

# Quigg Golden

## PROCUREMENT AND PUBLIC CONTRACTS REGULATIONS INFORMATION BOOKLET

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## **Excellence in Public Procurement**

Quigg Golden are long established experts in public sector procurement, with a well earned reputation for delivering high quality services.

Whilst our legal expertise allows us to assist, advise and represent contracting authorities in procuring works, goods and services in a manner compliant with EU and national law; we firmly believe that focus on achieving the desired contract delivery and value for money should lead the compliance process.

Our legal experience allows us to assist in ensuring smooth contract delivery and management through detailed attention to contract selection, amendment and drafting.

When acting for tenderers our expertise and experience allows us to provide a high level of service from supporting participation in procurement processes, to representing clients in challenging unlawful processes.

### **Legal Experience**

Many of Quigg Golden's staff are dual qualified, having both legal and technical competence, and all have developed a thorough understanding of the law surrounding public procurement. We pride ourselves on being at the forefront of developments in EU procurement law and national practices, particularly in the UK and Ireland.

In addition to procurement law, we are also experienced in advising on contract law matters. Procurement is a holistic process spanning the journey from the identification of a need through to the lessons learned debriefing after the contract has been fulfilled. Our ability to advise our clients on the legal issues that may arise throughout this journey separates us from our competitors. This experience is invaluable in both proactive and reactive manners. We can be proactive in ensuring that all tender and contract documentation is drafted to a high standard and can react quickly and effectively if any legal issues arise either pre or post-award of contract.

### **Value for Money**

In an era of increasing budgetary restrictions and oversight of public sector spend; value for money needs to be at the heart of all public procurement processes. Quigg Golden understands the challenges faced by the public sector. We work with public bodies and publicly funded organisations to develop procurement solutions that address economic concerns in the short and long term. We also assist tenderers in developing strategies to meet these ends for contracting authorities.

In the short term, our legal experience allows us to draft contracts and framework agreements that give public organisations the ability to monitor and enforce compliance with the tender commitments made by suppliers. In the longer term, we have experience of facilitating our clients' understanding of the value of any particular procurement from a whole life perspective.

Our experience of bringing legal challenges to procurement processes on behalf of suppliers gives us a unique insight into the areas of procurement processes most susceptible to challenge. No successful challenges have been made against the vast number of processes we have operated.

## Public Sector Procurement Services

Quigg Golden offers a number of services to the public sector. For example:

- Complete procurement and contract packages
- Marketing research processes
- Drafting procurement policies and procedure
- Facilitation of value for money exercises
- Advice on joint processes
- Tender evaluations
- Establishing and operating frameworks
- Extensions of existing contracts
- Debriefing of suppliers
- Legal challenges
- Litigation
- Procurement audits
- Full contract management
- Drafting procurement policies and procedure

To illustrate the range of services we offer, we have provided some examples of services we have successfully provided to clients below.

### Policy and Procedure Development

Quigg Golden has been engaged by organisations such as county councils through to central government, to develop and draft procurement policies, procedures and templates for use organisation-wide.

### Training

We have provided training on public procurement law to organisations such as the Office of Government Procurement, central government bodies, universities and councils in addition to professional bodies such as the ICE and RICS.

### Running Procurements

We have significant experience of project managing procurement procedures from identification of need through to contract award. We have provided full support to a wide range of public organisations from the NHS, central government and the education sector, such as:

- Professional services frameworks
- Legal services procurements
- IT and project management
- Works packages

### Legal Challenges

Quigg Golden is regularly instructed by public bodies to provide advice and representation in situations when disgruntled tenderers have attempted to legally challenge procurement processes. Our support services have included advice and negotiation, acting as expert witnesses, conciliatory services and conducting litigation.

## Procurement Services to the Private Sector

For many businesses the public sector represents a key market place that can define the success, expansion or otherwise of the business. However claiming a share of the public procurement market can be a challenging process and the formalities and administration surrounding public sector procurement can be daunting and difficult to resource. Frustration can arise when tenderers believe they have been unfairly excluded or inappropriately assessed as part of a procurement process.

Quigg Golden offers a number of services to the private sector. We can advise on:

- Challenging unlawful processes
- Bid drafting services
- Review of feedback
- Critiquing previous submissions
- Procurement training
- Advice on bid library development

### Challenging Unlawful Procurement Processes

Quigg Golden has assisted and represented numerous tenderers in challenges to procurement processes ranging from SME service contracts to designing and building prisons. We have the expertise needed to react quickly in any situation and can quickly review tender documentation to identify if an avenue for challenge actually exists and, if instructed, can engage with the relevant public organisation on our client's behalf. Many challenges can be resolved without the need to issue formal legal proceedings, however should the need arise Quigg Golden can provide expert support to a supplier's counsel.

### Tender Management

Our experience of drafting procurement documentation and of advising and sitting on evaluation panels means that we are ideally placed to work with tenderers in interpreting what the public buyer is looking for and what the tender documentation is really saying. In collaboration with the supplier's team, we can develop submissions that maximise the potential for success.

## Other Services

### Construction Law

Quigg Golden is a market leader in the provision of concise and practical construction contract advice, construction claim support and dispute resolution representation in the United Kingdom, Ireland and the Middle East. Our team is made up of construction and legal professionals (dual qualified). This range of expertise allows us to bring a claim or other issue from initial advice through to representation in a dispute resolution forum.

### Construction Services

- Claims Advice

We regularly prepare and evaluate all types of construction claims from final accounts to extensions of time and loss and expense.

- Adjudication/Conciliation/Mediation/Arbitration

We have advised and represented clients in hundreds of dispute resolution forums in the UK, Ireland and the Middle East. Whenever it is appropriate we encourage our clients to seek non-adversarial routes in resolving their disputes.

- Litigation

We have supported a number of clients through litigation by providing expert guidance on key legal and technical points. In England and Wales we are authorised to conduct litigation in contentious matters in any court of first instance, including the Technology and Construction Court which deals with procurement matters.

- Contract Drafting

We regularly draft bespoke, and amend standard form, contracts for clients, main and sub contractors.

- Training

We are qualified and experienced trainers and regularly provide highly interactive training sessions ranging from two hour seminars to the ICE Law and Contract Management Course.

- Advice

We can advise on all areas of construction law and any initial consultation with a new client is on a complimentary, no obligation basis.

## Contact Us

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**A Guide to Directive 2014/24  
&  
The Public Contracts Regulations 2015**

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## INTRODUCTION

This document is a guide to the new procurement Directive 2104/24 and the Public Contracts Regulations 2015 which transpose the Directions into domestic legislation for England, Wales and Northern Ireland. Largely speaking the Regulations come in to force on 26 February 2015.

The layout of the new Regulations has changed dramatically from the previous ones with the ordering and numbering largely following that of the Directions. Those familiar with the 2006 Regulations are likely to find this change leads to a lack of familiarity.

This guide will consider each Article of the new Directive in free text and in each instance a text box below will explain how the Regulations have transposed that Article. In some cases a Regulation is a mirror image of an Article; in other instances, especially where the Directive provide for discretion for member states, there is more to examine.

The Regulations, in addition to transposing the Directive, also make provision for:

- remedies;
- the Contracts Finder web site;
- rules for below threshold contracts; and
- prompt payment.

These Regulations (namely R.85 onwards) are dealt with at the rear of this guide.

It should be noted that this document provides an interpretation of various points. Since many of these are new and have not been tested by the courts, there may be alternative interpretations. As a result this document should be used as a guide, and not a substitute for checking the text of the Directive and Regulations themselves and for seeking legal advice.

This guide will be constantly updated by Quigg Golden to reflect changes in the law and various court decisions. The guide will be available on request or through our website, [www.QuiggGolden.com](http://www.QuiggGolden.com).

The writers any comments or feedback you are prepared to offer on this guide.

## **DIRECTIVE 2014/24 - OVERVIEW**

On 28 March 2014 three new Directives were published in the Official Journal of the European Union. These were:

- 2014/23 - Award of Concession Contracts;
- 2014/24 – Award of Public Contracts, which replaced Directive 2004/18; and
- 2014/25 - Award of Contracts by Utilities, which replaced 2004/17.

It should be noted that Directive 2007/66 - The Remedies Directive and Directive 2009/81 - Defence and Security Contracts are still in force.

Directive 2014/24 sets out at the second recital its *raisons d'être*. These can be summarised as:

- to increase the efficiency of public spending;
- to encourage and facilitate the participation of SMEs in public procurement;
- to enable procurers to make better use of public procurement in support of common social goals; and
- to clarify basic notions of concepts to ensure legal certainty and to incorporate certain aspects of related well established case law of the Court of Justice of the European Union.

Member states have two years to implement the Directive. In the UK this has been achieved through the enactment of the Public Contracts Regulations 2015, which came into force on 26 February 2015.

The Directive itself incorporates 138 recitals, 94 articles and 15 separate annexes.

They traditionally set out the rationale behind various articles and so should be used as a reference when seeking to understand the purpose of an article. In addition the recitals to Directive 2014/24 have added importance. During the various stages at which the text of the Directive was being agreed one MEP held a strong belief that the quality of legislation is inversely proportional to its length. Therefore to appease the MEP the Commission removed various important operative provisions from the articles

and put them into the recitals. An example of this is Recital 61, which provides that when awarding a call-off contract under a framework the preference of the person who will use the contract can be used as an award criterion in certain situations.

## **THE PUBLIC CONTRACTS REGULATIONS 2015 - OVERVIEW**

The Public Contracts Regulations 2015 were laid before Parliament on 5 February 2015 as Statutory Instrument No.102 2015; they largely came into force on 26 February 2015.

The Cabinet Office, being the executive body responsible for the new Regulations, has produced an explanatory memorandum in relation to the new legislation. It is a brief document offers some insight in to the rational of the Cabinet Office in implementing the Public Sector Procurement Directive (2014/24/EU). It addresses such things as:

- matters of special interest to the Joint Committee (of Parliament) on Statutory Instruments;
- the purpose of the instrument;
- the legislative context; and
- crucially, the policy background.

The general approach has been to adopt the 'copy out' technique. As a result the Regulations retain the key operative phrases which the Directive uses to express the obligations which are to be imposed on contracting authorities. In the explanatory memorandum to the Regulations the Cabinet Office states that:

*"Where it is absolutely clear what a clumsily worded passage in the Directive was intended to mean, and would be held to mean, the Cabinet Office has rephrased the corresponding passage in the Regulations with greater precision in a way that would be more readily understood by readers of UK legislation. By contrast, where there was considered to be genuine ambiguity in the Directive this has usually been reproduced in the Regulations."*

The Cabinet Office has taken this course in the belief that clarification would fail to provide greater legal certainty and even risk misleading those affected into a false sense of security. This is because contracting authorities would continue to be a risk that it may ultimately be held by the Court of justice of the European Union that the true interpretation of the Directive required them to proceed in a way that was more onerous, or at least different, from that provided for in the Regulations. In support of this approach the Cabinet Office asserts that the Court of Justice of the European

Union has previously developed an extensive body of jurisprudence often elaborating in very prescriptive detail the implications of provisions which, in the relative Directive, were expressed in quite vague or imprecise terms.

The Public Sector Remedies Directive has been re-transposed as Part 3 of the Regulations.

The Regulations apply to England, Wales and Northern Ireland, although Part 4 of the instrument does not apply to public bodies in Wales or Northern Ireland whose functions are wholly or mainly devolved functions in those jurisdictions.

In relation to supporting SME growth, the Cabinet Office states that:

*"Part 4 of this instrument implements the Government's domestic procurement policy to make public sector procurement more accessible to smaller businesses. This Part does not implement EU obligations. The regulations to implement this policy, are included in this instrument (rather than a separate, freestanding instrument) for convenience and simplicity, this instrument being the main vehicle for imposing regulations on public authorities in respect of public procurement procedures. These regulations address the Government's commitment to making public procurement more accessible to SMEs through: Ensuring advertised contract opportunities and award notices are accessible in one place, on the national Contracts Finder Portal; eliminating Pre Qualification Questionnaires for low value procurements and providing guidance to standardise Pre Questionnaires for high value contracts; and requiring that 30 day payment terms are flowed down the public sector supply chain, and that performance on late payment of invoices is reported on."*

## **TITLE I - SCOPE, DEFINITIONS AND GENERAL PRINCIPLES**

### **CHAPTER I Scope and Definitions**

#### **Section 1 Subject-Matter and Definitions**

##### **Article 1 Subject-matter and scope**

Article 1 of the Directive is fairly self-explanatory. It provides that the Directive establishes the rules on the procedures for procurement by contracting authorities of public contracts and design contests where the value is estimated to be greater than the thresholds. The term 'procurement' is described as the acquisition by means of a public contract of works, supplies or services.

The Article also makes it clear that the Directive does not affect the freedom of Member States to define how services should be organised and financed nor does it affect the decision of public authorities as to the extent to which they perform public functions themselves.

Lastly the Article makes clear that the Directive does not affect how Member States decide to organise the responsibility for the performance of public tasks.

##### **Regulation 1**

Regulation 1 deals with citation, commencement, extent and application and does so in a self-explanatory manner.

The Regulations apply to England, Wales and Northern Ireland, with the exception of Part 4 which does not apply to Northern Irish or Welsh Contracting Authorities. They do not apply to Scotland.

It should be noted that whilst the bulk of the Regulations came into force on 26 February 2015, there are a number of exceptions. These are highlighted below.

- Paragraphs 1 to 7 of Regulation 22, rules on electronic communication;
  - For Central Purchasing Bodies - 18 April 2017
  - For all other purposes - 18 October 2018
- Regulation 59(7) in relation to Electronic ESPD – 18 April 2017
- Regulation 61, e-Certis – 18 October 2018
- Regulations 106, 108, 110 and 112, use of Contracts Finder website - 1 April 2015 for Contracting Authorities other than on those performing their functions on behalf of the Crown.

## Article 2 Definitions

Article 2 of the Directive sets out some 25 various definitions.

One area that often causes difficulty is identifying which bodies are considered to be contracting authorities and therefore subject to the Directive. The answer to this lies in the definition section which firstly defines contracting authorities as being:

*“The State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.”*

The Directive goes on to define bodies governed by public law as those that have all of the following characteristics:

- “(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;*
- (b) they have legal personality; and*
- (c) they are financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.”*

It should be noted that different thresholds apply in relation to central government authorities which are defined as contracting authorities listed in Annex I and their successors in title, and sub-central contracting authorities.

### Regulation 2

Regulation 2 deals with definitions in a similar way to Article 2.

There is a slight difference in the third limb of the test of “*bodies governed by public law*” ((c), above), with the Regulations instead providing:

- (c) they have any of the following characteristics:—*

- (i) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;*
- (ii) they are subject to management supervision by those authorities or bodies; or*
- (iii) they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;*

The Regulations provide many more definitions (some 57, compared to 25 in the Directive). These define such things as “VAT”, “Academies” and “Contracts Finder”.

### **Article 3      Mixed procurement**

Article 3 states that where a contract will have as its subject two more types of procurement (e.g. works, services or supplies) it 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.

The Article continues to set out that where the subject of the procurement is partly covered by the Directive and partly not covered by the Directive, the Contracting Authority can either split the procurement or else the Directive will apply to the whole procurement process, so long as the part which is covered by the Directive is greater than the thresholds set out in Article 4.

The last part of the Article deals with where a procurement process is partly covered by the Utilities Directive and this Directive. In that case Articles 5 and 6 of the Utilities Directive must be followed.

### **Regulation 3**

This Regulation deals with subject matter and scope of Part 2 as follows:

*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.*

This does not mirror Article 3 of the Directive in any way and thus the numbering does not correspond directly between the Regulations and the Directive from this point. This guide continues to set out the Regulation provisions below the Directive equivalent for ease of reference.

#### **Regulation 4**

Regulation 4 deals with mixed procurement and is the equivalent to Article 3 (above).

The mixed contracts provisions are much the same as the Directive's provisions.

## **Section 2    Thresholds**

### **Article 4    Threshold amounts**

Article 4 sets out the thresholds. It provides that the Directive applies to procurements with a value, exclusive of VAT, estimated to be equal to, or greater than, the following thresholds. Those can be found at Section 23a and 23b of this booklet.

The value of threshold is to be revised in accordance with Article 6 (please refer to the notes on Article 6 below for further details).

### **Regulation 5**

Regulation 5 deals with thresholds by incorporating the Directive thresholds by reference. This means that the Regulations will not need to change to incorporate new thresholds.

The Regulation states that the value for threshold purposes is net of VAT.

Regulation 5(4) covers sterling conversion. This is necessary due to the reference to the Directive thresholds which are in Euros:

*(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.*

### **Article 5    Methods for calculating the estimated value of procurement**

Article 5 sets out the method for calculating the estimated value of procurement.

The calculation is to be of the estimated value of a procurement based on the total amount payable net of VAT including any form of option and any renewals expressly set out in the procurement documents.

Whereas the choice of the method used to calculate the estimated value is at the discretion of a contracting authority, the choice of method shall not be made with the intention of excluding the procurement process from the provisions of the Directive. Equally the procurement must not be subdivided with the effect of preventing it from falling within the scope of the Directive unless that subdivision is justified by objective reasons.

The estimate is to be the estimate at the moment at which the call for competition is sent or when a contracting authority commences a procurement procedure.

For framework agreements and dynamic purchasing systems the value to be taken into consideration is the maximum estimated value of all the contracts envisaged for the full term of the framework agreement or dynamic purchasing system.

Where proposed works or services may result in contracts being awarded in the form of separate lots, account must be taken of the total estimated value of all such lots, and similar rules apply in relation to supply contracts in separate lots.

That said, the Article expressly states that contracting authorities may award contracts as individual lots without applying the Directive provided that the estimated value of the lot is less than EUR 80,000 for supplies or services or EUR 1 million for works. However, the aggregate value of the lots awarded without applying the Directive must not exceed 20% of the aggregate value of all the lots into which the proposed works, supplies or services has been divided.

For supply or service contracts which are regular in nature the estimated contract value shall be based on either the total actual value of contracts of the same type awarded during the preceding 12 months or the estimated value of such contracts to be awarded during the following 12 months.

There are also rules set out in relation to calculating the estimated value of leasing, hire, rental or hire purchase products.

#### **Regulation 6**

Regulation 6 largely mirrors Article 5.

**Article 6      Revision of the thresholds and of the list of central government authorities**

The Article provides that the thresholds may be revised by the Commission every two years from 30 June 2013. However, this may be an error left over from earlier drafts and given the full text of the Article a revision every two years on 1<sup>st</sup> January would make more sense.

The revisions must be made in accordance with the rules set out, so the Commission cannot itself reduce them or increase them with the intent of the Directive covering more or fewer contracts.

As currently drafted, the Directive states that the Commission will, every two years from 1 January 2014, determine the values in the national currencies other than Euro.

The revisions are to be published in the OJEU in the beginning of November following their revision.

Lastly, the list of central contracting authorities set out at Annex I, can be revised by the Commission if a Member State informs them of a change.

**Note**

Article 6 is not reflected in the Regulations since they incorporate the Directive's thresholds.

This exclusion means that the Article and Regulation numbers coincide again hereafter.

### **Section 3 Exclusions**

Section 3 of Chapter 1 deals with specific exclusions from the Directive.

#### **Article 7 Contracts in the water, energy, transport and postal services sectors**

The first exclusion is in relation to contracts that would be covered by the Utilities Directive which provides that it covers the procurement of contracts by contracting entities, provided that the contracts are intended for the pursuit of one of the activities referred to in its Articles 8 to 14.

Therefore the question that identifies the appropriate Directive is not whether the body is a contracting authority or a utility, it is one of the subject matter of the contract.

It should be noted that the Utilities Directive is slightly wider in that it covers contracting entities, which includes contracting authorities in pursuit of one of the relevant activities as well as public undertakings that have as one of their activities any of the relevant activities.

The relevant activities relate to:

- gas and heat;
- electricity;
- water;
- transport services;
- ports and airports;
- postal services; and
- extraction of oil and gas.

In relation to the activities set out at Article 10 of the Utilities Directive – Water, the activity is the provision of a fixed network in connection with the production, transport or distribution of drinking water or the supply of drinking water to such networks. However if a contracting entity which carries out one of those activities also carries out the disposal of, or treatment of, sewage then the disposal or treatment of sewage is also a relevant activity.

If however a body enters into a contract for the disposal or treatment of sewage but does not involve itself with the provision of a fixed network for the production, transport and distribution of drinking water then it would not be covered by the Utilities Directive.

**Regulation 7**

Regulation 7 sets out utilities exclusions in a different way to the Directive, by stating that the exclusions apply to contracting authorities that are a utility within the meaning of Regulation 3 of the Utilities Contracts Regulations 2006, and the contract falls within the matters defined by sub-paragraphs (a) to (e). These are narrowly defined and should be considered in full, but include the likes of the provision of water within the defined confines.

Sub paragraph (f) provides a further exclusion where the utility is engaged in an activity that is excluded under Regulation 9 of the Utilities Contracts Regulations 2006.

**Article 8      Specific exclusions in the field of electronic communications**

The second exclusion relates to public contracts with the principal purpose of permitting a contracting authority to provide public communication networks or to provide to the public, electronic communications services.

**Regulation 8**

This provision is the same as Article 8 in all material ways.

**Article 9      Public contracts awarded and design contests organised pursuant to international rules**

The third exclusion relates to contracts which the contracting authority is must award due to international law obligations such as an international agreement, which must be in accordance with the TFEU, and also to contracts which are mainly or fully financed by an international organisation or financing institution.

**Regulation 9**

This provision is the same as Article 9 in all material ways.

**Article 10      Specific exclusions for service contracts**

The fourth exclusion relates to specific service contracts and includes:

- property rental;

- material intended for media services and broadcasting time programme provision;
- advice given in contemplation of and legal representation in arbitration, conciliation or litigation;
- legal services connected with document certification, as trustees or appointed guardians or in the exercise of official authority;
- financial services in connection with financial instruments or securities;
- loans;
- employment contracts;
- civil defence, protection and danger prevention services, except patient transport ambulance services;
- public passenger transport services by rail or metro; and
- political campaign services.

#### **Regulation 10**

This provision is the same as Article 10 with the exception of providing express definitions for such terms as “*audio-visual media services*” and “*programme*”.

#### **Article 11 Service contracts awarded on the basis of an exclusive right**

The fifth exclusion relates to public service contracts awarded to another contracting authority on the basis of an exclusive right which they enjoy pursuant to a law, regulation or published administrative provision.

#### **Regulation 11**

This provision is the same as Article 8 in all material ways.

#### **Article 12 Public contracts between entities within the public sector**

The sixth exclusion relates to contracts between entities within the public sector and effectively codifies the *Teckal / Hamburg* type exemptions.

Contracts awarded by a contracting authority to a body governed by private or public law shall fall outside the scope of the Directive where the following conditions are fulfilled:

1. the contracting authority exercises over the other body a control which is similar to that which it exercises over its own departments. This will be

fulfilled where it exercises a decisive influence over strategic objectives and significant decisions of the controlled body. The control may also be exercised by another legal body or person which is itself controlled in the same way by the contracting authority;

2. more than 80% of the activities of the body are carried out in the performance of tasks entrusted to it by the controlling contracting authority; and
3. there is no direct private capital participation in the controlled body with the exception of non-controlling and non-blocking forms of private capital participation.

The exemption set out above also applies where a controlled body awards a contract up the line to the controlling contracting authority, or to another body which is controlled by the same contracting authority.

Even if a contracting authority does not exercise the degree of control set out above it may nevertheless award a public contract without applying the Directive if the following conditions are fulfilled:

1. the contracting authority exercises, jointly with other contracting authorities, over the body of control which is similar to that which they exercise over their own departments. This will occur when:
  - a. the decision making bodies of the controlled body is composed of representatives of all participating contracting authorities (one may represent several or all of the participating Contracting Authorities);
  - b. those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled body;
  - c. the controlled body does not pursue any interests which are contrary to those of the controlling contracting authorities;
2. more than 80% of the activities of the body are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other bodies controlled by the same contracting authorities;
3. there is no direct private capital participation in the controlled body with the exception of non-controlling and non-blocking forms of private capital participation.

The above sets out the exceptions where a contracting authority, or group of contracting authorities, awards a contract to a body which they control, sometimes referred to as vertical co-operation. Another exemption can arise where a contracting authority wishes to award a contract to another contracting authority, sometimes referred to as horizontal co-operation.

Such a contract will fall outside the scope of the Directive where the following conditions are met:

1. the contract establishes or implements a corporation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to objectives they have in common;
2. the implementation of the corporation is governed solely by considerations relating to the public interest;
3. the contracting authorities perform on the open market less than 20% of the activities concerned by the corporation.

**Regulation 12**

This provision is the same as Article 12 in all material ways.

## **Section 4    Specific Situations**

Section 4 of Chapter 1 deals with certain miscellaneous specific situations.

### **Sub-section 1: Subsidised Contracts and Research and Development Services**

#### **Article 13    Contracts subsidised by Contracting Authorities**

Article 13 provides that the Directive will apply to works contracts which are subsidised by a contracting authority by more than 50% and the value of the subsidy is greater than the threshold. However the only contracts that this applies to are works contracts for either civil engineering activities or for building works for hospitals, sports, recreation, leisure, school and university buildings or lastly buildings used for administrative purposes.

Service contracts which are subsidised by more than 50% and the value of the subsidy is greater than the threshold which are connected to a works contract as set out above are also caught by this provision.

#### **Regulation 13**

This provision is the same as Article 13 in all material ways.

#### **Article 14    Research and development services**

Article 14 provides that the Directive will apply to certain research and development services where the benefits are exclusively for a contracting authority, for its use in the conduct of its own affairs and the research and development service is fully paid for by the contracting authority.

#### **Regulation 14**

This provision is the same as Article 14 in all material ways.

## **Subsection 2: Procurement involving defence and security aspects**

**Article 15**    **Defence and security**

**Article 16**    **Mixed procurement involving defence or security aspects**

**Article 17**    **Public contracts and design contests involving defence and security aspects which are awarded or organised pursuant to international rules**

Articles 15-17 are in relation to procurement which involves defence and security aspects. Essentially such contracts are not subject to the Directive if the contracts fall within the scope of Directive 2009/81/EC - the Directive which deals with the procurement of contracts in the field of defence and security.

The rules are not entirely straightforward and they also cover the situation of mixed contracts and should be looked at carefully if a contract could have a defence and security aspect to it.

### **Regulations 15-17**

These provisions are largely the same as the corresponding Articles, though they make reference to the Defence and Security Regulations rather than Directive 2009/81/EC.

## **CHAPTER II General Rules**

### **Article 18 Principles of procurement**

This is one of the most important Articles in the Directive and it sets out the basic obligation on a contracting authority. The first part is reproduced in full below:

*“Contracting authorities shall treat Economic Operators equally and without discrimination and shall act in a transparent and proportionate manner.*

*The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement was made with the intention of unduly favouring or disadvantaging certain economic operators.”*

This clearly sets out a contracting authority's overriding duties to:

- treat Economic Operators equally;
- not discriminate against an Economic Operator;
- act transparently;
- act proportionately; and
- not unduly favour or disadvantage certain Economic Operators.

Article 18(2) imposes an obligation on Member States to adopt appropriate measures to ensure that economic operators, in performance of public contracts, comply with their obligations in the fields of environmental, social and labour law.

