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STATUTORY INSTRUMENTS

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**2015 No. 102**

**The Public Contracts Regulations 2015**

**PART 2**

**RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE**

**CHAPTER 1**

**SCOPE AND GENERAL PRINCIPLES**

*SECTION 1*

*Scope*

**SUB-SECTION 1** Subject-matter and mixed procurement

**Subject-matter and scope of Part 2**

**3.—**(1) This Part establishes rules on the procedures for procurement by contracting authorities with respect to public contracts and design contests which—

- (a) have a value estimated to be not less than the relevant threshold mentioned in regulation 5, and
  - (b) are not excluded from the scope of this Part by any other provision in this Section.
- (2) This Part is subject to Article 346 of TFEU.

**Mixed procurement**

**4.—**(1) In the case of mixed contracts which have as their subject-matter different types of procurement all of which are covered by this Part—

- (a) contracts which have as their subject-matter two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject-matter of the contract in question; and

- (b) in the case of—

- (i) mixed contracts consisting partly of services to which Section 7 applies and partly of other services, or

- (ii) mixed contracts consisting partly of services and partly of supplies,

the main subject-matter shall be determined in accordance with which of the estimated values of the respective services, or of the respective services and supplies, is the highest.

(2) In the case of contracts which have as their subject-matter procurement covered by this Part and procurement not covered by this Part—

- (a) where the different parts of a given contract are objectively separable—

- (i) contracting authorities may choose to award separate contracts for the separate parts or to award a single contract;
  - (ii) where contracting authorities choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned; and
  - (iii) where contracting authorities choose to award a single contract, this Part applies to the ensuing mixed contract, irrespective of—
    - (aa) the value of the parts that would otherwise fall under a different legal regime, and
    - (bb) which legal regime those parts would otherwise have been subject to;
  - (b) where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject-matter of that contract.
- (3) But where part of a given contract is covered by Article 346 of TFEU or the Defence and Security Regulations, regulation 16 applies instead of paragraph (1) or (2).
- SUB-SECTION 2Thresholds

### **Threshold amounts**

**5.—**(1) This Part applies to procurements with a value net of VAT estimated to be equal to or greater than the following thresholds:—

- (a) for public works contracts, the sum specified in Article 4(a) of the Public Contracts Directive;
  - (b) for public supply contracts and public service contracts awarded by central government authorities, and design contests organised by such authorities, the sum specified in Article 4(b) of the Public Contracts Directive, subject to paragraph (2);
  - (c) for public supply contracts and public service contracts awarded by sub-central contracting authorities, and design contests organised by such authorities, the sum specified in Article 4(c) of the Public Contracts Directive;
  - (d) for public service contracts for social and other specific services listed in Schedule 3, the sum specified in Article 4(d) of the Public Contracts Directive.
- (2) Where public supply contracts are—
- (a) awarded by central government authorities operating in the field of defence, and
  - (b) concern products not covered by Schedule 4,

the applicable threshold for the purposes of paragraph (1) is the sum specified in Article 4(c) of the Public Contracts Directive.

(3) References in paragraphs (1) and (2) to the Public Contracts Directive are references to that Directive as amended from time to time.

(4) The value in pounds sterling of any amount expressed in euro in any of the provisions of the Public Contracts Directive mentioned in this regulation shall be taken to be the value for the time being determined by the Commission for the purpose of that provision and published from time to time in the Official Journal in accordance with Article 6 of the Public Contracts Directive.

### **Methods for calculating the estimated value of procurement**

#### *General rules*

#### *General rules*

6.—(1) The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents.

(2) Where the contracting authority provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the procurement.

(3) Where a contracting authority is comprised of separate operational units, account shall be taken of the total estimated value for all those units.

(4) But where a separate operational unit is independently responsible for its procurement, or certain categories of its procurement, the values may be estimated at the level of the unit in question.

(5) The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Part.

(6) A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Part, unless justified by objective reasons.

(7) The estimated value shall be calculated as at the moment at which the call for competition is sent or, in cases where a call for competition is not foreseen, at the moment at which the contracting authority commences the procurement procedure (for example, where appropriate, by contacting economic operators in relation to the procurement).

(8) In the case of framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value, net of VAT, of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.

(9) In the case of innovation partnerships, the value to be taken into consideration shall be the maximum estimated value, net of VAT, of the research and development activities to take place during all stages of the envisaged partnership as well as of the supplies, services or works to be developed and procured at the end of the envisaged partnership.

(10) In the case of public works contracts, the calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authority provided that they are necessary for executing the works.

#### *Treatment of lots*

(11) Where a proposed work or a proposed provision of services may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots.

(12) Where a proposal for the acquisition of similar supplies may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying regulation 5(1)(b) and (c) (read with regulation 5(2)).

(13) For the purposes of paragraphs (11) and (12), where the aggregate value of the lots is equal to or greater than the relevant threshold mentioned in regulation 5, this Part applies to the awarding of each lot.

(14) Despite paragraphs (11) to (13), contracting authorities may, subject to paragraph (15), award contracts for individual lots without applying the procedures provided for by this Part, but only if the estimated value, net of VAT, of the lot concerned is less than—

- (a) 80,000 euro for supplies or services, or
- (b) 1 million euro for works.

(15) The aggregate value of the lots awarded in reliance on paragraph (14) shall not exceed 20% of the aggregate value of all the lots into which the proposed work, the proposed acquisition of similar supplies, or the proposed provision of services, has been divided.

*Other specific rules*

(16) In the case of public supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on either of the following:—

- (a) the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, where possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;
- (b) the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.

(17) In the case of public supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:—

- (a) in the case of fixed-term public contracts, where that term is less than or equal to 12 months, the total estimated value for the term of the contract or, where the term of the contract is greater than 12 months, the total value including the estimated residual value;
- (b) in the case of public contracts without a fixed term, or public contracts the term of which cannot be defined, the monthly value multiplied by 48.

(18) In the case of public service contracts, the basis for calculating the estimated contract value shall, where relevant be the following:—

- (a) in the case of insurance services, the premium payable and other forms of remuneration;
- (b) in the case of banking and other financial services, the fees, commissions payable, interest and other forms of remuneration;
- (c) in the case of design contracts, the fees, commissions payable and other forms of remuneration.

(19) In the case of public service contracts which do not indicate a total price, the basis for calculating the estimated contract value shall be the following:—

- (a) in the case of fixed-term contracts where that term is less than or equal to 48 months, the total value for their full term;
- (b) in the case of contracts without a fixed term or with a term greater than 48 months, the monthly value multiplied by 48.

**SUB-SECTION 3Exclusions****Utilities**

7. This Part does not apply to the seeking of offers in relation to a proposed public contract, framework agreement or dynamic purchasing system where the contracting authority is a utility within the meaning of regulation 3 of the Utilities Contracts Regulations 2006<sup>(1)</sup> and—

- (a) that contract is for the purposes of carrying out an activity listed in any Part of Schedule 1 to those Regulations in which the utility is specified;
- (b) that contract is for the provision of bus services to the public where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the utility;

(1) S.I. 2006/6, amended by S.I. 2008/2848, 2011/1043, 2053, 2012/1659, 2013/610; there are other amending instruments but none is relevant.

- (c) that contract is for the purpose of acquiring goods, work, works or services in order to sell, hire or provide them to another person unless the utility has a special or exclusive right to sell, hire or provide such goods, work, works or services or other persons are not free to sell, hire or provide them under the same conditions;
- (d) that contract is for the purchase of water, where that utility is engaged in the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transportation or distribution of drinking water or the supply of drinking water to such networks;
- (e) that contract is for the supply of energy or of fuels for the production of energy, where that utility is engaged in—
  - (i) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat or the supply of gas or heat to such networks,
  - (ii) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity or the supply of electricity to such networks, or
  - (iii) exploring for or extracting oil, gas, coal or other solid fuels; or
- (f) where that utility is engaged in an activity excluded from the Utilities Contracts Regulations 2006 by virtue of regulation 9 of those Regulations.

#### **Specific exclusions in the field of electronic communications**

**8.—**(1) This Part does not apply to public contracts, or design contests, for the principal purpose of permitting contracting authorities to provide or exploit public communications networks or to provide to the public one or more electronic communications services.

(2) In this regulation, “public communications network” and “electronic communications service” have the same meanings as in Directive [2002/21/EC](#) of the European Parliament and of the Council<sup>(2)</sup> as amended from time to time.

#### **Public contracts awarded, and design contests organised, pursuant to international rules**

**9.—**(1) This Part does not apply to public contracts, or design contests, which the contracting authority is obliged to award or organise in accordance with procurement procedures which are different from those laid down by this Part and are established by any of the following:—

- (a) a legal instrument creating international law obligations, such as an international agreement, concluded in conformity with the Treaties, between a member State and one or more third countries (or subdivisions of such countries) and covering works, supplies or services intended for the joint implementation or exploitation of a project by its signatories;
- (b) an international organisation.

(2) This Part does not apply to public contracts, or design contests, which the contracting authority awards or organises in accordance with procurement rules provided by an international organisation or international financing institution where the public contracts or design contests concerned are fully financed by that organisation or institution.

(3) In the case of public contracts, or design contests, co-financed for the most part by an international organisation or international financing institution, the parties shall agree on applicable procurement procedures.

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(2) OJ No L 108, 24.4.2002, p33, last amended by Directive [2009/140/EC](#) of the European Parliament and of the Council (OJ No L 337, 18.12.2009, p37).

(4) In the case of contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules, regulation 17 applies instead of paragraphs (1) to (3) of this regulation.

### **Specific exclusions for service contracts**

**10.—**(1) This Part does not apply to public service contracts—

- (a) for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property, or which concern interests in or rights over any of them;
- (b) for—
  - (i) the acquisition, development, production or co-production of programme material intended for audiovisual media services or radio media services, that are awarded by audiovisual or radio media service providers, or
  - (ii) broadcasting time or programme provision that are awarded to audiovisual or radio media service providers;
- (c) for arbitration or conciliation services;
- (d) for any of the following legal services:—
  - (i) legal representation of a client by a lawyer within the meaning of Article 1 of Council Directive [77/249/EEC](#)(3), as amended from time to time, in—
    - (aa) an arbitration or conciliation held in a member State, a third country or before an international arbitration or conciliation instance, or
    - (bb) judicial proceedings before the courts, tribunals or public authorities of a member State or a third country or before international courts, tribunals or institutions;
  - (ii) legal advice given—
    - (aa) in preparation of any of the proceedings referred to in paragraph (i), or
    - (bb) where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer within the meaning of Article 1 of Council Directive [77/249/EEC](#) as amended from time to time;
  - (iii) document certification and authentication services which must be provided by notaries;
  - (iv) legal services provided by trustees or appointed guardians or other legal services the providers of which are designated by a court or tribunal in the member State concerned or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;
  - (v) other legal services which in the member State concerned are connected, even occasionally, with the exercise of official authority;
- (e) for—
  - (i) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive [2004/39/EC](#) of the European Parliament and of the Council(4) as amended from time to time,
  - (ii) central bank services, or

(3) OJ No L 78, 26.3.1977, p17, last amended by Council Directive 2013/25/EU (OJ No L 158, 10.6.2013, p368).

(4) OJ No L 145, 30.4.2004, p1, last amended by Directive 2010/78/EU of the European Parliament and of the Council (OJ No L 331, 15.12.2010, p120).

- (iii) operations conducted with the European Financial Stability Facility and the European Stability Mechanism;
  - (f) for loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
  - (g) which are employment contracts;
  - (h) for civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;
  - (i) for public passenger transport services by rail or metro; or
  - (j) for political campaign services covered by CPV codes 79341400-0, 92111230-3 and 92111240-6, when awarded by a political party in the context of an election campaign.
- (2) In this Regulation—
- (a) “audiovisual media services” and “media service providers” have, respectively, the meanings given by Articles 1(1)(a) and 1(1)(d) of Directive 2010/13/EU of the European Parliament and of the Council<sup>(5)</sup> as amended from time to time;
  - (b) “programme” has the meaning given by Article 1(1)(b) of that Directive as amended from time to time, but also includes radio programmes and radio programme materials; and
  - (c) “programme material” has the same meaning as “programme”.

### **Service contracts awarded on the basis of an exclusive right**

**11.** This Part does not apply to public service contracts awarded by a contracting authority to another contracting authority on the basis of an exclusive right which the latter enjoys pursuant to a law, regulation or published administrative provision which is compatible with TFEU.

### **Public contracts between entities within the public sector**

#### *Award of contracts to controlled persons*

#### *Award of contracts to controlled persons*

**12.—(1)** A public contract awarded by a contracting authority to a legal person falls outside the scope of this Part where all of the following conditions are fulfilled:—

- (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
- (b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

(2) A public contract also falls outside the scope of this Part where a controlled legal person which is a contracting authority awards the contract to—

- (a) its controlling contracting authority, or

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(5) OJ No L 95, 15.3.2010, p1.

(b) another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the legal person being awarded the contract.

(3) A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of paragraph (1)(a) where—

- (a) it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person, or
- (b) the control is exercised by another legal person which is itself controlled in the same way by the contracting authority,

and references to “control”, “controlled” and “controlling” in paragraphs (1) to (3) shall be interpreted accordingly.

*Award of contracts where there is joint control*

(4) A contracting authority which does not exercise over a legal person control within the meaning of paragraph (3) may nevertheless award a public contract to that legal person without applying this Part where all of the following conditions are fulfilled:—

- (a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;
- (b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

(5) For the purposes of paragraph (4)(a), contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:—

- (a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;
- (b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
- (c) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

(6) For the purposes of paragraph (5)(a), individual representatives may represent several or all of the participating contracting authorities.

*Contracts which establish or implement co-operation between contracting authorities*

(7) A contract concluded exclusively between two or more contracting authorities falls outside the scope of this Part where all of the following conditions are fulfilled:—

- (a) the contract establishes or implements a co-operation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and



- (c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.

#### *Determination of percentages*

(8) For the determination of the percentage of activities referred to in paragraphs (1)(b), (4)(b) and (7)(c), the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the 3 years preceding the contract award shall be taken into consideration.

