
SCOTTISH STATUTORY INSTRUMENTS

2012 No. 88

The Public Contracts (Scotland) Regulations 2012

PART 6

SPECIALISED CONTRACTS

Design contests

33.—(1) A contracting authority which organises a design contest—

- (a) must establish the rules for that design contest in accordance with the provisions of this regulation; and
- (b) must not limit the admission of any economic operator to the design contest by reference to the territory or part of the territory of a relevant State.

(2) This regulation applies to a design contest if it is organised as part of a procedure leading to the award of a public services contract whose estimated value (net of value added tax and including the value of any prizes or payments) is not less than the relevant threshold described in paragraphs (4) and (5).

(3) This regulation applies to a design contest whether or not it is organised as part of a procedure leading to the award of a public services contract if the aggregate value of the prizes or payments for the contest, including the estimated value (net of value added tax) of the contract which might subsequently be awarded in accordance with regulation 14(1)(c) (provided that the contracting authority does not exclude such an award), is not less than the relevant threshold described in paragraphs (4) and (5).

(4) Subject to paragraph (5), the relevant threshold for the purposes of paragraphs (2) and (3) is—

- (a) the amount set out in Article 67(1)(a) where offers are sought by a Schedule 1 entity; or
- (b) the amount set out in Article 67(1)(b) where offers are sought by any other contracting authority.

(5) For the purposes of paragraphs (2) and (3), the relevant threshold is the amount set out in Article 67(1)(c) in the case of a public services contract which is—

- (a) for telecommunications services specified under CPV references 64221000-1, 64227000-3, 64228000-0, 64228100-1 and 64228200-2 within category 5 of Part A of Schedule 3;
- (b) for research and development services specified in category 8 of Part A of Schedule 3; or
- (c) a Part B services contract.

(6) This regulation does not apply to a design contest—

- (a) where the contracting authority is a utility within the meaning of regulation 3 of the Utilities Contracts (Scotland) Regulations 2012 and that contract is for the purposes of carrying out an activity specified in any Part of Schedule 1 to those Regulations in which the utility is specified;

- (b) where the principal purpose is to permit the contracting authority to provide or exploit public telecommunications networks or to provide to the public one or more telecommunications services;
 - (c) which is classified as secret or where it must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the essential interests of the security of the United Kingdom requires it;
 - (d) where different rules govern the procedures of the design contest and it is to be entered into in accordance with—
 - (i) an international agreement to which the United Kingdom and a State which is not a relevant State are parties and it relates to a design contest intended for the joint implementation or exploitation of a project related to that agreement;
 - (ii) an international agreement relating to the stationing of troops; or
 - (iii) the design contest procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members; or
 - (e) which is otherwise excluded from the scope of these Regulations.
- (7) The contracting authority must publicise its intention to hold a design contest by sending to the Official Journal a notice in the form of the design contest notice in Annex XII to [Commission Regulation \(EC\) No 1564/2005](#)⁽¹⁾ and containing the information therein specified.
- (8) The contracting authority must make the rules of the design contest available to economic operators which wish to participate in the contest.
- (9) Regulations 28(2) and 29 apply to design contests as they apply to the seeking of offers in relation to a proposed public contract.
- (10) Regulation 42(1)(b) to (8) applies to notices relating to design contests as they apply to notices in relation to a proposed public contract.
- (11) Regulation 44(1), (2) and (4) applies to all communications relating to design contests as they apply to a proposed public contract.
- (12) The contracting authority must ensure that the specified means of communication and of information storage enable—
- (a) the integrity and confidentiality of information provided by those economic operators participating in the design contest to be maintained; and
 - (b) the jury to ascertain the contents of proposals only after the time limit for their submission has expired.
- (13) Where the contracting authority requires that proposals are to be received by electronic means, it must ensure that—
- (a) details of the equipment which is necessary for the electronic receipt of proposals, including encryption, are available to all economic operators which wish to participate in the design contest; and
 - (b) the equipment for the electronic receipt of proposals complies with the requirements of regulation 44(6).
- (14) Where the contracting authority restricts the number of economic operators in the design contest, it must—
- (a) establish clear and non-discriminatory criteria to select those economic operators;