#### **Regulation 18**

This provision is largely the same as Article 18, though there is the notable exclusion of any corresponding provision to Article 18(2).

### **Article 19 Economic Operators**

The first part of this Article provides that an economic operator shall not be rejected solely on the ground that they are required to be either people or legal persons (such as companies). However, where the contract is something other than supply only, legal persons may be required to indicate the names of relevant professional

qualifications of the staff that will be responsible for the performance of the contract in question.

The second part of the Article specifies that a group of economic operators may join together to participate in a procurement and cannot be required to have any specific legal form in order to submit a tender. However a contracting authority may, if the group's tender is successful, require that it adopts a specific legal form. Though, this is only to the extent that it is necessary for the satisfactory performance of the contract.

The competition documents may clarify how a group of economic operators shall meet the requirements as to the economic and financial standing or technical and professional ability so long as the clarification is justified by objective reasons and proportionate.

This is an area that many contracting authorities overlook in their competition documents. For example if there is a turnover requirement, can a group of economic operators satisfy it by simply adding the individual turnovers of the members of the group together? Or could there also be a rule that no individual member could have a turnover below a certain value? Equally can a requirement as to the minimum value of net assets be achieved merely by an addition, or does a contracting authority need a further rule that no economic operator in the group can have a negative net assets figure?

A contracting authority may also impose conditions for the performance of the contract by a group of operators, which are different from those imposed on individual participants but only if those conditions can be justified by objective reasons and are proportionate.

#### **Regulation 19**

This provision is the same as Article 19 in all material ways. Naturally references to laws are made to those of England, Wales and Northern Ireland, as opposed to 'the law of Member States'.

#### **Article 20 Reserved contracts**

This Article allows a contracting authority to reserve the right to participate in a procurement process to sheltered workshops or economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons. A contracting authority may also provide that the contract can only be performed in the context of sheltered employment programs.

In any of the three situations at least 30% of the employees of those workshops, economic operators or programs must be disabled or disadvantaged workers.

If a contracting authority wishes to take advantage of this Article then the call for competition must reference this Article.

#### **Regulation 20**

This provision is the same as Article 20 in all material ways.

#### **Article 21 Confidentiality**

This Article provides that, unless required elsewhere in the Directive or in the national law (including the Freedom of Information Act) a contracting authority shall not disclose information forwarded to it by economic operators which they have identified as confidential, including technical or trade secrets.

Contracting authorities sometimes forget to allow space in the tender submissions for an economic operator to be able to designate which parts of its tender it believes to be confidential or commercially sensitive, the reasons for that belief and the duration that the information would or should remain confidential or commercially sensitive.

A contracting authority may impose obligations on economic operators aimed at protecting the confidential nature of information which the contracting authority is making available to the economic operator through the procurement process.

#### **Regulation 21**

This provision is broadly similar to Article 21 in its wording and is not obviously different in its effect.

#### **Article 22 Rules applicable to communication**

This Article represents a significant development in the approach to electronic communications. In short it provides that all communication and information exchange under the Directive is to be performed using electronic means of communication.

The tools and devices to be used for communicating by electronic means must be non-discriminatory, generally available and interoperable with information and

communication technology products in general use and should not restrict economic operators' access to the procurement procedure.

The Article does set out some exceptions to this requirement such as where the nature of the procurement process requires specialist tools, devices, file formats, equipment or where physical models are appropriate. A further exception is permitted where electronic communication is not suitable due to the requirement for the protection of particularly sensitive information.

There is a helpful provision expressly stating that oral communication may be used for non-essential elements of the procurement procedure, provided that the content of the oral communication is documented to a sufficient degree. The Article specifies that all communication with tenderers which could have a substantial impact on the content or 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.

For this reason we would suggest that where a procurement procedure requires a presentation or interview then that stage of the process is recorded and stored.

The sub-section (3) provides that in all communications the confidentiality of tenders will be preserved and contracting authorities will only examine the content of tenders and requests to participate after the time limit set for submitting has expired.

Article 22(4) contains a welcome reference to building information electronic modelling, or 'BIM' for works contracts allowing contracting authorities to require the use of specific electronic tools such as BIM. The express reference is a useful progressive step, though as per the text box below, the BIM provision hasn't been transposed to the Regulations.

Article 22(5) provides that contracting authorities may require the use of tools and devices which are not generally available provided that the contracting authority offers an alternative means of access to those tools and devices. This can be achieved by offering unrestricted and full direct access free of charge to the tools and devices or the use of provisional tokens made available free of charge. Therefore it could well be that software companies who are keen to promote the use of their software will offer extended free trials so that contracting authorities can require the use of that software package.

Article 22(6) and Annex IV set out specific details in relation to the rules which will apply to tools and devices for the electronic transmission and receipt of tenders and requests to participate. Key points are that the process must be transparent and

specify the level of security required. The system must also record the exact time of receipt, ensure no one has access to the data until it is to be opened and then only by authorised persons. Any potential infringements should be clearly identifiable.

**Regulation 22**

This provision is broadly similar to Article 22, though there is the exception of Article 22(4) or a corresponding provision that relates to public works, design contests, and BIM tools.

**Article 23 Nomenclatures**

This is a simple Article stating that any references to nomenclatures shall be made using the Common Procurement Vocabulary (CPV), as adopted by Regulation 2195/2002.

**Regulation 23**

This provision is broadly the same as Article 20. Only the acronym 'CPV' is referred to since, unlike the Directive, the Regulation provides a definition.

**Article 24 Conflicts of interests**

This Article provides that Member States and contracting authorities shall take appropriate measures to prevent, identify and remedy conflicts of interest. The concept of a conflict of interest will at least cover any situation where an individual involved in the conduct of the procurement procedure, or who may influence the outcome of the procedure, has direct or indirect financial, economic or other personal interest in the process.

We would suggest that for every procurement procedure the assessment panel are given a simple one page guide to what a conflict of interest is and are asked to sign a declaration that they have no known conflict of interest at that time, and that if at any stage during the evaluation or procurement process they discover there is a potential conflict of interest they will raise it with the appropriate people. We would also suggest that the declaration from the evaluation panel also covers confidentiality as required by Article 21 and 22(3).

**Regulation 24**

This provision is much the same as Article 24, though definitions of the terms "*relevant staff members*" and "*procurement service provider*" are also included.

## **TITLE II - RULES ON PUBLIC CONTRACTS**

### **CHAPTER I Procedures**

#### **Article 25 Conditions relating to the Government Procurement Agreement and other international agreements**

Article 25 provides that contracting authorities shall accord economic operators of signatories to the GPA treatment no less favourable than the treatment accorded to the economic operators of the Union. GPA is the Plurilateral Agreement on Government Procurement and signatories to it include countries such as Canada, Israel and the United States of America. A full list of the signatories can be found on the WTO website.

#### **Regulation 25**

This provision is broadly similar to the Article, though Annexes 6 & 7 to the EU's Appendix 1 to the GPA are also included.

#### **Article 26 Choice of procedures**

The open procedure and the restricted procedure remain available to contracting authorities.

The new competitive procedure with negotiation and competitive dialogue are only available in one of the following circumstances:

- the needs cannot be met without adaptation of readily available solutions;
- they include design or innovative solutions;
- The contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make up, or because of the risks attaching to them;
- The technical specifications cannot be established with sufficient precision by reference to a standard, European Technical Assessment, common technical specifications or technical reference;
- Where in response to an open or restricted procedure, only irregular or unacceptable tenderers are submitted. Examples of irregular tenders include:

- tenders which do not comply with the procurement documents;
  - late tenders;
  - tenders where there is evidence of collusion or corruption; and
  - abnormally low tenders.
- Tenders that would be considered unacceptable include:
    - tenders submitted by tenderers without the required qualification; and
    - tender prices exceed a contracting authority's budget.

In these situations 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 Articles 57-64 if they, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

It is likely that contracting authorities will want to make use of the new competitive procedure with negotiation in their procurement processes. We would expect that one way to make this process available is to include an element of design or innovation within a works or services contract.

It may prove problematic when irregular or unacceptable tenders are received in a prior open or restricted procedure. The Article permits a contracting authority to commence a competitive procedure with negotiation without issuing a new notice where it includes all the tenderers which submitted a tender in accordance with "*the formal requirements*". However, if the tender was submitted in accordance with the formal requirements, then hard to envisage how that the tender could be considered to be irregular or unacceptable. Therefore it appears that for the majority of cases where only irregular or unacceptable tenders are received it will not be possible to proceed. This cannot be what was intended. It may be, for example, that this situation might arise where the tenders were submitted in accordance with the formal requirements but the tenders were unacceptable because they all exceed the contracting authorities budget (which must have been determined and documented in advance, but does not have to be included in the tender documents).

Article 26(5) provides that the call for competition shall be made by means of a contract notice in accordance with Article 49.

One exception to this is where a sub-central government contracting authority using either a restricted procedure or a competitive procedure with negotiation may make the call for competition by means of a prior information notice ("*PIN*") in accordance with Article 48(2). In this situation an economic operator, having expressed their interest following publication of the PIN, must be invited to confirm their interest in writing by means of an invitation to confirm interest in accordance with Article 54.

Lastly, Article 26 provides that contracting authorities may apply innovation partnerships in accordance with the Directive or apply a negotiated procedure without prior publication of a call for competition in accordance with Article 32.

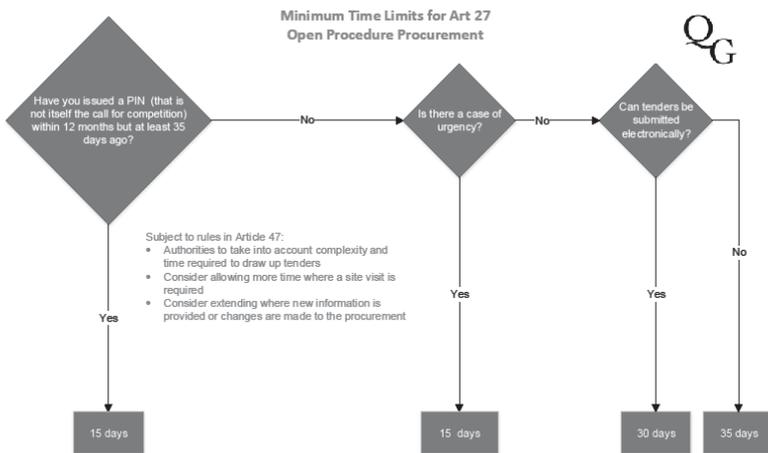
**Regulation 26**

This provision is the same as Article 26 in all material ways.

**Article 27 Open procedure**

Article 27 mainly concerns itself with setting out the minimum time limits which apply to the open procedure. However these time limits must be read in conjunction with Article 47 which prescribes further rules in relation to setting of time limits.

The time limits can be summarised as follows:



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The other provision in Article 27 provides that tenders are to be accompanied by the details of qualitative criteria specified by the contracting authority.

**Regulation 27**

This provision is the same as Article 27 in all material ways.

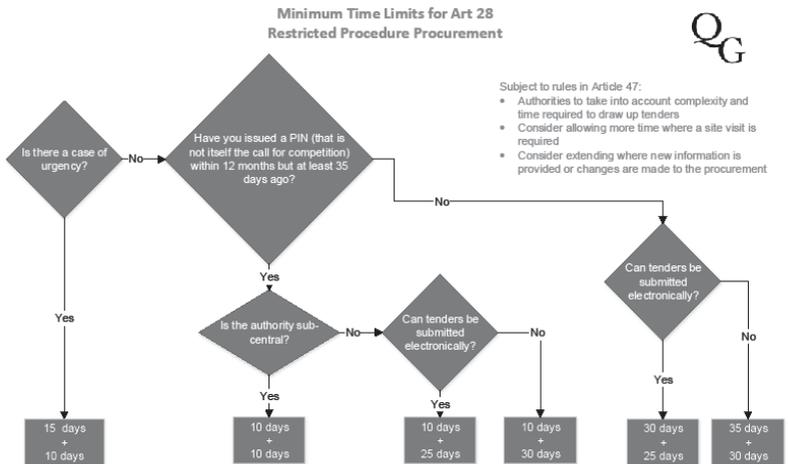
**Article 28 Restricted procedure**

Article 28 sets out rules relating to the restricted procedure.

Following a call for competition economic operators may submit a request to participate. After an assessment of the requests certain economic operators can be invited to submit the tender. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65.

As with Article 27, the majority of the text specifies the minimum time limits that apply. However, these time limits must be read in conjunction with Article 47 which prescribes further rules in relation to setting time limits.

The time limits can be summarised as follows:



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One new provision relates to sub-central contracting authorities which may set a time limit for receipt of tenderers by mutual agreement between the contracting authority and the selected candidates. Alternatively, in the absence of agreement, they may set a time limit as low as 10 days from the date on which the invitation to tender was sent. This is a significant reduction in the minimum time limits available to sub-central contracting authorities.

#### **Regulation 28**

This provision is the same as Article 28 in all material ways.

#### **Article 29 Competitive procedure with negotiation**

Article 29 sets out a new procedure for competitive procedure with negotiation which it is likely many Contracting Authorities will want to take advantage of. The procedure starts with a call for competition which is followed by a pre-qualification process. This is, in turn, followed by an initial tender and by a series of further tenders and negotiations leading to a final tender on which the award shall be made.

In the call for competition the contracting authority should identify the subject matter of the procurement by providing a description of their needs and the characteristics required of the supplies, works or services as well as specifying the contract award criteria. The description should also specify the minimum requirements to be met by all tenderers. The description and information is to 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.

The minimum time limit for receipt of request to participate should be 30 days. This is not subject to any reduction by the publication of a PIN.

Following an assessment of the information provided, contracting authorities should invite certain economic operators to submit an initial tender which will be the basis of subsequent negotiations. As with the restricted procedure, contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65.

The minimum time limit for receipt of initial tenders should be 30 days. However this can be reduced to 10 days provided a separate PIN has been published, which is not itself the call for competition, between 35 days and 12 months before the date of the contract notice. The time limit can also be reduced separately to 25 days if tenders can be submitted electronically. As with the restricted procedure sub-central contracting

authorities may agree a time limit for receipt of tenders with the selected candidates, or in the absence of agreement set a time of 10 days.

All such time limits are subject to Article 47.

If a contract notice or invitation to tender reserved the possibility of doing so, contracting authorities may award a contract on the basis of the initial tender without any further negotiation.

Otherwise contracting authorities must negotiate with tenderers the initial and all subsequent tenders submitted by them except for the final tender. The purpose of the negotiation is to improve the content of the tender.

Article 29(5) provides that during negotiations contracting authorities must ensure equal treatment of tenderers. They are not to provide information in a discriminatory manner which may give some tenderers an advantage over others. Contracting authorities should inform all tenderers in writing of any changes to technical specifications or other parts of the procurement documentation. Though, the minimum requirements which were originally identified cannot be altered.

Contracting authorities will, therefore, have to be careful in setting the minimum requirements to be met by all tenderers. If they are too low it is possible that the tenders submitted will not be satisfactory. Whereas if they are too high it is not possible to alter them at a later date if the criteria proves problematic or unachievable.

There are no minimum time limits for subsequent tenders. However contracting authorities must provide tenderers with sufficient time to modify and resubmit their tenders as appropriate.

The Article expressly refers Article 21 and provides that the contracting Authorities must not reveal to other participants confidential information communicated by a candidate or a tenderer without its agreement. The agreement is not to take the form of a general waiver; it shall be given with reference to the intended communication and specific information. Therefore it is not possible for a contracting authority to build into the invitation to tender a statement that the tenderer agrees that any part of its bid can be disclosed to other tenderers. If this concept is considered to be permissible it will need to be agreed individually with each of the tenderers.

The procedure and negotiation may be run in successive stages in order to reduce the number of tenderers being negotiated with. This reduction must be made by applying the award criteria specified in the contract notice and the contract notice must also

indicate that a contracting authority will use this option to reduce the number of tenderers.

Once a contracting authority is satisfied that the negotiation has run its course it must inform the remaining tenderers and set a common deadline to submit any new or revised final tender. Upon receipt a contracting authority must verify that the final tenders conform to the minimum requirements initially set, comply with Article 56(1), that the financial capacity and technical and professional ability requirements are met, and must assess the final tenders on the basis of the award criteria and award the contract in accordance with Articles 66-69.

As already stated it is likely that many contracting authorities will want to make use of this new procedure, however negotiation with tenderers is a skill in its own right and it will be important for contracting authorities to ensure that the individuals involved possess the necessary skills to do so successfully.

#### **Regulation 29**

This provision is the same as Article 29 in all material ways.

#### **Article 30 Competitive dialogue**

As with the competitive procedure with negotiation, competitive dialogue can only be used in situations permitted by Article 26(4).

The procedure is analogous with the competitive procedure with negotiation, except that it envisages a dialogue as opposed to a series of repeated tenders followed by negotiation.

The process commences with a call for competition with a minimum time limit for receipt of request to participate of 30 days. A contracting authority must invite certain of those candidates to participate in the dialogue and can limit the number in accordance with Article 65. The contract notice must define the needs and requirements and identify the chosen award criteria and an indicative timeframe. The award criteria must be on the basis of best price-quality ratio.

The dialogue has the aim of identifying and defining the means best suited to satisfy a contracting authority's needs and that they may discuss all aspects of the procurement with the participants during the dialogue. Contracting authorities must ensure equal treatment among the participants during the dialogue and must not provide information

in a discriminatory manner which may give some of the participants an advantage over others.

Article 21 is expressly referred to and a contracting authority must not reveal to other participants' solutions proposed or other confidential information communicated to it by a candidate without the candidate's agreement. However, that agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information. Therefore it will not be sufficient for a contracting authority to simply state in the procurement documents that any information provided to it can be disclosed to other participants.

So long as the contract notice states so, a contracting authority may conduct the dialogue in successive stages in order to reduce the number of solutions to be discussed during the dialogue by applying the award criteria.

When a contracting authority has identified a solution or solutions which are capable of meeting its needs, it shall declare that the dialogue has concluded and shall invite the remaining participants to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue.

The tenders may be clarified, specified and optimised; however, that process cannot involve changes to the essential aspects of the tender or to the needs and requirements set out in the contract notice where such a change is likely to distort competition or have a discriminatory effect.

A contracting authority must assess the tenders on the basis of the award criteria and may negotiate with the tenderer identified as having submitted the best price-quality ratio tender, provided this does not have the effect of materially modifying essential aspects of the tender or the needs and requirements set out in the contract notice and does not risk distorting competition or causing discrimination.

Lastly, Article 30(8) expressly provides that contracting authorities may award prizes or payments to the participants in the dialogue.

**Regulation 30**

This provision is the same as Article 30 in all material ways.

## Article 31 Innovation partnership

Article 26 provides that contracting authority may award an innovation partnership as regulated by the Directive. Unfortunately the Directive is far from clear as to exactly what an innovation partnership is, when it can be used or if it can be used widely.

Recital 49 states that:

*“Where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market, contracting authorities should have access to a specific procurement procedure in respect of contracts falling within the scope of this Directive. This specific procedure should allow Contracting Authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase. The innovation partnership should be based on the procedural rules that apply to the competitive procedure with negotiation and contracts should be awarded on the sole basis of the best price- quality ratio, which is most suitable for comparing tenders for innovative solutions. Whether in respect of very large projects or smaller innovative projects, the innovation partnership should be structured in such a way that it can provide the necessary ‘market-pull’, incentivising the development of an innovative solution without foreclosing the market.*

*Contracting authorities should therefore not use innovation partnerships in such a way as to prevent, restrict or distort competition. In certain cases, setting up innovation partnerships with several partners could contribute to avoiding such effects.”*

Innovation is also defined at Article 2 as follows:

*“‘innovation’ means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth;”*

It would therefore appear that innovation within the context of procurement pursuant to the Directive is referring to something which is new and has the purpose of helping to solve social challenges or further the Europe 2020 strategy for smart, sustainable and inclusive growth.

The procedure set out in Article 31 is to enable contracting authorities to establish long-term innovation partnerships for the development and subsequent purchase of innovative products, services or works. However contracting authorities should not use this new procedure in such a way as to prevent, restrict or distort competition.

The process itself is not dissimilar to a competitive procedure with negotiation.

A contracting authority should commence procedure by publishing a contract notice which identifies the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. The notice must indicate which elements of the description define the minimum requirements and must be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and to decide whether to request to participate in the procedure.

Although similar to the competitive procedure with negotiation, specific reference is made to arrangements for intellectual property rights and the fact that a contracting authority may decide to set up the innovation partnership with one partner or several partners conducting separate research and development activities.

The aim of the partnership is the development of an innovative product, service or works and the subsequent purchase of the result, provided they correspond to the performance levels and maximum costs agreed between a contracting authority and the participants. The partnership is structured in successive phases and shall set intermediate targets to be obtained and provide for payment in instalments. At each stage, based on the targets, a contracting authority may terminate the partnership.

A contracting authority must ensure that the structure of the partnership and particularly the duration and value of the phases, reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required to develop the solution, which is not yet available on the market. The estimated value of the supplies, services or works shall not be disproportionate in relation to the investment required for their development.

**Regulation 31**

This provision is the same as Article 31 in all material ways.

### **Article 32 Use of the negotiated procedure without prior publication**

The last procedure set out in Chapter I is the negotiated procedure without prior publication. As set out in Article 26 it can only be used in specific cases which are set out in paragraphs 2-5 of Article 32.

The situations where it can be used are:

- no tenders or no suitable tenders have been submitted in response to an open or a restricted procedure;
- where the works, supplies or services can be supplied only by a particular Economic Operator for reasons such as the protection of exclusive rights or the aim is the creation or acquisition of a unique work of art;
- where it is strictly necessary for reasons of extreme urgency brought about by unforeseeable events and the time limits for the open or restricted procedures cannot be complied with and the circumstances have not been brought about by the contracting authority;
- for supply contracts where:
  - the products are purely for research;
  - for additional deliveries where a change supplier would mean supplies having different technical characteristics which would create difficulties (the duration of such contracts shall not as a general rule exceed three years);
  - for supplies quoted on a commodity market;
  - for purchase on particularly advantageous terms from a supplier winding up its business or a liquidator;
- for service contracts when the contract follows a design contest in accordance with these Regulations;
- for works or services consisting in the repetition of similar works, or services in the conformity with the basic project for which the original contract was awarded and which indicates the extent of possible additional works services and the conditions on which they will be awarded (the value of the subsequent works services are to be included in calculating the value for the purposes of Article 4 for the base contract).

Interestingly the Directive does not provide any guidance as to how that negotiated procedure is to be conducted. Nevertheless the general requirement set out at Article 18 would apply and a contracting authority must treat economic operators equally and without discrimination and act in a transparent and proportionate manner.

#### **Regulation 32**

This provision is the same as Article 32 in all material ways.

## **CHAPTER II Techniques and instruments for electronic and aggregated procurement**

### **Article 33 Framework agreements**

The rules in relation to framework agreements are broadly similar to the previous Directive but some areas have been clarified.

The definition that a 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 remains.

There has been much debate as to whether or not, when establishing a framework agreement, it is necessary to agree on price. Certainly the definition set out in this Directive and the previous Directive would indicate that is the case; however, the Commission has previously stated that it was not necessary to agree price. Until such times as the courts provide clarity on this issue it must be assumed that is necessary to agree terms with regard to price.

The framework agreement shall not last more than four years except in exceptional circumstances due to the nature of the subject of the agreement.

The Article does clarify that only those contracting authorities that are clearly identified in the call for competition and those economic operators who are party to the framework agreement as concluded may make use of it.

The recitals do make it clear that the contracting authorities can be identified either by naming them or by some other means such as reference to a given category of contracting authorities so long as it is possible to easily and unequivocally identify what those contracting authorities actually are.

It should also be borne in mind that all contracting authorities have an obligation to act transparently; and therefore it could be argued that a framework agreement which names every possible contracting authority, both central and sub-central within a Member State would not be transparent as it is not possible for an economic operator to know whether or not any specific contracting authority is likely to use the framework or not.

Where a framework agreement is concluded with a single economic operator, contracts based on the agreement must be awarded in accordance with the terms specified in the framework agreement. However, a contracting authority may consult an economic operator, in writing, asking it to supplement its tender as necessary.

Where a framework agreement is concluded with more than one economic operator then there are three ways in which a contract can be awarded under that agreement.

Firstly if all the terms are set out in the framework agreement then it can be awarded without reopening competition by following the rules set out in the framework agreement.

Secondly, and again where the framework agreement sets out all of the terms, it is possible to award the contract by partly reopening the competition to those on the framework. The choice in relation to the extent of reopening the competition shall be made pursuant to objective criteria which will be set out in the framework agreement. The agreement must also specify which terms may be subject to the reopening of competition.

The third choice applies where all the terms are not set out in the framework agreement, then the award can be made through reopening competition amongst the economic operators who are party to the framework agreement.

Where there is to be a reopening of competition, or mini-competition, then the mini-competition is to be based on the same terms which applied for the award of the framework agreement itself and, where appropriate, more precisely formulated terms or other terms. The mini-competition must be with every economic operator capable of performing the contract and must allow sufficient time for the mini-tenders, taking into account the subject matter of the contract. Mini-tenders should be submitted in writing and will not be opened until the stipulated time for reply has expired. The mini-competition must be awarded 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.

Lastly, Recital 61 provides that where the framework relates to supplies or services which will be used by a natural person, then the framework may provide that the choice of which supplier will be awarded the contract may be made by on the basis of the needs or choice of the natural person. The example the Commission gave was a framework for orthopaedic shoes, an example which is hard to take issue with, but this provision may be open to abuse.

**Regulation 33**

This provision is the same as Article 33 in all material ways except that the provision in Recital 61 is excluded.

**Article 34 Dynamic purchasing systems**

Dynamic purchasing systems, which are not often used in the UK or Ireland, provide an efficient way to purchase items generally available on the market.

In order to set up a dynamic purchasing system, contracting authorities must follow restricted procedure rules and all candidates that satisfy the selection criteria must be admitted to the system and the numbers should not be limited.

Once the system has been established, contracting authorities must give any economic operator the opportunity to request to participate in the system so long as they meet the selection criteria.

Importantly there is no maximum period for the validity of dynamic purchasing system. The period must be specified in the contract notice, but that could be a significant duration. This can be justified on the basis that any economic operator can at any stage request to join the system. However, where the period of validity is changed or where the system is terminated then the Commission must be informed.

When a system is established the contracting authority must invite all those participants admitted to the system to submit a tender for any specific procurement and must award the contract to the tenderer that submitted the best tender on the basis of the award criteria. It is also necessary for a contracting authority to publish a call for competition for each contract awarded.

In some ways the system is analogous to having a select list of pre-approved suppliers albeit that a new supplier must be able to join the system and the system must be fully electronic.

It is not clear why it is underused in the UK and Ireland since it would appear to be an efficient method to procure commonly used services, supplies or works.

**Regulation 34**

This provision is the same as Article 34 in all material ways.

## **Article 35    Electronic auctions**

An electronic auction is not a procedure in its own right. It is instead a process that can be used in an open, restricted or competitive procedure with negotiation. If a contracting authority intends to use an electronic auction it must say so in the contract notice.