(9) Where, because of—

- (a) the date on which the relevant legal person or contracting authority was created or commenced activities, or
- (b) a reorganisation of its activities,

the turnover, or alternative activity-based measure such as costs, are either not available for the preceding 3 years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

SUB-SECTION 4 Specific situations

#### **Contracts subsidised by contracting authorities**

**13.**—(1) This Part applies to the awarding of the following contracts:—

- (a) works contracts which are subsidised directly by contracting authorities by more than 50% and the estimated value of which, net of VAT, is equal to or greater than the sum specified in Article 13(a) of the Public Contracts Directive, where those contracts involve any of the following activities:—
  - (i) civil engineering activities as listed in Schedule 2;
  - (ii) building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes;
- (b) service contracts which are subsidised directly by contracting authorities by more than 50% and the estimated value of which, net of VAT, is equal to or greater than the sum specified in Article 13(b) of the Public Contracts Directive and which are connected to a works contract as referred to in paragraph (a).

(2) References in paragraph (1) to the Public Contracts Directive are references to that Directive as amended from time to time.

(3) The contracting authorities providing the subsidies referred to in paragraph (1) shall ensure compliance with this Part where they do not themselves award the subsidised contract or where they award that contract for and on behalf of other entities.

#### **Research and development services**

**14.** This Part applies to public service contracts for research and development services which are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 only if—

- (a) the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and
- (b) the service provided is wholly remunerated by the contracting authority.

## **Defence and security**

**15.**—(1) This Part applies to the awarding of public contracts and to design contests organised in the fields of defence and security, with the exception of the following contracts:—

- (a) contracts falling within the scope of the Defence and Security Regulations;
- (b) contracts to which those Regulations do not apply by virtue of regulations 7 or 9 of those Regulations.

(2) This Part does not apply to public contracts and design contests not otherwise exempted by paragraph (1)—

- (a) to the extent that the protection of the essential security interests of the United Kingdom or another member State cannot be guaranteed by less intrusive measures, for example by imposing requirements aimed at protecting the confidential nature of information which the contracting authority makes available in a contract award procedure as provided for in this Part; or
- (b) to the extent that the application of this Part would oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security.

(3) Where the procurement and performance of the public contract or design contest are classified as secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in any part of the United Kingdom, this Part does not apply provided that the United Kingdom has determined that the essential interests concerned cannot be guaranteed by less intrusive means, such as those referred to in paragraph (2)(a).

## **Mixed procurement involving defence or security aspects**

**16.**—(1) This regulation applies in the case of mixed contracts which have as their subject-matter procurement covered by this Part and procurement covered by Article 346 of TFEU or the Defence and Security Regulations.

(2) Where the different parts of a given public contract are objectively separable, contracting authorities may choose to award separate contracts for the separate parts or to award a single contract.

(3) The decision to award a single contract shall not, however, be taken for the purpose of excluding contracts from the application of either this Part or the Defence and Security Regulations.

(4) Where contracting authorities choose to award separate contracts for separate parts, the decision of which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

(5) Where contracting authorities choose to award a single contract, the following criteria shall apply to determine the applicable legal regime:—

- (a) where part of a given contract is covered by Article 346 of TFEU, the contract may be awarded without applying this Part, provided that the award of a single contract is justified by objective reasons;
- (b) where part of a given contract is covered by the Defence and Security Regulations, the contract may be awarded in accordance with those Regulations, provided that the award of a single contract is justified by objective reasons.

(6) Paragraph (5)(b) is without prejudice to the thresholds and exclusions for which the Defence and Security Regulations provide.

(7) Paragraph (5)(a) applies to mixed contracts to which both paragraph (5)(a) and (b) could otherwise apply.

(8) Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying this Part where it includes elements to which Article 346 of TFEU applies; otherwise it may be awarded in accordance with the Defence and Security Regulations.

### **Public contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules**

17.—(1) This Part does not apply to public contracts, or design contests, involving defence or security aspects which the contracting authority is obliged to award or organise in accordance with procurement procedures which are different from those laid down by this Part and are established by any of the following:—

- (a) an international agreement or arrangement, concluded in conformity with the Treaties, between a member State and one or more third countries (or subdivisions of such countries) and covering works, supplies or services intended for the joint implementation or exploitation of a project by its signatories;
- (b) an international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a member State or a third country;
- (c) an international organisation.

(2) This Part does not apply to public contracts, or design contests, involving defence or security aspects which the contracting authority awards in accordance with procurement rules provided by an international organisation or international financing institution where the public contracts or design contests concerned are fully financed by that organisation or institution.

(3) In the case of public contracts, or design contests, co-financed for the most part by an international organisation or international financing institution, the parties shall agree on applicable procurement procedures.

## *SECTION 2*

### *General Rules*

#### **Principles of procurement**

18.—(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

(2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.

(3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

#### **Economic operators**

19.—(1) Economic operators that, under the law of the member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of England and Wales or, as the case may be, Northern Ireland, they would be required to be either natural or legal persons.

(2) In the case of—

- (a) public service contracts,
- (b) public works contracts, and

- (c) public supply contracts which cover in addition services or siting and installation operations,

legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

#### *Groups of economic operators*

(3) Groups of economic operators, including temporary associations, may participate in procurement procedures and shall not be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate.

(4) Where necessary, contracting authorities may clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in regulation 58 provided that this is justified by objective reasons and is proportionate.

(5) Any conditions for the performance of a contract by such groups of economic operators which are different from those imposed on individual participants shall also be justified by objective reasons and shall be proportionate.

(6) Contracting authorities may require groups of economic operators to assume a specific legal form once they have been awarded the contract, to the extent that such a change is necessary for the satisfactory performance of the contract.

#### **Reserved contracts**

**20.**—(1) Contracting authorities may—

- (a) reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, or
- (b) provide for such contracts to be performed in the context of sheltered employment programmes,

provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

(2) In such cases, the call for competition shall make reference to Article 20 of the Public Contracts Directive.

#### **Confidentiality**

**21.**—(1) A contracting authority shall not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

(2) Paragraph (1) is without prejudice to—

- (a) any other provision of this Part, including the obligations relating to the advertising of awarded contracts and the provision of information to candidates and tenderers set out in regulations 50 and 55 respectively;
- (b) the Freedom of Information Act 2000<sup>(6)</sup>;
- (c) any other requirement, or permission, for the disclosure of information that is applicable under the law of England and Wales or, as the case may be, Northern Ireland.

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(6) 2000 c.36.

(3) Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

## **Rules applicable to communication**

### *General principles about the use of electronic and non-electronic means of communication*

### *General principles about the use of electronic and non-electronic means of communication*

**22.**—(1) Subject to paragraphs (3), (5), (8) and (10), all communication and information exchange under this Part, including electronic submission, shall be performed using electronic means of communication in accordance with the requirements of this regulation.

(2) Subject to paragraph (13), the tools and devices to be used for communicating by electronic means, and their technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and shall not restrict economic operators' access to the procurement procedure.

(3) Contracting authorities are not obliged to require electronic means of communication in the submission process in the following situations:—

- (a) due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;
- (b) the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting authority;
- (c) the use of electronic means of communication would require specialised office equipment that is not generally available to contracting authorities; or
- (d) the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means.

(4) Where, in accordance with paragraph (3), electronic means of communication are not used, communication shall be carried out—

- (a) by post or by other suitable carrier, or
- (b) by a combination of post or other suitable carrier and electronic means.

(5) Contracting authorities are not obliged to require electronic means of communication in the submission process to the extent that the use of means of communication other than electronic means is necessary either—

- (a) because of a breach of security of the electronic means of communication, or
- (b) for the protection of information of a particularly sensitive nature requiring such a high level of protection that it cannot be properly ensured by using electronic tools and devices that are either generally available to economic operators or can be made available to them by alternative means of access within the meaning of paragraph (14).

(6) Where contracting authorities require, in accordance with paragraph (3), means of communication other than electronic means in the submission process, they shall indicate in the report referred to in regulation 84(1) the reasons for that requirement.

(7) Where applicable, contracting authorities shall indicate in that report the reasons why use of means of communication other than electronic means has been considered necessary in accordance with paragraph (5).

(8) Oral communication may be used in respect of communications other than those concerning the essential elements of a procurement procedure, provided that the content of the oral communication is documented to a sufficient degree.

(9) For that purpose, the essential elements of a procurement procedure include the procurement documents, requests to participate, confirmations of interest and tenders.

(10) In particular, oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders shall be documented to a sufficient extent and by appropriate means, such as written or audio records or summaries of the main elements of the communication.

(11) In all communication, exchange and storage of information, contracting authorities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved.

(12) Contracting authorities shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

*Use of tools and devices not generally available*

(13) Contracting authorities may, where necessary, require the use of tools and devices which are not generally available, provided that the contracting authorities offer suitable alternative means of access.

(14) Contracting authorities shall be deemed to offer suitable alternative means of access where they do any of the following:—

- (a) offer unrestricted and full direct access free of charge by electronic means to the tools and devices concerned from the date of publication of the call for competition or from the date when the invitation to confirm interest is sent;
- (b) ensure that tenderers having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the tenderer concerned, may access the procurement procedure through the use of provisional tokens made available free of charge online; or
- (c) support an alternative channel for electronic submission of tenders.

(15) For the purposes of paragraph (14)(a)—

- (a) “publication of the call for competition” means whichever of the following is relevant (and where both are relevant, the earliest of them):—
  - (i) its publication in the Official Journal after being sent in accordance with regulation 51;
  - (ii) its publication on a buyer profile in accordance with regulation 52; and
- (b) the text of the call for competition notice or the invitation to confirm interest shall specify the internet address at which the tools and devices are accessible.

*Technical etc requirements for tools and devices*

(16) Tools and devices for the electronic receipt of tenders, requests to participate and, in design contests, plans and projects, must at least guarantee, through technical means and appropriate procedures, that—

- (a) the exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects can be determined precisely;
- (b) it may be reasonably ensured that, before the time referred to in paragraph (12), no-one can have access to data transmitted under the requirements in this paragraph;
- (c) only authorised persons may set or change the dates for opening data received;

- (d) during the different stages of the procurement procedure, access to all data submitted, or to part of such data, must be possible only for authorised persons;
- (e) only authorised persons may give access to data transmitted and only after the time referred to in paragraph (12);
- (f) data received and opened in accordance with the requirements in sub-paragraphs (a) to (e) must remain accessible only to persons authorised to acquaint themselves with the data;
- (g) it must be reasonably ensured that any infringement, or attempted infringement, of the access prohibitions or conditions referred to in sub-paragraphs (b) to (f) are clearly detectable.

(17) In addition to those requirements, the following rules apply to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate:

- (a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, shall be available to interested parties;
- (b) contracting authorities shall, acting in accordance with paragraphs (18) and (19), specify the level of security required for the electronic means of communication in the various stages of the specific procurement procedure, and that level shall be proportionate to the risks attached;
- (c) where contracting authorities conclude that the level of risk, assessed in accordance with paragraphs (18) and (19), is such that advanced electronic signatures as defined by Directive [1999/93/EC](#) of the European Parliament and of the Council<sup>(7)</sup> as amended from time to time are required, contracting authorities shall accept advanced electronic signatures supported by a qualified certificate, taking into account whether the certificate is provided by a certificate services provider which is on a trusted list provided for in Commission Decision [2009/767/EC](#)<sup>(8)</sup> as amended from time to time, created with or without a secure signature creation device, subject to compliance with the following conditions:—
  - (i) (aa) the contracting authorities shall establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU<sup>(9)</sup> as amended from time to time and put in place necessary measures to be able to process these formats technically;
  - (bb) in case a different format of electronic signature is used, the electronic signature or the electronic document carrier shall include information on existing validation possibilities;
  - (cc) the validation possibilities shall allow the contracting authority to validate online, free of charge and in a way that is understandable for non-native speakers, the received electronic signature as an advanced electronic signature supported by a qualified certificate;
- (ii) where a tender is signed with the support of a qualified certificate that is included on a trusted list, contracting authorities must not apply additional requirements that may hinder the use of those signatures by tenderers.

### *Security requirements*

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<sup>(7)</sup> OJ No L 13, 19.1.2000, p12, amended by Regulation [\(EC\) No 1137/2008](#) (OJ No L 311, 21.11.2008, p1).

<sup>(8)</sup> OJ L 274, 20.10.2009, p36, last amended by Commission Decision 2013/662/EU (OJ No L 306, 16.11.2013, p21).

<sup>(9)</sup> OJ L 53, 26.2.2011, p66, amended by Commission Implementing Decision 2014/148/EU (OJ No L 80, 19.3.2014, p7).

(18) In deciding the level of security required at each stage of a procurement procedure, and in concluding whether the level of risk is such that advanced electronic signatures are required, contracting authorities shall assess the risks having regard to both the likelihood that particular risks will materialise and the potential adverse consequences if those risks materialise.

(19) In doing so, contracting authorities shall, in particular, have regard to such of the following matters as are relevant:—

- (a) the risk to the proper functioning and integrity of the specific procurement process, including risks of breach of this Part;
- (b) risks to national security;
- (c) the risk of inadvertent or unauthorised disclosure of, or access to, any economic operator's confidential information;
- (d) the risk of inadvertent or unauthorised disclosure of, or access to, information held by the contracting authority including information relating to the specific procurement;
- (e) the risk that use of electronic communications could provide opportunity for malicious attacks on the electronic systems of, or data held by, the authority, any economic operator or any other person, including introduction of malware or denial of service attacks;
- (f) other material risks relating to the procurement procedure in question;
- (g) the need for consistency as between similar procurements performed by the same contracting authority;
- (h) the need for proportionality between, on the one hand the expected benefits of any particular security requirements (in terms of eliminating or reducing any of the risks referred to in sub-paragraphs (a) to (g)), and on the other hand the costs, burdens and obligations which those requirements may impose on economic operators.

#### *Electronic signatures*

(20) Paragraph (21) applies where—

- (a) a competent authority of the United Kingdom located in England and Wales or Northern Ireland, or
- (b) another issuing entity so located,

signs and issues a document for use in a procurement procedure within the scope of the Public Contracts Directive, whether the procedure is under this Part or under the law of any member State.

(21) The competent authority or issuing entity may establish the required advanced signature format in accordance with the requirements set out in Article 1(2) of Commission Decision 2011/130/EU and, where it does so—

- (a) it shall put in place the necessary measures to be able to process that format technically by including the information required for the purpose of processing the signature in the document concerned; and
- (b) the document shall contain in the electronic signature or in the electronic document carrier information on existing validation possibilities that allow the validation of the received electronic signature online, free of charge and in a way that is understandable for non-native speakers.