(1) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

- (b) ensure that the number of economic operators selected is sufficient to ensure adequate competition; and
 - (c) by notice in writing as soon as reasonably practicable after restricting the number of economic operators, inform the affected economic operators that they have been excluded from the design contest.
- (15) A contracting authority must ensure that—
- (a) the members of the jury are all individuals who are independent of those economic operators participating in the design contest;
 - (b) where the economic operators are required to possess a particular professional qualification, that at least one third of the members of the jury also possess that qualification or an equivalent qualification;
 - (c) the proposals of the economic operators are submitted to the jury without any indication as to the authorship of each proposal;
 - (d) the jury makes its decisions or opinions independently and solely on the basis of the criteria specified in the notice referred to in paragraph (7);
 - (e) the jury is not informed of the authorship of any proposal until after it has reached its decision or opinion;
 - (f) the jury prepares minutes signed by its members in which it records—
 - (i) its ranking of the proposals based upon its assessment of each proposal’s merits; and
 - (ii) its observations or details of any issues upon which clarification is required in relation to each proposal; and
 - (g) the jury may invite the economic operators to answer any questions to clarify issues noted in the minutes referred to in sub-paragraph (f) and must record complete minutes of any such communications with economic operators.
- (16) The contracting authority must, not later than 48 days after the date the jury makes its selection, publicise the results of the design contest by sending to the Official Journal a notice in the form of the notice of the results of a design contest in Annex XIII to [Commission Regulation \(EC\) No 1564/2005](#) and including the information therein specified.
- (17) The contracting authority must retain evidence of the date of dispatch to the Official Journal of each notice.
- (18) Any of the information specified in the form of the notice referred to in paragraph (16) to be included in that notice may be omitted in a particular case where to publish such information—
- (a) would impede law enforcement;
 - (b) would otherwise be contrary to the public interest;
 - (c) would prejudice the legitimate commercial interests of any person; or
 - (d) might prejudice fair competition between economic operators.

Subsidised public works contracts and public services contracts

34.—(1) Where—

- (a) a contracting authority undertakes to contribute more than half of the consideration to be or expected to be paid under a contract to which this paragraph applies by virtue of paragraph (2); and
- (b) the contract has been or is to be entered into by a person other than another contracting authority (in this regulation referred to as “the subsidised body”), that contracting authority must—

- (i) make it a condition of the making of such a contribution that the subsidised body complies with the provisions of these Regulations in relation to that contract as if it were a contracting authority; and
 - (ii) ensure that the subsidised body does so comply or recover the contribution.
- (2) Paragraph (1) applies to a contract which, if the subsidised body were a contracting authority, would be—
- (a) a public works contract to which these Regulations apply by virtue of regulation 8 and which is for the carrying out of—
 - (i) any of the civil engineering activities specified in Schedule 2; or
 - (ii) building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings or buildings for administrative purposes; or
 - (b) a public services contract to which these Regulations apply by virtue of regulation 8 for providing services in connection with a contract referred to in sub-paragraph (a) of this paragraph.

Subsidised housing scheme works contracts

35.—(1) For the purpose of seeking offers in relation to a subsidised housing scheme works contract to which the circumstances of paragraph (2) apply, a contracting authority may, except as indicated in the following paragraphs, depart from the provisions of these Regulations insofar as it is necessary to do so to select the contractor which is most suitable for integration into the team referred to in paragraph (2).

(2) The circumstances referred to in paragraph (1) are where the size and complexity of the scheme and the estimated duration of the works involved require that the planning of the scheme be based from the outset on a close collaboration of a team comprising representatives of the contracting authority, experts and the contractor.

(3) The contracting authority must comply with the provisions of—

- (a) regulations 4(3), 11, 31, 32, 42 and 44; and
- (b) the time limits referred to in regulations 15, 16, 17 and 18.

(4) The contracting authority must include in the contract notice a job description which is as accurate as possible so as to enable contractors to form a valid idea of the scheme and of the minimum standards relating to the business or professional status, the economic and financial standing, the technical ability and any quality assurance standards which the contractor awarded the contract will be expected to fulfil in accordance with regulations 23 to 26.

Public works concession contracts

36.—(1) A contracting authority seeking offers in relation to a public works concession contract must comply with this regulation.

(2) These Regulations do not apply to the seeking of offers in relation to a proposed public works concession contract where the estimated value of the contract (net of value added tax) at the relevant time is less than the amount set out in Article 56.

(3) In this regulation “relevant time” has the same meaning it has in regulation 8(20).

(4) The estimated value of a public works concession contract for the purposes of paragraph (2) must be the value of the consideration which the contracting authority would expect to give for the carrying out of the work or works if it did not propose to grant a concession.

(5) The value of the consideration under a public works concession contract must be calculated in accordance with regulation 8(6).