Article 35 provides that certain public service contracts and certain public works contracts, having as their subject matter intellectual performances such as design which cannot be ranked using automatic evaluation methods, shall not be the object of electronic auctions.

The auction itself must either be based solely on price or on a combination of price and on new values of the features of the tenders, as indicated in the procurement documents.

Where an electronic auction is held a contracting authority must first make a full initial evaluation of the tenders in accordance with the award criteria and make the outcome of the evaluation available to the individual tenderers. The invitation to take part in the auction, which must be sent to any tenderer who submitted an admissible tender and who has not been excluded for some other reason, must set out the mathematical formula to be used in the electronic auction. This would mean that where criteria have previously been set out in order of importance, or with weighting being given in a range, the precise weighting must now be given.

The auction cannot commence until at least two days after the invitation to take part in the auction has been sent and will end either on the previously indicated date and time or when no new bids, which meet any requirements concerning minimum differences, are made within an explicit time or when a previously indicated number of phases have been completed.

Once an auction is closed a contracting authority must award the contract in accordance with Article 67 on the basis of the results of the auction.

### **Regulation 35**

This provision is the same as Article 35 in all material ways.

## **Article 36 Electronic catalogues**

Article 36 sets out the rules which are applicable if a contracting authority wishes to use an electronic catalogue. An electronic catalogue may be nothing more than a spreadsheet in a certain defined format which tenderers must complete and return as part of their tender. However it is more commonly used in relation to supplier's own electronic catalogues that are often linked to their supply chain catalogue(s). They tend to offer enriched content such as stock levels, product specification, etc. They can form the basis for more advanced e-business including electronic ordering, dispatch and stock control. The biggest area for a contracting authority to watch for is interoperability. It is clearly essential that the buyer's systems fully integrate with each and every supplier's systems. This is not an easy task and some of the standardisation is still not mature.

A contracting authority may award a contract under a framework agreement or a dynamic purchasing agreement by notifying the participants that they intend to collect from the electronic catalogue the information needed to constitute the tenderers. In that case, the contracting authority must present the collected information to the tenderers to give them the opportunity to contest or confirm that the tender so constituted does not contain any material errors.

### **Regulation 36**

This provision is the same as Article 36 in all material ways.

## **Article 37 Centralised purchasing activities and central purchasing bodies**

It should be noted that the definition of a central purchasing body requires that the body must be a contracting authority and not a private company.

Article 37 starts off with the relatively uncontentious statement that contracting authorities may acquire supplies and/or services from a central purchasing body offering centralised purchasing activities. Article 37 then provides that a contracting authority may acquire works, supplies and services using a contract, a dynamic purchasing system or a framework agreement, awarded by a central purchasing body.

Where a contracting authority does either of the former, then it fulfils its obligations under the Directive; however it will remain liable itself for fulfilling the obligations in respect of the activities that it conducts itself, such as the awarding of the contract under the dynamic purchasing system, the reopening of competition or making a direct call-off under a framework agreement.

Lastly, when awarding the public service contract for the provision of centralised purchasing activities to a central purchasing body, a contracting authority may ignore the procedures set out in this Directive.

**Regulation 37**

This provision is the same as Article 37 in all material ways.

**Article 38 Occasional joint procurement**

Two or more contracting authorities may agree to perform a procurement process jointly. When they do so, and the procedure is carried out jointly in the name of, and on behalf of all the contracting authorities concerned, they shall be jointly responsible for fulfilling their obligations; even if one contracting authority manages the procedure on behalf of all.

Where parts of the procedure are carried out jointly, and parts carried out individually, a contracting authority will have sole responsibility for fulfilling its obligations in respect of the parts carried out individually.

**Regulation 38**

This provision is the same as Article 38 in all material ways.

**Article 39 Procurement involving contracting authorities from different Member States**

Article 39 is welcome in expressly stating that contracting authorities from different Member States may act jointly and also a contracting authority from one Member State may use a central purchasing body located in another Member State.

Where a central purchasing body is used then the national law of the central purchasing body will apply and will also apply to the award of a contract under a dynamic purchasing system or framework which has been established by that central purchasing body.

Where contracting authorities from different Member States collaborate and jointly award contracts, frameworks or dynamic purchasing systems, they agree what the responsibilities of the different contracting authorities are and the relevant applicable

national provisions. That information must be made plain in the procurement documents.

Contracting authorities should bear in mind that they may not use this right to jointly procure with contracting authorities from other Member States for the purpose of avoiding the application of mandatory public law provisions which they are subject to in their own Member State. Therefore it is not possible for a contracting authority in the UK to collaborate with a contracting authority from another Member State which has more relaxed public law obligations.

Lastly, the Article sets out certain provisions in relation to contracting authorities from different Member States establishing a joint entity such as the European Grouping of Territorial Cooperation.

**Regulation 39**

This provision is the same as Article 39 in all material ways.

## **CHAPTER III Conduct of Procedure**

### **Section 1 Preparation**

#### **Article 40 Preliminary market consultations**

Article 40 is a welcome addition since it specifies that a contracting authority may conduct market consultations with a view to preparing for the procurement and to inform economic operators of its procurement plans and requirements. Contracting authorities are often nervous of doing this feeling that in some way they would be acting unlawfully.

Though, whereas a contracting authority can accept advice from independent experts or market participants and use that in the procurement procedure, they must ensure that any such advice does not have the effects of distorting competition or violating the principles of non-discrimination or transparency. Therefore a contracting authority should be careful in asking market participants for a sample specification, since an operator providing one could distort competition in their favour.

#### **Regulation 40**

This provision is the same as Article 40 in all material ways.

#### **Article 41 Prior involvement of candidates or tenderers**

Article 41 continues from Article 40 providing that where a candidate or tenderer has advised a contracting authority or been involved in the preparation of a procurement procedure the contracting authority must take steps to ensure competition is not distorted.

Such measures should include the communication to other candidates and tenderers of the relevant information exchanged in the early involvement and also will include the fixing of adequate time limits for the receipt of tenders. Clearly an economic operator that has been involved in the preparation for the procurement could have a head start on others unless steps are taken to level the playing field.

A candidate or tenderer who has been involved in the preparation of a procurement process should only be excluded from the procedure where there are no other means to ensure compliance with the principle of equal treatment. Before doing so they must be advised of issues so that they have an opportunity to prove that their involvement would not distort competition.

Taken together Article 40 and 41 should provide a degree of comfort to for all to take part in procurement preparation and planning to a greater degree than previously.

**Regulation 41**

This provision is the same as Article 41 in all material ways.

**Article 42 Technical specifications**

The rules relating to technical specifications are often not well adhered to by contracting authorities, particularly in relation to the specification of works. This may be because it is unlikely that operators will challenge a procurement process at such an early stage and by the time they discover they have not succeeded with the procurement they are beyond the time limit for bringing an action. That said the rules are clearly prescribed and should be followed.

A technical specification is to identify the characteristics of the required works, services or supplies and may also refer to specific processes or methods of production or other stage of its life cycle, provided that those characteristics are linked to the subject matter of the contract and proportionate to its value and objectives. Technical specifications may also specify whether a transfer of intellectual property rights would be required. A contracting authority procuring something that is likely to be re-procured at a later date, such as a service provision, should carefully think whether or not intellectual property rights might need to be transferred to a new service provider at a later date.

Where a procurement process is intended for use by a natural person the technical specification should be drawn up to take into account accessibility criteria or persons with disabilities.

Any specification is to afford equal access for economic operators and must not have the effect of creating unjustified obstacles to the opening up of competition. Technical specifications should be formulated in one of the following ways:

- in terms of performance or functional requirements including environmental characteristics;
- by reference to technical specifications, in order of preference:
  - national standards transposing European standards;
  - European technical assessment;
  - common technical specifications;
  - international standards;

- other reference system is established by European standardisation bodies;
  - national standards, or equivalent;
  - national technical approvals, or equivalent;
  - national technical specifications, or equivalent;
- performance or functional requirements with reference to technical specifications;
- by a combination of performance and functional requirements and technical specifications.

Technical specifications should not refer to a specific brand, source or any particular characteristics of a specific economic operator so as to have the effect of favouring or eliminating certain economic operators or products. Such a reference will be permitted on an exceptional basis where a sufficiently precise and intelligible description is not possible without such reference. If the reference is permitted it should be followed by the words 'or equivalent'.

Economic Operators may use their tender to prove, by any appropriate means (including those referred to in Article 44), that their tender is compliant with the performance or functional requirements that have been set.

#### **Regulation 42**

Article 42 is wholly transposed into the Regulations at Regulation 42. However, the Regulations also introduce a number of other provisions. In contrast to the majority of this statutory instrument and the transposition of EU Legislation generally, the Regulations are quite prescriptive in this area. Whilst the Directive already specifies how a technical specification should be formulated, the Regulations provide that the technical specifications should define any characteristics of the subject matter of a public contract. The Regulations go on to include examples of what those characteristics may be. These include levels of environmental and climate performance, safety or dimensions and rules relating to design and costing. An exhaustive list is provided in Regulation 42(4).

### **Article 43    Labels**

Article 43 contains a new provision in relation to labels. If a contracting authority intends to purchase works, supplies or services with specific environmental, social or other characteristics it may require a specific label as means of proof, provided that:

- the label requirements only contain criteria which are linked to the subject matter of the contract, and are appropriate to define the characteristics;
- the label requirements are based on objectively verifiable and non-discriminatory criteria;
- the labels are established in an open and transparent procedure in which all stakeholders may participate;
- the labels are accessible to all interested parties; and
- the label requirements are set by a third party over whom an economic operator applying for the label cannot exercise a decisive influence.

A contracting authority may also provide that not all of the requirements of the label need to be met in which case they shall indicate which of the label requirements are to be met. A contracting authority must also accept any other label that confirms that the works, supplies or services meet the equivalent label requirements. Where an operator can demonstrate no possibility of obtaining a specific label or an equivalent within the time limits for reasons not attributable to it, they must accept other appropriate means of proof which may include a technical dossier from the manufacturer which shows that it fulfils the requirements of the label.

Where a label would otherwise fulfil all of the requirements but also sets out requirements not linked to the subject matter of the contract, a contracting authority must not require the label as such, but may define technical specifications by reference to the detailed specification of the label or the parts of it which are linked to the subject matter of the contract and are appropriate.

#### **Regulation 43**

This provision is the same as Article 43 in all material ways.

#### **Article 44 Test reports, certification and other means of proof**

Contracting authorities are permitted to ask for test reports from a conformity assessment body or a certificate issued by such body to prove compliance with the technical specifications. Contracting authorities may, in doing so, identify a specific conformity assessment body, but must also accept certificates from equivalent bodies.

Where an economic operator has no access to the certificates or test reports required and no possibility of obtaining them within the relevant time limits, provided the lack of access is not attributable to the economic operator, the contracting authority must accept other appropriate means of proof, such as a technical dossier from a manufacturer.

#### **Regulation 44**

This provision is the same as Article 44 in all material ways.

#### **Article 45 Variants**

Contracting authorities may authorise or require tenders to submit variants, in which case they must indicate so in the call for competition. Variants should not be authorised without such an indication and all variants must be linked to the subject matter of the Contract.

Where variants are permitted, contracting authorities must set out in the procurement documents the minimum requirements which need to be met and also whether variants may be submitted only where a tender has submitted a non-variant tender, or if they will accept variants without a non-variant tender.

Contracting authorities are to ensure that the chosen award criteria can be applied to variants meeting the minimum requirements. This is not easy to do. Often a contracting authority who permits variants will not know the nature of the variant bids and it is therefore difficult to select appropriate award criteria and even more difficult to set the weighting. For this reason it is common, if not sensible, to take the opportunity to specify a range of weightings where variants are permitted.

Only variants that meet the minimum requirements can be taken into account by a contracting authority.

**Regulation 45**

This provision is the same as Article 45 in all material ways.

**Article 46 Division of contracts into lots**

Paragraph 1 of Article 46 provides that contracting authorities may award contracts in the form of separate lots and may in such cases determine the size and subject matter of such lots. If contracting authorities decide not to award separate lots, then they should provide the main reasons for their decision, in either the procurement documents or the Article 84 report.

Where a contracting authority feels there are justifiable reasons for not dividing the contract into lots the reasoning should be recorded. This represents a subtle shift. The Directive does not make use of lots mandatory, but is forcing contracting authorities to identify reasons why they have chosen not to do so.

Contracting authorities can determine whether tenders from a specific economic operator may be submitted for one, several or all of the lots. Even where an economic operator may submit a tender for all the lots, the contracting authority may limit the number of lots that may be awarded to that individual tenderer, provided the maximum number is stated in the contract notice. Contracting authorities should also identify in the procurement documents objective and non-discriminatory criteria or rules they are going to apply to determine which lots would be awarded to an economic operator if the number they would otherwise have won exceeds the maximum number permitted.

Contracting authorities have in the past been reluctant to limit the number of lots which a tenderer would be permitted to tender for and it is welcome that this is clarified in the Directive.

Paragraph 3 provides that in the implementing regulations Member States may provide that where more than one lot is to be awarded to the same economic operator, the contracting authority may award a contract by combining several or all of those lots together, provided that possibility is specified in the Contract Notice.

Lastly, Paragraph 4 provides that Member States may, in the implementing domestic legislation, make it obligatory to award contracts in the form of separate lots.

**Regulation 46**

This provision is the same as Article 46 in all material ways.

The possibility of making it mandatory to split a contract into lots was not adopted in the UK but the option to have one contract for more than one lot was.

**Article 47     Setting time limits**

Article 47, Paragraph 1 provides that without prejudice to the minimum time limits set in Articles 27-31, contracting authorities shall take into account the complexity of the contract and the time required to draw up tenders when fixing the time limits for receipt of tenders and request to participate.

Therefore, just because Article 27 states that tenders can be requested to be returned within 15 days, if the complexity makes this time limit unrealistic then it must be extended.

When a site visit or on-the-spot inspection is required prior to the submission of a tender then a longer time limit than those set out in Articles 27-31 should be allowed. It should be noted that in the majority of construction contracts there is a clause stating that the contractor has visited the site and is deemed to have knowledge about the site conditions which would be obtained on a site visit. Therefore, when any such contract is being procured, the contracting authority should permit longer time limits than those specified in Articles 27-31.

Paragraph 3 states that the time limit should be extended where additional information is supplied within six days of the time for receipt of tenders (or in the case of an accelerated procedure four days) or where significant changes are made to the procurement documents. The length of the extension must be proportionate to the importance of the information or change.

However, if the additional information has not been requested in good time or its importance is insignificant, contracting authorities are not required to extend time.

**Regulation 47**

This provision is the same as Article 47 in all material ways.

## **Section 2 Publication and Transparency**

### **Article 48 Prior information notices**

Contracting authorities may, pursuant to Article 48, make known their intentions of planned procurements with the publication of a Prior Information Notice (PIN). The provision of a PIN is not mandatory unless a contracting authority wants to make use of the reduced time limits under Article 27 and 28, in which case it must be published at least 35 days prior to the contract notice but no more than 12 months before it. Therefore, if a contracting authority is under time pressure in relation to procurement, one of the first actions it should take is to publish a PIN.

The information the PIN must contain is set out at Annex V Part B Section 1 and it is to be published either in the OJEU or on their buyer profiles, in which case an OJEU Notice must be provided to state that it has been published. An important addition is included at Paragraph 2 which provides that in competitive procedures with negotiation and in restricted procedures sub-central contracting authorities may use a PIN as a call for competition provided the notice:

- Refers specifically to the supplies, works or services that will be the subject of the contract to be awarded;
- Indicates the contract will be awarded without a further call for competition and invites interested economic operators to express their interest; and
- Contains the information set out at Annex V Part B Section 1 and Section 2.

Should a sub-central contracting authority take this opportunity they should invite the economic operator to confirm their interest in writing by means of an invitation to confirm interest and conformity with Article 54.

Lastly, note that one of the pieces of information that has to be provided in the notice is the internet address of where the procurement documents can be obtained. The procurement documents include the Invitation To Tender and conditions of contract. Therefore it would appear that having these documents drafted is a pre-requisite to issuing a PIN, which does seem both surprising and difficult to manage.

#### **Regulation 48**

This provision is the same as Article 48 in all material ways.

## **Article 49 Contract notices**

The general means for calling for competition should be a contract notice which should contain the information identified in Annex V Part C and should be published in accordance with Article 51.

The only exception to this is a negotiated procedure without publication and where a sub-central contracting authority uses a PIN as a call for competition.

### **Regulation 49**

This provision is the same as Article 49 in all material ways.

## **Article 50 Contract award notices**

Within 30 days of the conclusion of a contract or a framework agreement contracting authorities must send a contract award notice specifying the results of the procurement procedure. It should contain the information referred to at Annex V Part D and should be published in accordance with Article 51.

Where for the contract the call for competition is in the form of a PIN and the contracting authority has decided not to award any further contracts during the period covered by the PIN, the contract award notice should specify as much.

Contracting authorities do not need to send a contract award notice in respect of contracts awarded pursuant to a framework agreement. However, Member States may provide in the implementing regulations that contract authorities should publish notices for the results of the procurement of contracts based on a framework agreement on a quarterly basis.

Contracting authorities must send a contract award notice for any dynamic purchasing system within 30 days after the award of each contract. However, they may group such notices on a quarterly basis in which case the notice(s) are to be sent within 30 days of the end of each quarter.

Paragraph 4 provides that certain information on the contract award or the conclusion of a framework agreement may be withheld where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interest of a particular economic operator, public or private, or might prejudice fair competition between economic operators. Clearly, this will be a fact

driven exercise specific to each procurement process. However, it could come into play when there is a series of very closely related procurements processes taking place and the release of information in relation to one could affect the following processes.

**Regulation 50**

This provision is the same as Article 50 in all material ways.

The Regulations do not require the publication of a contract award notice for the award of a contract under a framework.

**Article 51 Form and manner of publication of notices**

Prior information, contract and contract award notices must be transmitted by electronic means to the publications office of the European Union in accordance with Annex VIII and contain the information set out at Annex V. Notices must be published not later than the five days after they are sent. Contracting authorities must be able to supply proof of the date on which the notices are dispatched. The publications office should give the contracting authority confirmation of the receipt of the notice and of the publication of the notice together with the date of publication, which will constitute proof of publication.

Contracting authorities may also publish notices for contracts that are not subject to the publication requirements of the Directive. This is a useful provision where a contracting authority genuinely believes that the Directive does not require publication of a contract notice but accepts that there is some element of doubt or risk in relation to this. In that situation, the safest course of action for a contracting authority is likely to be sending a notice in accordance with Paragraph 6 of Article 51.

**Regulation 51**

This provision is the same as Article 51 in all material ways.

**Article 52 Publication at national level**

Prior information, contract and contract award notices and information they contain should not be published at a national level before publication in the OJEU. That said, a contracting authority may publish the information at a national level if they have not been notified of publication by the publications office within 48 hours after confirmation of receipt of the notice.

Any notice published at a national level must not contain further information other than the official notice and should indicate the date of dispatch of the notice to the publications office.

#### **Regulation 52**

Article 52 is wholly transposed into the Regulations at Regulation 52(1)-(6). The Regulations add another two provisions which relate to the publication of notices on the internet via a buyer profile. This is a discretionary activity of any contracting authority and not mandatory. Based on the information that the suggested buyer profile may include, such as information on on-going invitations to tender, contracts concluded, useful general information, it appears that the purpose of this Regulation is to encourage SME involvement.

#### **Article 53    Electronic availability of procurement documents**

Contracting authorities should offer unrestricted and full direct access by electronic means, free of charge, to the procurement documents from the date of publication of a notice and the text of the notice is to indicate the internet address at which the procurement documents are accessible. Note that this applies to all notices including the PIN so a contracting authority must have all the procurement documents drafted before issuing any notice. The definition of procurement documents includes all documents for the competition such as an Invitation to Tender and conditions of contract.

Where this is not possible for reasons set out at Paragraph 2 of Article 22(1), which would be exceptional, contracting authorities may indicate that the documents will be transmitted by alternative means and the time limit for submission of tenders should be extended by five days.

Lastly, Paragraph 2 provides that as long as it has been requested in good time, contracting authorities should supply to all tenderers additional information relating to the specifications and any supporting documents not later than six days before the time limit fixed for receipt of tenders, or four days in relation to an accelerated procedure.

#### **Regulation 53**

This provision is the same as Article 53 in all material ways.

## **Article 54     Invitations to candidates**

In restricted procedures, competitive dialogue procedures, innovation partnerships and competitive procedures with negotiation contracting authorities should simultaneously invite the selected candidates to submit their tenders or take part in the dialogue. Such invitations should include a reference to the electronic address at which the procurement documents have been made available and the invitation is to contain the information identified in Annex IX.

### **Regulation 54**

Article 54 of the Directive is wholly transposed into the Regulations at Regulation 54(1)-(3).

Additionally the Regulations include a number of provisions that create a requirement for contracting authorities to make available information relating to the contract as soon as possible. If the information includes such things as the type of procedure the date on which the delivery of supplies with the execution of works or services is to commence or terminate and the form of the contract which is the subject of the invitation to tender. For an exhaustive list please see Regulations 54(4) and 54(6). It appears that the purpose of these additional provisions is to ensure better engagement by SMEs.

## **Article 55     Informing candidates and tenderers**

As soon as a decision is reached concerning the conclusion of a framework agreement or the award of a contract, or admittance to a dynamic purchasing system a contracting authority should inform each economic operator of the decision including the grounds for any decision not to proceed with the procurement.

On request from the candidate or tenderer a contracting authority should, as quickly as possible and in any event within 15 days of the request, inform:

- Any unsuccessful candidate of the reasons for rejection of its request to participate;
- Any unsuccessful tenderer of the reasons for the rejection of its tender including, as required the reasons for its decision of non-equivalence or failure to meet the performance or functional requirements;
- 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 parties to the framework agreement;

- Any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

Contracting authorities may decide to withhold certain elements of the information set out above where release of the information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice legitimate commercial interest of a particular economic operator, whether public or private, or might prejudice fair competition.

It should be noted that this Directive does not replace Directive 2007/66/EC - the Remedies Directive. That Directive requires that any communication of the award decision shall be accompanied by a summary of the relevant reasons and a precise statement of the exact standstill period applicable. Therefore, it is submitted that the information which is required by Article 55(2) has to be automatically provided and a contracting authority cannot simply await a request.

#### **Regulation 55**

This provision is the same as Article 55 in all material ways. Note that Regulation 86, which has its roots in Directive 2007/66, effectively requires the automatic provision of much of the information dealt with in Regulation 55.

### **Section 3 Choice of participants and award of contracts**

The general scope of Section 3 is as follows:

Subsection 1: Sets out grounds for excluding a tenderer and for not selecting a tenderer or candidate because of suitability to pursue the professional activity or because of its economic and financial standing or because of its technical and professional ability.

Subsection 2: Provides for a reduction in the number of candidates, tenders and solutions.

Subsection 3: Deals with the award of the contract.

### **Article 56 General principles**

Article 56 establishes the general principles in relation to the choice of participants and the award of contracts.

It provides that contracts should be awarded on the basis of the criteria laid down in accordance with Articles 67-69, provided that a contracting authority has verified, in accordance with Articles 59-61, that all of the following are fulfilled:

- The tender complies with the requirements, conditions and criteria set out in the contract notice taking into account, where applicable, Article 45 (variants); and
- The tender comes from a tenderer that is not excluded in accordance with Article 57 and it meets the selection criteria set out in accordance with Article 58 and, where applicable, the rules or criteria referred to in Article 65.

Contracting authorities may decide not to award a contract to a tender which is the most economically advantageous where the tender does not comply with the obligations referred to in Article 18(2), compliance with obligations in the fields of environmental, social and labour law.

Article 56(2) provides that in open procedures contracting authorities may examine tenders before verifying the absence of grounds for exclusion and the fulfilment of section criteria in accordance with Articles 57-64. Where they do so, they shall carry out the verification in an impartial and transparent manner so that no contract is awarded to a tenderer that should have been excluded or does meet the selection criteria.

This is an important provision in an attempt to make procurement in open procedures more efficient. Essentially a contracting authority can immediately upon opening the tenders move to the award criteria and determine the most economically advantageous tenderer. Having done so it will then verify that the tenderer should not have been excluded and that it meets the selection criteria, in which case the contracting authority can proceed to award the contract without having to check for grounds of exclusion and selection criteria for all the other tenderers.

If, on the other hand, the tenderer is excluded or fails to meet the selection criteria the contracting authority should move onto the next most economically advantageous tender.

One word of warning is that a similar procedure has been in place in Ireland for some time brought about by Circular 10/10 and many commentators are of the opinion that it does not make the process more efficient as tenderers will often overlook the exclusion and selection criteria and proceed to submit a tender even though, if they had considered it, they would realise that they would be excluded or not meet the selection criteria.

Section 56(3) attempts to provide some clarification in relation to clarifying tenders. It provides that where information or documentation appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may ask the economic operator concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit. However, a contracting authority should ensure that such requests are made in full compliance with the principles of equal treatment and transparency.

Although this paragraph is to be welcomed it does not provide as much clarity as could be hoped for. Contracting authorities will, therefore, have to rely on existing case law to determine whether or not seeking the specific clarification from a tenderer would comply with the principles of equal treatment and transparency or not.

**Regulation 56**

This provision is the same as Article 56 in all material ways.

## **Subsection 1: Criteria for Qualitative Selection**

### **Article 57 Exclusion grounds**

As with the previous Directives there are, so called, mandatory and discretionary grounds of exclusion.

Paragraph 1 provides that contracting authorities should exclude economic operators from participation in a procurement process where they have been subject of a conviction by final judgement for one of the following reasons:

- Participation in a criminal organisation;
- Corruption;
- Fraud;
- Terrorist Offences or offences linked to terrorist activities;
- Money laundering or terrorist financing; or
- Child labour and other forms of trafficking in human beings.

A contracting authority can determine this either by verification in accordance with Articles 59, 60 and 61 or if they already possess the documents.

The obligation to exclude for the above reasons shall also apply where the person convicted by final judgement is a member of the administrative, management or supervisory body of the economic operator or have powers of representation, decision or control therein. Therefore, if a director of a company has been found guilty of fraud then the company itself should be excluded.

Paragraph 2 sets out that economic operators shall be excluded if they are in breach of their obligations in relation to the payment of taxes or social security contributions, where this has been established by a judicial or administrative decision having final and binding effect. A contracting authority may also exclude an economic operator where a 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.

However, the exclusion for payment of taxes or social security contributions shall no longer apply if 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 together with any interest or fines.

In Paragraph 3, Member States may provide in their implementing regulations for a derogation from the mandatory exclusions set out above, on an exceptional basis for reasons relating to the public interest such as public health or protection of the environment. Equally, the national regulations may provide for a derogation from the exclusion due to non-payment of tax or social security contributions where the exclusion would be clearly disproportionate where the amount unpaid is minor and the economic operator has not yet had an opportunity to make payment of it.

The discretionary grounds are then set out at Paragraph 4 which provides that a contracting authority may exclude any economic operator where any of the following exists:

- a. Violation of the obligations in relation to environmental, social and labour law;
- b. Bankruptcy or insolvency;
- c. Grave professional misconduct which renders its integrity questionable;
- d. Entering into agreements with other economic operators aimed at distorting competition;
- e. Where there is a conflict of interest which cannot be remedied;
- f. A distortion of competition from prior involvement of the economic operator which cannot be remedied;
- g. The economic operator had 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 lead to early termination of that prior contract, damages or other comparable sanctions;
- h. Serious misrepresentation in supplying information in the procurement; or
- i. The economic operator has undertaken to unduly influence the process or obtain confidential information or has negligently provided misleading information.