#### **Nomenclatures**

**23.** Any references to nomenclatures in the context of public procurement shall be made using the CPV.



## **Conflicts of interest**

**24.**—(1) Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

(2) For the purposes of paragraph (1), the concept of conflicts of interest shall at least cover any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

(3) In paragraph (2)—

“relevant staff members” means staff members of the contracting authority, or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure; and

“procurement service provider” means a public or private body which offers ancillary purchasing activities on the market.

## **CHAPTER 2**

### **RULES ON PUBLIC CONTRACTS**

#### *SECTION 3*

#### *Procedures*

## **Conditions relating to the GPA and other international agreements**

**25.** In so far as they are covered by Annexes 1, 2 and 4 to 7 and the General Notes to the EU's Appendix 1 to the GPA and by the other international agreements by which the EU is bound, contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU.

## **Choice of procedures**

### *General*

### *General*

**26.**—(1) When awarding public contracts, contracting authorities shall apply procedures that conform to this Part.

(2) Such contracts may be awarded only if a call for competition has been published in accordance with this Part and the Public Contracts Directive, except where regulation 32 permits contracting authorities to apply a negotiated procedure without prior publication.

(3) Contracting authorities may apply—

- (a) open or restricted procedures as regulated by this Part;
- (b) innovation partnerships as regulated by this Part.

(4) Contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue in the following situations:—

- (a) with regard to works, supplies or services fulfilling one or more of the following criteria:—
  - (i) the needs of the contracting authority cannot be met without adaptation of readily available solutions;

- (ii) they include design or innovative solutions;
- (iii) the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risks attaching to them;
- (iv) the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference;
- (b) with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted.

#### *Irregular and unacceptable tenders*

(5) Where paragraph (4)(b) applies, contracting authorities are not required to publish a contract notice where they include in the procedure all of, and only, the tenderers which satisfy the criteria set out in regulations 57 to 64 and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

(6) In particular, tenders—

- (a) which do not comply with the procurement documents,
- (b) which were received late,
- (c) where there is evidence of collusion or corruption, or
- (d) which have been found by the contracting authority to be abnormally low,

shall be considered irregular for the purposes of paragraph (4)(b).

(7) In particular,—

- (a) tenders submitted by tenderers which do not have the required qualifications, and
- (b) tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure,

shall be considered unacceptable for the purposes of paragraph (4)(b).

#### *Calling for competition etc*

(8) Subject to paragraph (9), the call for competition shall be made by means of a contract notice in accordance with regulation 49.

(9) Where the contract is awarded by restricted procedure or competitive procedure with negotiation, sub-central contracting authorities may make the call for competition by means of a prior information notice in accordance with regulation 48(5) to (7).

(10) Where the call for competition is made by means of such a prior information notice, economic operators which have expressed their interest following the publication of the prior information notice shall subsequently be invited to confirm their interest in writing by means of an invitation to confirm interest in accordance with regulation 54.

### **Open procedure**

**27.—**(1) In open procedures, any interested economic operator may submit a tender in response to a contract notice.

(2) The minimum time limit for the receipt of tenders shall, subject to paragraphs (4) to (6), be 35 days from the date on which the contract notice is sent.

(3) The tender shall be accompanied by the information for qualitative selection that is requested by the contracting authority.

(4) Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders as laid down in paragraph (2) may be shortened to 15 days, provided that both of the following conditions are fulfilled:—

- (a) the prior information notice included all the information required for the contract notice in section I of part B of Annex V to the Public Contracts Directive insofar as that information was available at the time the prior information notice was published;
- (b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(5) Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in paragraph (2), it may fix a time limit which shall be not less than 15 days from the date on which the contract notice is sent.

(6) The contracting authority may reduce by 5 days the time limit for receipt of tenders set out in paragraph (2) where it accepts that tenders may be submitted by electronic means in accordance with regulation 22.

### **Restricted procedure**

**28.**—(1) In restricted procedures, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting authority.

(2) The minimum time limit for receipt of requests to participate shall, subject to paragraph (10), be 30 days from the date on which—

- (a) the contract notice is sent, or
- (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent.

(3) Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender.

(4) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(5) The minimum time limit for the receipt of tenders shall, subject to paragraphs (6) to (10), be 30 days from the date on which the invitation to tender is sent.

(6) Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders as laid down in paragraph (5) may be shortened to 10 days, provided that both of the following conditions are fulfilled:—

- (a) the prior information notice included all the information required in section I of part B of Annex V to the Public Contracts Directive, insofar as that information was available at the time the prior information notice was published;
- (b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(7) Sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and all selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

(8) In the absence of such an agreement, the time limit shall be at least 10 days from the date on which the invitation to tender is sent.

(9) The time limit for receipt of tenders provided for by paragraph (5) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 22.

(10) Where a state of urgency duly substantiated by the contracting authorities renders impracticable the time limits laid down in this regulation, they may fix—

- (a) a time limit for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice is sent, and
- (b) a time limit for the receipt of tenders which shall not be less than 10 days from the date on which the invitation to tender is sent.

### **Competitive procedure with negotiation**

#### *Starting the procedure*

#### *Starting the procedure*

**29.—**(1) In competitive procedures with negotiation, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting authority.

(2) In the procurement documents, contracting authorities shall—

- (a) identify the subject-matter of the procurement by providing a description of their needs and the characteristics required of the supplies, works or services to be procured,
- (b) indicate which elements of the description define the minimum requirements to be met by all tenders, and
- (c) specify the contract award criteria.

(3) The information provided under paragraph (2) shall be sufficiently precise to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the procedure.

#### *Time limits*

(4) The minimum time limit for receipt of requests to participate shall, subject to paragraph (6), be 30 days from—

- (a) the date on which the contract notice is sent, or
- (b) where a prior information notice is used as a means of calling for competition, the date on which the invitation to confirm interest is sent.

(5) The minimum time limit for the receipt of initial tenders shall, subject to paragraphs (6) to (10), be 30 days from the date on which the invitation is sent.

(6) Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of initial tenders as laid down in paragraph (5) may be shortened to 10 days, provided that both of the following conditions are fulfilled:—

- (a) the prior information notice included all the information required in section 1 of part B of Annex V to the Public Contracts Directive, insofar as that information was available at the time the prior information notice was published;
- (b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(7) Sub-central contracting authorities may set the time limit for the receipt of initial tenders by mutual agreement between the contracting authority and all selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

(8) In the absence of such an agreement, the time limit shall be at least 10 days from the date on which the invitation to tender is sent.

(9) The time limit for receipt of initial tenders provided for by paragraph (5) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 22.

(10) Where a state of urgency duly substantiated by the contracting authorities renders impracticable the time limits laid down in this regulation, they may fix—

- (a) a time limit for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice is sent, and
- (b) a time limit for the receipt of initial tenders which shall not be less than 10 days from the date on which the invitation to tender is sent.

#### *Tenders and negotiations*

(11) Only those economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender which shall be the basis for the subsequent negotiations.

(12) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(13) Subject to paragraphs (15) and (19), contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

(14) The minimum requirements and the award criteria shall not be subject to negotiation.

(15) Contracting authorities may award contracts on the basis of the initial tenders without negotiation where they have indicated, in the contract notice or in the invitation to confirm interest, that they reserve the possibility of doing so.

(16) During the negotiations, contracting authorities shall ensure equal treatment of all tenderers and, to that end —

- (a) they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (b) they shall inform all tenderers whose tenders have not been eliminated under paragraph (19), in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements; and
- (c) following any such changes, they shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

(17) In accordance with regulation 21, contracting authorities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

(18) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(19) Competitive procedures with negotiation may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document.

(20) In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority shall indicate whether it will use the option described in paragraph (19).

*Concluding the procedure*

- (21) Where the contracting authority intends to conclude the negotiations, it shall—
- (a) inform the remaining tenderers and set a common deadline to submit any new or revised tenders,
  - (b) verify that the final tenders are in conformity with the minimum requirements and comply with regulation 56(1),
  - (c) assess the final tenders on the basis of the award criteria, and
  - (d) award the contract in accordance with regulations 66 to 69.

**Competitive dialogue***General and selection of participants**General and selection of participants*

**30.**—(1) In competitive dialogues, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.

(2) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent.

(3) Only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the dialogue.

(4) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(5) The contract shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with regulation 67.

(6) Contracting authorities shall set out their needs and requirements in the contract notice and they shall define those needs and requirements in that notice or in a descriptive document, or in both.

(7) At the same time and in the same documents, contracting authorities shall also set out and define the chosen award criteria and set out an indicative timeframe.

*Conduct of the dialogue*

(8) Contracting authorities—

- (a) shall open, with the participants selected in accordance with the relevant provisions of regulations 56 to 66, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs, and
- (b) may discuss all aspects of the procurement with the chosen participants during this dialogue.

(9) During the dialogue, contracting authorities shall ensure equality of treatment among all participants and, to that end, they shall not provide information in a discriminatory manner which may give some participants an advantage over others.

(10) In accordance with regulation 21, contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or tenderer participating in the dialogue without its agreement.

(11) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(12) Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria laid down in the contract notice or in the descriptive document.

(13) In the contract notice or the descriptive document, the contracting authority shall indicate whether it will use the option described in paragraph (12).

(14) The contracting authority shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

#### *Final tenders*

(15) Having declared that the dialogue is concluded and having so informed the remaining participants, contracting authorities shall ask each of them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue.

(16) Those tenders shall contain all the elements required and necessary for the performance of the project.

(17) Those tenders may be clarified, specified and optimised at the request of the contracting authority.

(18) But such clarifications, specification or optimisation, or any additional information, may not involve changes to the essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

(19) Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document.

(20) At the request of the contracting authority, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 67 may be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract, provided this—

- (a) does not have the effect of materially modifying essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document, and
- (b) does not risk distorting competition or causing discrimination.

#### *Prizes and payments*

(21) Contracting authorities may specify prizes or payments to the participants in the dialogue.

### **Innovation partnership**

**31.**—(1) In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.

(2) In the procurement documents, the contracting authority shall—

- (a) identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market, and
- (b) indicate which elements of this description define the minimum requirements to be met by all tenders.

(3) The information provided under paragraph (2) shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

(4) The contracting authority may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.

(5) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent.

(6) Only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the procedure.

(7) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(8) The contracts shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with regulation 67.

(9) The innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting authority and the participants.

(10) The innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works.

(11) The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

(12) Based on those targets, the contracting authority may decide after each phase to—

- (a) terminate the innovation partnership, or
- (b) in the case of an innovation partnership with several partners, reduce the number of partners by terminating individual contracts,

provided that the contracting authority has indicated in the procurement documents those possibilities and the conditions for their use.

(13) Subject to the following provisions of this regulation, contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

(14) The minimum requirements and the award criteria shall not be subject to negotiation.

(15) During the negotiations, contracting authorities shall ensure equal treatment of all tenderers and, to that end—

- (a) they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (b) they shall inform all tenderers whose tenders have not been eliminated under paragraph (18), in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements; and
- (c) following any such changes, contracting authorities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

(16) In accordance with regulation 21, contracting authorities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

(17) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(18) Negotiations during innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document.



(19) In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority shall indicate whether it will use the option described in paragraph (18).

(20) In selecting candidates, contracting authorities shall in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

(21) Only those economic operators invited by the contracting authority following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions.

(22) In the procurement documents, the contracting authority shall define the arrangements applicable to intellectual property rights.

(23) In the case of an innovation partnership with several partners, the contracting authority shall not, in accordance with regulation 21, reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement.

(24) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(25) The contracting authority shall ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market.

(26) The estimated value of supplies, services or works shall not be disproportionate in relation to the investment required for their development.

### **Use of the negotiated procedure without prior publication**

**32.—**(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.

#### *General grounds*

(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:—

- (a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests;
- (b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:—
  - (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance,
  - (ii) competition is absent for technical reasons,
  - (iii) the protection of exclusive rights, including intellectual property rights,but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;
- (c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

(3) For the purposes of paragraph (2)(a)—

- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents;
- (b) a request to participate shall be considered not to be suitable where the economic operator concerned—
  - (i) is to be or may be excluded under regulation 57, or
  - (ii) does not meet the selection criteria.
- (4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

*Additional grounds relevant to public supply contracts*

- (5) The negotiated procedure without prior publication may be used for public supply contracts—
  - (a) where the products involved are manufactured purely for the purpose of research, experimentation, study or development, but contracts awarded in reliance on this sub-paragraph shall not include quantity production to establish commercial viability or to recover research and development costs;
  - (b) for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
  - (c) for supplies quoted and purchased on a commodity market;
  - (d) for the purchase of supplies or services on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.
- (6) In the case of paragraph (5)(b), the duration of the contract, as well as that of recurrent contracts, shall not, save in exceptional circumstances, exceed 3 years.

*Additional ground relevant to public service contracts that follow a design contest*

- (7) The negotiated procedure without prior publication may be used for public service contracts where the contract concerned—
  - (a) follows a design contest organised in accordance with this Part, and
  - (b) is to be awarded, under the rules provided for in the design contest, to—
    - (i) the winner of the design contest, or
    - (ii) one of the winners of the design contest.
- (8) Where paragraph (7)(b)(ii) applies, all winners must be invited to participate in the negotiation.

*Additional ground relevant to new works or services which repeat similar ones*

- (9) The negotiated procedure without prior publication may be used for new works and services consisting of the repetition of similar works or services entrusted to the economic operator to which the same contracting authority awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded following a procedure in accordance with regulation 26(1) and (2).
- (10) The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded.

(11) As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authority when it applies regulation 5.

(12) This procedure may be used only during the 3 years following the conclusion of the original contract.

## SECTION 4

### *Techniques and Instruments for Electronic and Aggregated Procurement*

#### **Framework agreements**

**33.**—(1) Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in this Part.

(2) In these regulations, “framework agreement” means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

(3) The term of a framework agreement shall not exceed 4 years, save in exceptional cases duly justified, in particular by the subject-matter of the framework agreement.

(4) Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this regulation.

(5) Those procedures may be applied only between those contracting authorities clearly identified for that purpose in the call for competition or the invitation to confirm interest and those economic operators party to the framework agreement as concluded.

(6) Contracts based on a framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph (7).