(6) These Regulations do not apply to the seeking of offers in relation to a proposed public works concession contract—

- (a) where—
 - (i) the contracting authority is a utility within the meaning of regulation 3 of the Utilities Contracts (Scotland) Regulations 2012; and
 - (ii) the work or works to be carried out under it are for the purposes of carrying out an activity specified in any Part of Schedule 1 to those Regulations in which the utility is specified;
- (b) where the principal purpose of the contract is to permit the contracting authority to provide or exploit public telecommunications networks or to provide to the public one or more telecommunications services;
- (c) which is classified as secret or where the performance of the contract must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the essential interests of the security of the United Kingdom require it;
- (d) where Article 346 of the TFEU applies to that public works concession contract;
- (e) where different procedures govern the procedures leading to the award of the contract and it is to be entered into in accordance with—
 - (i) an international agreement concluded in conformity with the TFEU to which the United Kingdom and a State which is not a relevant State are parties and it relates to the carrying out of works intended for the joint implementation or exploitation of a project related to that agreement;
 - (ii) an international agreement relating to the stationing of troops and concerning the undertakings of a relevant State; or
 - (iii) the contract award procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members; or
- (f) subject to paragraph (7), when a contracting authority wants an economic operator which has entered into a public works concession contract with the contracting authority to carry out additional work or works which were not included in the project initially considered or in the original public works concession contract but which through unforeseen circumstances have become necessary, and such work or works—
 - (i) cannot for technical or economic reasons be carried out separately from those under the original contract without major inconvenience to the contracting authority; or
 - (ii) can be carried out separately from those under the original contract but are strictly necessary to the later stages of the performance of that contract.

(7) Paragraph (6)(f) does not apply where the aggregate value of the consideration to be given under contracts for the additional work or works exceeds 50% of the value of the consideration payable under the original contract.

(8) The contracting authority must—

- (a) publicise its intention to seek offers in relation to the public works concession contract by sending to the Official Journal as soon as possible after forming the intention a notice in the form of the public works concession contract notice in Annex X to [Commission Regulation \(EC\) No 1564/2005](#)⁽²⁾ and containing the information therein specified and any other information which the contracting authority considers useful; and

(2) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

(b) comply with regulation 42 in relation to a public works concession contract notice as it would comply in relation to a proposed public contract.

(9) Subject to paragraphs (10) and (13), the date which the contracting authority fixes as the last date for the receipt by it of tenders or of requests to be selected to tender for or to negotiate the contract, must be specified in the contract notice and must be not less than 52 days from the date of dispatch of the notice.

(10) Where the contracting authority has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VIII to the Public Sector Directive, the time limit referred to in paragraph (9) may be reduced by 7 days.

(11) The contracting authority must send the contract documents to an economic operator within 6 days of the receipt of a request from that economic operator provided that the documents are requested in good time and any fee specified in the contract notice has accompanied the request.

(12) The contracting authority must supply to an economic operator such further information relating to the contract documents as may be reasonably requested by that economic operator provided that the request is received in sufficient time to enable the contracting authority to supply the information not later than 6 days before the date specified in the contract notice as the final date for the receipt by it of tenders.

(13) The contracting authority must extend the time limit for the receipt by it of tenders in order that all the information necessary for the preparation of a tender is available to all economic operators where—

- (a) an economic operator requests the contract documents in sufficient time to allow the contracting authority to respond in accordance with paragraphs (11) and (12) and, for whatever reason, the contract documents are not supplied in accordance with those paragraphs; or
- (b) it is necessary that the economic operators be given the opportunity to inspect the site or premises or documents relating to the contract documents.

Sub-contracting the work or works to be carried out under a public works concession contract

37.—(1) A contracting authority seeking offers in relation to a public works concession contract must either—

- (a) include in the invitation to tender for, to apply to be selected to tender for or to negotiate, the concession contract, a request that the economic operator specify whether it would intend, if awarded the concession contract, to sub-contract to economic operators which are not related to it—
 - (i) any of the work or works to be carried out under the contract; and
 - (ii) where sub-paragraph (a)(i) applies, how much as a proportion of the value of such work or works would be so sub-contracted; or
- (b) require as a term of the public works concession contract—
 - (i) that the concessionaire sub-contract to economic operators which are not related to the concessionaire some or all of the work or works to be carried out under the concession contract; and
 - (ii) that the amount of the work or works so sub-contracted be not less than 30%, or such higher percentage as may be specified in the contract at the option of the concessionaire, of the value of the consideration which the contracting authority would expect to give for the carrying out of the work or works if it did not grant a concession.