However, the national Regulations may require or provide the possibility that a contracting authority will not exclude an economic operator on the grounds of bankruptcy or insolvency if it has established that the economic operator will be able to perform the contract in any event.

Paragraph 5 provides that a contracting authority should at any time during the procedure exclude an economic operator where one of the mandatory grounds comes

in to existence. Further, a contracting authority may at any time exclude an economic operator when one of the discretionary grounds applies. Therefore, the mandatory and discretionary grounds for exclusion are not just applied at the commencement of the procurement process but at all stages of the procurement up to award. It is suggested that in any procurement process, particularly one that takes a considerable length of time, the grounds for exclusion are checked again immediately prior to the award of the contract.

Paragraph 6 deals with what is known as self-cleansing. It provides that an economic operator who is in one of the situations which would lead to mandatory or discretionary exclusion may provide evidence that it has taken measures sufficient to demonstrate its reliability despite the existence of the ground. If that evidence is considered sufficient the economic operator shall not be excluded.

For this purpose the economic operator can prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with any investigation and is taking concrete technical, organisational and personal measures that are appropriate to prevent further criminal offences or misconduct.

In making the assessment a contracting authority should consider the measures taken by an economic operator and also the gravity of the particular circumstances into account. Where a contracting authority believes that the measures are insufficient then the economic operator is entitled to receive a statement of the reasons for that decision.

Where an economic operator has been excluded by final judgement from participating in procurements it shall not be entitled to make use of the self-cleansing paragraph during the period of exclusion.

Paragraph 7 requires that the implementing legislation shall specify the implementing conditions of the Article. In particular, the legislation is to determine the maximum period of exclusion if no self-cleansing measures are taken. The legislation must provide that where the period of exclusion has not been set by final judgement, the period shall not exceed five years from the date of conviction by final judgement in relation to the first set of mandatory grounds for exclusion and three years for the grounds for discretionary exclusion.

This is one of the Articles where the Member States choice of means of implementation will be important and influential.

### **Regulation 57**

Article 57 of the Directive is largely transposed as Regulation 57.

There are a number of discrepancies. The Regulations do not make provision, as permitted at the final paragraph of Article 57(4), for the non-exclusion of an economic operator if the contracting authority establishes that the economic operator can perform the contract despite being bankrupt or insolvent.

The durations for exclusions is codified as Regulation 57(11) – (12). It is 5 years for the mandatory grounds and 3 years for the discretionary grounds.

### **Article 58 Selection criteria**

Article 58 sets out the rules in relation to selection criteria and has been significantly modified. Firstly, the selection criteria may relate to:

- a. Suitability to pursue the professional activity;
- b. Economic and financial standing; and
- c. Technical and professional ability.

The Article sets out certain rules in relation to any selection criteria. The first rule is that the criteria referred to in Article 58 can only be used as requirements for participation. Therefore the same criteria cannot be used at the award stage.

The second rule is that contracting authorities must limit any requirements to those which are appropriate to ensure that a candidate or tenderer has the legal and professional capacities and the technical and professional abilities to perform the contract.

Thirdly, all requirements shall be related to and proportionate to the subject matter of the contract.

Essentially what a contracting authority is doing in applying selection criteria is determining whether or not a potential tenderer is capable and able of performing the contract.

### **Suitability to pursue the professional activity**

A contracting authority may require that economic operators be enrolled in one of the professional or trade registers kept in their Member State as described in Annex XI. In

the United Kingdom this is limited to providing a certificate from the Register of Companies stating that the economic operator is certified as incorporated or registered, or where he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in a specific place under a given business name.

In Ireland this is limited to a certificate from the Register of Companies or Register of Friendly Societies, or where he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name.

In relation to a procurement processes for services and in so far as economic operators have to process 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, the contracting authority may require them to prove that they hold such authorisation or membership.

### **Economic and Financial Standing**

Contracting authorities may impose requirements to ensure that economic operators possess the necessary economic and financial capacity to perform a contract. In particular contracting authorities may require that economic operators have a certain minimum yearly turnover or a certain minimum turnover in the area covered by the contract. In addition to this contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. Contracting authorities may also require an appropriate level of professional risk indemnity insurance.

Where a minimum yearly turnover is required, it must not exceed two times the estimated contract value, except in duly justified cases such as relating to the special risks attached to the nature of the works services or supplies. If such a duly justified case exists, the contracting authority must indicate the main reasons for this in the procurement documents or the Article 84 Report.

In relation to any test which is applied, the contracting authority must specify the test in the contract documents so that the methods and criteria are transparent, objective and non-discriminatory.

Where a contract is divided into lots different tests may apply to each individual lot the contracting authority may set a minimum yearly turnover that economic operators are required to have in the event that the successful tenderer is to be awarded several lots to be executed at the same time.

In relation to contracts ordered under a framework agreement, following a re-opening of competition, the turnover requirement shall be calculated on the basis of the expected maximum size of the specific contracts that will be performed at the same time.

### **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 standard.

In particular, they may require that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

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.

In procurements for works, services or supplies which require the siting or installation of work the professional ability of economic operators may be evaluated with regard to their skills, efficiency, experience and reliability.

Lastly, Paragraph 5 provides that contracting authorities shall indicate their required conditions for participation which may be expressed as minimum levels of ability, together with appropriate means of proof, in the contract notice or the invitation to confirm interest.

#### **Regulation 58**

This provision is the same as Article 58 in all material ways.

### **Article 59 European Single Procurement Document**

Article 59 introduces a new provision known as the European Single Procurement Document or 'ESPN'.

Paragraph 1 provides that contracting authorities must accept the ESPD as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the economic operator fulfils the following conditions:

- a. It is not in one of the situations referred to in Article 57 – mandatory and discretionary grounds for exclusion;
- b. It meets the relevant selection criteria that have been set out pursuant to Article 58;
- c. Where applicable fulfils the objective rules and criteria that have been set out pursuant to Article 65.

The ESPD is an updated self-declaration from an economic operator. Where the economic operator relies on the capacities of others, the ESPD shall also contain the information relevant in respect of the others.

The ESPD must also 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 to provide those supporting documents.

Where the contracting authority can obtain the supporting documents directly by accessing a national database that is available free of charge then the economic operator does not need to provide the documents so long as the ESPD contains the information required to obtain the information. Equally economic operators will not be required to provide the supporting documents where the contracting authority already has them.

The ESPD should be drawn up on the basis of a standard form which the Commission is to establish and it shall be in electronic format. A contracting authority is permitted to ask tenders or candidates at any stage of the procurement for the necessary documents and must before awarding a contract require the tenderer to submit the up-to-date supporting documents.

It should be borne in mind however that the ESPD will only exist to act as preliminary evidence in replacement of certificates issued by public authorities or third parties. Therefore, it would cover for example insurance certificates and accounts or certificates from the Registry of Companies but would not cover a list of available plant and equipment required to demonstrate technical and professional ability.

### **Regulation 59**

This provision is the same as Article 59 in all material ways.

### **Article 60 Means of proof**

Article 60 sets out the forms of proof which contracting authorities may seek as evidence for the absence of grounds for exclusion as referred to in Article 57 and the fulfilment of the selection criteria in accordance with Article 58. Contracting authorities should not require means of proof other than those referred to in Article 60 and in Article 62, relating to quality assurance standards and the environmental management standards. The Article itself refers to Annex XII which lists out the means of proof in relation to economic and financial standing and technical ability.

Under the previous Directive the list was not an exhaustive list because reference was made to such other information as the contracting authority may require. However, that is now gone and the means of proof is set out in Article 60 and Annex XII is exhaustive.

The means of proof that can be sought are:

- In relation to Article 57 mandatory grounds of exclusion; the production of an extract from the relevant register such as judicial records or equivalent document;
- In relation to the payment of social security and taxes and whether the economic operator is bankrupt or insolvent, a certificate issued by the competent authority in the Member State. However, where a Member State does not issue such documents or certificates, such as the UK, they may be replaced by a declaration on oath. However, Member States are required to provide an official declaration stating that the documents or certificates are not issued, which shall be made available through the online repository of certificates (e-Certis);
- In relation to economic and financial standing the proof may be provided by one or more of the references listed in Annex XII Part 1 which includes appropriate statements from banks, evidence from professional risk indemnity insurance, financial statements, a statement of turnover. However, where an economic operator is unable to provide the references requested, it may prove his economic and financial standing by other documents which a contracting authority considers appropriate. This could be the case where a new company has not traded for a sufficient period for the references to be available;

- In relation to technical abilities reference is made to Part 2 of Annex VII which contains items such as a list of works carried out over the past five years or goods and services provided over the last three years (or longer if necessary to ensure an adequate level of competition), indications of technicians responsible for quality control, indication of supply chain management, educational professional qualifications of the service provider or managerial staff.

### **Regulation 60**

Article 60 of the Directive, is transposed into the Regulations as Regulation 60, with two minor exceptions.

Article 60(3) states that proof of an economic operator's economic and financial standing "*may, as a general rule*" be provided by one or more of the references listed in Annex XII part T I. The references alluded to in the Annex are transposed into the Regulations at Regulation 60(6)(a)-(c).

The same approach is subsequently adopted with regard to Article 60(4); the Annex alluded to is transposed at Regulation 60(9)(a)-(k).

There are 2 points worth noting at this juncture:

1. Regulation 60(2) states the contracting authority shall not require from economic operator means of proof other than those referred to in this Regulation or in Regulations 58(16) and 62. Accordingly, an economic operator's economic and financial standing may only be proved utilising the references set out at Regulation 60(6) unless they "*are not appropriate in a particular case*". This would appear, on the face of it, to rule out any sort of third party accreditation (other than a bank);
2. The requirement for economic operators to provide a list of works, goods and services provided within a maximum of the last 3/5 years has been relaxed so that contracting authorities may extend that period as long as they indicate that they are going to do so.

### **Article 61 Online repository of certificates (e-Certis)**

To facilitate cross border tendering Member States are to ensure that information concerning certificates and other forms of documentary evidence held by E-Certis is constantly kept up to date.

For example, the UK will be responsible to make available a statement that it does not issue a certificate showing that economic operators have not been subject of a conviction for one of the reasons set out in Article 55(1).

**Regulation 61**

This provision is the same as Article 61 in all material ways.

**Article 62 Quality assurance standards and environmental management standards**

Where a contracting authority requires the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards it shall refer to quality assurance systems based on the relevant European Standards Series certified by accredited bodies and shall recognise equivalent certificates from bodies established in other Member States. Where an economic operator has no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to it, the contracting authority must accept other evidence that proves the proposed quality assurance measures comply with the required quality assurance standards.

In relation to environmental management systems contracting authorities must refer to the European Management and Audit System (EMAS) or other specified environmental management systems and standards. Again, a contracting authority must accept other means of proof if an operator has no access to such certificates or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to it.

**Regulation 62**

This provision is the same as Article 62 in all material ways.

**Article 63 Reliance on the capacities of other entities**

In relation to criteria relating to economic and financial standing and to technical and professional ability an operator may, where appropriate for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to educational and professional qualifications economic operators may only rely on the capacities of other entities where the entity will perform the works or services for which those capacities are required.

An economic operator that wishes to rely on the capacities of other entities should prove to the contracting authority that it will have at its disposal the resources necessary, for example, by providing a commitment from those entities to that effect. Article 60 provides that in doing so an economic operator may rely on any appropriate means of proof to that effect. If an economic operator relies on the capacity of others

then the contracting authority should verify whether the entities fulfil the relevant selection criteria and whether there are grounds for exclusion of them.

If an entity does not pass the verification then the contracting authority must require that the economic operator to replace that entity. This appears to be an area where some further clarity could be helpful. It would appear that it means that an economic operator can tender, relying on the capacities of others, then find out that the others are not suitable and be told to replace them. Contracting authorities will likely prefer that the onus is on the tenderer to ensure that the other entity on which it wishes to use will be suitable prior to the submission of the tender.

Where the capacity being relied on relates to economic and financial standing the contracting authority may require that the economic operator and the entities be jointly liable for the execution of the contract.

The last sub paragraph of Paragraph 1 provides that under the same conditions a group of economical operators as referred to in Article 19(2) may rely on the capacities of other participants in the group or of other entities. This is helpful as it clearly demonstrates that the provision in Article 63 is separate to that in Article 19(2).

Paragraph 2 of Article 63 provides that in the case of works or services contracts or supply contracts that require onsite installation, contracting authorities may require that certain critical tasks be performed by the economic operator itself and cannot rely on the capacities of others to carry out that function.

This is an extremely important paragraph and makes it clear that for all contracts other than supply only contracts, a contracting authority is able to identify crucial tasks and require the tenderer itself to carry it out and not rely on others to do so. This will prevent a situation arising whereby a company with no prior experience or track record in carrying out a particular type of service can still succeed in the procurement process by relying almost entirely on others to carry out the contract.

**Regulation 63**

This provision is the same as Article 63 in all material ways.

**Article 64 Official lists of approved economic operators and certification by bodies established under public or private law**

Article 64 provides that Member States may establish and maintain either official lists of approved contractors, suppliers and service providers or provide for a certification by certification bodies of such.

Such a provision is not used in the UK or Ireland and therefore no further comment will be made.

**Regulation 64**

Regulation 64 has been amended substantially from its 'original' form as Article 64 of the Directive. These differences include:

1. Paragraph 1 of the Article provides for the establishment or maintenance of official list by a Member State. The UK explicitly opts out of this via Regulation 64(10). Accordingly paragraph 2 of the Article does not apply;
2. The Regulations omit the second paragraph of Article 64(3): *"those certificates shall state the references which enable those economic operators to be registered on the official list or to obtain certification and the classification given in that list."*
3. The Regulation omits the second sentence of the first paragraph of Article 64(6): *"for any registration of economic operators of other Member States on an official list or further certification, no further proof or statements shall be required other than those requested of national economic operators."*
4. The second paragraph of Article 6(6) is omitted in its entirety as is Article 64(8).

## **Subsection 2: Reduction of numbers of candidates, tenders and solutions**

### **Article 65 Reduction of the number of otherwise qualified candidates to be invited to participate**

Contracting authorities may limit the number of candidates which they will invite to tender or conduct a dialogue with in restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships.

Contracting authorities must indicate in the contract notice the objective and non-discriminatory criteria or rules that they intend to apply. The minimum number of candidates they intend to invite and where appropriate the maximum number.

In a restricted procedure the minimum number of candidates should be 5 and in a competitive procedure with negotiation, competitive dialogue or innovation partnership the minimum number of candidates should be 3. In any event the minimum number invited must be sufficient to ensure genuine competition.

Where a contracting authority has set a minimum number and where the number of candidates meeting the selection criteria is below the minimum number the contracting authority may continue the procedure by inviting the candidates with the required capabilities, however, they cannot in the same procedure invite economic operator that did not request to participate or candidates that do not have the required capabilities.

It is up to the contracting authority to determine the objective and non-discriminatory criteria or rules that they intend to apply to limit the number. A common approach is to provide a mark in relation to technical and professional ability and then rank the candidates according to that mark and select the top candidates from that list.

An alternative approach, which has been used in Ireland, is to make a random selection of those candidates that have the required capabilities. The random selection approach has its proponents and opponents; however, it has not been available in the United Kingdom due to the prohibitive wording of the Regulations.

#### **Regulation 65**

This provision is the same as Article 65 in all material ways.

**Article 66      Reduction of the number of tenders and solutions**

In a competitive procedure with negotiation or a competitive dialogue procedure where contracting authorities exercise the option of reducing the number of tenders or solutions they are to do so by applying the award criteria stated in the procurement documents. A contracting authority must ensure that in the final stage the number of tenders or solutions will be sufficient to make for genuine competition.

**Regulation 66**

This provision is the same as Article 63 in all material ways.

### **Subsection 3: Award of Contract**

#### **Article 67 Contract award criteria**

Paragraph 1 states that contracting authorities should award public contracts on basis of the most economically advantageous tender. At first blush it would appear that the lowest cost option has now been removed by this paragraph. However, it is submitted that there will be situations where the most economically advantageous tender is in fact the lowest cost option and no other award criterion is relevant. There is more on this on the following page.

In determining the most economically advantageous tender from the point of view of the contracting authority it must use a cost effectiveness approach and the Directive gives the example of life cycle costing in accordance with Article 68.

Paragraph 2 also makes reference to the best price/quality ratio which is a common approach to combine price and quality used on the continent. The price/quality ratio would simply provide that a ratio is established by dividing the price score by the quality score and whoever has achieved the best ratio is successful. In the United Kingdom and Ireland it is common for a quality score to be calculated out of up to around 70 and a price score to be calculated out of up to 30 (giving a combined total of 100, whatever the split) and to add these two scores together. Weightings are often used in these calculations according to the importance of price against quality. The winner is the tenderer with the highest score.

The criteria which a contracting authority can take into account is not exhaustively set out in the Article, however the Article does state that the criteria could include environmental or social aspects which are linked to the subject matter of the contract and examples are given of:

- a. quality, including technical merit, aesthetic and functional characteristics, accessibility;
- b. organisation, including qualification and experience of staff assigned performing the contract; and
- c. after sales services and technical assistance.

The introduction of (b) above is welcomed. Under the previous Directive it was not possible to take experience and qualifications of staff into account at the award stage. Many commentators found this difficult to accept and justify, particularly in relation to service contracts.

The Article also makes it clear that it is permissible for the cost element to take the form of a fixed price or cost under which the economic operators will compete on quality criteria only (i.e. who will offer the most for that price). This was previously permissible, but the express wording now provided will give comfort to some. A good example of where this can be beneficial is where a contracting authority is provided a fixed grant for providing a certain type of amenity.

The Directive makes it possible for national legislation to provide that contracting authorities may not use price only as the sole award criteria. This would suggest that unless a Member State does so provide, it must be open to contracting authorities to still use price only in certain situations.

Paragraph 3 provides that award criteria shall be considered to be linked to the subject matter of the contract where they relate to the works, supplies or services to be provided in any respect and at any stage of their life cycle, even where such factors do not form part of their material substance. It would appear that this paragraph, whilst maintaining a requirement that any criteria must be linked to the subject matter of the contract, is widening the definition of what is linked to the subject matter of the contract to include any stage of the life cycle or any specific processes in relation to the production, provision or trading of those works, services or supplies.

Paragraph 4 provides that the chosen award criteria shall not have the effect of conferring an unrestricted freedom of choice on a contracting authority and must ensure the possibility of the effective competition and allow for information provided by tenderers to be effectively verified.

Paragraph 4 also provides that contracting authorities should verify the accuracy of the information and supporting details provided by the tenderers. Therefore it is not permissible for a contracting authority to ask tenderers to provide them with information which they have no means of checking.

Paragraph 5 provides that a contracting authority shall specify in the procurement documents the weighting it gives to each of the criteria chosen to determine the most economically advantageous tender and that those weightings may be expressed by providing a range with an appropriate maximum spread. Where weighting is not possible for objective reasons, the contracting authority should indicate criteria in decreasing order of importance.

#### **Regulation 67**

This provision is the same as Article 67 in all material ways.

The Regulations do not prohibit the use of price as the sole criterion.

## **Article 68 Life-cycle costing**

In determining the most economically advantageous tender a contracting authority should use a cost effectiveness approach and the Directive provides for one such approach at Article 68, Life Cycle Costing.

Life Cycle Costing must, to the extent relevant, cover parts 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. cost relating to acquisition;
  - ii. cost 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 inputted to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified;
- c. such costs may include the costs of emission of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

Where a contracting authority uses this approach they must indicate in the procurement documents data to be provided by the tenderers and the method by which they will determine the life cycle cost based on that data.

The method used to assess the costs inputted to environmental externalities must be based on objectively verifiable and non-discriminatory criteria, be accessible to all interested parties and the data required must be capable of being provided with reasonable effort by normally diligent economic operators.

Lastly, the Article makes reference to certain legislation which sets out a mandatory method for the calculation of life cycle costs. Currently the only one relates to the Clean Vehicles Directive.

### **Regulation 68**

This provision is the same as Article 68 in all material ways.

## **Article 69     Abnormally low tenders**

Where tenders appear to be abnormally low contracting authorities must require that economic operators explain the price or costs proposed in their tender.

The explanation may in particular relate to the economics of manufacturing process, of the services provided or the construction method or to a technical solution or an exceptionally favourable condition, compliance with labour law obligations or in relation to sub-contracting.

The contracting authority must then assess the information provided by consulting the tenderer. The contracting authority may, not must, reject the tender if the evidence supplied does not satisfactorily account for the low level of price or costs proposed.

The only situation in which a contracting authority must reject a tender is where they have established that the tender is abnormally low because it does not apply with the applicable obligations in relation to environmental, social and labour law.

Where a contracting authority establishes that a tender is abnormally low because of state aid the tender will only be rejected after further consultation with the tenderer in which the tenderer has sufficient time to show the aid was compatible with the meaning of Article 107 TFEU. If a contracting authority does reject the tender in those circumstances it must inform the commission.

### **Regulation 69**

This provision is the same as Article 69 in all material ways.

## **CHAPTER IV Contract Performance**

### **Article 70 Conditions for performance of contracts**

Article 70 expressly provides contracting authorities may lay down special conditions relating to the performance of a contract, provided that those conditions are linked to the subject matter of the contract, as widely defined by Article 67(3) and are clearly referred to in the procurement documents. The conditions may include economic, innovation related, environmental, and social or employment related considerations.

#### **Regulation 70**

This provision is the same as Article 70 in all material ways.

### **Article 71 Subcontracting**

A contracting authority may ask a tenderer to indicate in its tender any share of a contract it may subcontract to third parties and the identity of those subcontractors.

Members States in their national legislation may provide that upon request of the subcontractor and where the terms of the contract allow, the contracting authorities should pay the subcontractor directly. In that situation the specific arrangements should be set out in the procurement documents.

In the case of works contracts or services to be provided at a facility under the direct oversight of a contracting authority, they must require that the main contractor provide the contact details and legal representatives of its subcontractors. This should also be updated for new subcontractors and the contracting authority should be notified of any changes.

Where necessary this information should also to be accompanied by a subcontractor's self-declaration by way of a European Single Procurement Document.

This obligation can be extended to supply contracts or other service contracts and also to tier 2 and 3 subcontractors.

Contracting authorities, aiming to avoid breaches in relation to employment, environment and labour law, may then verify whether there are grounds for exclusion of

the subcontractor pursuant to Article 57. If there are grounds for exclusion they can require that the main contractor replace the subcontractor.

### **Regulation 71**

This provision is the same as Article 71 in all material ways.

The Regulations do not provide for the direct payment to subcontractors; however doing so remains lawful so long as it is proved for in the conditions of contract.

### **Article 72     Modification of contracts during their term**

Article 72 sets out situations where contracts and framework agreements may be modified without a new procurement procedure. This will be permitted in the following cases:

1. Where the modifications, irrespective of their value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, but they shall not provide for modifications that alter the overall nature of a contract;
2. For additional works, services or supplies that have become necessary and for which a change of contract cannot be made for economic or technical reasons or would cause significant inconvenience or substantial duplication of a cost. Such additional scope must not increase price by more than 50% of the original value. For successive modifications the financial limit must apply to each modification so long as successive modifications are not aimed at circumventing the Directive. A contracting authority must publish a notice to that effect in OJEU.
3. Where all of the following conditions are met:
  - i. the need for modification could not have been foreseen;
  - ii. the modifications do not alter the overall nature of the contract; and
  - iii. any increase in price is not higher than 50% of the value of the original contract.

The contracting authority must publish a notice to that effect in OJEU.

4. Where a new contractor replaces the original one as a consequence of either:
  - i. an unequivocal review clause as set out at 1;
  - ii. universal or partial succession following corporate restructuring including take over, merger and acquisition; and

- iii. In the event that the contracting authority assumes the main contractor's obligations toward the subcontractors.
5. Where modifications, irrespective of their value are not substantial within the meaning of paragraph 4.
6. Paragraph 2 provides that contracts can be altered without a new procurement procedure where the modification is below the thresholds and 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts. However, the modification may not alter the overall nature of a contract and where there are successive modifications the value shall be assessed on the basis of the net cumulative value of the success of modifications.

By way of an example in a works contract this would permit a relatively small addition to the scope but if the variation was to omit the original scope and replace with an entirely different scope then even though the value may not be significantly different the overall nature of the contract could be.

Paragraph 4 provides that a modification shall be considered to be substantial, and therefore not permitted without a new procurement procedure, where it renders a contract materially different in character from the one originally concluded. This will occur where one or more of the following conditions are met:

1. the modification, had it been known at procurement stage, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than the one originally accepted or would have attracted additional participants;
2. the modification changes the economic balance in the favour of the contractor;
3. the modification extends the scope of the contract considerably; or
4. where a new contractor replaces the one to which the contracting authority had originally awarded the contract, other than as set out at paragraph 1(d).

Paragraph 5 then provides that a new procurement procedure would be required for other modifications other than those provided for under paragraph 1 and 2.

**Regulation 72**

This provision is the same as Article 72 in all material ways.

### **Article 73 Termination of contracts**

The national regulations must provide that contracting authorities have the right at least under the following circumstances to terminate a public contract:

- a. where the contract has been subject to a substantial modification and would require a new procurement procedure;
- b. the Contractor should have been excluded at the time of the contract award for one of the mandatory exclusions; or
- c. the contract should not have been awarded a view of a serious infringement of the obligations under the treaties or of the Directive which has been declared by the ECJ in their procedure under Article 258 TFEU.

#### **Regulation 73**

This provision is the same as Article 73 in all material ways and requires a suitable provision to be included in every contract they award.

### **TITLE III - PARTICULAR PROCUREMENT REGIMES**

#### **CHAPTER I Social and other specific services**

Chapter 1 of Title III sets out what is referred to as a light touch regime in relation to social and other specific services.

#### **Article 74 Award of contracts for social and other specific services**

Article 74 states that public contracts for social and other specific services listed in Annex XIV shall be awarded in accordance with Chapter 1 where the value of the contracts is equal to or greater than the threshold indicated at Article 4(d) (being €750k).

The services set out at Annex XIV these need to be considered carefully since, whilst they do include services in relation to social issues, they also include services such as:

- Hotel and restaurant services;
- Legal services to the extent not excluded at Article 10(d);
- Postal services;
- Tyre remoulding services; and
- Blacksmith services.

The Annex sets out the CPV codes of the relevant services and in any service contract they should be checked carefully.

#### **Regulation 74**

This provision is the same as Article 74 in all material ways.

#### **Article 75 Publication of notices**

Where a contracting authority intends to award a light touch contract it shall make known their intention by either a contract notice or a prior information notice (which shall be published continuously and refer specifically to the types of services that would be the subject of the contracts to be awarded and indicate that the contracts will be awarded without further publication). Once an award has been made then the contracting authority shall publish a contract award notice. However, they may group such notices on quarterly basis which shall then be published within 30 days of the end of each quarter.

#### **Regulation 75**

This provision is the same as Article 75 in all material ways.

