the reasons for refusal as soon as possible and under no circumstances later than 15 days after the date of the decision.

(13) An application may only be refused if the applicant fails to meet the requirements for qualification laid down in accordance with paragraph (3).

(14) The utility shall keep a written record of qualified economic operators which may be divided into categories according to the type of contract for which the qualification is valid.

(15) The utility may cancel the qualification of an economic operator which has qualified under the qualification system only if it does not continue to meet the rules and criteria laid down in accordance with paragraph (3).

(16) The utility may not cancel a qualification unless it notifies the economic operator in writing at least 15 days before the qualification is due to be cancelled of the reasons for the proposed cancellation.

(17) The utility shall send a notice in the form of the qualification system notice in Annex VII to Commission Regulation (EC) No. 1564/2005 and containing the information relating to the qualification system therein specified to the Official Journal when the system is first established.

(18) If the utility expects to operate the system for more than 3 years, or if it has operated the system for more than 3 years, it shall send a notice as referred to in paragraph (17) on an annual basis after the year in which the system is first established.

Criteria for rejection of economic operators

26.—(1) Subject to paragraph (2), where a utility is a contracting authority, it shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the utility has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences—

- (a) conspiracy within the meaning of section 1 of the Criminal Law Act 1977(2) where that conviction relates to participation in a criminal organisation as defined in Article 2(1) of Council Joint Action 98/733/JHA(3);

(2) 1977, c. 45; section 1 was amended by section 5(1) of the Criminal Attempts Act 1981 (c. 47), section 9(1) and (2) of, and paragraph 4 of Part II of Schedule 1 and Part II of Schedule 2 to, the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c. 40) and section 300(1) of, and Schedule 1 to, the Trade Union and Labour Relations (Consolidation) Act 1992 (c. 52).

(3) OJ No L 351, 29.12.1998, p.1.

- (b) corruption within the meaning of section 1 of the Public Bodies Corrupt Practices Act 1889(4) or section 1 of the Prevention of Corruption Act 1906(5);
- (c) the offence of bribery;
- (d) fraud, where the offence relates to fraud affecting the financial interests of the European Communities as defined by Article 1 of the Convention relating to the protection of the financial interests of the European Union(6), within the meaning of—
 - (i) the offence of cheating the Revenue;
 - (ii) the offence of conspiracy to defraud;
 - (iii) fraud or theft within the meaning of the Theft Act 1968(7) and the Theft Act 1978(8);
 - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(9);
 - (v) defrauding the Customs within the meaning of the Customs and Excise Management Act 1979(10) and the Value Added Tax Act 1994(11);
 - (vi) an offence in connection with taxation in the European Community within the meaning of section 71 of the Criminal Justice Act 1993(12); or
 - (vii) destroying, defacing or concealing of documents or procuring the extension of a valuable security within the meaning of section 20 of the Theft Act 1968;
- (e) money laundering within the meaning of the Money Laundering Regulations 2003(13); or
- (f) any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant State.

(2) In any case where an economic operator or its directors or any other person who has powers of representation, decision or control has been convicted of an offence described in paragraph (1), a utility may disregard the prohibition described there if it is satisfied that there are overriding requirements in the general interest which justify doing so in relation to that economic operator.

(3) Where a utility is not a contracting authority, the criteria which the utility uses for deciding not to select an economic operator may include the fact that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the offences in paragraph (1).

(4) A utility may apply to the relevant competent authority to obtain further information regarding the economic operator and in particular details of convictions of the offences listed in paragraph (1) if it considers it needs such information to decide on any exclusion referred to in paragraphs (1) and (3).

(4) 1889 c. 69.

(5) 1906 c. 34; section 1 was amended by section 47(2) and (3) of the Criminal Justice Act 1988 (c. 33) and section 108(2) of the Anti-terrorism, Crime and Security Act 2001 (c. 24).

(6) OJ No C 316, 27.11.1995, p.49.

(7) 1968 c. 60; section 9 was amended by s26(2) of the Criminal Justice Act 1991 (c. 53) and sections 139, 140 of, and Part 17 of Schedule 6 and Schedule 7 to, the Sexual Offences Act 2003 (c. 42). Section 14 was amended by S.I.2003/2908. Sections 15A and 15B were inserted by sections 1(1) of the Theft (Amendment) Act 1996 (c. 62) and section 15B was amended by S.I. 2001/3649. Section 16 was amended by section 5(5) of the Theft Act 1978 (c. 31). Section 24A was inserted by section 2(1) of the Theft (Amendment) Act 1996(c. 62). Section 33 was amended by S.I. 2001/1149. Section 34 was amended by 2003/2908. Section 36 was amended by section 41(1) of, and Part I of Schedule 6 to, the Northern Ireland Constitution Act 1973 (c. 36). There are other amendments which are not relevant to these Regulations.

(8) 1978 c. 31; section 1 was amended by s4(1) of the Theft (Amendment) Act 1996. Section 5 was amended by section 37(1) of and Schedule 2 to, the Extradition Act 1989 (c. 33). There are other amendments which are not relevant to these Regulations.

(9) 1985 c 6. There are amendments to this Act which are not relevant to these Regulations.

(10) 1979 c. 2. There are amendments to this Act which are not relevant to these Regulations.

(11) 1994 c. 23; section 72 was amended by section 17 of the Finance Act 2003 (c. 14). There are other amendments to this Act which are not relevant to these Regulations.

(12) 1993 c. 36. There are amendments to this Act which are not relevant to these Regulations.

(13) S.I. 2003/3075.