#### *Awarding contracts based on a framework agreement*

(7) Where a framework agreement is concluded with a single economic operator—

- (a) contracts based on that agreement shall be awarded within the limits laid down in the framework agreement; and
- (b) for the award of those contracts, contracting authorities may consult the economic operator which is party to the framework agreement in writing, requesting it to supplement its tender as necessary.

(8) Where a framework agreement is concluded with more than one economic operator, that framework agreement shall be performed in one of the following ways:—

- (a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out—
  - (i) all the terms governing the provision of the works, services and supplies concerned, and
  - (ii) the objective conditions for determining which of the economic operators that are party to the framework agreement shall perform them, which conditions shall be indicated in the procurement documents for the framework agreement;
- (b) where the framework agreement sets out all the terms governing the provision of the works, services and supplies concerned—
  - (i) partly without reopening competition in accordance with sub-paragraph (a), and

- (ii) partly through reopening competition amongst the economic operators which are party to the framework agreement, where this possibility has been stipulated by the contracting authorities in the procurement documents for the framework agreement;
  - (c) where not all the terms governing the provision of the works, services and supplies concerned are laid down in the framework agreement, through reopening competition amongst the economic operators which are party to the framework agreement.
- (9) For the purposes of paragraph (8)(b)—
- (a) the choice of whether specific works, supplies or services shall be acquired following a reopening of competition or directly on the terms set out in the framework agreement shall be made pursuant to objective criteria, which shall be set out in the procurement documents for the framework agreement;
  - (b) those procurement documents shall also specify which terms may be subject to reopening of competition.
- (10) The possibilities provided for in paragraph (8)(b) shall also apply to any lot of a framework agreement for which all the terms governing the provision of the works, services and supplies concerned are set out in the framework agreement, regardless of whether all the terms governing the provision of the works, services and supplies concerned under other lots have been set out.
- (11) The competitions referred to in paragraph (8)(b) and (c) shall be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms and, where appropriate, other terms referred to in the procurement documents for the framework agreement, in accordance with the following procedure:—
- (a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;
  - (b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
  - (c) tenders shall be submitted in writing, and their content shall not be opened until the stipulated time limit for reply has expired;
  - (d) contracting authorities shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the procurement documents for the framework agreement.

## **Dynamic purchasing systems**

### *General features*

### *General features*

- 34.—**(1) Contracting authorities may use a dynamic purchasing system for commonly used purchases the characteristics of which, as generally available on the market, meet their requirements.
- (2) The dynamic purchasing system shall be operated as a completely electronic process, and shall be open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria.
- (3) The dynamic purchasing system may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned.

(4) Such characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.

(5) In order to procure under a dynamic purchasing system, contracting authorities shall follow the rules of the restricted procedure, subject to the following provisions of this regulation.

(6) All the candidates satisfying the selection criteria shall be admitted to the system, and the number of candidates to be admitted to the system shall not be limited in accordance with regulations 28(4) and 65.

(7) Where contracting authorities have divided the system into categories of products, works or services in accordance with paragraph (3), they shall specify the applicable selection criteria for each category.

#### *Time limits*

(8) The following provisions about time limits shall apply instead of those provided for in regulation 28(2) and (5) to (10).

(9) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which—

- (a) the contract notice is sent, or
- (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent.

(10) No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent.

(11) The minimum time limit for receipt of tenders shall, subject to paragraph (12), be at least 10 days from the date on which the invitation to tender is sent.

(12) Sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and all selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

#### *Requirement to use electronic communication*

(13) All communications in the context of a dynamic purchasing system shall only be made by electronic means in accordance with regulation 22(1) to (7) and (11) to (20).

#### *The call for competition etc*

(14) For the purposes of awarding contracts under a dynamic purchasing system, contracting authorities shall—

- (a) publish a call for competition making it clear that a dynamic purchasing system is involved;
- (b) indicate in the procurement documents at least the nature and estimated quantity of the purchases envisaged, as well as all the necessary information concerning the dynamic purchasing system, including how the dynamic purchasing system operates, the electronic equipment used and the technical connection arrangements and specifications;
- (c) indicate in the procurement documents any division into categories of products, works or services and the characteristics defining them;
- (d) offer unrestricted and full direct access, as long as the system is valid, to the procurement documents in accordance with regulation 53.

#### *Requests to participate and their evaluation*

(15) Contracting authorities shall give any economic operator, throughout the entire period of validity of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in paragraphs (5) to (12).

(16) Contracting authorities shall finalise their evaluation of such requests in accordance with the selection criteria within 10 working days following their receipt.

(17) That period may be prolonged to 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met.

(18) Despite paragraphs (16) and (17), as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, contracting authorities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period.

(19) Where contracting authorities intend to extend the evaluation period in accordance with paragraph (18), they shall indicate in the procurement documents the length of the extended period that they intend to apply.

(20) Contracting authorities shall inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.

#### *Tendering and the award of the contract*

(21) Contracting authorities shall invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with regulation 54.

(22) Where the dynamic purchasing system has been divided into categories of works, products or services, contracting authorities shall invite all participants having been admitted to the category corresponding to the specific procurement concerned to submit a tender.

(23) Contracting authorities shall award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice for the dynamic purchasing system or in the invitation to confirm interest.

(24) Those criteria may, where appropriate, be formulated more precisely in the invitation to tender.

#### *Means of proof*

(25) Contracting authorities may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed ESPD within 5 working days from the date on which that request is transmitted.

(26) Regulation 59(8) to (11) shall apply throughout the entire period of validity of the dynamic purchasing system.

#### *Period of validity of the system*

(27) Contracting authorities shall indicate the period of validity of the dynamic purchasing system in the call for competition.

(28) Contracting authorities shall notify the Commission of any change in the period of validity, using the following standard forms:—

- (a) where the period of validity is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
- (b) where the system is terminated, a contract award notice under regulation 50.

#### *Charges*

(29) No charges may be billed, prior to or during the period of validity of the dynamic purchasing system, to the economic operators which are interested in or party to the dynamic purchasing system.

### **Electronic auctions**

**35.—**(1) Contracting authorities may use electronic auctions, in which—

- (a) new prices, revised downwards, or
- (b) new values concerning certain elements of tenders,

or both, are presented.

(2) Contracting authorities shall structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

#### *When electronic auctions may and may not be used*

(3) Public service contracts, and public works contracts, which have as their subject-matter intellectual performances (such as the design of works) which cannot be ranked using automatic evaluation methods, shall not be the subject of electronic auctions.

(4) In open or restricted procedures or competitive procedures with negotiation, contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the content of the procurement documents, in particular the technical specifications, can be established with precision.

(5) In procurements where the content of the procurement documents, in particular the technical specifications, can be established with precision, an electronic auction may be held—

- (a) on the reopening of competition among the parties to a framework agreement as provided for in regulation 33(8)(b) or (c), and
- (b) on the opening for competition of contracts to be awarded under a dynamic purchasing system.

(6) The electronic auction shall be based on one of the following elements of the tenders:—

- (a) solely on prices where the contract is awarded on the basis of price only;
- (b) on prices or on the new values of the features of the tenders indicated in the procurement documents, or on both, where the contract is awarded—
  - (i) on the basis of the best price-quality ratio, or
  - (ii) to the tender with the lowest cost using a cost-effectiveness approach.

#### *Preliminary requirements*

(7) Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice or in the invitation to confirm interest.

(8) Where contracting authorities have decided to hold an electronic auction, the procurement documents shall include at least the following details:—

- (a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
- (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject-matter of the contract;
- (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- (d) the relevant information concerning the electronic auction process;

- (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;
- (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

#### *Admissibility of tenders*

(9) Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them.

(10) A tender shall be considered admissible where—

- (a) it has been submitted by a tenderer which has not been excluded under regulation 57 and which meets the selection criteria; and
- (b) it is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.

(11) In particular, tenders—

- (a) which do not comply with the procurement documents,
- (b) which were received late,
- (c) where there is evidence of collusion or corruption, or
- (d) which have been found by the contracting authority to be abnormally low,

shall be considered irregular for the purposes of paragraph (10)(b).

(12) In particular—

- (a) tenders submitted by tenderers which do not have the required qualifications, and
- (b) tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure,

shall be considered unacceptable for the purposes of paragraph (10)(b).

(13) For the purposes of paragraph (10)(b)—

- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents; and
- (b) a request to participate shall be considered not to be suitable where the economic operator concerned—
  - (i) is to be or may be excluded under regulation 57, or
  - (ii) does not meet the selection criteria.

#### *Commencement and structure of the auction*

(14) All tenderers that have submitted admissible tenders shall be invited simultaneously to participate in the electronic auction using, as of the date and time specified in the invitation, the connections in accordance with the instructions set out in the invitation.

(15) The electronic auction may take place in a number of successive phases.

(16) The electronic auction shall not start sooner than 2 working days after the date on which invitations are sent out.

(17) The invitation shall be accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in regulation 67(9).

#### *The formula to be used*



(18) The invitation shall also state the mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices or new values submitted, or both.

(19) Except where the most economically advantageous offer is identified on the basis of price alone, that formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in other procurement documents.

(20) For the purposes of paragraph (19), any ranges of weightings shall be reduced beforehand to a specified value.

(21) Where variants are authorised in accordance with regulation 45, a separate formula shall be provided for each variant.

#### *Communication of information*

(22) Throughout each phase of an electronic auction the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment.

(23) Contracting authorities may, where this has been previously indicated, communicate other information concerning other prices or values submitted.

(24) Contracting authorities may also at any time announce the number of participants in the current phase of the auction.

(25) In no case, however, may contracting authorities disclose the identities of the tenderers during any phase of an electronic auction.

#### *Closing the auction and awarding the contract*

(26) Contracting authorities shall close an electronic auction in one or more of the following manners:—

- (a) at the previously indicated date and time;
- (b) when they receive no more new prices or new values which meet the requirements concerning minimum differences, provided that they have previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction; or
- (c) when the previously indicated number of phases in the auction has been completed.

(27) Where contracting authorities intend to close an electronic auction in accordance with paragraph (26)(c), whether or not in combination with paragraph (26)(b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

(28) After closing an electronic auction, contracting authorities shall award the contract in accordance with regulation 67 on the basis of the results of the electronic auction.

### **Electronic catalogues**

#### *Generally*

#### *Generally*

**36.—**(1) Where the use of electronic means of communication is required, contracting authorities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

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

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

(4) Electronic catalogues shall also comply with the requirements for electronic communication tools set out in regulation 22 as well as with any additional requirements set by the contracting authority in accordance with that regulation.

(5) Where the presentation of tenders in the form of electronic catalogues is accepted or required, contracting authorities shall—

- (a) state so in the contract notice or in the invitation to confirm interest; and
- (b) indicate in the procurement documents all the necessary information relating to the matters covered by regulation 22(16) to (20) so far as they concern the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

#### *Framework agreements*

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

(7) In such a case, contracting authorities shall use one of the following methods:—

- (a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the contract in question; or
- (b) notify tenderers that they intend to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the contract in question, provided that the use of that method has been indicated in the procurement documents for the framework agreement.

(8) Where contracting authorities reopen competition for specific contracts in accordance with paragraph (7)(b), they shall—

- (a) notify tenderers of the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question; and
- (b) give tenderers the possibility to refuse such collection of information.

(9) Contracting authorities shall allow for an adequate period between the notification and the actual collection of information.

(10) Before awarding the contract, contracting authorities shall present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.

#### *Dynamic purchasing systems*

(11) Contracting authorities may award contracts based on a dynamic purchasing system by requiring that offers for a specific contract are to be presented in the format of an electronic catalogue.

(12) Contracting authorities may also award contracts based on a dynamic purchasing system in accordance with paragraphs (7)(b) and (8) to (10) provided that the request to participate in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting authority.

(13) For the purposes of paragraph (12), the catalogue shall be completed subsequently by the candidates, when they are informed of the contracting authority's intention to constitute tenders by means of the procedure set out in paragraph (7)(b).

### **Centralised purchasing activities and central purchasing bodies**

37.—(1) Contracting authorities may acquire supplies or services, or both, from a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(a).

(2) Contracting authorities may acquire works, supplies and services, or any one or more of them, by—

- (a) using contracts awarded by a central purchasing body;
- (b) using dynamic purchasing systems operated by a central purchasing body; or
- (c) to the extent set out in regulation 33(5), by using a framework agreement concluded by a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(b).

(3) Where a dynamic purchasing system which is operated by a central purchasing body may be used by other contracting authorities, this shall be mentioned in the call for competition setting up that dynamic purchasing system.

(4) A contracting authority fulfils its obligations under this Part when it acquires supplies or services from a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(a).

(5) A contracting authority also fulfils its obligations under this Part where it acquires works, supplies or services by—

- (a) using contracts awarded by the central purchasing body;
- (b) using dynamic purchasing systems operated by the central purchasing body; or
- (c) to the extent set out in regulation 33(5), by using a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(b).

(6) However, the contracting authority concerned shall be responsible for fulfilling the obligations imposed by this Part in respect of any parts of the procedure that it conducts itself, such as—

- (a) awarding a contract under a dynamic purchasing system which is operated by a central purchasing body;
- (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body;
- (c) determining, under regulation 33(8)(a) or (b), which of the economic operators, party to the framework agreement, shall perform a given task under a framework agreement that has been concluded by a central purchasing body.

(7) All procurement procedures conducted by a central purchasing body shall be performed using electronic means of communication, in accordance with the requirements set out in regulation 22.

(8) Contracting authorities may, without applying the procedures provided for in this Part, award a public service contract for the provision of centralised purchasing activities to a central purchasing body.

(9) Such public service contracts may also include the provision of ancillary purchasing activities.

(10) In these Regulations, “centralised purchasing activities” means activities conducted on a permanent basis in one of the following forms:—

- (a) the acquisition of supplies or services, or both, intended for contracting authorities;
- (b) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities.

**Occasional joint procurement**

**38.**—(1) Two or more contracting authorities may agree to perform certain specific procurements jointly.

(2) Where the conduct of a procurement procedure in its entirety is carried out jointly in the name and on behalf of all the contracting authorities concerned, they shall be jointly responsible for fulfilling their obligations under this Part.

(3) Such joint responsibility applies also in cases where one contracting authority manages the procedure, acting on its own behalf and on the behalf of the other contracting authorities concerned.