#### **Article 76 Principles of awarding contracts**

In relation to the awarding of the light touch contracts Member States are to put in place national rules for the award of them to ensure contracting authorities comply with the principles of transparency and equal treatment. In doing so Member States will ensure that national regulations allow contracting authorities to take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of the different categories of users, the involvement and empowerment of the users and innovation.

#### **Regulation 76**

This provision is the same as Article 76 in all material ways.

The Regulation delegates this function to the contracting authority itself.

#### **Article 77 Reserved contracts for certain services**

The article provides that national rules may permit that contracting authorities to reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and controlled services which are covered by certain of the CPV codes. Those codes include items such as a supply of domestic help personnel, nursing personnel, medical personnel, education services, library and sporting services.

The organisations for which such contracts can be reserved for must:

- have as its objective the pursuit of a public service mission;
- have profits being reinvested with a view to achieving organisations objectives;
- be based on employee ownership of participatory principles;
- not have been awarded a contract for the reserved services by a contracting authority under this Article within the past three years.

#### **Regulation 77**

Article 77 of the Directive is largely transposed via Regulation 77.

Further, this Regulation specifically excludes application to the procurement of health care services for the purposes of NHS.

## **CHAPTER II Rules Governing Design Contests**

There are specific rules in relation to design contests organised as part of a procedure leading to the award of a public service contract or with prizes or payments to participants. Those rules are set out in Chapter II and specifically in Articles 78-82. They are not often used and so no comment has been made to this Chapter.

### **Article 78 Scope**

#### **Regulation 78**

This provision is the same as Article 78 in all material ways.

### **Article 79 Notices**

#### **Regulation 79**

This provision is the same as Article 79 in all material ways.

### **Article 80 Rules on the Organisation of design contests and the selection of participants**

#### **Regulation 80**

This provision is the same as Article 80 in all material ways.

### **Article 81 Composition of the jury**

#### **Regulation 81**

This provision is the same as Article 81 in all material ways.

### **Article 82 Decisions of the jury**

#### **Regulation 82**

This provision is the same as Article 82 in all material ways.

## **TITLE IV - GOVERNANCE**

### **Article 83 Enforcement**

Article 83 imposes certain requirements on Member States in relation to ensuring that the Directive is complied with. These include the monitoring of the application of the procurement rules. This has to be done by a contracting authority or body which is established by the Member State which also has the power to indicate any problems to audit authorities, courts or tribunals or other appropriate authorities. The results of the monitoring activities have to be made public and the Member State must every three years produce a report to the commission indicating any areas of wrong application or legal uncertainty and on the level of SME participation.

Member States must also to ensure that information and guidance on the interpretation application of EU public procurement law is available free of charge to assist contracting authorities and economic operators (including SMEs).

#### **Regulation 83**

This Regulation does not transpose Article 83. Instead it requires that contracting authorities keep and grant access to contracts in excess of EUR 1 million for supplies and services and EUR 10 million for works.

In the UK the bodies responsible for Article 83 functions are the Cabinet Office and the Courts.

### **Article 84 Individual reports on procedures for the award of contracts**

Article 84 sets out the rules in relation to keeping of reports in relation to the award of a contract or a framework agreement covered by the Directive. The report shall include the information set out at points (a) to (i), which includes things such as reasons for rejection of tenders found to be abnormally low, the names of candidates and tenderers rejected and the reasons for the rejection and the names of the winner. Such a report is required in relation to a framework agreement but not in respect of individual contracts awarded under that framework agreement.

Further, contracting authorities are to document the progress of all procurement procedures and ensure they keep sufficient documentation to justify the decisions taken at all stages. This will include communications with the economic operators and also documentation in relation to the internal deliberations, preparation of the procurement documents and selection and award of the contract. The documentation

must be kept for a period of at least three years from the date of the award of the contract.

**Regulation 84**

Article 84 of the Directive is transposed wholly as Regulation 84.

There is an additional provision in that the report must be provided to the Cabinet Office, not just the Commission, in order for the UK to comply with its obligations under Article 83.

**Article 85 National reporting and statistical information**

Article 85 requires the commission to review the quality and completeness of the data that can be extracted from the various notices and further national reporting of statistical information.

**Regulation 85**

This provision deals with different issues and will be commented on after the provision of the Directive is finished.

**Article 86 Administrative Cooperation**

This Article sets out a requirement for Member States to provide mutual assistance in certain respects.

## **TITLE V - DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS**

This Title deals with the working of the Commission and other administrative provisions relating to the Directive.

As such it is not replicated in the Regulations and is not commented on.

**Article 87     Exercise of the delegation of powers**

**Article 88     Urgency procedure**

**Article 89     Committee procedure**

**Article 90     Transposition and transitional provisions**

**Article 91     Repeals**

**Article 92     Review**

**Article 93     Entry into force**

**Article 94     Addressees**

What follows relates to the Regulations only and not Directive 2014/24.

The Regulations, in addition to transposing the Directive, also make provision for:

- remedies;
- the Contracts Finder web site;
- rules for Below Threshold Contracts; and
- prompt payment.

## **PART 3 - REMEDIES**

### **CHAPTER 5 Facilitation of Remedies**

#### **Regulation 85      Scope of Chapter 5**

This Regulation makes it clear that it only applies to contracts covered by part 2, i.e. public contracts above threshold which are not otherwise excluded.

#### **Regulation 86      Notices of decisions to award a contract or conclude a framework agreement**

This Regulation prescribes what has to be communicated to a candidate or tenderer once a decision has been made to award the contract. There is some overlap with Regulation 55.

The notices must set out the criteria for the award of a contract together with the reasons for the decision including the relative characteristics and relative advantages of the successful tenderer including the scores obtained by the tenderer who is receiving the notice and the tenderer who is to be awarded the contract.

The notice must also contain the name of the successful tenderer and a precise statement of when the standstill period will end.

The notice does not need to be provided in relation to a call-off contract under a framework agreement or a dynamic purchasing system.

The information which has to be disclosed may be withheld by a contracting authority if it would impede law enforcement, be contrary to the public interest, prejudicially legitimate commercial interest of an operator or prejudice fair competition between operators.

#### **Regulation 87      Standstill period**

This Regulation provides that the Contracting Authority must not enter into a contract until the end of the standstill period. The standstill period ends at midnight at the end of the tenth day after sending the Regulation 86 notices by electronic means or 15 days if sent by other means.

## **CHAPTER 6 APPLICATIONS TO THE COURT**

This Chapter replicates the amendments made to the Public Contracts Regulations 2006 following publication of the Remedies Directive 2007/66.

### **Regulation 88 Interpretation of Chapter 6**

This Regulation merely sets out a number of definitions used in the rest of the Chapter.

### **Regulation 89 Duty owed to economic operators from EEA States**

This Regulation applies to an obligation arising out of Part 2 of the Regulations or any enforceable EU obligation in the field of public procurement. The Regulation makes it clear that the obligation is owed to operators from the UK or from other EEA States.

### **Regulation 90 Duty owed to economic operators from certain other States**

This Regulation provides that the duty set out at Regulation 89 is also owed to operators from a GPA state if the GPA applies to the procurement or if a relevant bilateral agreement applies.

### **Regulation 91 Enforcement of duties through the court**

This Regulation provides that any breach of the duties owed at Regulation 89 or 90 is actionable by any economic operator that suffers or risks suffering loss or damage in consequence of the breach. The Regulation also provides that the proceedings must be started in the High Court and that Regulations 92-104 apply to the proceedings.

### **Regulation 92 General time limits for starting proceedings**

This Regulation provides that the proceedings must be started within 30 days beginning on the date of when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

For the purpose of this Regulation proceedings are started when the claim form is issued, or in Northern Ireland when a writ is issued.

The Court has jurisdiction to extend time when there is good reason for doing so but not beyond three months after the date the economic operator first knew or ought to have known that grounds for starting proceedings had arisen.

**Regulation 93      Special time limits for seeking a declaration of ineffectiveness**

This Regulation applies if the application to court is for a declaration of effectiveness.

Where the contract award notice has been published in the OJEU, then proceedings must be commenced within 30 days commencing on the day after the notice is published.

Where an Operator has received a Regulation 86 notice, then the proceedings must be commenced within 30 days of receipt of that Notice.

In any event proceedings must be commenced within six months beginning with the day after the date on which the contract was entered into.

**Regulation 94      Starting proceedings**

Once proceedings have commenced the claim form or writ must be served on the contracting authority within seven days after the date of issue and in certain situations on the successful tenderer, if the contract has been entered into. Due to the rules of service under the Civil Procedure Rules in England and Wales, this is arguably shortened to five days.

**Regulation 95      Contract-making suspended by challenge to award**

Regulation 95 provides that where a claim form has been issued and a contracting authority is aware that it has been issued and if the contract has not yet been entered into, the contracting authority is required to refrain from entering into the contract.

This requirement stays in place until the court lifts the prohibition or the proceedings at first instance are determined, discontinued or otherwise disposed of.

## **Regulation 96      Interim orders**

This Regulation gives the court authority to make an interim order:

- ending the automatic suspension or modifying the suspension;
- suspending the procedure; or
- suspending the implementation of any decision or action taken by the contracting authority.

The Regulation provides that when the court is deciding whether to lift the automatic suspension it must consider if, in the absence of the automatic suspension, it would be appropriate to make an interim order restraining the contracting authority from entering into the contract. The courts use the *American Cyanamid* principles to establish such matters (as they would for an interim injunction).

Regulation 96(3) provides that the court may impose certain undertakings or conditions, such as the provision of an undertaking in damages, if it considers it would not be appropriate to issue an interim order to stop the contracting authority entering into a contract in their absence.

## **Regulation 97      Remedies where the contract has not been entered into**

If a contract has not been entered into then the court may do one or more of the following:

- set aside the decision or action concerned;
- order the contracting authority to amend any document; or
- award damages.

## **Regulation 98      Remedies where the contract has been entered into**

If a contract has already been entered into then the court:

- must, if any of the grounds for ineffectiveness apply, make a declaration of ineffectiveness or impose penalties as required by Regulation 100 and 102; or
- may award damages.

## **Regulation 99      Grounds for ineffectiveness**

This Regulation sets out the grounds for ineffectiveness which are:

- the contract has been awarded without the prior publication of a contract notice;
- the contract has been awarded during the standstill period or during the automatic suspension;
- the contract was awarded under a framework or dynamic purchasing system, but is in breach of the rules for doing so.

**Regulation 100      General interest grounds for not making the declaration of ineffectiveness**

This Regulation provides that where there are grounds of ineffectiveness, the court must not make a declaration of ineffectiveness if it is satisfied that an overriding interest relating to a general interest requires that the contract is maintained.

This Regulation expressly states that economic interests can only be considered as overriding reasons in exceptional circumstances.

**Regulation 101      The consequences of ineffectiveness**

This Regulation provides that where a contract is declared ineffective the contract is to be considered prospectively but not retrospectively ineffective. The Regulation also gives the authority to the court to make any order it thinks appropriate to address the implications of declaring the contract ineffective, which may include damages to the contractor whose contract is to be declared ineffective.

**Regulation 102      Penalties in addition to, or instead of, ineffectiveness**

This Regulation provides, in some detail, that if a contract which would be declared ineffective is not, pursuant to Regulation 100 – General Interest Grounds, then the court must order at least one of the following penalties:

- the duration of the contract being shortened; or
- the contracting authority having to pay a civil financial penalty to the Minister for the Cabinet Office or the Department of Finance and Personnel in Northern Ireland.

Interestingly the Regulation does provide that if it is the Department of Finance and Personnel itself that is ordered to pay the penalty then it does not pay it to itself but pays it to the consolidated fund of Northern Ireland.

**Regulation 103      Ineffectiveness etc. in relation to specific contracts based on a framework agreement**

This regulation sets out what should happen if a contract is awarded under a framework agreement and then the framework agreement is subsequently declared ineffective. The Regulation requires that the contract is not automatically declared ineffective itself, but must be separately considered by the court who would then issue a separate declaration of effectiveness in respect of each relevant specific contract.

**Regulation 104      Injunctions against the Crown**

This Regulation merely provides that the court has power to grant an injunction against the Crown despite Section 21 of the Crown Proceedings Act 1974, which would otherwise not allow it.

## **PART 4 – MISCELLANEOUS OBLIGATIONS**

### **CHAPTER 7 ADDITIONAL RULES FOR PART 2 PROCUREMENTS**

#### **Regulation 105      Scope of Chapter 7**

The Regulation provides that the Chapter applies to procurements within the scope of Part 2 i.e. above threshold public contracts, but does not apply healthcare services for the purposes of the NHS within the meaning of the National Health Service (Procurement, Patient Choice on Competition) (Nr 2) Regulations 2013, or where a contracting authority is a maintained school or an academy.

#### **Regulation 106      Publication of information on Contracts Finder where contract notices are used**

This Regulation provides that where a contract notice is sent to the OJEU then it must be published on the Contracts Finder website within 24 hours of when it becomes entitled to publish it nationally in accordance with Regulation 52, which is when it has been published or within 48 hours of the receipt being acknowledged.

The Regulation then sets out what information has to be published on Contracts Finder, which will be determined by the Minister for the Cabinet Office. It may be that the Minister's guidance will provide that the information will be extracted from the OJEU notice.

#### **Regulation 107      Qualitative selection**

The first part of this Regulation provides that contracting authorities must have regard to any guidance issued by the Minister for the Cabinet Office in relation to selection.

That guidance has been issued and incorporates a new standardised PQQ.

#### **Regulation 108      Publication of information on Contracts Finder about contracts awarded**

This Regulation provides that when a contract award notice is published in OJEU it must then publish certain information on Contracts Finder.

## **CHAPTER 8 BELOW-THRESHOLD PROCUREMENTS**

### **Regulation 109      Scope of Chapter 8**

This Regulation provides that Chapter 8 applies to below threshold contracts where the value of a contract is not less than £10,000 for central government contracting authorities, or not less than £25,000 for sub-central contracting authorities and NHS trusts.

### **Regulation 110      Publication of contract opportunities on Contracts Finder**

As the title of the Regulation suggests it provides that a contracting authority must publish the contract award opportunity on the Contracts Finder website; it also identifies what information has to be included. In doing so the Regulation requires that contracting authorities have regard to any guidance issued by the Minister for the Cabinet Office.

### **Regulation 111      Assessing suitability etc.**

This Regulation prohibits a contracting authority from including a pre-qualification stage in a procurement covered by Chapter 8.

### **Regulation 112      Publication of information on Contracts Finder about contracts awarded**

This Contract requires that a contracting authority publish on Contracts Finder certain information in regarding a contract which has been awarded including the name of the successful tenderer, the date the contract was entered into, the value of the contract and whether the contractor is an SME or a VCSE.

## **CHAPTER 9 MISCELLANEOUS PROVISIONS**

### **Regulation 113 Payment of undisputed invoices within 30 days by contracting authorities, contractors and subcontractors**

This Regulation requires that every contract a contracting authority enters into must provide that payment will be made to the contractor no later than 30 days from the date from which the relevant invoice is regarded as valid and undisputed.

This provision also applies to a sub-contract awarded by the contractor and also any sub-sub-contract which the subcontractor in turn awards.

The Regulation also requires that contracting authorities have regard to any guidance issued by the Minister for the Cabinet Office and also requires them to publish on the internet, statistics for each financial year showing how far the contracting authority has actually complied with its obligations under this regulation.

### **Regulation 114 General provisions applicable to Part 4**

This Regulation makes it clear that a failure to comply with Part 4 does not affect the validity of a public contract and that any requirement to disclose information does not apply where it would be contrary to the security interests of the United Kingdom.

## **PART 5 - REVOCATIONS, CONSEQUENTIAL AMENDMENTS, SAVINGS AND TRANSITIONAL PROVISIONS**

### **Regulation 115      Interpretation of Part 6**

There is a typo in the heading of this since it clearly refers to Part 5.

### **Regulation 116      Revocation and amendments**

This Regulation revokes the Public Contracts Regulations 2006.

### **Regulation 117      General saving in respect of certain concession contracts**

This provides that the Regulations do not apply to public works concession contracts or service concession contracts

### **Regulation 118      General transitional provisions and saving where procurement procedure commenced before 26 February 2015**

This provides that the Regulations do not affect a contract award procedure which was commenced before 26 February 2015.

The contract award procedure is commenced by an publishing OJEU notice or advertising for offers or expressions of interest.

The Regulations do not apply to the award of any contract based on a framework agreement or dynamic purchasing system concluded or established before 26 February 2015.

**Regulation 119      Transitional provision and saving where utilities procurement procedure commenced before 26 February 2015**

This Regulation provides that the Utilities amendments do not affect a contract award procedure which was commenced before 26 February 2015. However the Utilities amendments referred to are very minor at paragraph 15 of Schedule 7.

**Regulation 120      Temporary exemption and saving for certain NHS procurements**

The Regulations do not apply to any contract award procedure for health care services for the NHS commenced prior to 18 April 2016.

**Regulation 121      Transitory provision prior to full commencement of Regulation 22 (1) to (7)**

For the period between 26 February 2015 and 18 October 2018, when Regulation 22 comes into force and which requires fully electronic communication to be used, a contracting authority has a choice between electronic communication and post, courier or fax.

**Regulation 122      Complying with Regulation 113 before 1 April 2016**

This provision relates to annual reporting of compliance with prompt payment rules for a financial year ending before 1 April 2016.







**2015 No. 102**

**PUBLIC PROCUREMENT**

**The Public Contracts Regulations 2015**

*Made* - - - - *4th February 2015*

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The Minister for the Cabinet Office is designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to public procurement(b) and in relation to the combating of late payment in commercial transactions(c).

The Minister for the Cabinet Office makes these Regulations in exercise of the powers conferred by section 2(2) of, as read with paragraph 1A(d) of Schedule 2 to, that Act.

These Regulations make provision for a purpose mentioned in section 2(2) of that Act, and it appears to the Minister for the Cabinet Office that it is expedient for certain references to provisions of EU instruments to be construed as references to those provisions as amended from time to time.

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(a) 1972 c.68; section 2(2) was amended by the European Union (Amendment) Act 2008 (c.7), Part 1 of the Schedule.

(b) S.I. 2010/2473.

(c) S.I. 2014/2705.

(d) Paragraph 1A was inserted by the Legislative and Regulatory Reform Act 2006 (c.51), section 28, and was amended by the European Union (Amendment) Act 2008, Part 1 of the Schedule.

## PART 1

### GENERAL

#### Citation, commencement, extent and application

1.—(1) These Regulations may be cited as the Public Contracts Regulations 2015.

##### *Commencement*

(2) Except for the provisions mentioned in paragraphs (3) to (6), these Regulations come into force on 26th February 2015.

(3) Paragraphs (1) to (7) of Regulation 22 come into force—

- (a) for the purposes of regulations 27(6), 28(9), 34(13), 36(4), 53(3) and 121(2)(a), on 26th February 2015;
- (b) for the purposes of regulation 37(7), on 18th April 2017;
- (c) for all other purposes, on 18th October 2018.

(4) Regulations 37(7) and 59(7) come into force on 18th April 2017.

(5) Regulation 61 comes into force on 18th October 2018.

(6) Regulations 106, 108, 110 and 112 come into force—

- (a) in relation to contracting authorities which perform their functions on behalf of the Crown, on 26th February 2015;
- (b) in relation to other contracting authorities, on 1st April 2015.

##### *Extent and application*

(7) Except for paragraph 19 of Schedule 6, these Regulations do not extend to Scotland.

(8) Part 4 does not apply to a contracting authority if its functions are wholly or mainly—

- (a) Northern Ireland devolved functions, that is to say functions which could be conferred by provision included in an Act of the Northern Ireland Assembly made without the consent of the Secretary of State (see sections 6 to 8 of the Northern Ireland Act 1998(a)); or
- (b) Welsh devolved functions, that is to say functions which could be conferred by provision falling within the legislative competence of the National Assembly for Wales (as defined in section 108 of the Government of Wales Act 2006(b)).

#### Definitions

2.—(1) In these Regulations, except where the context otherwise requires,—

“Academy” means a person who is the proprietor, within the meaning of section 579(1) of the Education Act 1996(c), of an Academy within the meaning of that section;

“accelerated procedure” means any of the following:—

- (a) an open procedure in which the contracting authority has exercised the power conferred by regulation 27(5) to fix a time limit for the receipt of tenders that is shorter than the minimum specified in regulation 27(2);
- (b) a restricted procedure in which the contracting authority has exercised the power conferred by regulation 28(10) to fix a time limit—

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(a) 1998 c.47; section 6 was amended by S.I. 2011/1053, article 6(2)(a); section 7 was amended by the Justice (Northern Ireland) Act 2002 (c.26), section 84(1) and Schedule 13 and by the Northern Ireland (Miscellaneous Provisions) Act 2006 (c.33), Schedule 4, paragraph 10; section 7A was inserted by the Northern Ireland (Miscellaneous Provisions) Act 2014, section 6(1) and (3).

(b) 2006 c.32; section 108 was amended by S.I. 2011/1053, article 6(2)(a).

(c) 1996 c.56; the definition of ‘Academy’ was inserted by the Academies Act 2010 (c.32), Schedule 2, paragraphs 1 and 6. That definition, and the definition of ‘proprietor’, were amended by the Education Act 2011 (c.21), Schedule 13, paragraphs 9(1) and (17).

- (i) for the receipt of requests to participate that is shorter than the minimum specified in regulation 28(2), or
  - (ii) for the receipt of tenders that is shorter than the minimum specified in regulation 28(5);
- (c) a competitive procedure with negotiation in which the contracting authority has exercised the power conferred by regulation 29(10) to fix a time limit—
- (i) for the receipt of requests to participate that is shorter than the minimum specified in regulation 29(4); or
  - (ii) for the receipt of initial tenders that is shorter than the minimum specified in regulation 29(5).

“ancillary purchasing activities” means activities consisting of the provision of support to purchasing activities, in particular in the following forms:—

- (a) technical infrastructure enabling contracting authorities to award public contracts or to conclude framework agreements for works, supplies or services;
- (b) advice on the conduct or design of public procurement procedures;
- (c) preparation and management of procurement procedures on behalf and for the account of the contracting authority concerned;

“bodies governed by public law” means bodies that have all of the following characteristics:—

- (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) they have legal personality; and
- (c) they have any of the following characteristics:—
  - (i) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;
  - (ii) they are subject to management supervision by those authorities or bodies; or
  - (iii) they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

“call for competition” means a call for competition made in a manner required or permitted by regulation 26(8) to (9) or, where relevant, one of the notices referred to in regulation 75(1) or a contest notice;

“candidate” means an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership;

“central government authorities” means the Crown and all the bodies listed in Schedule 1 (whether or not they perform their functions on behalf of the Crown), but does not include Her Majesty in her private capacity;

“central purchasing body” means a contracting authority which provides centralised purchasing activities and which may also provide ancillary purchasing activities;

“centralised purchasing activities” has the meaning given by regulation 37(10);

“the Commission” means the European Commission;

“common technical specification” means a technical specification in the field of information and communication technology laid down in accordance with Articles 13 and 14 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council(a) as amended from time to time;

“contest notice” means the notice referred to in regulation 79(1);

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(a) OJ No L 316, 14.11.2012, p12.

“contract notice” means the notice referred to in regulation 49 or, where relevant, 75(1)(a);

“contracting authorities” means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, and includes central government authorities, but does not include Her Majesty in her private capacity;

“Contracts Finder” means a web-based portal provided for the purposes of Part 4 by or on behalf of the Cabinet Office;

“CPV” means the Common Procurement Vocabulary as adopted by Regulation (EC) No 2195/2002 of the European Parliament and of the Council(a) as amended from time to time;

“Defence and Security Regulations” means the Defence and Security Public Contracts Regulations 2011(b);

“design contests” means those procedures which enable a contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes;

“disabled”, in relation to a person, means a disabled person within the meaning of the Equality Act 2010(c) and, in relation to a worker, means a disabled person who is a worker;

“dynamic purchasing system” means the system referred to in regulation 34;

“economic operator” means any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market;

“electronic means” means electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by any other electromagnetic means;

“ESPD” means the European Single Procurement Document referred to in regulation 59(1);

“EU Publications Office” means the Publications Office of the European Union;

“European standard” means a standard adopted by a European standardisation organisation and made available to the general public;

“European Technical Assessment” means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the relevant European Assessment Document as defined in point 12 of Article 2 of Regulation (EU) No 305/2011 of the European Parliament and of the Council(d) as amended from time to time;

“framework agreement” has the meaning given by regulation 33(2);

“GPA” means the Agreement on Government Procurement between certain parties to the World Trade Organisation signed in Marrakesh on 15th April 1994 as amended(e);

“innovation” means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations, including with the purpose of helping to solve societal challenges or to support the Europe 2012 strategy for smart, sustainable and inclusive growth;

“international standard” means a standard adopted by an international standardisation organisation and made available to the general public;

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(a) OJ No L 340, 16.12.2002, p1, last amended by Commission Regulation (EC) No 213/2008 (OJ No L 74, 15.3.2008, p1).

(b) S.I. 2011/1848, amended by S.S.I. 2012/88, 2012/89; there are other amending instruments but none is relevant.

(c) 2010 c.15.

(d) OJ No L 88, 4.4.2011, p5, last amended by Commission Delegated Regulation (EU) No 574/2014 (OJ No L 159, 28.5.2014, p41).

(e) All the substantive provisions of the Agreement were substituted by the Protocol which was approved, on behalf of the EU, by Council Decision 2014/115/EU (OJ No L 68, 7.3.2014, p1), to which the text of the Protocol is attached (at OJ No L 68, 7.3.2014, p2). In accordance with Article 3 of the Protocol, the Protocol has entered into force for the EU.

“invitation to confirm interest” means, except in regulation 31(18), an invitation which a contracting authority sends in order to comply with regulation 54(2);

“label” means any document, certificate or attestation confirming that the works, products, services, processes or procedures in question meet certain requirements;

“label requirements” means the requirements to be met by the works, products, services, processes or procedures in order to obtain the label concerned;

“legal person” means a person, whether governed by private law or public law, other than a natural person;

“life cycle” means all stages which are consecutive or interlinked, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation;

“maintained school” means the governing body of a maintained school within the meaning of section 19(1) of the Education Act 2002(a);

“national standard” means a standard adopted by a national standardisation organisation and made available to the general public;

“NHS Trust” means a trust established under section 25 of the National Health Service Act 2006(b);

“Official Journal” means the Official Journal of the European Union;

“prior information notice” means the notice referred to in regulation 48 or, where relevant, regulation 75(1)(b);

“prior publication” means prior publication of a call for competition;

“procurement” means the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose;

“procurement document” means any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

“public contracts” means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

“Public Contracts Directive” means Directive 2014/24/EU of the European Parliament and of the Council(c);

“public service contracts” means public contracts which have as their object the provision of services other than those referred to in the definition of “public works contracts”;

“public supply contracts” means public contracts which have as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products, whether or not the contract also includes, as an incidental matter, siting and installation operations;

“public works contracts” means public contracts which have as their object any of the following:—

- (a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 2;

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(a) 2002 c.32.

(b) 2006 c.41.

(c) OJ No L 94, 28.3.2014, p65.