(2) Where the concessionaire is a contracting authority, that contracting authority must comply with the provisions of these Regulations in respect of any public works contract in relation to which it seeks offers for the purpose of sub-contracting the work or works to be carried out under the public works concession contract.

(3) Where the concessionaire is not a contracting authority, the concessionaire must—

- (a) publicise its intention to seek offers in relation to any contract to which this paragraph applies by virtue of paragraph (4) by sending to the Official Journal as soon as possible after forming the intention a notice in the form of the contract notice for contracts to be awarded by a concessionaire in Annex XI to Commission Regulation (EC) No 1564/2005 and containing the information therein specified and any other information which the concessionaire considers useful;
- (b) comply with regulation 42 in relation to that contract notice as if the concessionaire were a contracting authority; and
- (c) subject to paragraphs (5), (6) and (9)—
 - (i) if that contract notice invites tenders, fix as the last date for the receipt by the concessionaire of tenders a date of not less than 40 days from the date of the dispatch of the notice and specify that date in that notice; or
 - (ii) if that contract notice invites applications to be selected to tender for or negotiate the contract—
 - (aa) fix as the last date for the receipt of such applications a date not less than 37 days from the date of dispatch of the notice and specify that date in that notice; and
 - (bb) fix as the last date for the receipt of tenders following selection of the economic operators to be invited to tender a date of not less than 40 days from the date of dispatch of the invitation and specify that date in the invitation.

(4) Paragraph (3) applies to a contract—

- (a) in relation to which the concessionaire is seeking offers for the purpose of sub-contracting any of the work or works to be carried out under the public works concession contract;
- (b) which the concessionaire does not intend to enter into with an economic operator—
 - (i) which is a member of the group of economic operators which acted jointly for the purpose of obtaining the public works concession contract; or
 - (ii) related to it or any member of the group mentioned in paragraph (i); and
- (c) which would, if the concessionaire were a contracting authority, be a public works contract, other than a public works contract—
 - (i) in respect of which a contracting authority would be entitled to use the negotiated procedure in accordance with regulation 14; or
 - (ii) which is excluded from the application of these Regulations by regulation 6 or 8.

(5) Where the concessionaire has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VIII to the Public Sector Directive, the time limits referred to in paragraph (3)(c) may be reduced by 7 days.

(6) The concessionaire may reduce the time limits for the receipt of tenders by 5 days provided that—

- (a) the concessionaire offers unrestricted and full direct access by electronic means to the contract documents from the date of publication of the contract notice; and

(b) the contract notice specifies the internet address at which the documents referred to in sub-paragraph (a) are available.

(7) The concessionaire must send the contract documents to an economic operator within 6 days of the receipt of a request from that economic operator provided that the documents are requested in good time and any fee specified in the contract notice has accompanied the request.

(8) The concessionaire must supply to an economic operator such further information relating to the contract documents as may be reasonably requested by that economic operator provided that the request is received in sufficient time to enable the concessionaire to supply the information not later than 6 days before the date specified in the contract notice as the final date for the receipt by it of tenders.

(9) The concessionaire must extend the time limit for the receipt by it of tenders in order that all the information necessary for the preparation of a tender is available to all economic operators where—

- (a) an economic operator requests the contract documents in sufficient time to allow the concessionaire to respond in accordance with paragraphs (7) and (8) and, for whatever reason, the contract documents are not supplied by that date; or
- (b) it is necessary that the economic operators be given the opportunity to inspect the site or premises or documents relating to the contract documents.

(10) The concessionaire may combine the reduction in the periods of time referred to in paragraphs (5) and (6).

(11) In this regulation an economic operator is to be treated as related to another economic operator—

- (a) if one economic operator exercises, directly or indirectly, a dominant influence over the other; or
- (b) if both those economic operators are subject to the dominant influence of another economic operator.

(12) An economic operator is taken to exercise a dominant influence over another economic operator within the meaning of paragraph (11)—

- (a) if it possesses the greater part of the issued share capital of that economic operator or controls the voting power attached to such greater part; or
- (b) if it may appoint more than half of the individuals which are ultimately responsible for managing that economic operator's affairs.

(13) A contracting authority must require applicants for a public works concession contract to submit with the application a list of—

- (a) all economic operators which are related to the applicant; and
- (b) all economic operators which are related to the economic operators referred to in sub-paragraph (a),

and to update the list from time to time to take account of any changes in the economic operators referred to in sub-paragraphs (a) and (b).