(4) Where the conduct of a procurement procedure is not in its entirety carried out in the name and on behalf of the contracting authorities concerned—

- (a) they shall be jointly responsible only for those parts carried out jointly, and
- (b) each contracting authority shall have sole responsibility for fulfilling its obligations under this Part in respect of the parts it conducts in its own name and on its own behalf.

**Procurement involving contracting authorities from other member States**

**39.**—(1) Without prejudice to regulation 12, contracting authorities may act jointly with contracting authorities from other member States in the award of public contracts by using one of the means provided for in this regulation.

(2) Contracting authorities shall not use the means provided for in this regulation for the purpose of avoiding the application of mandatory public law provisions in the law of the jurisdiction to which they are subject, where those provisions are in conformity with EU law.

*Centralised purchasing*

(3) Contracting authorities shall be free to use centralised purchasing activities offered by central purchasing bodies located in another member State.

(4) The provision of centralised purchasing activities by a central purchasing body located in another member State shall be conducted in accordance with the national provisions of the member State where the central purchasing body is located.

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

- (a) the award of a contract under a dynamic purchasing system;
- (b) the conduct of a reopening of competition under a framework agreement;
- (c) the determination, for the purposes of points (a) or (b) of Article 33(4) of the Public Contracts Directive (to which effect is given in these Regulations by regulation 33(8)(a) and (b)), of which of the economic operators that are party to the framework agreement shall perform a given task.

*Joint procurement*

(6) In the circumstances set out in paragraph (7), contracting authorities may—

- (a) award a public contract, conclude a framework agreement or operate a dynamic purchasing system jointly with contracting authorities from other member States; and
- (b) to the extent set out in regulation 33(5), award contracts based on the framework agreement or on the dynamic purchasing system.

(7) The circumstances are that—

- (a) there is an agreement that determines—

- (i) the responsibilities of the parties and the applicable national provisions, and
  - (ii) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts; and
- (b) the allocation of responsibilities and the applicable national law were referred to in the procurement documents.
- (8) For the purposes of paragraph (7)(a)—
  - (a) the agreement may be—
    - (i) an agreement made between the participating contracting authorities, or
    - (ii) an international agreement concluded between the member States concerned; and
  - (b) the agreement may have allocated specific responsibilities among the participating contracting authorities and determined the applicable provisions of the national laws of any of their respective member States.
- (9) In procurements under paragraph (6)—
  - (a) the other provisions of this Part apply only where they are the applicable national provisions determined by an agreement referred to in paragraph (7)(a); and
  - (b) where provisions of this Part do apply, a contracting authority fulfils its obligations under this Part when it purchases works, supplies or services from a contracting authority which is responsible for the procurement procedure.

#### *Joint entities*

(10) Contracting authorities may, with contracting authorities from other member States, set up joint entities for the purposes of paragraph (1), subject to compliance with paragraph (11).

(11) This paragraph is complied with if, before undertaking any given procurement, the participating contracting authorities, by a decision of the competent body of the joint entity, have agreed on the applicable national procurement provisions of one of the following member States:—

- (a) the member State where the joint entity has its registered office;
- (b) the member State where the joint entity is carrying out its activities.

(12) The agreement may either apply for an undetermined period, when fixed in the constitutive act of the joint entity, or may be limited to a certain period of time, certain types of contracts or to one or more individual contract awards.

(13) The other provisions of this Part apply to procurement by the joint entity only where they are the national provisions applicable in accordance with paragraphs (11) and (12).

(14) In this regulation, “joint entity” includes European groupings of territorial cooperation established under Regulation (EC) No 1082/2006 of the European Parliament and of the Council<sup>(10)</sup> and other entities established under EU law.

#### *Meaning of certain expressions in relation to other member States*

(15) In this regulation—

“central purchasing body located in another member State” means any person which is a central purchasing body for the purposes of the Public Contracts Directive in the member State in which it is located;

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<sup>(10)</sup> OJ No L 210, 31.7.2006, p19, amended by Regulation (EU) No 1302/2013 of the European Parliament and of the Council (OJ No L 347, 20.12.2013, p303).

“contracting authority from another member State” means any person which is a contracting authority for the purposes of the Public Contracts Directive in a member State other than the United Kingdom; and references to “participating contracting authorities” shall, to the extent that they are from another member State, be interpreted accordingly.

## SECTION 5

### *Conduct of the Procedure*

#### SUB-SECTION 5 Preparation

##### **Preliminary market consultations**

**40.**—(1) Before commencing a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.

(2) For this purpose, contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants.

(3) Such advice may be used in the planning and conduct of the procurement procedure, 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**

**41.**—(1) Where a candidate or tenderer, or an undertaking related to a candidate or tenderer—

- (a) has advised the contracting authority, whether in the context of regulation 40 or not, or
- (b) has otherwise been involved in the preparation of the procurement procedure,

the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

(2) Such measures shall 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 procedure; and
- (b) the fixing of adequate time limits for the receipt of tenders.

(3) The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to treat economic operators equally in accordance with regulation 18(1).

(4) Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

(5) The measures taken under this regulation shall be documented in the report referred to in regulation 84(1).

##### **Technical specifications**

**42.**—(1) The technical specifications shall be set out in the procurement documents.

##### *Scope of the technical specifications*

(2) The technical specifications shall lay down the characteristics required of works, services or supplies.

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

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

- (a) levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods at any stage of the life cycle of the works;
- (b) rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority 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.

(5) In the case of public supply or service contracts, the required characteristics may include quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures.

(6) In the case of any public 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, or
- (b) a specific process for another stage of its life cycle,

even where such factors do not form part of the characteristics' material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

(7) The technical specifications may also specify whether the transfer of intellectual property rights will be required.

#### *Formulating the technical specifications*

(8) For all procurement which is intended for use by natural persons, whether the general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for disabled persons or design for all users.

(9) Where mandatory accessibility requirements are adopted by a legal act of the EU, technical specifications shall, as far as accessibility criteria for disabled persons or design for all users are concerned, be defined by reference thereto.

(10) Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(11) Without prejudice to mandatory national technical rules, to the extent that they are compatible with EU law, the technical specifications shall be formulated in one of the following ways:—

- (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 contracting authorities to award the contract;
- (b) by reference to technical specifications and, in order of preference, to—

- (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 shall 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;
- (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.

(12) Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.

(13) But such reference is permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract in accordance with paragraph (11) is not possible, in which case the reference shall be accompanied by the words “or equivalent”.

#### *Applying the technical specifications*

(14) Where a contracting authority uses the option of referring to the technical specifications referred to in paragraph (11)(b), it shall 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, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 44, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

(15) Where a contracting authority uses the option laid down in paragraph (11)(a) to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for works, supplies or services which comply with a national standard transposing a European standard, a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where those address the performance or functional requirements which it has laid down.

(16) In its tender, the tenderer shall prove by any appropriate means, including those referred to in regulation 44, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

#### **Labels**

**43.—(1)** Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies 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 that are the subject-matter of the contract;
  - (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
  - (c) the labels are 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 labels are accessible to all interested parties;
  - (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.
- (2) Where contracting authorities do not require the works, supplies or services to meet all of the label requirements, they shall indicate which label requirements are required.
- (3) Contracting authorities requiring a specific label shall 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 contracting authority, or an equivalent label, within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall 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 contracting authority.
- (5) Where a label fulfils the conditions mentioned in paragraph (1)(b), (c), (d) and (e) but also sets out requirements not linked to the subject-matter of the contract, contracting authorities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts of it, 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**

**44.**—(1) Contracting authorities may require that economic operators 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 contracting authorities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by the contracting authorities.

(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<sup>(11)</sup>.

(4) Contracting authorities shall accept appropriate means of proof other than those referred to in paragraphs (1) and (2), such as a technical dossier of the manufacturer, where the economic operator concerned had 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, provided that—

- (a) the lack of access is not attributable to the economic operator concerned, and

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(11) OJ No L 218, 13.8.2008, p30.

- (b) the economic operator concerned thereby 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.

## **Variants**

**45.—**(1) Contracting authorities may authorise or require tenderers to submit variants.

(2) Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether or not they authorise or require variants.

(3) Variants shall not be authorised or required without such an indication and shall be linked to the subject-matter of the contract.

(4) Contracting authorities authorising or requiring variants shall 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 a tender which is not a variant has also been submitted.

(5) Contracting authorities shall ensure that the chosen award criteria can be applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

(6) Only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration.

(7) In procedures for awarding public supply or service contracts, contracting authorities that have authorised or required variants shall not reject a variant on the sole ground that it would, where successful, lead to either a public service contract rather than a public supply contract or a public supply contract rather than a public service contract.

## **Division of contracts into lots**

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

(2) Contracting authorities shall provide an indication of the main reasons for their decision not to subdivide into lots, which shall be included in the procurement documents or the report referred to in regulation 84(1).

(3) Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots.

(4) Contracting authorities 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.

(5) Contracting authorities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend 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.

(6) Where more than one lot may be awarded to the same tenderer, contracting authorities may award contracts combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.

## **Setting time limits**

**47.—**(1) When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall 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 27 to 31.

(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 27 to 31, shall be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.

(3) Contracting authorities shall 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 in the following cases:—

- (a) where, 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;
- (b) where significant changes are made to the procurement documents.

(4) The length of the extension shall be proportionate to the importance of the information or change.

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

(6) Where additional information has either not been requested in good time or its importance with a view to preparing responsive tenders is insignificant, contracting authorities are not required to extend the time limits.

#### SUB-SECTION 6 Publication and transparency

##### **Prior information notices**

**48.**—(1) Contracting authorities may make known their intentions of planned procurements through the publication of a prior information notice.

(2) Such notices shall contain the information set out in section I of part B of Annex V to the Public Contracts Directive.

(3) A contracting authority wishing to publish a prior information notice shall—

- (a) send it for publication in accordance with regulation 51; or
- (b) publish it on the contracting authority's buyer profile in accordance with regulation 52.

(4) Where the prior information notice is published by the contracting authority on its buyer profile—

- (a) the prior information notice shall contain the information set out in part A of Annex V to the Public Contracts Directive, and
- (b) the contracting authority shall send for publication, in accordance with regulation 51, a notice of the publication on its buyer profile.

(5) Where sub-central contracting authorities use a prior information notice as a call for competition in accordance with regulation 26(9), the notice shall fulfil all of the following conditions:—

- (a) it refers specifically to the supplies, works or services that will be the subject-matter of the contract to be awarded;
- (b) it indicates that the contract will be awarded by restricted procedure or competitive procedure with negotiation without further publication of a call for competition and invites interested economic operators to express their interest;
- (c) it contains, in addition to the information set out in section 1 of part B of Annex V to the Public Contracts Directive, the information set out in section 2 of that part;
- (d) it has been sent for publication between 35 days and 12 months prior to the date on which an invitation is sent for the purposes of regulation 54(1) or (2).

(6) Where paragraph (5) applies, paragraph (3)(b) shall not apply to the notice, but additional publication at national level under regulation 52, if any, may be made on a buyer profile.

(7) The period covered by the prior information notice shall be a maximum of 12 months from the date on which the notice is transmitted for publication.

(8) In the case of public contracts for social and other specific services, the prior information notice referred to in regulation 75(1)(b) may cover a period which is longer than 12 months.

### **Contract notices**

**49.** Contract notices shall contain the information set out in part C of Annex 5 to the Public Contracts Directive and shall be sent for publication in accordance with regulation 51.

### **Contract award notices**

**50.**—(1) Not later than 30 days after the award of a contract or the conclusion of a framework agreement, following the decision to award or conclude it, contracting authorities shall send for publication a contract award notice on the results of the procurement procedure.

(2) Such notices shall contain the information set out in part D of Annex 5 to the Public Contracts Directive and shall be sent for publication in accordance with regulation 51.

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

(4) In the case of framework agreements, contracting authorities shall not be bound to send a notice of the results of the procurement procedure for each contract based on such an agreement.

(5) In the case of dynamic purchasing systems, contracting authorities shall either—

- (a) send a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system, or
- (b) group such notices on a quarterly basis, in which case they shall send the grouped notices within 30 days of the end of each quarter.

(6) Certain information on the award of the contract or the conclusion of the framework agreement may be withheld from publication where its release—

- (a) would impede law enforcement or would otherwise be contrary to the public interest,
- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or
- (c) might prejudice fair competition between economic operators.

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

**51.**—(1) The notices required by regulations 48, 49, 50, 72, 75 and 79 to be sent for publication in accordance with this regulation shall be sent by electronic means to the EU Publications Office for publication.

(2) Contracting authorities shall ensure that they are 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 contracting authority 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) Contracting authorities may send notices in respect of public contracts to the EU Publications Office for publication even where they are not required by this Part to do so, provided that the notices are sent by electronic means.

## **Publication at national level**

### *Publication on buyer profiles*

#### *Publication on buyer profiles*

**52.**—(1) In addition to the publication of the notices referred to in regulations 48, 49, 50, 75 and 79 by the EU Publications Office, contracting authorities may publish the information contained in them on the internet on a buyer profile.

(2) A buyer profile may also include (in addition to the prior information notices referred to in regulation 48(3)(b))—

- (a) information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled; and
- (b) any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address.

### *Timing and content of publication at national level*

(3) The notices referred to in regulations 48, 49, 50, 72 and 79, and the information contained in them, shall not be published at national level before they are published by the EU Publications Office.

(4) But publication may in any event take place at national level where contracting authorities have 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 51(5) of the Public Contracts Directive.

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

(6) Where a prior information notice is to be published on a buyer profile for the purposes of regulation 48(3)(b)—

- (a) the prior information notice may not be so published before the notice referred to in regulation 48(4)(b) is sent to the EU Publications Office; and
- (b) the prior information notice shall indicate the date of that sending.

## **Electronic availability of procurement documents**

**53.**—(1) Contracting authorities shall, by means of the internet, offer unrestricted and full direct access free of charge to the procurement documents from the date of the publication in the Official Journal of a notice sent in accordance with regulation 51 or the date on which an invitation to confirm interest is sent.

(2) The text of the notice or the invitation to confirm interest shall specify the internet address at which the procurement documents are accessible.

(3) Where unrestricted and full direct access free of charge to certain procurement documents cannot be offered by means of the internet for one of the reasons set out in regulation 22(3), contracting authorities may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by means other than the internet in accordance with paragraphs (6) and (7).