- (b) the execution, or both the design and execution, of a work;
- (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

“selection criteria” means, except in regulation 80, selection criteria set out by a contracting authority in accordance with regulation 58;

“standard” means a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory, and which is an international standard, a European standard or a national standard;

“sub-central contracting authorities” means all contracting authorities which are not central government authorities;

“technical reference” means any deliverable produced by European standardisation bodies, other than European standards, according to procedures adapted to the development of market needs;

“technical specifications” means the matters referred to in regulation 42(2) to (7);

“tenderer” means an economic operator that has submitted a tender;

“TFEU” means the Treaty on the Functioning of the European Union(a);

“the Treaties” means the Treaty on European Union(b) and TFEU;

“VAT” means value added tax;

“a work”, means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function; but “works” is to be interpreted in accordance with paragraph (2);

“working day” means a day other than a Saturday, Sunday, Christmas Day, Good Friday or bank holiday within the meaning of the Banking and Financial Dealings Act 1971(c); and

“written” or “in writing” means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information transmitted and stored by electronic means.

(2) Unless the context otherwise requires, any expression used both in Part 2 and in the Public Contracts Directive has the meaning that it bears in that Directive.

(3) In Part 2 (except regulation 52(4)), any reference to a period of time, however expressed, is to be interpreted subject to the following requirements:—

- (a) the period must include at least 2 working days; and
- (b) where the period is to be calculated from the moment at which an action takes place or other event occurs, the day during which that action takes place or that event occurs is not to be counted in the calculation of that period.

(4) In Parts 2 and 3, any reference to a period of time which is expressed otherwise than in hours is to be interpreted subject to the requirement that where the period—

- (a) is to be calculated by counting forwards in time from a given date or event, and
- (b) would (but for this paragraph) have ended on a day which is not a working day,

the period is to end at the end of the next working day.

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(a) OJ No C 115, 9.5.2008, p47.

(b) OJ No C 115, 9.5.2008, p13.

(c) 1971 c.80.

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 2  
*Thresholds*

**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*

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 3

#### *Exclusions*

#### **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(a) 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;
- (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.

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(a) 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.

(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(a) 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.

(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(b), 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

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(a) 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).

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

- (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<sup>(a)</sup> as amended from time to time,
    - (ii) central bank services, or
    - (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>(b)</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*

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<sup>(a)</sup> 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).

<sup>(b)</sup> OJ No L 95, 15.3.2010, p1.

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
- (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(a);
- (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.

(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*

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(a) 2000 c.36.

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>(a)</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>(b)</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>(c)</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*

(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

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(a) OJ No L 13, 19.1.2000, p12, amended by Regulation (EC) No 1137/2008 (OJ No L 311, 21.11.2008, p1).

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

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

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*

**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*

**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 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 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*

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*

**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*

**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>(a)</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;

“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.

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(a) 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).

(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>(a)</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
- (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).

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

(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*

**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*

**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(a) or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983(b) 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(c);
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889(d) or section 1 of the Prevention of Corruption Act 1906(e);
- (c) the common law offence of bribery;
- (d) bribery within the meaning of sections 1, 2 or 6 of the Bribery Act 2010(f), or section 113 of the Representation of the People Act 1983(g);
- (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(h):—
  - (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(i), the Theft Act (Northern Ireland) 1969(j), the Theft Act 1978(k) or the Theft (Northern Ireland) Order 1978(l);
  - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(m), article 451 of the Companies (Northern Ireland) Order 1986(n) or section 993 of the Companies Act 2006(o);
  - (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(p) or section 72 of the Value Added Tax Act 1994(q);
  - (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993(r);
  - (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(s) or section 19 of the Theft Act (Northern Ireland) 1969(t);
  - (viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006(u); or

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- (a) 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).
  - (b) 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.
  - (c) OJ No L 300, 11.11.2008, p42.
  - (d) 1889 c.69; this Act was repealed by the Bribery Act 2010 (c.23), Schedule 2.
  - (e) 1906 c.34; this Act was repealed by the Bribery Act 2010 (c.23), Schedule 2.
  - (f) 2010 c.23.
  - (g) 1983 c.2; section 113 was amended by the Greater London Authority Act 1999 (c.29), Schedule 3, paragraph 30(2).
  - (h) OJ No C 316, 27.11.1995, p48.
  - (i) 1968 c.60.
  - (j) 1969 c.16 (N.I.).
  - (k) 1978 c.31.
  - (l) S.I. 1978/1407 (N.I.23).
  - (m) 1985 c.6; section 458 was modified by S.I. 2001/1090 and repealed by the Companies Act 2006 (c.46), Schedule 16.
  - (n) 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.
  - (o) 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.
  - (p) 1979 c.2.
  - (q) 1994 c.23.
  - (r) 1993 c.36.
  - (s) 1968 c.60; section 20 was amended by the Fraud Act 2006 (c.35), Schedules 1 and 3.
  - (t) 1969 c.16 (N.I.); section 19 was amended by the Fraud Act 2006 (c.35), Schedules 1 and 3.
  - (u) 2006 c.35.

- (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(a); 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(b) 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(c);
  - (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(d) or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996(e);
- (j) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004(f);
- (k) an offence under section 59A of the Sexual Offences Act 2003(g);
- (l) an offence under section 71 of the Coroners and Justice Act 2009(h);
- (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(i); 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.

*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.

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(a) 2008 c.28.

(b) 2007 c.27.

(c) 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).

(d) 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).

(e) 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).

(f) 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.

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

(h) 2009 c.25.

(i) 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.

(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*

**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*

**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*

**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(a), 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),

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.

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

(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*

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(a).

## 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,

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(a) S.I. 2013/500.

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 I 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*

**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.

**PART 3**  
**REMEDIES**  
**CHAPTER 5**  
**FACILITATION OF REMEDIES**

**Scope of Chapter 5**

**85.** This Chapter applies to contracts and framework agreements falling within the scope of Part 2.

**Notices of decisions to award a contract or conclude a framework agreement**

**86.**—(1) Subject to paragraphs (5) and (6), a contracting authority shall send to each candidate and tenderer a notice communicating its decision to award the contract or conclude the framework agreement.

*Content of notices*

- (2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—
- (a) the criteria for the award of the contract;
  - (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
    - (i) the tenderer which is to receive the notice; and
    - (ii) the tenderer—
      - (aa) to be awarded the contract, or
      - (bb) to become a party to the framework agreement,
 and anything required by paragraph (3);
  - (c) the name of the tenderer—
    - (i) to be awarded the contract, or
    - (ii) to become a party to the framework agreement; and
  - (d) a precise statement of either—
    - (i) when, in accordance with regulation 87, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies, or
    - (ii) the date before which the contracting authority will not, in conformity with regulation 87 enter into the contract or conclude the framework agreement.
- (3) The reasons referred to in paragraph (2)(b) shall include the reason for any decision by the contracting authority that the economic operator did not meet the technical specifications—
- (a) in an equivalent manner as mentioned in regulation 42(14); or
  - (b) because compliance with a standard, approval, specification or system mentioned in regulation 42(15) does not address the performance or functional requirements laid down by the contracting authority.
- (4) Where it is to be sent to a candidate, the notice referred to in paragraph (1) shall include—

- (a) the reasons why the candidate was unsuccessful; and
- (b) the information mentioned in paragraph (2), but as if the words “and relative advantages” were omitted from sub-paragraph (b).

*Exemptions*

(5) A contracting authority need not comply with paragraph (1) in any of the following cases:—

- (a) where the contract or framework agreement is permitted by Part 2 to be awarded or concluded without prior publication of a contract notice;
- (b) where the only tenderer is the one who is to be awarded the contract or who is to become a party to the framework agreement, and there are no candidates;
- (c) where the contracting authority awards a contract under a framework agreement or a dynamic purchasing system.

(6) A contracting authority may withhold any information to be provided in accordance with the preceding requirements of this regulation 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.

*Meaning of “candidate” and “tenderer”*

(7) In this regulation,—

- (a) “candidate” means a candidate, as defined in regulation 2(1), which—
  - (i) is not a tenderer, and
  - (ii) has not been informed of the rejection of its application and the reasons for it;
- (b) “tenderer” means a tenderer, as defined in regulation 2(1), which has not been definitively excluded.

(8) For the purposes of paragraph (7)(b), an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either—

- (a) the exclusion has been held to be lawful in proceedings under Chapter 6; or
- (b) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 92(4) and (5).

**Standstill period**

**87.**—(1) Where regulation 86(1) applies, the contracting authority must not enter into the contract or conclude the framework agreement before the end of the standstill period.

(2) Where the contracting authority sends a regulation 86 notice to all the relevant economic operators by facsimile or electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.

(3) Where the contracting authority sends a regulation 86 notice to all the relevant economic operators only by other means, the standstill period ends at whichever of the following occurs first:—

- (a) midnight at the end of the 15th day after the relevant sending date;
- (b) midnight at the end of 10th day after the date on which the last of the economic operators to receive such a notice receives it.

(4) In paragraphs (2) and (3), “the relevant sending date” means the date on which the regulation 86 notice is sent to the relevant economic operators, and if the notices are sent to different relevant economic operators on different dates, the relevant sending date is the date on which the last of the notices is sent.

(5) Where the contracting authority sends the regulation 86 notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest:—

- (a) midnight at the end of the 10th day after the date on which the last notice is sent by facsimile or electronic means;
- (b) the time when whichever of the following occurs first:—
  - (i) midnight at the end of the 15th day after the date on which the last notice is sent by other means;
  - (ii) midnight at the end of the 10th day after the date on which the last of the economic operators to receive a notice sent by any such other means receives it.

(6) In this regulation—

“regulation 86 notice” means a notice given in accordance with regulation 86; and

“relevant economic operators” means economic operators to which regulation 86 requires a notice to be sent.

## CHAPTER 6

### APPLICATIONS TO THE COURT

#### Interpretation of Chapter 6

**88.**—(1) In this Chapter—

“claim form” includes, in Northern Ireland, the originating process by which the proceedings are commenced;

“contract”, except in regulation 103, means a public contract or a framework agreement;

“declaration of ineffectiveness” means a declaration made under regulation 98(2)(a) or 103(3);

“economic operator” has the meanings given by paragraph (2);

“grounds for ineffectiveness” has the meaning given to it by regulation 99;

“proceedings” means court proceedings taken for the purposes of regulation 91; and

“standstill period”, and references to its end, have the same meaning as in regulation 87.

(2) In regulations 89 and 90, “economic operator” has its usual meaning (in accordance with regulation 2(1)), but in the other provisions of this Part “economic operator” has the narrower meaning of an economic operator (as defined by regulation 2(1)) to which a duty is owed in accordance with regulation 89 or 90

#### Duty owed to economic operators from EEA states

**89.**—(1) This regulation applies to the obligation on a contracting authority to comply with—

- (a) the provisions of Part 2; and
- (b) any enforceable EU obligation in the field of public procurement in respect of a contract or design contest falling within the scope of Part 2.

(2) That obligation is a duty owed to an economic operator from the United Kingdom or from another EEA state.

#### Duty owed to economic operators from certain other states

**90.**—(1) The duty owed in accordance with regulation 89 is a duty owed also to—

- (a) an economic operator from a GPA state, but only where the GPA applies to the procurement concerned; and
- (b) an economic operator which is not from an EEA state or a GPA state, but only if a relevant bilateral agreement applies.

- (2) For the purposes of paragraph (1)(a), the GPA applies to a procurement if—
- (a) the procurement may result in the award of a contract of any description; and
  - (b) at the relevant time—
    - (i) a GPA State has agreed with the EU that the GPA shall apply to a contract of that description, and
    - (ii) the economic operator is from that GPA state.
- (3) For the purposes of paragraph (1)(b), a relevant bilateral agreement applies if—
- (a) there is an international agreement, other than the GPA, by which the EU is bound; and
  - (b) in accordance with that agreement, the economic operator is, in respect of the procurement concerned, to be accorded remedies no less favourable than those accorded to economic operators from the EU in respect of matters falling within the scope of the duty owed in accordance with regulation 89.
- (4) In this regulation—
- “GPA state” means any country, other than an EEA state, which at the relevant time is a signatory to the GPA; and
- “relevant time” means the date on which the contracting authority sent a call for competition in respect of the contract to the EU Publications Office or would have done so if it had been required by Part 2 to do so.

#### **Enforcement of duties through the Court**

**91.**—(1) A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in the High Court, and regulations 92 to 104 apply to such proceedings.

#### **General time limits for starting proceedings**

**92.**—(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods:—

- (a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—
  - (i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
  - (ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
- (b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first:—
  - (i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
  - (ii) 10 days beginning with—
    - (aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or
    - (bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

(c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.

(4) Subject to paragraph (5), the Court may extend the time limits imposed by this regulation (but not any of the limits imposed by regulation 93) where the Court considers that there is a good reason for doing so.

(5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

### **Special time limits for seeking a declaration of ineffectiveness**

**93.—**(1) This regulation limits the time within which proceedings may be started where the proceedings seek a declaration of ineffectiveness.

(2) Such proceedings must be started—

(a) where paragraph (3) or (5) applies, within 30 days beginning with the relevant date mentioned in that paragraph;

(b) in any event, within 6 months beginning with the day after the date on which the contract was entered into.

(3) This paragraph applies where a relevant contract award notice has been published in the Official Journal, in which case the relevant date is the day after the date on which the notice was published.

(4) For that purpose, a contract award notice is relevant if, and only if—

(a) the contract was awarded without prior publication of a contract notice; and

(b) the contract award notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice.

(5) This paragraph applies where the contracting authority has informed the economic operator of—

(a) the conclusion of the contract, and

(b) a summary of the relevant reasons,

in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary of the relevant reasons.

(6) In paragraph (5), “the relevant reasons” means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 55(2).

(7) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

### **Starting proceedings**

**94.—**(1) Where proceedings are started, the economic operator must serve the claim form on the contracting authority within 7 days after the date of issue.

(2) Paragraph (3) applies where proceedings are started—

(a) seeking a declaration of ineffectiveness; or

(b) alleging a breach of regulation 87, 95 or 96(1)(b) where the contract has not been fully performed.

(3) In those circumstances, the economic operator must, as soon as practicable, send a copy of the claim form to each person, other than the contracting authority, who is a party to the contract in question.

(4) The contracting authority must, as soon as practicable, comply with any request from the economic operator for any information that the economic operator may reasonably require for the purpose of complying with paragraph (3).

(5) In this regulation, “serve” means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served.

### **Contract-making suspended by challenge to award decision**

**95.**—(1) Where—

- (a) a claim form has been issued in respect of a contracting authority’s decision to award the contract,
- (b) the contracting authority has become aware that the claim form has been issued and that it relates to that decision, and
- (c) the contract has not been entered into,

the contracting authority is required to refrain from entering into the contract.

(2) The requirement continues until any of the following occurs—

- (a) the Court brings the requirement to an end by interim order under regulation 96(1)(a);
- (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

(3) This regulation does not affect the obligations imposed by regulation 87.

### **Interim orders**

**96.**—(1) In proceedings, the Court may, where relevant, make an interim order—

- (a) bringing to an end the requirement imposed by regulation 95(1);
- (b) restoring or modifying that requirement;
- (c) suspending the procedure leading to—
  - (i) the award of the contract, or
  - (ii) the determination of the design contest,in relation to which the breach of the duty owed in accordance with regulation 89 or 90 is alleged;
- (d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.

(2) When deciding whether to make an order under paragraph (1)(a)—

- (a) the Court must consider whether, if regulation 95(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and
- (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 95(1).

(4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court.

### **Remedies where the contract has not been entered into**

**97.**—(1) Paragraph (2) applies where—

- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 89 or 90; and
- (b) the contract has not yet been entered into.

(2) In those circumstances, the Court may do one or more of the following—

- (a) order the setting aside of the decision or action concerned;
- (b) order the contracting authority to amend any document;
- (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(3) This regulation does not prejudice any other powers of the Court.

### **Remedies where the contract has been entered into**

**98.**—(1) Paragraph (2) applies if—

- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 89 or 90; and
- (b) the contract has already been entered into.

(2) In those circumstances, the Court—

- (a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 100 requires the Court not to do so;
- (b) must, where required by regulation 102, impose penalties in accordance with that regulation;
- (c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in subparagraphs (a) and (b);
- (d) must not order any other remedies.

(3) Paragraph (2)(d) is subject to regulation 103(3) and (9) (additional relief in respect of specific contracts where a framework agreement is ineffective) and does not prejudice any power of the Court under regulation 101(3) or 102(12) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

### **Grounds for ineffectiveness**

**99.**—(1) There are three grounds for ineffectiveness.

#### *The first ground*

(2) Subject to paragraph (3), the first ground applies where the contract has been awarded without prior publication of a contract notice in any case in which Part 2 required the prior publication of a contract notice.

(3) The first ground does not apply if all the following apply:—

- (a) the contracting authority considered the award of the contract without prior publication of a contract notice to be permitted by Part 2;
- (b) the contracting authority has had published in the Official Journal a voluntary transparency notice expressing its intention to enter into the contract; and
- (c) the contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published in the Official Journal.

(4) In paragraph (3), “voluntary transparency notice” means a notice which contains the following information—

- (a) the name and contact details of the contracting authority;
- (b) a description of the object of the contract;
- (c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice;
- (d) the name and contact details of the economic operator to be awarded the contract; and
- (e) where appropriate, any other information which the contracting authority considers it useful to include.

*The second ground*

(5) The second ground applies where all the following apply—

- (a) the contract has been entered into in breach of any requirement imposed by—
  - (i) regulation 87 (the standstill period),
  - (ii) regulation 95 (contract-making suspended by challenge to award), or
  - (iii) regulation 96(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 95);
- (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 89 or 90 in respect of obligations other than those imposed by regulation 87 (the standstill period) and this Chapter;
- (c) the breach mentioned in sub-paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-paragraph (b), or pursuing them to a proper conclusion, before the contract was entered into; and
- (d) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the contract.

*The third ground*

(6) Subject to paragraph (7), the third ground applies where all the following apply—

- (a) the contract is based on a framework agreement or was awarded under a dynamic purchasing system;
- (b) the contract was awarded in breach of any requirement imposed by—
  - (i) regulation 33(11) (award of contracts based on framework agreements through re-opening of competition), or
  - (ii) regulation 34(21) to (24) (award of contracts under dynamic purchasing systems); and
- (c) the estimated value of the contract is equal to or greater than the relevant threshold mentioned in regulation 5.

(7) The third ground does not apply if all the following apply—

- (a) the contracting authority considered the award of the contract to be in accordance with the provisions mentioned in paragraph (6)(b)(i) or (ii);
- (b) the contracting authority has, despite regulation 86(5)(c), voluntarily complied with the requirements set out in regulation 86(1) to (4); and
- (c) the contract has not been entered into before the end of the standstill period.

**General interest grounds for not making a declaration of ineffectiveness**

**100.**—(1) Where the Court is satisfied that any of the grounds for ineffectiveness applies, the Court must not make a declaration of ineffectiveness if—

- (a) the contracting authority or another party to the proceedings raises an issue under this regulation; and

- (b) the Court is satisfied that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

(2) For that purpose, economic interests in the effectiveness of the contract may be considered as overriding reasons only if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

(3) However, economic interests directly linked to the contract cannot constitute overriding reasons relating to a general interest.

(4) For that purpose, economic interests directly linked to the contract include—

- (a) the costs resulting from the delay in the execution of the contract;
- (b) the costs resulting from the commencement of a new procurement procedure;
- (c) the costs resulting from change of the economic operator performing the contract; and
- (d) the costs of legal obligations resulting from the ineffectiveness.

(5) For the purposes of paragraph (1)(b), overriding reasons may be taken to require that the effects of the contract should be maintained even if they do not require the Court to refrain from shortening the duration of the contract by an order under regulation 102(3)(a).

### **The consequences of ineffectiveness**

**101.**—(1) Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made and, accordingly, those obligations under the contract which at that time have yet to be performed are not to be performed.

(2) Paragraph (1) does not prevent the exercise of any power under which the orders or decisions of the Court may be stayed, but at the end of any period during which a declaration of ineffectiveness is stayed, the contract is then to be considered to have been ineffective as from the time when the declaration had been made.

(3) When making a declaration of ineffectiveness, or at any time after doing so, the Court may make any order that it thinks appropriate for addressing—

- (a) the implications of paragraph (1) or (2) for the particular circumstances of the case;
- (b) any consequential matters arising from the ineffectiveness.

(4) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(5) Paragraph (6) applies where the parties to the contract have, at any time before the declaration of ineffectiveness is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such a declaration being made.

(6) In those circumstances, the Court must not exercise its power to make an order under paragraph (3) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the requirement in paragraph (1) or (2).

### **Penalties in addition to, or instead of, ineffectiveness**

**102.**—(1) Where the Court makes a declaration of ineffectiveness, it must also order that the contracting authority pay a civil financial penalty of the amount specified in the order.

(2) Paragraph (3) applies where—

- (a) in proceedings for a declaration of ineffectiveness, the Court is satisfied that any of the grounds for ineffectiveness applies but does not make a declaration of ineffectiveness because regulation 100 requires it not to do so; or
- (b) in any proceedings, the Court is satisfied that the contract has been entered into in breach of any requirement imposed by regulation 87, 95 or 96(1)(b), and does not make a

declaration of ineffectiveness (whether because none was sought or because the Court is not satisfied that any of the grounds for ineffectiveness applies).

(3) In those circumstances, the Court must order at least one, and may order both, of the following penalties:—

- (a) that the duration of the contract be shortened to the extent specified in the order;
- (b) that the contracting authority pay a civil financial penalty of the amount specified in the order.

(4) When the Court is considering what order to make under paragraph (1) or (3), the overriding consideration is that the penalties must be effective, proportionate and dissuasive.

(5) In determining the appropriate order, the Court must take account of all the relevant factors, including—

- (a) the seriousness of the relevant breach of the duty owed in accordance with regulation 89 or 90;
- (b) the behaviour of the contracting authority;
- (c) where the order is to be made under paragraph (3), the extent to which the contract remains in force.

(6) Where more than one economic operator starts proceedings in relation to the same contract, paragraph (4) applies to the totality of penalties imposed in respect of the contract.

*Civil financial penalties*

(7) Subject to paragraph (8), where a contracting authority is ordered by the High Court of England and Wales to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Minister for the Cabinet Office;
- (b) the Court must send a copy of the order to the Minister;
- (c) the contracting authority must pay the penalty to the Minister; and
- (d) the Minister must, on receipt of the penalty, pay it into the Consolidated Fund.

(8) Where the Minister for the Cabinet Office, or the Cabinet Office, is ordered to pay a civil financial penalty under this Chapter—

- (a) paragraph (7) does not apply; and
- (b) the Minister for the Cabinet Office must pay the penalty into the Consolidated Fund.

(9) Subject to paragraph (10), where a contracting authority is ordered by the High Court of Northern Ireland to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Department of Finance and Personnel;
- (b) the Court must send a copy of the order to the Department;
- (c) the contracting authority must pay the penalty to the Department; and
- (d) the Department must, when it receives the penalty, pay it into the Consolidated Fund of Northern Ireland.

(10) Where the Department of Finance and Personnel is ordered to pay a civil financial penalty under this Chapter—

- (a) paragraph (9) does not apply; and
- (b) the Department must pay the penalty into the Consolidated Fund of Northern Ireland.

(11) Where a contracting authority is a non-Crown body—

- (a) any payment due under paragraph (7) may be enforced by the Minister for the Cabinet Office as a judgment debt due to the Minister; and
- (b) any payment due under paragraph (9) may be enforced by the Department of Finance and Personnel as a judgment debt due to it.

### *Contract shortening*

(12) When making an order under paragraph (3)(a), or at any time after doing so, the Court may make any order that it thinks appropriate for addressing the consequences of the shortening of the duration of the contract.

(13) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(14) Paragraph (15) applies where the parties to the contract have, at any time before the order under paragraph (3)(a) is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such an order being made.

(15) In those circumstances, the Court must not exercise its power to make an order under paragraph (12) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the primary order that is being made, or has been made, under paragraph (3)(a).

(16) In paragraph (3)(a), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

### **Ineffectiveness etc. in relation to specific contracts based on a framework agreement**

**103.—**(1) In this regulation, “specific contract” means a contract which—

- (a) is based on the terms of a framework agreement; and
- (b) was entered into before a declaration of ineffectiveness (if any) was made in respect of the framework agreement.

(2) A specific contract is not to be considered to be ineffective merely because a declaration of ineffectiveness has been made in respect of the framework agreement.

(3) Where a declaration of ineffectiveness has been made in respect of the framework agreement, the Court must, subject to paragraph (5), make a separate declaration of ineffectiveness in respect of each relevant specific contract.

(4) For that purpose, a specific contract is relevant only if a claim for a declaration of ineffectiveness in respect of that specific contract has been made—

- (a) within the time limits mentioned in regulation 93 as applicable to the circumstances of the specific contract;
- (b) regardless of whether the claim was made at the same time as any claim for a declaration of ineffectiveness in respect of the framework agreement.

(5) Regulation 100 (general interest grounds for not making a declaration of ineffectiveness) applies for the purposes of paragraph (3), insofar as the overriding reasons relate specifically to the circumstances of the specific contract.

(6) This regulation does not prejudice the making of a declaration of ineffectiveness in relation to a specific contract in accordance with other provisions of this Part on the basis of—

- (a) the third ground of ineffectiveness set out in regulation 99(6) and (7); or
- (b) the second ground of ineffectiveness set out in regulation 99(5), where—
  - (i) the relevant breach of the kind mentioned in regulation 99(5)(a) is entering into the specific contract in breach of regulation 95 or 96(1)(b), and
  - (ii) the relevant breach of the kind mentioned in regulation 99(5)(b) relates specifically to the award of the specific contract and the procedure relating to that award, rather than to the award of the framework agreement and the procedure relating to it.

(7) A declaration of ineffectiveness must not be made in respect of a specific contract otherwise than in accordance with paragraph (3) or on a basis mentioned in paragraph (6).

(8) Where a declaration of ineffectiveness is made in respect of a specific contract in accordance with paragraph (3)—

- (a) regulation 101 (the consequences of ineffectiveness) applies;
- (b) regulation 102(1) (requirement to impose a civil financial penalty) does not apply.

(9) Where the Court refrains, by virtue of paragraph (5), from making a declaration of ineffectiveness which would otherwise have been required by paragraph (3), the Court must, subject to paragraph (10), order that the duration of the contract be shortened to the extent specified in the order.

(10) The extent by which the duration of the contract is to be shortened under paragraph (9) is the maximum extent, if any, which the Court considers to be possible having regard to what is required by the overriding reasons mentioned in paragraph (5).

(11) In paragraphs (9) and (10), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

### **Injunctions against the Crown**

**104.** In proceedings against the Crown, the Court has power to grant an injunction despite section 21 of the Crown Proceedings Act 1947(a).

## **PART 4**

### **MISCELLANEOUS OBLIGATIONS**

#### **CHAPTER 7**

#### **ADDITIONAL RULES FOR PART 2 PROCUREMENTS**

### **Scope of Chapter 7**

**105.**—(1) This Chapter applies to procurements within the scope of Part 2.

(2) But—

- (a) this Chapter does not apply 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(b);
- (b) regulations 106 and 108 do not apply where the contracting authority is a maintained school or an Academy.