(5) A utility may treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator—

- (a) being an individual is bankrupt or has had a receiving order or administration order or bankruptcy restrictions order made against him or has made any composition or arrangement with or for the benefit of his creditors or has made any conveyance or assignment for the benefit of his creditors or appears unable to pay, or to have no reasonable prospect of being able to pay, a debt within the meaning of section 268 of the Insolvency Act 1986⁽¹⁴⁾, or article 242 of the Insolvency (Northern Ireland) Order 1989⁽¹⁵⁾, or in Scotland has granted a trust deed for creditors or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of his estate, or is the subject of any similar procedure under the law of any other state;
- (b) being a partnership constituted under Scots law has granted a trust deed or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate;
- (c) being a company or any other entity within the meaning of section 255 of the Enterprise Act 2002⁽¹⁶⁾ has passed a resolution or is the subject of an order by the court for the company's winding up otherwise than for the purpose of bona fide reconstruction or amalgamation, or has had a receiver, manager or administrator on behalf of a creditor appointed in respect of the company's business or any part thereof or is the subject of the above procedures or is the subject of similar procedures under the law of any other state;
- (d) has been convicted of a criminal offence relating to the conduct of his business or profession;
- (e) has committed an act of grave misconduct in the course of his business or profession;
- (f) has not fulfilled obligations relating to the payment of social security contributions under the law of any part of the United Kingdom or of the relevant State in which the economic operator is established;
- (g) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom or of the relevant State in which the economic operator is established; or
- (h) is guilty of serious misrepresentation in providing any information required of him under this regulation.

(6) A utility may require an economic operator to provide such information as it considers it needs to make the evaluation in accordance with paragraphs (1), (3) and (5) except that it shall accept as conclusive evidence that an economic operator does not fall within the grounds specified in paragraphs (1), (3), (5)(a), (b), (c), (d), (f) or (g) if that economic operator provides to the utility—

- (a) in relation to the grounds specified in paragraphs (1), (3), (5)(a), (b), (c) or (d)—
 - (i) an extract from the judicial record; or
 - (ii) in a relevant State which does not maintain such a judicial record, a document issued by the relevant judicial or administrative authority;
- (b) in relation to the grounds specified in paragraphs (5)(f) or (g), a certificate issued by the relevant competent authority; and
- (c) in a relevant State where the documentary evidence specified in paragraphs (6)(a) and (b) is not issued in relation to one of the grounds specified in paragraphs (1), (3), (5)(a), (b), (c), (d), (f) or (g), a declaration on oath made by the economic operator before

⁽¹⁴⁾ 1986 c. 45. There are amendments to this Act which are not relevant to these Regulations.

⁽¹⁵⁾ S.I. 1989/2405 (N.I.19). There are amendments to this Order which are not relevant to these Regulations.

⁽¹⁶⁾ 2002 c. 40. There are amendments to this Act which are not relevant to these Regulations.

the relevant judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths.

(7) In this regulation, “relevant” in relation to a judicial, administrative or competent authority, notary public or Commissioner for oaths means an authority nominated by, or a notary public or Commissioner for oaths in, the relevant State in which the economic operator is established.

Criteria for selection of economic operators

27.—(1) A utility using the open procedure shall establish selection criteria on the basis of objective criteria and rules which it determines and which it makes available to economic operators which request them.

(2) A utility using the restricted procedure or the negotiated procedure, with or without a call for competition, shall make the selection of the economic operators to be invited to tender for or to negotiate the contract on the basis of objective criteria and rules which it determines and which it makes available to economic operators which request them.

(3) Where the criteria referred to in paragraphs (1) and (2) include requirements relating to the economic and financial capacity or the technical or professional abilities of the economic operator—

- (a) the economic operator, or a group of economic operators as referred to in regulation 28 may rely on the capacity or abilities of other entities or members in the group, regardless of the legal nature of the link between the economic operator or the group of economic operators and the other entities; and
- (b) the economic operator, or the group of economic operators shall prove to the utility that the resources necessary to perform the contract will be available to it, and such proof may in particular include an undertaking from those entities to that effect.

(4) Without prejudice to the generality of paragraph (2), the criteria may be based on the need of the utility to reduce the number of economic operators selected to tender for or to negotiate the contract to a level which is justified by the characteristics of the award procedure and the resources required to complete it.

(5) The utility shall take account of the need to ensure adequate competition in determining the number of economic operators selected to tender for or to negotiate the contract.

Consortia

28.—(1) In this regulation a “consortium” means two or more persons, at least one of whom is an economic operator, acting jointly for the purpose of being awarded a contract.

(2) Subject to paragraph (3), a utility shall not treat the tender of a consortium as ineligible nor decide not to include a consortium amongst those economic operators from which it will make the selection of economic operators to be invited to tender for or to negotiate a contract or to be admitted to a dynamic purchasing system on the grounds that the consortium has not formed a legal entity for the purpose of tendering for or negotiating the contract or being admitted to a dynamic purchasing system.

(3) Where a utility awards a contract to a consortium it may, if it is justified for the satisfactory performance of the contract, require the consortium to form a legal entity before entering into, or as a term of, the contract.

(4) In these Regulations references to an economic operator where the economic operator is a consortium include a reference to each person who is a member of that consortium.

Corporations

29.—(1) A utility shall not treat the tender of a services provider as ineligible nor decide not to include a services provider amongst those services providers from which it will make the selection of services providers to be invited to tender for or to negotiate a contract or to be admitted to a dynamic purchasing system on the ground that under the law of any part of the United Kingdom the services provider is required to be an individual, a corporation or other type of body, if under the law of the relevant State in which the services provider is established, that services provider is authorised to provide such services.

(2) In the case of—

- (a) a services contract;
- (b) a works contract; or
- (c) a supply contract which includes services or siting and installation of operations;

a utility may require an economic operator which is not an individual to indicate in the tender, the indicative tender or in the request to be selected to tender for or to negotiate the contract, the names and relevant professional qualifications of the staff who will be responsible for the performance of the contract.