(4) Where unrestricted and full direct access free of charge to certain procurement documents cannot be offered by means of the internet because contracting authorities intend to apply regulation 21(3), contracting authorities shall indicate in the notice or the invitation to confirm interest which measures aimed at protecting the confidential nature of the information they require and how access can be obtained to the documents concerned.

(5) In the cases referred to in paragraphs (3) and (4), the time limit for the submission of tenders shall be prolonged by 5 days, except in the cases of duly substantiated urgency referred to in regulations 27(5), 28(10) and 29(10).

(6) Provided that it has been requested in good time, contracting authorities shall supply to all tenderers taking part in the procurement procedure 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.

(7) In the case of an accelerated procedure, the period mentioned in paragraph (6) shall be 4 days.

### **Invitations to candidates**

**54.—**(1) In restricted procedures, competitive dialogue procedures, innovation partnerships and competitive procedures with negotiation, contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders or, in the case of a competitive dialogue, to take part in the dialogue.

(2) Where a prior information notice is used as a call for competition in accordance with regulation 26(9), contracting authorities shall simultaneously and in writing invite the economic operators which have expressed their interest to confirm their continuing interest.

(3) The invitations required by paragraphs (1) and (2) shall—

- (a) include a reference to the electronic address at which the procurement documents have been made directly available by electronic means, and
- (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 53(3) or (4) and have not already been made otherwise available.

(4) The invitations required by paragraph (1) shall also contain at least the following information:

- (a) a reference to the call for competition published;
- (b) 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;
- (c) 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;
- (d) a reference to any documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with regulations 59 and 60 and, where appropriate, 62 or to supplement the information referred to in those regulations, and under the conditions laid down in regulations 59, 60 and 62;
- (e) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, where they are not given in the contract notice, in the invitation to confirm interest, in the technical specifications or the descriptive document.

(5) But in the case of contracts awarded through a competitive dialogue or an innovation partnership, the information referred to in paragraph (4)(b) shall not appear in the invitation to participate in the dialogue or to negotiate but it shall appear in the invitation to submit a tender.

(6) The invitations required by paragraph (2) shall also contain at least the following information:

- (a) nature and quantity, including all options concerning complementary contracts and, where possible, the estimated time available for exercising these options for renewable contracts, the nature and quantity and, where possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;
- (b) type of procedure, namely restricted procedure or competitive procedure with negotiation;
- (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 language or languages in which they are to be drawn up;
- (e) the address of the contracting authority which is to award the contract;
- (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 weighting or, where appropriate, the order of importance of such criteria, where this information is not given in the prior information notice or the technical specifications or in the invitation to tender or to negotiate.

### **Informing candidates and tenderers**

**55.**—(1) Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of a contract or admittance to a dynamic purchasing system, including 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.

(2) On request from the candidate or tenderer concerned, the contracting authority shall as quickly 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 42(14) and (15), 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;
- (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

(3) Contracting authorities may decide to withhold certain information referred to in paragraphs (1) and (2) where the release of such information—

- (a) would impede law enforcement or would otherwise be contrary to the public interest;

- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
  - (c) might prejudice fair competition between economic operators.
- SUB-SECTION 7 Choice of participants and award of contracts

### **General principles in awarding contracts etc**

**56.**—(1) Contracts shall be awarded on the basis of criteria laid down in accordance with regulations 67 to 69, provided that the contracting authority has verified in accordance with regulations 59 to 61 that all of the following conditions are fulfilled:—

- (a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, regulation 45;
- (b) the tender comes from a tenderer that—
  - (i) is not excluded in accordance with regulation 57, and
  - (ii) meets—
    - (aa) the selection criteria, and
    - (bb) where applicable, the non-discriminatory rules and criteria referred to in regulation 65.

(2) Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Public Contracts Directive as amended from time to time.

(3) In open procedures—

- (a) contracting authorities may decide to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria in accordance with regulations 57 to 64; and
- (b) where contracting authorities make use of that possibility, they shall ensure that the verification of absence of grounds for exclusion and of fulfilment of the selection criteria is carried out in an impartial and transparent manner so that no contract is awarded to a tenderer that—
  - (i) should have been excluded under regulation 57, or
  - (ii) does not meet the selection criteria set out by the contracting authority.

(4) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, contracting authorities may request the economic operators 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.

### **Exclusion grounds**

#### *Mandatory exclusions*

#### *Mandatory exclusions*

**57.**—(1) Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with regulations 59,



60 and 61, or are otherwise aware, that that economic operator has been convicted of any of the following offences:—

- (a) conspiracy within the meaning of section 1 or 1A of the Criminal Law Act 1977<sup>(12)</sup> or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983<sup>(13)</sup> where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA on the fight against organised crime<sup>(14)</sup>;
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889<sup>(15)</sup> or section 1 of the Prevention of Corruption Act 1906<sup>(16)</sup>;
- (c) the common law offence of bribery;
- (d) bribery within the meaning of sections 1, 2 or 6 of the Bribery Act 2010<sup>(17)</sup>, or section 113 of the Representation of the People Act 1983<sup>(18)</sup>;
- (e) where the offence relates to fraud affecting the European Communities' financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities<sup>(19)</sup>:—
  - (i) the common law offence of cheating the Revenue;
  - (ii) the common law offence of conspiracy to defraud;
  - (iii) fraud or theft within the meaning of the Theft Act 1968<sup>(20)</sup>, the Theft Act (Northern Ireland) 1969<sup>(21)</sup>, the Theft Act 1978<sup>(22)</sup> or the Theft (Northern Ireland) Order 1978<sup>(23)</sup>;
  - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985<sup>(24)</sup>, article 451 of the Companies (Northern Ireland) Order 1986<sup>(25)</sup> or section 993 of the Companies Act 2006<sup>(26)</sup>;
  - (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979<sup>(27)</sup> or section 72 of the Value Added Tax Act 1994<sup>(28)</sup>;
  - (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993<sup>(29)</sup>;

(12) 1977 c.45; section 1 was amended by the Criminal Attempts Act 1981 (c.47), section 5(1), by the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40), Schedule 2, Part 2, and by the Trade Union and Labour Relations (Consolidation) Act 1992 (c.52), Schedule 1; section 1A was inserted by the Criminal Justice (Terrorism and Conspiracy) Act 1998, section 5(1), and was amended by the Coroners and Justice Act 2009 (c.25), section 72(1)(a).

(13) S.I. 1983/1120 (N.I.13); article 9 was amended by Part 2 of Schedules 1 and 2 to the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40), and article 9A was inserted by section 6(1) of that Act; there are other amendments but none is relevant.

(14) OJ No L 300, 11.11.2008, p42.

(15) 1889 c.69; this Act was repealed by the Bribery Act 2010 (c.23), Schedule 2.

(16) 1906 c.34; this Act was repealed by the Bribery Act 2010 (c.23), Schedule 2.

(17) 2010 c.23.

(18) 1983 c.2; section 113 was amended by the Greater London Authority Act 1999 (c.29), Schedule 3, paragraph 30(2).

(19) OJ No C 316, 27.11.1995, p48.

(20) 1968 c.60.

(21) 1969 c.16 (N.I.).

(22) 1978 c.31.

(23) S.I. 1978/1407 (N.I.23).

(24) 1985 c.6; section 458 was modified by S.I. 2001/1090 and repealed by the Companies Act 2006 (c.46), Schedule 16.

(25) S.I. 1986/1032 (N.I.6), amended by S.R. (NI) 2004/307 (and other instruments that were not relevant) and revoked by the Companies Act 2006 (c.46), Schedule 16.

(26) 2006 c.46; section 993 is applied (with modifications) by S.I. 2009/1804, regulation 47, and by S.I. 2009/2436, regulation 3 and Schedule 1.

(27) 1979 c.2.

(28) 1994 c.23.

(29) 1993 c.36.

- (vii) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968(30) or section 19 of the Theft Act (Northern Ireland) 1969(31);
- (viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006(32); or
- (ix) the possession of articles for use in frauds within the meaning of section 6 of the Fraud Act 2006, or the making, adapting, supplying or offering to supply articles for use in frauds within the meaning of section 7 of that Act;
- (f) any offence listed—
  - (i) in section 41 of the Counter Terrorism Act 2008(33); or
  - (ii) in Schedule 2 to that Act where the court has determined that there is a terrorist connection;
- (g) any offence under sections 44 to 46 of the Serious Crime Act 2007(34) which relates to an offence covered by subparagraph (f);
- (h) money laundering within the meaning of sections 340(11) and 415 of the Proceeds of Crime Act 2002(35);
- (i) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988(36) or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996(37);
- (j) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004(38);
- (k) an offence under section 59A of the Sexual Offences Act 2003(39);
- (l) an offence under section 71 of the Coroners and Justice Act 2009(40);
- (m) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994(41); or
- (n) any other offence within the meaning of Article 57(1) of the Public Contracts Directive—
  - (i) as defined by the law of any jurisdiction outside England and Wales and Northern Ireland; or
  - (ii) created, after the day on which these Regulations were made, in the law of England and Wales or Northern Ireland.

(2) The obligation to exclude an economic operator also applies where the person convicted is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control in the economic operator.

(30) 1968 c.60; section 20 was amended by the Fraud Act 2006 (c.35), Schedules 1 and 3.

(31) 1969 c.16 (N.I.); section 19 was amended by the Fraud Act 2006 (c.35), Schedules 1 and 3.

(32) 2006 c.35.

(33) 2008 c.28.

(34) 2007 c.27.

(35) 2002 c.29; sections 340(11) and 415 were modified by the Serious Crime Act 2007 (c.27), section 63(1) and Schedule 6, paragraph 44(a); section 415 was amended by the Serious Organised Crime and Police Act 2005 (c.15), section 107(4).

(36) 1988 c.33; sections 93A, 93B and 93C were inserted by sections 29, 30 and 31 of the Criminal Justice Act 1993 (c.36) and repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraph 17(2).

(37) S.I. 1996/1299 (N.I.9); articles 45, 46 and 47 were repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraph 31(2).

(38) 2004 c.19; section 4 was amended by the Human Tissue Act 2004 (c.30), Schedule 6, paragraph 7, by the UK Borders Act 2007 (c.30), section 31(1), by the Borders, Citizenship and Immigration Act 2009 (c.11), section 54, by the Protection of Freedoms Act 2012 (c.9), section 110, and by the Criminal Justice Act (Northern Ireland) 2013 (c.7 (N.I.)), section 7(2) to (5) and Schedule 4, Part 2, and extended to the Isle of Man with modifications by S.I. 2008/680, article 18 and Schedule 8.

(39) 2003 c.37; section 59A was inserted by the Protection of Freedoms Act 2012 (c.9), section 109(2).

(40) 2009 c.25.

(41) 1994 c.37; sections 49, 50 and 51 were repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraphs 1 and 25(1) and (2)(a), and by Schedule 12.

*Mandatory and discretionary exclusions for non-payment of taxes etc*

(3) An economic operator shall be excluded from participation in a procurement procedure where—

- (a) the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions; and
- (b) the breach has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of any of the jurisdictions of the United Kingdom.

(4) Contracting authorities may exclude an economic operator from participation in a procurement procedure where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

(5) Paragraphs (3) and (4) cease to apply when the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

*Exceptions to mandatory exclusion*

(6) A contracting authority may disregard any of the prohibitions imposed by paragraphs (1) to (3), on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

(7) A contracting authority may also disregard the prohibition imposed by paragraph (3) where an exclusion would be clearly disproportionate, in particular—

- (a) where only minor amounts of taxes or social security contributions are unpaid; or
- (b) where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of fulfilling its obligations in a manner described in paragraph (5) before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.

*Discretionary exclusions*

(8) Contracting authorities may exclude from participation in a procurement procedure any economic operator in any of the following situations:—

- (a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in regulation 56(2);
- (b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under the laws and regulations of any State;
- (c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
- (d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- (e) where a conflict of interest within the meaning of regulation 24 cannot be effectively remedied by other, less intrusive, measures;

- (f) where a distortion of competition from the prior involvement of the economic operator in the preparation of the procurement procedure, as referred to in regulation 41, cannot be remedied by other, less intrusive, measures;
- (g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions;
- (h) where the economic operator—
  - (i) has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria; or
  - (ii) has withheld such information or is not able to submit supporting documents required under regulation 59; or
- (i) where the economic operator has—
  - (i) undertaken to—
    - (aa) unduly influence the decision-making process of the contracting authority, or
    - (bb) obtain confidential information that may confer upon it undue advantages in the procurement procedure; or
  - (ii) negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.

#### *Exclusion during procedure*

(9) Contracting authorities shall exclude an economic operator where they become aware, at any time during a procurement procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (1) to (3).

(10) Contracting authorities may exclude an economic operator where they become aware, at any time during a procurement procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (4) or (8).

#### *Duration of exclusion*

(11) In the cases referred to in paragraphs (1) to (3), the period during which the economic operator shall (subject to paragraphs (6), (7) and (14)) be excluded is 5 years from the date of the conviction.

(12) In the cases referred to in paragraphs (4) and (8), the period during which the economic operator may (subject to paragraph (14)) be excluded is 3 years from the date of the relevant event.

#### *Self-cleaning*

(13) Any economic operator that is in one of the situations referred to in paragraph (1) or (8) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

(14) If the contracting authority considers such evidence to be sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

(15) For that purpose, the economic operator shall prove that it has—

- (a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- (b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- (c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

(16) The measures taken by the economic operator shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct.

(17) Where the contracting authority considers such measures to be insufficient, the contracting authority shall give the economic operator a statement of the reasons for that decision.

## **Selection criteria**

### *General principles*

#### *General principles*

**58.**—(1) — Selection criteria may relate to—

- (a) suitability to pursue a professional activity;
- (b) economic and financial standing;
- (c) technical and professional ability.

(2) Contracting authorities may impose on economic operators as requirements for participation only the criteria referred to in paragraphs (5) to (18).

(3) Contracting authorities shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded.

(4) All requirements shall be related and proportionate to the subject-matter of the contract.

(5) With regard to suitability to pursue a professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their member State of establishment, as described in Schedule 5, or to comply with any other request set out in that Schedule.

(6) In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, contracting authorities may require them to prove that they hold such authorisation or membership.

### *Economic and financial standing*

(7) With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract.

(8) In particular, contracting authorities may require that economic operators—

- (a) have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract;
- (b) provide information on their annual accounts showing the ratios, for example, between assets and liabilities; and
- (c) have an appropriate level of professional risk indemnity insurance.