### **Publication of information on Contracts Finder where contract notices are used**

**106.**—(1) Where a contracting authority sends a contract notice to the EU Publications Office for publication, the contracting authority shall cause information to be published on Contracts Finder within 24 hours of the time when the contracting authority becomes entitled, in accordance with regulation 52(3) and (4), to publish the notice at national level.

(2) The information to be published on Contracts Finder shall include at least the following:—

- (a) the internet address at which the procurement documents are accessible;
- (b) the time by which any interested economic operator must respond if it wishes to be considered;
- (c) how and to whom such an economic operator is to respond; and
- (d) any other requirements for participating in the procurement.

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(a) 1947 c.44  
(b) S.I. 2013/500.

(3) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to the form and manner in which information is to be published on Contracts Finder.

(4) Paragraph (5) applies if such guidance confirms that, for the time being, arrangements have been put in place by or on behalf of the Cabinet Office under which the information referred to in paragraph (2) will, without further action by contracting authorities, be extracted and published on Contracts Finder following the publication of contract notices by the EU Publications Office.

(5) In those circumstances, contracting authorities shall be deemed to have complied with paragraph (1) by virtue of sending the contract notice to the EU Publications Office for publication in accordance with regulation 51.

### **Qualitative selection**

**107.**—(1) Contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to the qualitative selection of economic operators.

(2) In this regulation, “qualitative selection” means the processes by which, in accordance with regulations 57 to 65, contracting authorities—

- (a) select economic operators to participate in procurement procedures; and
- (b) decide whether to exclude economic operators from such participation.

(3) Such guidance may, in particular, relate to—

- (a) the use of questionnaires for the purposes of qualitative selection, including the avoidance of burdensome, excessive or disproportionate questions;
- (b) the assessment of information relevant to qualitative assessment.

(4) Where a contracting authority conducts a procurement in a way which represents a reportable deviation from the guidance issued under this regulation, the contracting authority shall send to the Cabinet Office a report explaining the deviation.

(5) For that purpose, something is a reportable deviation only if it falls within criteria laid down for that purpose in guidance issued under this regulation.

### **Publication of information on Contracts Finder about contracts awarded**

**108.**—(1) Paragraph (2) applies where a contracting authority—

- (a) sends a contract award notice to the EU Publications Office for publication; or
- (b) awards a contract based on a framework agreement.

(2) In those circumstances, the contracting authority shall cause at least the following information to be published on Contracts Finder:—

- (a) the name of the contractor;
- (b) the date on which the contract was entered into;
- (c) the value of the contract.

(3) But the contracting authority may withhold information 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.

(4) Contracting authorities shall comply with paragraph (2) within a reasonable time.

(5) But where a contracting authority sends, or intends to send, a contract award notice to the EU Publications Office for publication, the contracting authority shall not cause the information to be published on Contracts Finder earlier than the time at which the contracting authority becomes entitled, in accordance with regulation 52(3) and (4), to publish the notice at national level.

(6) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office on—

- (a) the form and manner in which the information is to be published on Contracts Finder; and
- (b) what is a reasonable time (having regard, where relevant, to paragraph (5)) for the purposes of paragraph (4).

(7) Paragraph (8) applies if such guidance confirms that, for the time being, arrangements have been put in place by or on behalf of the Cabinet Office under which the information referred to in paragraph (2) will, without further action by contracting authorities, be extracted and published on Contracts Finder following the publication of contract notices by the EU Publications Office.

(8) In those circumstances, contracting authorities shall be deemed to have complied with paragraph (2) by virtue of sending a contract award notice to the EU Publications Office for publication in accordance with regulation 51.

(9) In this regulation, “contract award notice” means a contract award notice referred to in regulation 50 or 75(3).

## CHAPTER 8

### BELOW-THRESHOLD PROCUREMENTS

#### Scope of Chapter 8

**109.**—(1) Subject to paragraphs (2) and (5), this Chapter applies to procurements by contracting authorities with respect to public contracts where Part 2 does not apply because the estimated value of the procurement is less than the relevant threshold mentioned in regulation 5.

(2) This Chapter does not apply in any of the following cases:—

- (a) where Part 2 would not have applied even if the estimated value of the procurement had been equal to or greater than the relevant threshold mentioned in regulation 5;
- (b) where the contracting authority is a central government authority and the procurement has a value net of VAT estimated to be less than £10,000;
- (c) where the contracting authority is—
  - (i) a sub-central contracting authority or an NHS Trust, and
  - (ii) the procurement has a value net of VAT estimated to be less than £25,000;
- (d) 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(a).

(3) For the purposes of paragraph (2)(b) and (c) and regulation 111(2), the estimated value of the procurement shall be calculated on the basis set out in regulation 6(1) to (5), (7) to (10) and (16) to (19), but as if the reference to a call for competition in regulation 6(7) were a reference to the publication of information on Contracts Finder in accordance with regulation 110.

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

(5) Regulations 110 and 112 do not apply where the contracting authority is a maintained school or an Academy.

#### Publication of contract opportunities on Contracts Finder

**110.**—(1) Paragraph (2) applies where a contracting authority advertises a contract award opportunity.

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(a) S.I. 2013/500.

(2) In those circumstances, the contracting authority shall publish information about the opportunity on Contracts Finder, regardless of what other means it uses to advertise the opportunity.

(3) Where a contracting authority is required by paragraph (2) to publish information on Contracts Finder, it shall do so within 24 hours of the time when it first advertises the contract award opportunity in any other way.

(4) A contracting authority may publish on Contracts Finder information about a contract award opportunity even if the contracting authority does not advertise the opportunity in any other way.

(5) For the purposes of this regulation—

- (a) a contracting authority advertises an opportunity if it does anything to put the opportunity in the public domain or bring the opportunity to the attention of economic operators generally or to any class or description of economic operators which is potentially open-ended, with a view to receiving responses from economic operators who wish to be considered for the award of the contract; and
- (b) accordingly, a contracting authority does not advertise an opportunity where it makes the opportunity available only to a number of particular economic operators who have been selected for that purpose (whether ad hoc or by virtue of their membership of some closed category such as a framework agreement), regardless of how it draws the opportunity to the attention of those economic operators.

(6) In this regulation, “contract award opportunity” means the opportunity to be awarded a public contract by a contracting authority, regardless of how specific the opportunity is.

(7) For example, advertising by means of techniques similar to prior information notices used to call for competition under Part 2 amounts to the advertising of contract award opportunities even though the specific contracts that may in due course be awarded within the scope of such procurements are not identified individually in the advertising.

(8) The information to be published on Contracts Finder shall include at least the following:—

- (a) the time by which any interested economic operator must respond if it wishes to be considered;
- (b) how and to whom such an economic operator is to respond; and
- (c) any other requirements for participating in the procurement.

(9) For the purposes of paragraph (8)(a), the time shall be such as to allow the economic operators a sufficient but not disproportionate period of time within which to respond.

(10) The contracting authority shall ensure that the information remains published on Contracts Finder until the time mentioned in paragraph (8)(a).

(11) Paragraph (10) does not apply where the procedure is, for any reason, abandoned before that time.

(12) Where a contracting authority publishes information on Contracts Finder under this regulation, the contracting authority shall—

- (a) by means of the internet, offer unrestricted and full direct access free of charge to any relevant contract documents; and
- (b) specify in the information published on Contracts Finder the internet address at which those documents are accessible.

(13) But paragraph (12)(a) does not require a contracting authority to provide such access where the access cannot be offered for a relevant reason.

(14) In paragraph (13), “relevant reason” means any reason which, in accordance with regulation 53(3) and (4), would have applied if the procurement had been covered by Part 2 and the relevant contract documents had been procurement documents.

(15) For the purposes of this regulation, a document is a relevant contract document if—

- (a) it contains information about the opportunity which goes beyond the information published on Contracts Finder, and

- (b) that information is intended by the contracting authority to be taken into account by those responding to the advertisement.

(16) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to—

- (a) the form and manner in which information is to be published on Contracts Finder;
- (b) what is a sufficient but not disproportionate period of time for the purposes of paragraph (9).

### **Assessing suitability etc**

**111.**—(1) A contracting authority shall not include a pre-qualification stage in a procurement.

(2) Where the relevant threshold for the purposes of regulation 109(1) is that mentioned in regulation (5)(1)(a) or (d), paragraph (1) of this regulation applies only if the estimated value of the procurement is less than the lower threshold mentioned in paragraph (3).

(3) The lower threshold is the threshold mentioned in—

- (a) regulation 5(1)(b) where the contracting authority is a central government authority;
- (b) regulation 5(1)(c) where the contracting authority is a sub-central contracting authority.

(4) In paragraph (1), “pre-qualification stage” means a stage in the procurement process during which the contracting authority assesses the suitability of candidates to perform a public contract for the purpose of reducing the number of candidates to a smaller number who are to proceed to a later stage of the process.

(5) In any event, contracting authorities may ask candidates to answer suitability assessment questions only if each such question is—

- (a) relevant to the subject-matter of the procurement; and
- (b) proportionate.

(6) In paragraph (5), “suitability assessment question” means a question which relates to information or evidence which the contracting authority requires for the purpose of assessing whether candidates meet requirements or minimum standards of suitability, capability, legal status or financial standing.

(7) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office, which may include guidance on how to establish and assess, without infringing paragraph (5), whether candidates meet requirements or minimum standards relating to suitability, capability, legal status and financial standing.

(8) Where a contracting authority conducts a procurement in a way which represents a reportable deviation from the guidance issued under paragraph (7), the contracting authority shall send to the Cabinet Office a report explaining the deviation.

(9) For that purpose, something is a reportable deviation only if it falls within criteria laid down for that purpose in guidance issued under paragraph (7).

(10) In this regulation, “candidate” means an economic operator that wishes to be considered for the award of a public contract.

### **Publication of information on Contracts Finder about contracts awarded**

**112.**—(1) Where a public contract is awarded, the contracting authority shall, within a reasonable time, publish on Contracts Finder at least the following information:—

- (a) the name of the contractor;
- (b) the date on which the contract was entered into;
- (c) the value of the contract;
- (d) whether the contractor is a SME or VCSE.

(2) But the contracting authority may withhold information 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.

(3) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to—

- (a) the form and manner in which the information is to be published on Contracts Finder; and
- (b) what is a reasonable time for the purposes of paragraph (1).

(4) In paragraph (1)(d)—

“SME” means an enterprise falling within the category of micro, small and medium-sized enterprises defined by the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises(a); and

“VCSE” means a non-governmental organisation that is value-driven and which principally reinvests its surpluses to further social, environmental or cultural objectives.

## CHAPTER 9

### MISCELLANEOUS PROVISIONS

#### **Payment of undisputed invoices within 30 days by contracting authorities, contractors and subcontractors**

**113.**—(1) This regulation applies to all public contracts except the following:—

- (a) contracts for 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(b);
- (b) contracts awarded by a contracting authority which is a maintained school or an Academy.

(2) Contracting authorities shall ensure that every public contract which they award contains suitable provisions to require the following:—

- (a) that any payment due from the contracting authority to the contractor under the contract is to be made no later than the end of a period of 30 days from the date on which the relevant invoice is regarded as valid and undisputed;
- (b) that any invoices for payment submitted by the contractor are considered and verified by the contracting authority in a timely fashion and that undue delay in doing so is not to be sufficient justification for failing to regard an invoice as valid and undisputed; and
- (c) that any subcontract awarded by the contractor contains suitable provisions to impose, as between the parties to the subcontract—
  - (i) requirements to the same effect as those which sub-paragraphs (a) and (b) require to be imposed as between the parties to the public contract; and
  - (ii) a requirement for the subcontractor to include in any subcontract which it in turn awards suitable provisions to impose, as between the parties to that subcontract, requirements to the same effect as those required by this sub-paragraph (c).

(3) Paragraph (2) is without prejudice to any contractual or statutory provision under which any payment is to be made earlier than the time required by that paragraph.

(4) In complying with paragraph (2), contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office.

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(a) OJ No L 124, 20.5.2003, p.36.

(b) S.I. 2013/500.

(5) Such guidance may, in particular, recommend model provisions, including provisions defining the circumstances in which an invoice is to be regarded as being, or as having become, valid and undisputed including, for example—

- (a) provisions deeming an invoice to have become valid and undisputed if not considered and verified in a timely manner; and
- (b) addressing what is to be considered, for that purpose, to be a timely manner in various circumstances.

(6) To the extent that a public contract does not contain express provisions dealing with any of the matters which, in accordance with paragraph (2), should have been contained in that contract or subcontract, it shall be an implied term of the contract that—

- (a) any payment due under it from the contracting authority to the contractor is to be made no later than the end of a period of 30 days from the date on which the contracting authority completes any process of verification that the invoice is valid and undisputed;
- (b) the contracting authority is to consider and verify any invoice submitted by the contractor in a timely manner with a view to ascertaining whether the invoice is valid and undisputed; and
- (c) the contractor will include in any subcontract which it awards provisions—
  - (i) imposing, as between the parties to that subcontract, requirements to the same effect as those which sub-paragraphs (a) and (b) refer to as between the parties to the public contract, and
  - (ii) requiring the subcontractor party to that subcontract to include in any subcontract which it in turn awards provisions imposing, as between the parties to that subcontract, requirements to the same effect as those referred to in paragraphs (i) and (ii) of this sub-paragraph.

(7) Every financial year, each contracting authority shall publish on the internet statistics showing, for the preceding financial year, how far the contracting authority has actually complied with its obligations under this regulation to make payments within 30 days, including—

- (a) the proportion of invoices that were paid in accordance with those obligations, expressed as a percentage of the total number of invoices that were, or should have been, paid in accordance with those obligations;
- (b) the total amount of any liability (whether statutory or otherwise) to pay interest which accrued by virtue of circumstances amounting to a breach of those obligations; and
- (c) the total amount of interest actually paid in discharge of any such liability (including any which had accrued before the beginning of the period to which the statistics relate).

(8) In paragraph (7), “publish on the internet” means—

- (a) make freely available on the internet; and
- (b) maintain such availability, subject to temporary interruptions for technical reasons, until the publication under paragraph (7) of the statistics for the following financial year.

(9) In complying with paragraph (7), contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office.

(10) Such guidance may, in particular, recommend model templates for presenting the statistics.

(11) In this regulation—

“financial year” means the period in respect of which the accounts of the contracting authority are prepared;

“subcontract” means a contract between two or more suppliers (at any stage of remoteness from the contracting authority in a subcontracting chain) made wholly or substantially for the purpose of performing (or contributing to the performance of) the whole or any part of a public contract; and

“supplier” means a party to a contract or subcontract under which that party is to execute any works, supply any products or provide any services.

## **General provisions applicable to Part 4**

**114.**—(1) A material failure to comply with any requirement of this Part does not, of itself, affect the validity of a public contract that has been entered into.

(2) Nothing in this Part requires a contracting authority to disclose any information if it considers that the disclosure would be contrary to the security interests of the United Kingdom.

## **PART 5**

### **REVOICATIONS, CONSEQUENTIAL AMENDMENTS, SAVINGS AND TRANSITIONAL PROVISIONS**

#### **Interpretation of Part 6**

**115.** In this Part, “the 2006 Regulations” means the Public Contracts Regulations 2006(a).

#### **Revocation and amendments**

**116.** Subject to the other provisions of this Part—

- (a) the 2006 Regulations are revoked; and
- (b) the consequential and miscellaneous amendments set out in Schedule 6 have effect.

#### **General saving in respect of certain concession contracts**

**117.** Nothing in these Regulations affects—

- (a) public works concession contracts within the meaning of the 2006 Regulations, or
- (b) services concession contracts within the meaning of the 2006 Regulations,

or procedures for the award of such contracts.

#### **General transitional provision and saving where procurement procedure commenced before 26th February 2015**

**118.**—(1) Nothing in these Regulations affects any contract award procedure commenced before 26th February 2015.

(2) For that purpose, a contract award procedure has been commenced before 26th February 2015 if, before that date—

- (a) a contract notice has been sent to the Official Journal in accordance with the 2006 Regulations in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed public contract, framework agreement or dynamic purchasing system;
- (b) the contracting authority has had published any form of advertisement seeking offers or expressions of interest in a proposed public contract, framework agreement or dynamic purchasing system; or
- (c) the contracting authority has contacted any economic operator in order to—
  - (i) seek expressions of interest or offers in respect of a proposed public contract, framework agreement or dynamic purchasing system, or

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(a) S.I. 2006/5, amended by S.I. 2007/3542, 2008/2256, 2683, 2848, 2009/1307, 2992, 2010/133, 976, 2011/1043, 1848, 2053, 2581, 3058, 2013/252, 1431, 2014/834 and by the Enterprise and Regulatory Reform Act 2013 (c.24), Schedule 20, paragraph 2.

- (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed public contract, framework agreement or dynamic purchasing system.
- (3) Nothing in these Regulations affects the award of a specific contract based on a framework agreement where the framework agreement was concluded—
- (a) before 26th February 2015; or
  - (b) on or after 26th February 2015 following a contract award procedure which, by virtue of paragraph (1), was not affected by these Regulations.
- (4) Nothing in these Regulations affects the award of a specific contract under a dynamic purchasing system where the system was established—
- (a) before 26th February 2015; or
  - (b) on or after that date following a contract award procedure which, by virtue of paragraph (1), was not affected by these Regulations.
- (5) Nothing in these Regulations affects a contract awarded—
- (a) before 26th February 2015; or
  - (b) after that date but where the award itself was not, by virtue of paragraphs (1) to (4), affected by these Regulations.
- (6) In this regulation, “dynamic purchasing system”, “framework agreement” and “public contract” have the same meanings as in the 2006 Regulations.

**Transitional provision and saving where utilities procurement procedure commenced before 26th February 2015**

**119.**—(1) The Utilities amendments do not affect any contract award procedure commenced before 26th February 2015.

(2) For that purpose, a contract award procedure has been commenced before 26th February 2015 if, before that date—

- (a) a contract notice has been sent to the Official Journal in accordance with the UCR in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed contract or dynamic purchasing system;
- (b) a periodic indicative notice has been sent to the Official Journal, in which case the contract award procedure that is not affected by the Utilities amendments is the procedure for the award of any proposed contract the intention to award which was indicated in the notice, but only if the requirements in regulation 16(3)(a) and (b) of the UCR are satisfied;
- (c) the utility has published any form of advertisement seeking offers or expressions of interest in a proposed contract or dynamic purchasing system; or
- (d) the utility has contacted any economic operator in order to—
  - (i) seek expressions of interest or offers in respect of a proposed contract or dynamic purchasing system, or
  - (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed contract or dynamic purchasing system.

(3) The Utilities amendments do not affect the award of a specific contract under a framework agreement where the framework agreement was concluded—

- (a) before 26th February 2015; or
- (b) on or after 26th February 2015 following a contract award procedure which, by virtue of paragraph (1), was not affected by the Utilities amendments.

(4) The Utilities amendments do not affect the award of a specific contract under a dynamic purchasing system where the system was established—

- (a) before 26th February 2015; or

- (b) on or after that date following a contract award procedure which, by virtue of paragraph (1), was not affected by the Utilities amendments.
- (5) In this regulation—
- (a) “contract”, “dynamic purchasing system”, “economic operator”, “framework agreement” and “periodic indicative notice” have the same meanings as in the UCR;
  - (b) “the UCR” means the Utilities Contracts Regulations 2006(a); and
  - (c) “the Utilities amendments” means the amendments made to the UCR by paragraph 15 of Schedule 7.

### **Temporary exemption and saving for certain NHS procurements**

**120.**—(1) Nothing in these Regulations affects—

- (a) any contract award procedure that—
  - (i) relates 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(b), and
  - (ii) is commenced before 18th April 2016; or
- (b) any contract awarded as a result of such a procedure.

(2) For that purpose, a contract award procedure has been commenced before 18th April 2016 if, before that date, any of the events mentioned in regulation 118(2)(a) to (c) has occurred.

### **Transitory provision prior to full commencement of regulation 22(1) to (7)**

**121.**—(1) This regulation applies during the period beginning on the date mentioned in regulation 1(3)(a) and ending immediately before the date mentioned in regulation 1(3)(c).

(2) During that period, contracting authorities may choose between the following means of communication for the purposes mentioned in paragraph (3):—

- (a) electronic means in accordance with regulation 22;
- (b) post or other suitable carrier;
- (c) fax;
- (d) a combination of those means.

(3) That choice is available for all communication and information exchange in respect of which both the following criteria are met:—

- (a) the use of electronic means would, in accordance with regulation 22(1) to (5), have been required if those provisions had been in force;
- (b) the use of electronic means is not required by any other provision of these Regulations that is in force.

### **Complying with regulation 113 before 1st April 2016**

**122.** In relation to any financial year ending before 1st April 2016, a contracting authority may comply with regulation 113(7) as if sub-paragraph (b) referred to the total amount of interest actually paid instead of the total amount of liability accrued.

*Francis Maude*  
Minister for the Cabinet Office

4th February 2015

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(a) 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.

(b) S.I. 2013/500.

## SCHEDULE 1

Regulation 2(1)

### CENTRAL GOVERNMENT AUTHORITIES

Where an entity listed in this Schedule is succeeded by another entity, which is itself a contracting authority, the successor entity shall be deemed to be included in this Schedule.

Cabinet Office

Office of the Parliamentary Counsel

Crown Commercial Service

Charity Commission

Crown Estate Commissioners (Vote Expenditure Only)

Crown Prosecution Service

Department for Business, Innovation and Skills

Competition and Markets Authority

Higher Education Funding Council for England

Intellectual Property Office

Met Office

National Measurement Office

Office of Manpower Economics

Department of Communities and Local Government

Rent Assessment Panels

Department for Culture, Media and Sport

British Library

British Museum

Commission for Architecture and the Built Environment

The Gambling Commission

Historic Buildings and Monuments Commission for England (English Heritage)

Imperial War Museum

Museums, Libraries and Archives Council

National Gallery

National Maritime Museum

National Portrait Gallery

Natural History Museum

Science Museum

Tate Gallery  
Victoria and Albert Museum  
Wallace Collection  
Department for Education  
Department for Energy and Climate Change  
Department for Environment, Food and Rural Affairs  
Agricultural Dwelling House Advisory Committees  
Agricultural Land Tribunals  
Cattle Breeding Centre  
Countryside Agency  
Plant Variety Rights Office  
Royal Botanic Gardens, Kew  
Royal Commission on Environmental Pollution  
Department of Health  
NHS Business Services Authority  
NHS Trusts  
Department for International Development  
Department of the Procurator General and Treasury Solicitor  
Legal Secretariat to the Law Officers  
Department for Transport  
Maritime and Coastguard Agency  
Department for Work and Pensions  
Health and Safety Executive  
Independent Tribunal Service  
Industrial Injuries Advisory Council  
Medical Boards and Examining Medical Officers (War Pensions)  
Occupational Pensions Regulatory Authority  
Pensions Ombudsman  
Pensions Protection Fund Ombudsman  
Regional Medical Service  
Social Security Advisory Committee  
Foreign and Commonwealth Office  
Wilton Park Conference Centre  
Government Actuary's Department  
GCHQ

Home Office  
    HM Inspectorate of Constabulary

House of Commons

House of Lords

Ministry of Defence  
    Defence Equipment & Support  
    Defence Infrastructure Organisation  
    Defence Science and Technology Laboratories

Ministry of Justice  
    Boundary Commission for England  
    Combined Tax Tribunal  
    Council on Tribunals  
    Court of Appeal — Criminal  
    Employment Appeals Tribunal  
    Employment Tribunals  
    HMCS Regions, Crown, County and Combined Courts (England and Wales)  
    Immigration Appellate Authorities  
    Immigration Adjudicators  
    Immigration Appeals Tribunal  
    Lands Tribunal  
    Law Commission  
    Legal Aid Agency (England and Wales)  
    Office of the Social Security Commissioners  
    Parole Board and Local Review Committees  
    Pensions Appeal Tribunals  
    Public Trust Office  
    Supreme Court Group (England and Wales)  
    Transport Tribunal

The National Archives

National Audit Office

National Savings and Investments

Public Prosecution Service for Northern Ireland

Office of Fair Trading

Office for National Statistics  
    National Health Service Central Register

Parliamentary and Health Service Ombudsman  
Paymaster General's Office  
Privy Council Office  
HM Revenue and Customs  
Royal Hospital, Chelsea  
Royal Mint  
Rural Payments Agency  
HM Treasury  
    United Kingdom Debt Management Office  
Northern Ireland, Department of Agriculture and Rural Development  
    Agri-Food and Biosciences Institute  
    Livestock and Meat Commission for Northern Ireland  
    Northern Ireland Fishery Harbour Authority  
Northern Ireland, Department of Culture, Arts and Leisure  
    Armagh Observatory  
    Armagh Planetarium  
    Arts Council of Northern Ireland  
    Northern Ireland Library Authority  
    Northern Ireland Screen  
    Northern Ireland Museums Council  
    National Museums Northern Ireland  
    Sport NI  
Northern Ireland, Department of Education  
    Council for Catholic Maintained Schools  
    Comhairle na Gaelscolaíochta  
    Council for the Curriculum, Examinations and Assessment  
    Education and Library Boards  
    Exceptional Circumstances Body  
    General Teaching Council for Northern Ireland  
    Middletown Centre for Autism  
    Northern Ireland Council for Integrated Education  
    Staff Commission for Education and Library Boards  
    Youth Council for Northern Ireland  
Northern Ireland, Department for Employment and Learning  
    Belfast Metropolitan College

Construction Industry Training Board - ConstructionSkills NI  
Labour Relations Agency  
Northern Regional College  
North West Regional College  
South Eastern Regional College  
Southern Regional College  
South West College  
Stranmillis University College  
Ulster Supported Employment Limited  
Northern Ireland, Department of Enterprise, Trade and Investment  
Consumer Council for Northern Ireland  
Health and Safety Executive for Northern Ireland  
Invest Northern Ireland  
Northern Ireland Tourist Board  
Northern Ireland, Department of the Environment  
Northern Ireland Local Government Officers' Superannuation Committee  
Local Government Staff Commission  
Northern Ireland Environment Agency  
Northern Ireland, Department of Finance and Personnel  
Northern Ireland Building Regulations Advisory Committee  
Statistics Advisory Committee  
Public service Commission for Northern Ireland  
Lay Observer for Northern Ireland  
Northern Ireland, Department of Health, Social Services and Public Safety  
Belfast Health and Social Care Trust  
Regional Business Services Organisation  
Regional Health and Social Care Board  
Northern Health and Social Care Trust  
Northern Ireland Ambulance Service Trust  
Northern Ireland Blood Transfusion Service  
Northern Ireland Fire and Rescue Service  
Northern Ireland Guardian Ad Litem Agency  
Northern Ireland Medical and Dental Training Agency  
Northern Ireland Practice and Education Council for Nursing and Midwifery  
Northern Ireland Social Care Council

Patient and Client Council  
Regional Agency for Public Health and Social Well Being  
Health and Social care Regulation and Quality Improvement Authority  
South Eastern Health and Social Care Trust  
Southern Health and Social Care Trust  
Western Health and Social Care Trust  
Northern Ireland, Department of Justice  
Chief Inspector of Criminal Justice  
Northern Ireland Law Commission  
Northern Ireland Legal Services Commission  
Northern Ireland Policing Board  
Northern Ireland Policing Fund  
Northern Ireland Prisoner Ombudsman  
Probation Board for Northern Ireland  
Police Ombudsman Northern Ireland  
Police Retraining and Rehabilitation Trust  
Police Service of Northern Ireland  
RUC George Cross Foundation  
Northern Ireland, Department for Regional Development  
Northern Ireland, Department for Social Development  
Northern Ireland Housing Executive  
The Charity Commission for Northern Ireland  
Northern Ireland, Office of the First Minister and Deputy First Minister  
Attorney General for Northern Ireland  
Commissioner for Children and Young People for Northern Ireland  
Commissioner for Older People for Northern Ireland  
Commissioner for Public Appointments for Northern Ireland  
Commissioner for Victims and Survivors  
Community Relations Council  
Equality Commission for Northern Ireland  
ILEX Urban Regeneration Company Limited  
Maze Long Kesh Development Corporation  
Northern Ireland Judicial Appointments Commission  
Strategic Investment Board  
Planning and Water Appeals Commission

Victims and Survivors Service Ltd  
Scotland, Auditor-General  
Scotland, Crown Office and Procurator Fiscal Service  
Scotland, General Register Office  
Scotland, Queen's and Lord Treasurer's Remembrancer  
Scotland, Registers of Scotland  
The Scotland Office  
The Scottish Ministers  
    Architecture and Design Scotland  
    Community Health Partnerships  
    Court of Session  
    Crofting Commission  
    Health Boards  
    High Court of Justiciary  
    HM Inspectorate of Constabulary  
    Keeper of the Records of Scotland  
    Lands Tribunal for Scotland  
    National Galleries of Scotland  
    National Library of Scotland  
    National Museums of Scotland  
    Office of the Social Security Commissioners  
    Parole Board for Scotland  
    Pensions Appeal Tribunals  
    Revenue Scotland  
    Royal Botanic Garden, Edinburgh  
    Royal Commission on the Ancient and Historical Monuments of Scotland  
    Scottish Further and Higher Education Funding Council  
    Scottish Land Court  
    Scottish Law Commission  
    Sheriff Courts  
    Scottish Police Agency  
    Special Health Boards  
    The Office of the Accountant of Court  
    The Private Rented Housing Panel and Private Rented Housing Committees  
The Scottish Parliamentary Body Corporate

UK Export Finance  
 Higher Education Funding Council Wales  
 Local Democracy and Boundary Commission for Wales  
 Rent Assessment Committees  
 The Wales Assembly Parliamentary Service  
 Welsh Language Commissioner  
 The Wales Office (Office of the Secretary of State for Wales)  
 The Welsh Ministers  
 Arts Council of Wales  
 Care Council for Wales  
 National Museum Wales  
 National Library of Wales  
 Natural Resources Wales  
 Royal Commission on the Ancient and Historical Monuments of Wales  
 Sport Wales  
 Welsh NHS Bodies

## SCHEDULE 2      Regulations 2(1) and 13(1)(a)(i)

### ACTIVITIES CONSTITUTING WORKS

In this Schedule, 'NACE Rev.1' has the same meaning as in Council Regulation (EEC) No 3037/90 on the classification of economic activities in the European Community(a), and numerical references in the columns relating to the NACE Rev.1 relate to the Annex to that Regulation. In the event of any difference of interpretation between the CPV and the NACE Rev.1, the CPV nomenclature shall apply.