(9) The minimum yearly turnover that economic operators are required to have shall not exceed twice the estimated contract value, except in duly justified cases, such as by reference to special risks attached to the nature of the works, services or supplies, in which case the contracting authority shall indicate their main reasons in the procurement documents or in the report referred to in regulation 84(1).

(10) Ratios, for example that between assets and liabilities, may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents, but such methods and criteria shall be transparent, objective and non-discriminatory.

#### *Application to lots, framework agreements and dynamic purchasing systems*

(11) Where a contract is divided into lots this regulation shall apply in relation to each individual lot.

(12) But the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be executed at the same time.

(13) Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in paragraph (9) shall be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the framework agreement.

(14) In the case of a dynamic purchasing system, the maximum yearly turnover requirement referred to in paragraph (9) shall be calculated on the basis of the expected maximum size of specific contracts to be awarded under that system.

#### *Technical and professional ability*

(15) With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

(16) Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

(17) A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

(18) In procurement procedures for supplies requiring siting or installation work, or for services or works, the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability.

#### *Indicating requirements for participation*

(19) Contracting authorities shall indicate the requirements for participation, which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest.

### **European Single Procurement Document**

*Use, content and form of the ESPD*

*Use, content and form of the ESPD*

**59.**—(1) At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document, consisting of an updated self-declaration as preliminary evidence instead of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:—

- (a) it is not in one of the situations referred to in regulation 57 in which economic operators shall or may be excluded;
- (b) it meets the relevant selection criteria that have been set out under regulation 58;
- (c) where applicable, it fulfils the objective rules and criteria that have been set out under regulation 65.

(2) Where the economic operator relies on the capacities of other entities under regulation 63, the ESPD shall also contain the information referred to in paragraph (1) in respect of such entities.

(3) The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and, or alternatively, that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority.

(4) The ESPD shall further identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

(5) Where the contracting authority can obtain the supporting documents directly by accessing a database as mentioned in paragraph (11), the ESPD shall also contain the information required for this purpose, such as the internet address of the database, any identification data and, where applicable, the necessary declaration of consent.

(6) Economic operators may reuse an ESPD which has already been used in a previous procurement procedure, provided that they confirm that the information contained in it continues to be correct.

(7) The ESPD shall be provided exclusively in electronic form.

#### *Supporting documentation*

(8) A contracting authority may require candidates and tenderers at any moment during the procedure to submit all or any of the supporting documents where this is necessary to ensure the proper conduct of the procedure.

(9) Before awarding the contract, the contracting authority shall, except in respect of contracts based on framework agreements where such contracts are concluded in accordance with regulation 33(7) or (8)(a), require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents in accordance with regulation 60 and, where appropriate, regulation 62.

(10) The contracting authority may invite economic operators to supplement or clarify the certificates received under regulations 60 and 62.

(11) Despite paragraphs (8) and (9), economic operators shall not be required to submit—

- (a) supporting documents or other documentary evidence where and in so far as the contracting authority has the possibility of obtaining the certificates or the relevant information directly by accessing a national database in any member State that is available free of charge, such as a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system; or
- (b) a supporting document which the contracting authority already possesses.

**Means of proof***General principles**General principles*

**60.**—(1) —Contracting authorities may require the certificates, statements and other means of proof referred to in this regulation as evidence for the absence of grounds for exclusion under regulation 57 and for the fulfilment of the selection criteria.

(2) Contracting authorities shall not require from economic operators means of proof other than those referred to in this regulation and in regulations 58(16) and 62.

(3) In respect of regulation 63, economic operators may rely on any appropriate means to prove to the contracting authority that they will have the necessary resources at their disposal.

*Proving the absence of grounds for exclusion*

(4) Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in regulation 57 apply to the economic operator:—

- (a) as regards regulation 57(1) and (2), the production of an extract from the relevant register, such as judicial records or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the member State or country of origin or the country where the economic operator is established showing that those requirements have been met;
- (b) as regards regulation 57(3) to (5) and (8)(b), a certificate issued by the competent authority in the member State or country concerned.

(5) Where the member State or country in question does not issue such documents or certificates, or to the extent that these do not cover all the cases specified in regulation 57(1) to (5) and (8)(b), they may be replaced by a declaration on oath or, in member States or countries where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the member State or country of origin or in the member State or country where the economic operator is established.

*Proving economic and financial standing*

(6) Proof of the economic operator's economic and financial standing may be provided by one or more of the following references:—

- (a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;
- (b) the presentation of financial statements or extracts from the financial statements, where publication of financial statements is required under the law of the country in which the economic operator is established;
- (c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last 3 financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on those turnovers is available.

(7) Where the references mentioned in paragraph (6) are not appropriate in a particular case, the contracting authority may require the economic operator to provide other information to prove its economic and financial standing.



(8) Where, for any valid reason, the economic operator is unable to provide the references or other information required by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate.

*Proving technical and professional ability*

(9) Proof of the economic operator's technical and professional ability may, subject to regulation 58(16), be provided by one or more of the following means, in accordance with the nature, quantity or importance, and the use, of the works, supplies or services:—

- (a) the following lists:—
  - (i) a list of the works carried out over at the most the past 5 years, accompanied by certificates of satisfactory execution and outcome for the most important works; but, where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant works carried out more than 5 years before will be taken into account;
  - (ii) a list of the principal deliveries effected or the main services provided over at the most the past 3 years, with the sums, dates and recipients, whether public or private, involved; but, where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than 3 years before will be taken into account;
- (b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;
- (c) a description of the technical facilities and measures used by the economic operator for ensuring quality and the undertaking's study and research facilities;
- (d) an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract;
- (e) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority, or on its behalf, by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, where necessary, on the means of study and research which are available to it and the quality control measures it will operate;
- (f) the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff, provided that they are not to be evaluated as an award criterion;
- (g) an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;
- (h) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last 3 years;
- (i) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;
- (j) an indication of the proportion of the contract which the economic operator intends possibly to subcontract;
- (k) with regard to the products to be supplied:—
  - (i) samples, descriptions or photographs, the authenticity of which must be certified where the contracting authority so requests;

- (ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to technical specifications or standards.

### **Recourse to e-Certis**

**61.**—(1) Contracting authorities shall have recourse to e-Certis and shall require primarily such types of certificates or forms of documentary evidence as are covered by e-Certis.

(2) In this regulation, “e-Certis” means the online repository established by the Commission and referred to as “e-Certis” in the Public Contracts Directive.

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

**62.**—(1) —Contracting authorities shall, where they require 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) Contracting authorities shall recognise equivalent certificates from bodies established in other member States.

(3) Contracting authorities shall 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 contracting authorities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, they shall refer to—

- (a) the Eco-Management and Audit Scheme of the EU,
- (b) other environmental management systems as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009(42), or
- (c) other environmental management standards based on the relevant European or international standards by accredited bodies,

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

(5) Where an economic operator had demonstrably no access to the 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 contracting authority shall 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.

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

**63.**—(1) With regard to—

- (a) criteria relating to economic and financial standing as set out under regulation 58(7) to (14), and
- (b) criteria relating to technical and professional ability as set out under regulation 58(15) to (18),

(42) OJ No L 342, 22.12.2009, p1, amended by Council Regulation (EU) No 517/2013 (OJ No L 158, 10.6.2013, p1).

an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them, subject to the following provisions of this regulation.

(2) With regard to criteria relating to the educational and professional qualifications mentioned in regulation 60(9)(f), or to relevant professional experience, economic operators may however only rely on the capacities of other entities where those entities will perform the works or services for which these capacities are required.

(3) Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example by producing a commitment by those entities to that effect.

(4) The contracting authority shall, in accordance with regulations 59 to 61, verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion under regulation 57, and—

- (a) the contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion; and
- (b) the contracting authority may require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

(5) Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

(6) A group of economic operators within the meaning of regulation 19(3) may rely on the capacities of participants in the group or of other entities, and paragraphs (1) to (5) apply in relation to such a group in the same way that they apply in relation to an economic operator.

(7) In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators within the meaning of regulation 19(3), by a participant in that group.

#### **Recognition of official lists of approved economic operators and certification by certification bodies**

**64.**—(1) Economic operators registered on an official list or having a certificate issued by a certification body may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the certification body.

(2) A certificate of either kind shall constitute a presumption of suitability with regard to requirements for qualitative selection encompassed by the certificate or the official list to which it relates.

(3) Information that can be deduced from registration on official lists or certification by certification bodies shall not be questioned without justification.

(4) With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is to be awarded.

(5) In relation to an official list established or maintained by a member State other than the United Kingdom, paragraphs (1) and (3) apply only in favour of economic operators established in the member State holding the official list.

(6) The requirements of proof for the criteria for qualitative selection encompassed by the official list or certificate shall comply with regulation 60 and, where appropriate, regulation 62.

(7) Economic operators shall not be obliged to be registered on an official list or to provide a certificate issued by a certification body in order to participate in a public contract.

(8) Contracting authorities shall—

- (a) recognise equivalent certificates from bodies established in other member States, and
- (b) accept other equivalent means of proof.

(9) In this regulation—

“official list” means an official list of approved contractors, suppliers or service providers established or maintained by a member State under to Article 64 of the Public Contracts Directive; and

“certification body” means a certification body complying with European standards of certification, and “certificate issued by a certification body” means a certificate issued by such a body in accordance with certification arrangements for which a member State has provided for the purposes of Article 64 of the Public Contracts Directive.

(10) For the purposes of this regulation, no official list or certification arrangements are established, maintained or provided for in relation to the jurisdictions to which this Part extends and, accordingly, in paragraph (9), “member State” includes the United Kingdom only insofar as the official list or the certification arrangements are established, maintained or provided for in respect of any other jurisdiction.

#### **Reduction of the number of otherwise qualified candidates to be invited to participate**

**65.**—(1) In restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships, contracting authorities may limit the number of candidates meeting the selection criteria that they will invite to tender or to conduct a dialogue, provided that the minimum number of qualified candidates is available, in accordance with the following paragraphs of this regulation.

(2) Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where applicable the maximum number.

(3) In the restricted procedure, the minimum number of candidates shall be 5.

(4) In the competitive procedure with negotiation, the competitive dialogue procedure and the innovation partnership procedure, the minimum number of candidates shall be 3.

(5) In any event the number of candidates invited shall be sufficient to ensure genuine competition.

(6) Contracting authorities shall invite a number of candidates at least equal to the minimum number indicated in accordance with paragraph (2).

(7) But where the number of candidates meeting the selection criteria and the minimum levels of ability as referred to in regulation 58(19) is below that minimum number, the contracting authority may continue the procedure by inviting the candidates with the required capabilities.

(8) In the context of the same procedure, the contracting authority shall not include economic operators that did not request to participate, or candidates that do not have the required capabilities.

#### **Reduction of the number of tenders and solutions**

**66.**—(1) Where contracting authorities exercise the option of reducing the number of tenders to be negotiated in accordance with regulation 29(19) and (20) or of solutions to be discussed in accordance with regulation 30(12) and (13), they shall do so by applying the award criteria stated in the procurement documents.

(2) In the final stage, the number arrived at shall make for genuine competition in so far as there are enough tenders, solutions or qualified candidates.

### **Contract award criteria**

**67.—**(1) Contracting authorities shall base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority.

(2) That tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

(3) Such criteria may comprise, for example—

- (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; or
- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

(4) 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.

(5) Award criteria shall be considered to be linked to the subject-matter of the public 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 those factors do not form part of their material substance.

(6) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority.

(7) Award criteria shall—

- (a) ensure the possibility of effective competition; and
- (b) 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, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

### *Weighting*

(9) The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

(10) Those weightings may be expressed by providing for a range with an appropriate maximum spread.

(11) Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

**Life-cycle costing**

**68.**—(1) Life-cycle costing shall, 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 contracting authority 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;
- (b) costs imputed to environmental externalities linked to the product, service or works 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 shall 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 shall 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 contracting authorities assess costs using a life-cycle costing approach, they shall indicate in the procurement documents—

- (a) the data to be provided by the tenderers, and
- (b) the method which the contracting authority 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 shall be applied for the assessment of life-cycle costs.

(6) A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XIII to the Public Contracts Directive as amended from time to time.

**Abnormally low tenders**

**69.**—(1) Contracting authorities shall require tenderers to explain the price or costs proposed in the tender where tenders appear 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 supply of the products or services or for the execution of the work;
- (c) the originality of the work, supplies or services proposed by the tenderer;
- (d) compliance with applicable obligations referred to in regulation 56(2);
- (e) compliance with obligations referred to in regulation 71;
- (f) the possibility of the tenderer obtaining State aid.

(3) The contracting authority shall assess the information provided by consulting the tenderer.

(4) The contracting authority may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).

(5) The contracting authority shall reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 56(2).

(6) Where the contracting authority 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 contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of TFEU.

(7) Where the contracting authority rejects a tender in the circumstances referred to in paragraph (6), it shall inform the Commission.

## *SECTION 6*

### *Contract Performance*

#### **Conditions for performance of contracts**

**70.**—(1) Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are—

(a) linked to the subject-matter of the contract within the meaning of regulation 67(5), and

(b) indicated in the call for competition or in the procurement documents.

(2) Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

#### **Subcontracting**

##### *Giving information to contracting authorities*

##### *Giving information to contracting authorities*

**71.**—(1) In the procurement documents, the contracting authority may ask the tenderer to indicate in its tender any share of the contract that it may intend to subcontract to third parties and any proposed subcontractors.

(2) Paragraph (1) is without prejudice to the main contractor's liability.

(3) In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, after the award of the contract and at the latest when the performance of the contract commences, the contracting authority shall require the main contractor to notify to the contracting authority the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at the time.

(4) The contracting authority shall require the main contractor to notify the contracting authority of—

(a) any changes to the information notified under paragraph (3) during the course of the contract; and

- (b) the name, contact details and legal representatives of any new subcontractors which the main contractor subsequently involves in such works or services.
- (5) Where necessary for the purposes of paragraph (8), the required information shall be accompanied by ESPDs in respect of the subcontractors.
- (6) Paragraphs (3) and (4) do not apply to suppliers.
- (7) Contracting authorities may extend the obligations provided for in paragraphs (3) and (4) to, for example—
  - (a) supply contracts, services contracts (other than those concerning services to be provided at the facilities under the direct oversight of the contracting authority) or suppliers involved in works or services contracts;
  - (b) subcontractors of the main contractor's subcontractors or subcontractors further down the subcontracting chain.

#### *Excluding subcontractors*

- (8) Contracting authorities may, in accordance with regulations 59, 60 and 61, verify whether there are grounds for exclusion of subcontractors under regulation 57.
- (9) In such cases, the contracting authority—
  - (a) shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion; and
  - (b) may require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

#### **Modification of contracts during their term**

**72.—**(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Part in any of the following cases:—

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses—
  - (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and
  - (ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;
- (b) for additional works, services or supplies by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor—
  - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, or
  - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority,
 provided that any increase in price does not exceed 50% of the value of the original contract;
- (c) where all of the following conditions are fulfilled:—
  - (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;
  - (ii) the modification does not alter the overall nature of the contract;



- (iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.
  - (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of—
    - (i) an unequivocal review clause or option in conformity with sub-paragraph (a), or
    - (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Part;
  - (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (8); or
  - (f) where paragraph (5) applies.
- (2) Where several successive modifications are made:—
- (a) the limitations imposed by the proviso at the end of paragraph (1)(b) and by paragraph (c) (iii) shall apply to the value of each modification; and
  - (b) such successive modifications shall not be aimed at circumventing this Part.
- (3) Contracting authorities which have modified a contract in either of the cases described in paragraph (1)(b) and (c) shall send a notice to that effect, in accordance with regulation 51, for publication.
- (4) Such a notice shall contain the information set out in part G of Annex 5 to the Public Contracts Directive.
- (5) This paragraph applies where the value of the modification is below both of the following values:—
- (a) the relevant threshold mentioned in regulation 5, and
  - (b) 10% of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts,
- provided that the modification does not alter the overall nature of the contract or framework agreement.
- (6) For the purposes of paragraph (5), where several successive modifications are made, the value shall be the net cumulative value of the successive modifications.
- (7) For the purpose of the calculation of—
- (a) the price mentioned in paragraph (1)(b) and (c), and
  - (b) the values mentioned in paragraph (5)(b),
- the updated figure shall be the reference figure when the contract includes an indexation clause.
- (8) A modification of a contract or a framework agreement during its term shall be considered substantial for the purposes of paragraph (1)(e) where one or more of the following conditions is met:—
- (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
  - (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—
    - (i) allowed for the admission of other candidates than those initially selected,
    - (ii) allowed for the acceptance of a tender other than that originally accepted, or

- (iii) attracted additional participants in the procurement procedure;
  - (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
  - (d) the modification extends the scope of the contract or framework agreement considerably;
  - (e) a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than those provided for in paragraph (1)(d).
- (9) A new procurement procedure in accordance with this Part shall be required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation.

### **Termination of contracts**

**73.—**(1) Contracting authorities shall ensure that every public contract which they award contains provisions enabling the contracting authority to terminate the contract where—

- (a) the contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72(9);
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 57(1), including as a result of the application of regulation 57(2), and should therefore have been excluded from the procurement procedure; or
- (c) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of TFEU.

(2) Those provisions may address the basis on which the power is to be exercisable in those circumstances, for example by providing for notice of termination to be given and by addressing consequential matters that will or might arise from the termination.

(3) To the extent that a public contract does not contain provisions enabling the contracting authority to terminate the contract on any of the grounds mentioned in paragraph (1), a power for the contracting authority to do so on giving reasonable notice to the contractor shall be an implied term of that contract.

## **CHAPTER 3**

### **PARTICULAR PROCUREMENT REGIMES**

#### **SECTION 7**

#### *Social and Other Specific Services*

### **Award of contracts for social and other specific services**

**74.** Public contracts for social and other specific services listed in Schedule 3 shall be awarded in accordance with this Section.

### **Publication of notices**

**75.—**(1) Contracting authorities intending to award a public contract for the services referred to in regulation 74 shall make known their intention by any of the following means:—

- (a) by means of a contract notice, which shall contain the information referred to in part H of Annex V to the Public Contracts Directive; or

- (b) by means of a prior information notice, which shall—
  - (i) be published continuously,
  - (ii) contain the information set out in part I of Annex V to the Public Contracts Directive,
  - (iii) refer specifically to the types of services that will be the subject-matter of the contracts to be awarded, and
  - (iv) indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing.
- (2) Paragraph (1) shall not apply where a negotiated procedure without prior publication could have been used, in accordance with regulation 32, for the award of a public service contract.
- (3) Contracting authorities that have awarded a public contract for the services referred to in regulation 74 shall make known the results of the procurement procedure by means of a contract award notice, which shall contain the information referred to in part J of Annex V to the Public Contracts Directive.
- (4) Contracting authorities may group contract award notices on a quarterly basis, in which case they shall comply with paragraph (5) by sending the grouped notices within 30 days of the end of each quarter.
- (5) Contracting authorities shall send the notices referred to in this regulation for publication in accordance with regulation 51.

### **Principles of awarding contracts**

76.—(1) Contracting authorities shall determine the procedures that are to be applied in connection with the award of contracts subject to this Section, and may take into account the specificities of the services in question.

(2) Those procedures shall be at least sufficient to ensure compliance with the principles of transparency and equal treatment of economic operators.

(3) In particular, where, in accordance with regulation 75, a contract notice or prior information notice has been published in relation to a given procurement, the contracting authority shall, except in the circumstances mentioned in paragraph (4), conduct the procurement, and award any resulting contract, in conformity with the information contained in the notice about—

- (a) conditions for participation,
- (b) time limits for contacting the contracting authority, and
- (c) the award procedure to be applied.

(4) The contracting authority may, however, conduct the procurement, and award any resulting contract, in a way which is not in conformity with that information, but only if all the following conditions are met:—

- (a) the failure to conform does not, in the particular circumstances, amount to a breach of the principles of transparency and equal treatment of economic operators;
- (b) the contracting authority has, before proceeding in reliance on sub-paragraph (a)—
  - (i) given due consideration to the matter,
  - (ii) concluded that sub-paragraph (a) is applicable,
  - (iii) documented that conclusion and the reasons for it in accordance with regulation 84(7) and (8), and
  - (iv) informed the participants of the respects in which the contracting authority intends to proceed in a way which is not in conformity with the information contained in the notice.

(5) In paragraph (4)(b)(iv), “participants” means any economic operators which have responded to the notice and have not been informed by the contracting authority that they are no longer under consideration for the award of a contract within the scope of the procurement concerned.

(6) All time limits imposed on economic operators for the purposes of this regulation, whether for responding to a contract notice or taking any other steps in the relevant procedure, shall be reasonable and proportionate.

(7) Without prejudice to the generality of paragraph (1), and subject to the other requirements of this Chapter, contracting authorities may apply procedures for the purposes of this regulation which correspond (with or without variations) to procedures, techniques or other features provided for in Chapter 2, as well as procedures which do not.

(8) In relation to the award of contracts subject to this Section, contracting authorities may take into account any relevant considerations, including —

- (a) the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services;
- (b) the specific needs of different categories of users, including disadvantaged and vulnerable groups;
- (c) the involvement and empowerment of users; and
- (d) innovation.

#### **Reserved contracts for certain services**

**77.**—(1) Contracting authorities may reserve to qualifying organisations the right to participate in procedures for the award of reservable public contracts.

(2) For that purpose, a contract is a reservable public contract only if it is exclusively for one or more of the services which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, and 98133110-8.

(3) In this regulation, “qualifying organisation” means an organisation which fulfils all of the following conditions:—

- (a) its objective is the pursuit of a public service mission linked to the delivery of services referred to in paragraph (2);
- (b) profits are reinvested with a view to achieving the organisation’s objective, and any distribution of profits is based on participatory considerations;
- (c) the structures of management or ownership of the organisation are (or will be, if and when it performs the contract) —
  - (i) based on employee ownership or participatory principles, or
  - (ii) require the active participation of employees, users or stakeholders; and
- (d) the organisation has not been awarded, pursuant to this regulation, a contract for the services concerned by the contracting authority concerned within the past 3 years.

(4) The maximum duration of a contract awarded under this regulation shall not be longer than 3 years.

(5) Where a contracting authority exercises the power of reservation conferred by paragraph (1), the call for competition shall make reference to Article 77 of the Public Contracts Directive.

(6) This regulation does not apply in relation to the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(43).

## SECTION 8

### *Rules Governing Design Contests*

#### **Scope of Section 8**

**78.**—(1) This Section applies to—

- (a) design contests organised as part of a procedure leading to the award of a public service contract;
- (b) design contests with prizes or payments to participants.

(2) In the cases referred to in paragraph (1)(a), the threshold mentioned in regulation 5 shall be calculated on the basis of the estimated value net of VAT of the public service contract, including any possible prizes or payments to participants.

(3) In the cases referred to in paragraph (1)(b), the threshold mentioned in regulation 5 shall be calculated on the basis of the total amount of the prizes and payments, including the estimated value net of VAT of the public services contract which might subsequently be concluded following a negotiated procedure without prior publication in accordance with regulation 32(7) and (8) if the contracting authority has announced its intention to award such a contract in the contest notice.

#### **Notices**

**79.**—(1) Contracting authorities that intend to carry out a design contest shall make known their intention by means of a contest notice.

(2) Contest notices shall—

- (a) include the information set out in part E of Annex V to the Public Contracts Directive; and
- (b) be sent for publication in accordance with regulation 51.

(3) Contracting authorities that have held a design contest shall send for publication in accordance with regulation 51 a notice of the results of the contest, and must be able to prove the date of dispatch.

(4) A notice of the results of the contest shall include the information set out in part F of Annex V to the Public Contracts Directive.

(5) But where the release of information on the outcome of the contest—

- (a) would impede law enforcement or would otherwise be contrary to the public interest,
- (b) would prejudice the legitimate commercial interests of a particular enterprise, whether public or private, or
- (c) might prejudice fair competition between service providers,

such information may be withheld from publication.

#### **Rules on the organisation of design contests and the selection of participants**

**80.**—(1) When organising design contests, contracting authorities shall apply procedures which are adapted to the provisions of Chapter 1 and this Section.

(2) The admission of participants to design contests shall not be limited—

- (a) by reference to the territory or part of the territory of a member State;
  - (b) on the grounds that, under the law of the member State in which the contest is organised, they would be required to be either natural or legal persons.
- (3) Where design contests are restricted to a limited number of participants, the contracting authorities shall lay down clear and non-discriminatory selection criteria.
- (4) In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.

### **Composition of the jury**

**81.—**(1) The jury shall be composed exclusively of natural persons who are independent of participants in the contest.

(2) Where a particular professional qualification is required from participants in a contest, at least a third of the members of the jury shall have that qualification or an equivalent qualification.

### **Decisions of the jury**

**82.—**(1) The jury shall be autonomous in its decisions and opinions.

(2) The jury shall examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.

(3) The jury shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points that may need clarification.

(4) Anonymity shall be observed until the jury has reached its opinion or decision.

(5) Candidates may be invited, if need be, to answer questions that the jury has recorded in the minutes to clarify any aspect of the projects.

(6) Complete minutes shall be drawn up of the dialogue between jury members and candidates.

## **CHAPTER 4**

### **RECORDS AND REPORTS**

#### **Retention of contract copies**

**83.—**(1) Contracting authorities shall, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than—

- (a) 1,000,000 EUR in the case of public supply contracts or public service contracts;
- (b) 10,000,000 EUR in the case of public works contracts.

(2) Contracting authorities shall grant access to those contracts, but access to specific documents or items of information may be denied to the extent and on the conditions provided for in the applicable EU or national rules on access to documents and data protection.

#### **Reporting and documentation requirements**

##### *Individual reports*

##### *Individual reports*

**84.—**(1) For every contract or framework agreement covered by this Part, and every time a dynamic purchasing system is established, contracting authorities shall draw up a written report which shall include at least the following:—

- (a) the name and address of the contracting authority, the subject-matter and value of the contract, framework agreement or dynamic purchasing system;
- (b) where applicable, the results of the qualitative selection and reduction of numbers pursuant to regulations 65 and 66, namely:—
  - (i) the names of the selected candidates or tenderers and the reasons for their selection;
  - (ii) the names of the rejected candidates or tenderers and the reasons for their rejection;
- (c) the reasons for the rejection of tenders found to be abnormally low;
- (d) the name of the successful tenderer and the reasons why its tender was selected and, where known—
  - (i) the share (if any) of the contract or framework agreement which the successful tenderer intends to subcontract to third parties, and
  - (ii) the names of the main contractor's subcontractors (if any);
- (e) for competitive procedures with negotiation and competitive dialogues, the circumstances as laid down in regulation 26 which justify the use of those procedures;
- (f) for negotiated procedures without prior publication, the circumstances referred to in regulation 32 which justify the use of this procedure;
- (g) where applicable, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system;
- (h) where applicable, the reasons why means of communication other than electronic means have been used for the submission of tenders;
- (i) where applicable, conflicts of interests detected and subsequent measures taken.

(2) But such a report is not required in respect of contracts based on framework agreements where these are concluded in accordance with regulation 33(7) or (8)(a).

(3) To the extent that the contract award notice drawn up in accordance with regulation 50 or 75(3) contains the information required in this paragraph, contracting authorities may refer to that notice.

(4) Where the Commission so requests, a contracting authority shall communicate the report, or its main elements, to the Commission.

(5) Where the Cabinet Office so requests, a contracting authority shall communicate the report, or its main elements, to the Cabinet Office or to such other body as the Cabinet Office may direct in connection with any functions which that body exercises for the purposes of Article 83 of the Public Contracts Directive.

#### *Reporting other information required by the Cabinet Office*

(6) Contracting authorities shall send to the Cabinet Office a report containing such other information as the Cabinet Office may from time to time request in respect of procurements—

- (a) within the scope of this Part, or
- (b) which would have been within the scope of this Part if their value had exceeded the relevant threshold mentioned in regulation 5,

for the purpose of enabling the Cabinet Office to provide the Commission with information.

#### *Documentation of progress and decisions*

(7) Contracting authorities shall document the progress of all procurement procedures, whether or not they are conducted by electronic means.

(8) To that end, contracting authorities shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on —

- (a) communications with economic operators and internal deliberations,
  - (b) preparation of the procurement documents,
  - (c) dialogue or negotiation if any,
  - (d) selection and award of the contract.
- (9) The documentation shall be kept for a period of at least 3 years from the date of award of the contract.