NACE Rev. 1					CPV Code
SECTION F			CONSTRUCTION		
Division	Group	Class	Subject	Notes	
45			Construction	This division includes: —construction of new buildings and works, restoring and common repairs.	45000000
	45.1		Site preparation		45100000
		45.11	Demolition and wrecking of buildings; earth moving	This class includes: —demolition of buildings and other structures, —clearing of building	45110000

(a) OJ No L 293, 24.10.1990, p.1; last amended by Regulation (EC) No 1893/2006 of the European Parliament and of the Council (OJ No L 393, 30.12.2006, p.1).

				<p>sites,  —earth moving:  excavation, landfill,  levelling and grading of  construction sites, trench  digging, rock removal,  blasting, etc  —site preparation for  mining:  —overburden removal  and other development  and preparation of  mineral properties and  sites.  This class also includes:  —building site drainage.  —drainage of  agricultural or forestry  land.</p>	
		45.12	Test drilling and boring	<p>This class includes:  —test drilling, test  boring and core  sampling for  construction,  geophysical, geological  or similar purposes.  This class excludes:  —drilling of production  oil or gas wells, see  11.20.  —water well drilling,  see 45.25,  —shaft sinking, see  45.25,  —oil and gas field  exploration,  geophysical, geological  and seismic surveying,  see 74.20.</p>	45120000
	45.2		Building of complete constructions or parts thereof; civil engineering		45200000
		45.21	General construction of buildings and civil engineering works	<p>This class includes:  —construction of all  types of buildings  construction of civil  engineering  constructions,  —bridges, including  those for elevated  highways, viaducts,  tunnels and subways,  —long-distance</p>	45210000 Except: —45213316 45220000 45231000 45232000

				<p>pipelines, communication and power lines,  —urban pipelines, urban communication and power lines,  —ancillary urban works,  —assembly and erection of prefabricated constructions on the site.  This class excludes:  —service activities incidental to oil and gas extraction, see 11.20,  —erection of complete prefabricated constructions from self-manufactured parts not of concrete, see divisions 20, 26 and 28,  —construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations, see 45.23,  —building installation, see 45.3,  —building completion, see 45.4,  —architectural and engineering activities, see 74.20,  —project management for construction, see 74.20.</p>	
		45.22	Erection of roof covering and frames	<p>This class includes:  —erection of roofs,  —roof covering,  —waterproofing.</p>	45261000
		45.23	Construction of highways, roads, airfields and sport facilities	<p>This class includes:  —construction of highways, streets, roads, other vehicular and pedestrian ways,  —construction of railways,  —construction of airfield runways,  —construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf</p>	45212212 and DA03 45230000 except: —45231000 —45232000 —45234115

				<p>courses and other sports installations,  —painting of markings on road surfaces and car parks.  This class excludes:  —preliminary earth moving, see 45.11.</p>	
		45.24	Construction of water projects	<p>This class includes  —construction of:  —waterways, harbour and river works, pleasure ports (marinas), locks etc.;  —dams and dykes,  —dredging,  —subsurface work.</p>	45240000
		45.25	Other construction work involving special trades	<p>This class includes:  —construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment,  —construction of foundations, including pile driving,  —water well drilling and construction, shaft sinking,  —erection of non-self-manufactured steel elements,  —steel bending,  —bricklaying and stone setting,  —scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms,  —erection of chimneys and industrial ovens.  This class excludes:  —renting of scaffolds without erection and dismantling, see 71.32</p>	45250000 45262000
	45.3		Building installation		45300000
		45.31	Installation of electrical wiring and fittings	<p>This class includes:  installation in buildings or other construction projects of:  —electrical wiring and</p>	45213316 45310000 Except: —45316000

				fittings, —telecommunications systems, —electrical heating systems, —residential antennas and aerials, —fire alarms, —burglar alarm systems, —lifts and escalators, —lightning conductors, etc	
		45.32	Insulation work activities	This class includes: —installation in buildings or other construction projects of thermal, sound or vibration insulation. This class excludes: —waterproofing, see 45.22.	45320000
		45.33	Plumbing	This class includes: —installation in buildings or other construction projects of: —plumbing and sanitary equipment, —gas fittings, —heating, ventilation, refrigeration or air-conditioning equipment and ducts, —sprinkler systems This class excludes: —installation of electrical heating systems, see 45.31.	45330000
		45.34	Other building installation	This class includes: —installation of illumination and signalling systems for roads, railways, airports and harbours, —installation in buildings or other construction projects of fittings and fixtures n.e.c.	45234115 45316000 45340000
	45.4		Building completion		45400000
		45.41	Plastering	This class includes: —application in buildings or other	45410000

				construction projects of interior and exterior plaster or stucco, including related lathing materials.	
		45.42	Joinery installation	This class includes: —installation of not self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials, —interior completion such as ceilings, wooden wall coverings, movable partitions, etc. This class excludes: —laying of parquet and other wood floor coverings, see 45.43	45420000
		45.43	Floor and wall covering	This class includes: —laying, tiling, hanging or fitting in buildings or other construction projects of: —ceramic, concrete or cut stone wall or floor tiles, —parquet and other wood floor coverings carpets and linoleum floor coverings, —including of rubber or plastic, —terrazzo, marble, granite or slate floor or wall coverings, —wallpaper.	45430000
		45.44	Painting and glazing	This class includes: —interior and exterior painting of buildings, —painting of civil engineering structures, —installation of glass, mirrors, etc This class excludes: —installation of windows, see 45.42,	45440000
		45.45	Other building completion	This class includes: —installation of private swimming pools, —steam cleaning, sand	45212212 and DA04 45450000

				blasting and similar activities for building exteriors, —other building completion and finishing work n.e.c. This class excludes: —interior cleaning of buildings and other structures see 74.70.	
	45.5		Renting of construction or demolition equipment with operator		45500000
		45.50	Renting of construction or demolition equipment with operator	This class excludes: —renting of construction or demolition machinery and equipment without operators, see 71.32.	45500000

**SCHEDULE 3** Regulations 5(1)(d) and 74  
**SOCIAL AND OTHER SPECIFIC SERVICES**

<b>CPV Code</b>	<b>Description</b>
75200000-8; 75231200-6; 75231240-8; 79611000-0; 79622000-0 (Supply services of domestic help personnel); 79624000-4 (Supply services of nursing personnel) and 79625000-1 (Supply services of medical personnel) from 85000000-9 to 85323000-9; 98133100-5, 98133000-4; 98200000-5; 98500000-8 (Private households with employed persons) and 98513000-2 to 98514000-9 (Manpower services for households, Agency staff services for households, Clerical staff services for households, Temporary staff for households, Home-help services and Domestic services)	Health, social and related services
85321000-5 and 85322000-2, 75000000-6 (Administration, defence and social security services), 75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80000000-4 Education and training services to 80660000-8; from 92000000-1 to 92700000-8; 79950000-8 (Exhibition, fair and congress organisation services), 79951000-5 (Seminar organisation services), 79952000-2 (Event services), 79952100-3 (Cultural event organisation services), 79953000-9 (Festival organisation services), 79954000-6 (Party organisation services), 79955000-3 (Fashion	Administrative social, educational, healthcare and cultural services

shows organisation services), 79956000-0 (Fair and exhibition organisation services)	
75300000-9	Compulsory social security services
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
98000000-3; 98120000-0; 98132000-7; 98133110-8 and 98130000-3	Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services
98131000-0	Religious services
55100000-1 to 55410000-7; 55521000-8 to 55521200-0 (55521000-8 Catering services for private households, 55521100-9 Meals-on-wheels services, 55521200-0 Meal delivery service) 55520000-1 Catering services, 55522000-5 Catering services for transport enterprises, 55523000-2 Catering services for other enterprises or other institutions, 55524000-9 School catering services 55510000-8 Canteen services, 55511000-5 Canteen and other restricted-clientele cafeteria services, 55512000-2 Canteen management services, 55523100-3 School-meal services	Hotel and restaurant services
79100000-5 to 79140000-7; 75231100-5;	Legal services, to the extent not excluded by regulation 10(1)(d)
75100000-7 to 75120000-3; 75123000-4; 75125000-8 to 75131000-3	Other administrative services and government services
75200000-8 to 75231000-4	Provision of services to the community
75231210-9 to 75231230-5; 75240000-0 to 75252000-7; 794300000-7; 98113100-9	Prison related services, public security and rescue services to the extent not excluded by regulation 10(1)(h)
79700000-1 to 79721000-4 (Investigation and security services, Security services, Alarm-monitoring services, Guard services, Surveillance services, Tracing system services, Absconder-tracing services, Patrol services, Identification badge release services, Investigation services and Detective agency services) 79722000-1 (Graphology services), 79723000-8 (Waste analysis services)	Investigation and security services
98900000-2 (Services provided by extra-territorial organisations and bodies) and 98910000-5 (Services specific to international organisations and bodies)	International services
64000000-6 (Postal and telecommunications services), 64100000-7 (Post and courier services), 64110000-0 (Postal services), 64111000-7 (Postal services related to newspapers and periodicals), 64112000-4 (Postal services related to letters), 64113000-1 (Postal services related to parcels), 64114000-8 (Post office counter services), 64115000-5 (Mailbox rental), 64116000-2 (Post-restante services), 64122000-7 (Internal office mail and	Postal services

messenger services)	
50116510-9 (Tyre-remoulding services), 71550000-8 (Blacksmith services)	Miscellaneous services

## SCHEDULE 4

Regulation 5(2)(b)

### LIST OF PRODUCTS RELEVANT TO THRESHOLDS

The products covered by this Schedule are those specified in the following chapters of the Combined Nomenclature (CN)(a):

Chapter 25:	Salt, sulphur, earths and stone, plastering materials, lime and cement
Chapter 26:	Metallic ores, slag and ash
Chapter 27:	Mineral fuels, mineral oils and products of their distillation, bituminous substances, mineral waxes  except: ex 27.10: special engine fuels
Chapter 28:	Inorganic chemicals, organic and inorganic compounds of precious metals, of rare-earth metals, of radioactive elements and isotopes  except: ex 28.09: explosives ex 28.13: explosives ex 28.14: tear gas ex 28.28: explosives ex 28.32: explosives ex 28.39: explosives ex 28.50: toxic products ex 28.51: toxic products ex 28.54: explosives
Chapter 29:	Organic chemicals  except: ex 29.03: explosives ex 29.04: explosives ex 29.07: explosives ex 29.08: explosives ex 29.11: explosives

(a) The references in this Schedule are derived from Annex 4 to the EU's Appendix 1 to the GPA (for which see the footnote to the definition of 'GPA' in regulation 2(1)).

	<p>ex 29.12: explosives</p> <p>ex 29.13: toxic products</p> <p>ex 29.14: toxic products</p> <p>ex 29.15: toxic products</p> <p>ex 29.21: toxic products</p> <p>ex 29.22: toxic products</p> <p>ex 29.23: toxic products</p> <p>ex 29.26: explosives</p> <p>ex 29.27: toxic products</p> <p>ex 29.29: explosive</p>
Chapter 30:	Pharmaceutical products
Chapter 31:	Fertilisers
Chapter 32:	Tanning and dyeing extracts, tanning and their derivatives, dyes, colours, paints and varnishes, putty, fillers and stoppings, inks
Chapter 33:	Essential oils and resinoids, perfumery, cosmetic or toilet preparations
Chapter 34:	Soap, organic surface-active agents, washing preparations, lubricating preparations, artificial waxes, prepared waxes, polishing and scouring preparations, candles and similar articles, modelling pastes and 'dental waxes'
Chapter 35:	Albuminoidal substances, glues, enzymes
Chapter 37:	Photographic and cinematographic goods
Chapter 38:	Miscellaneous chemical products, except: ex 38.19: toxic products
Chapter 39:	Artificial resins and plastic materials, celluloses esters and ethers, articles thereof, except: ex 39.03: explosives
Chapter 40:	Rubber, synthetic rubber, factice, and articles thereof, except: ex 40.11: bullet-proof tyres
Chapter 41:	Raw hides and skins (other than fur skins) and leather
Chapter 42:	Articles of leather, saddlery and harness, travel goods, handbags and similar containers, articles of animal gut (other than silk-worm gut)
Chapter 43:	Fur skins and artificial fur, manufacturers thereof
Chapter 44:	Wood and articles of wood, wood charcoal
Chapter 45:	Cork and articles of cork
Chapter 46:	Manufactures of straw of esparto and of other plaiting materials, basketware and

	wickerwork
Chapter 47:	Paper-making material
Chapter 48:	Paper and paperboard, articles or paper pulp, of paper or of paperboard
Chapter 49:	Printed books, newspapers, pictures and other products of the printing industry, manuscripts, typescripts and plans
Chapter 65:	Headgear and parts thereof
Chapter 66:	Umbrellas, sunshades, walking-sticks, whips, riding-crops and parts thereof
Chapter 67:	Prepared feathers and down and articles made of feathers or of down, artificial flowers, articles of human hair
Chapter 68:	Articles of stone, of plaster, of cement, of asbestos, of mica and of similar materials
Chapter 69:	Ceramic products
Chapter 70:	Glass and glassware
Chapter 71:	Pearls, precious and semi-precious stones, precious metals, rolled precious metals, and articles thereof; imitation jewellery
Chapter 73:	Iron and steel and articles thereof
Chapter 74:	Copper and articles thereof
Chapter 75:	Nickel and articles thereof
Chapter 76:	Aluminium and articles thereof
Chapter 77:	Magnesium and beryllium and articles thereof
Chapter 78:	Lead and articles thereof
Chapter 79:	Zinc and articles thereof
Chapter 80:	Tin and articles thereof
Chapter 81:	Other base metals employed in metallurgy and articles thereof
Chapter 82:	Tools, implements, cutlery, spoons and forks, of base metal, parts thereof, except: ex 82.05: tools ex 82.07: tools, parts
Chapter 83:	Miscellaneous articles of base metal
Chapter 84:	Boilers, machinery and mechanical appliances, parts thereof, except: ex 84.06: engines ex 84.08: other engines ex 84.45: machinery ex 84.53: automatic data-processing machines ex 84.55: parts of machines under heading No 84.53 ex 84.59: nuclear reactors

Chapter 85:	Electrical machinery and equipment, parts thereof, except: ex 85.13: telecommunication equipment ex 85.15: transmission apparatus
Chapter 86:	Railway and tramway locomotives, rolling-stock and parts thereof, railway and tramway tracks fixtures and fittings, traffic signalling equipment of all kinds (not electrically powered), except ex 86.02: armoured locomotives, electric ex 86.03: other armoured locomotives ex 86.05: armoured wagons ex 86.06: repair wagons ex 86.07: wagons
Chapter 87:	Vehicles, other than railway or tramway rolling-stock, and parts thereof, except: ex 87.08: tanks and other armoured vehicles ex 87.01: tractors ex 87.02: military vehicles ex 87.03: breakdown lorries ex 87.09: motorcycles ex 87.14: trailers
Chapter 89:	Ships, boats and floating structures, except: ex 89.01A: warships
Chapter 90:	Optical, photographic, cinematographic, measuring, checking, precision, medical and surgical instruments and apparatus, parts thereof, except: ex 90.05: binoculars ex 90.13: miscellaneous instruments, lasers ex 90.14: telemeters ex 90.28: electrical and electronic measuring instruments ex 90.11: microscopes ex 90.17: medical instruments ex 90.18: mechano-therapy appliances ex 90.19: orthopaedic appliances ex 90.20: X-ray apparatus

Chapter 91:	Manufacture of watches and clocks
Chapter 92:	Musical instruments, sound recorders and reproducers, television image and sound recorders or reproducers, parts and accessories of such articles
Chapter 94:	Furniture and parts thereof, bedding, mattresses, mattress supports, cushions and similar stuffed furnishings, except: ex 94.01A: aircraft seats
Chapter 95:	Articles and manufactures of carving or moulding material
Chapter 96:	Brooms, brushes, powder-puffs and sieves
Chapter 98:	Miscellaneous manufactured articles

## SCHEDULE 5

Regulation 58(5)

### PROFESSIONAL AND TRADE REGISTERS ETC.

The registers and other requests referred to in regulation 58(5) are the following and, where changes have been made at national level, the references to particular registers, declarations and certificates shall include those which have replaced them:

in Belgium the 'Registre du Commerce'/'Handelsregister', and, in the case of service contracts, the 'Ordres professionnels/Beroepsorden';

in Bulgaria, the 'Търговски регистър';

in the Czech Republic, the 'obchodní rejstřík';

in Denmark, the 'Erhvervsstyrelsen';

in Germany, the 'Handelsregister', the 'Handwerksrolle', and, in the case of service contracts, the 'Vereinsregister', the 'Partnerschaftsregister' and the 'Mitgliedsverzeichnisse der Berufskammern der Länder';

in Estonia, the 'Registrite ja Infosüsteemide Keskus';

in Ireland, the economic operator may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies or, where he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name;

in Greece, the 'Μητρώο Εργοληπτικών Επιχειρήσεων — ΜΕΕΠ' of the Ministry for Environment, Town and Country Planning and Public Works (Υ.Π.Ε.Χ.Ω.Δ.Ε) in respect of works contracts; the 'Βιοτεχνικό ή Εμπορικό ή Βιομηχανικό Επιμελητήριο' and the 'Μητρώο Κατασκευαστών Αμυντικού Υλικού' in the case of supplies contracts; in the case of service contracts, the service provider may be asked to provide a declaration on the exercise of the profession concerned made on oath before a notary; in the cases provided for by existing national legislation, for the provision of research services, the professional register 'Μητρώο Μελετητών' and the 'Μητρώο Γραφείων Μελετών';

in Spain, the 'Registro Oficial de Licitadores y Empresas Clasificadas del Estado' in respect of works and services contracts, and, in the case of supplies contracts, the 'Registro Mercantil' or, in the case of non-registered individuals, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question;

in France, the 'Registre du commerce et des sociétés' and the 'Répertoire des métiers';

in Croatia, the ‘Sudski registar’ and the ‘Obrtni registar’ or, in the case of some activities, a certificate stating that the person concerned is authorised to be engaged in the commercial activity or profession in question;

in Italy, the ‘Registro della Camera di commercio, industria, agricoltura e artigianato’; in the case of supplies and services contracts also the ‘Registro delle commissioni provinciali per l’artigianato’ or, in addition to the already mentioned registers, the ‘Consiglio nazionale degli ordini professionali’ in respect of services contracts; in respect of works or services contracts, the ‘Albo nazionale dei gestori ambientali’ in addition to the already mentioned registers;

in Cyprus, the contractor may be requested to provide a certificate from the ‘Council for the Registration and Audit of Civil Engineering and Building Contractors (Συμβούλιο Εγγραφής και Ελέγχου Εργοληπτόν Οικοδομικών και Τεχνικών Έργων)’ in accordance with the Registration and Audit of Civil Engineering and Building Contractors Law in respect of works contracts; in the case of supplies and services contracts the supplier or service provider may be requested to provide a certificate from the ‘Registrar of Companies and Official Receiver’ (Εφορός Εταιρειών και Επίσημος Παραλήπτης) or, where this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name;

in Latvia, the ‘Uzņēmumu reģistrs’;

in Lithuania, the ‘Juridinių asmenų registras’;

in Luxembourg, the ‘Registre aux firmes’ and the ‘Rôle de la Chambre des métiers’;

in Hungary, the ‘Cégnyilvántartás’, the ‘egyéni vállalkozók jegyzői nyilvántartása’ and, in the case of service contracts, some ‘szakmai kamarák nyilvántartása’ or, in the case of some activities, a certificate stating that the person concerned is authorised to be engaged in the commercial activity or profession in question;

in Malta, the economic operator obtains his ‘numru ta’ registrazzjoni tat-Taxxa tal-Valur Miżjud (VAT) u n-numru tal-licenzja ta’ kummerċ’, and, in the case of a partnership or company, the relevant registration number as issued by the Malta Financial Services Authority;

in the Netherlands, the ‘Handelsregister’;

in Austria, the ‘Firmenbuch’, the ‘Gewerberegister’, the ‘Mitgliederverzeichnisse der Landeskammern’;

in Poland, the ‘Krajowy Rejestr Sądowy’;

in Portugal, the ‘Instituto da Construção e do Imobiliário’ (INCI) in respect of works contracts; the ‘Registro Nacional das Pessoas Colectivas’ in the case of supplies and services contracts;

in Romania, the ‘Registrul Comerțului’;

in Slovenia, the ‘sodni register’ and the ‘obrotni register’;

in Slovakia, the ‘Obchodný register’;

in Finland, the ‘Kaupparekisteri’/‘Handelsregistret’;

in Sweden, the ‘aktiebolags-, handels- eller föreningsregistren’;

in the United Kingdom, the economic operator may be requested to provide a certificate from the Registrar of Companies stating that he is certified as incorporated or registered or, where he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in a specific place under a given business name.

## CONSEQUENTIAL AND MISCELLANEOUS AMENDMENTS

## PART 1

## Consequential amendments to Acts of Parliament

**Late Payment of Commercial Debts (Interest) Act 1998**

1. In section 4 of the Late Payment of Commercial Debts (Interest) Act 1998(a) (period for which statutory interest runs), in subsection (8), in the definition of “public authority” for “regulation 3 of the Public Contracts Regulations 2006(b)” substitute “regulation 2(1) of the Public Contracts Regulations 2015”.

**Greater London Authority Act 1999**

2. The Greater London Authority Act 1999(c) is amended as follows.

3.—(1) Section 355(d) (duties of waste collection authorities etc.) is amended as follows.

(2) In subsection (7)(a) for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006(e)”.

(3) After subsection (7) insert—

“(8) In any case where—

- (a) an authority is required to comply with the Public Contracts Regulations 2015 in the awarding of a waste contract,
- (b) in compliance with those regulations the authority sends the contract notice relating to the awarding of that contract to the Publications Office of the European Union, and
- (c) after the authority sends that notice, the Mayor revises the provisions of the London Environment Strategy dealing with municipal waste management.”

this section, and any guidance issued under it, are to have effect in relation to the awarding of that contract as if the revision had not been made.

4.—(1) Section 356 (directions by the Mayor) is amended as follows.

(2) In subsection (3)(a) for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006”.

(3) After subsection (3) insert—

“(3A) The Mayor may not give to an authority a direction under subsection (1) above requiring the authority to exercise a function in relation to the awarding of a waste contract if—

- (a) the authority is required to comply with the Public Contracts Regulations 2015 in awarding that contract, and

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(a) 1998 c.20; section 4(8) was amended by regulation 2(1) and (6) of S.I. 2013/395 and regulation 2(1) and (6) of S.S.I. 2013/77.

(b) S.I. 2006/5, amended by S.I. 2007/3542, 2008/2256, 2683, 2848, 2009/1307, 2992, 2010/133, 976, 2011/1043, 1848, 2053, 2581, 3058, 2013/252, 1431, 2014/834 and by the Enterprise and Regulatory Reform Act 2013 (c.24), Schedule 20, paragraph 2.

(c) 1999 c.29.

(d) Section 355(7) was amended by paragraphs 1, 6(a) and 7 of Schedule 23 and Part 33 of Schedule 25 to the Localism Act 2011 (c.20).

(e) 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.

- (b) in compliance with those regulations the authority has sent the contract notice relating to the awarding of that contract to the Publications Office of the European Union.”.

5.—(1) Section 358(a) (information about new waste contracts) is amended as follows.

(2) In subsection (1) for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006”.

(3) After subsection (1) insert—

“(1ZA) If, in the awarding of a waste contract, a waste authority in compliance with the Public Contracts Regulations 2015 has decided—

- (a) to send to the Publications Office of the European Union a prior information notice relating to the awarding of the contract, or
- (b) to publish such a notice on the authority’s buyer profile, subsection (1A) below applies.”.

(4) In subsection (1A) for “that notice” substitute “the notice in question”.

(5) In subsection (1B) for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006”.

(6) After subsection (1B) insert—

“(1BA) If, in the awarding of a waste contract, a waste authority in compliance with Public Contracts Regulations 2015—

- (a) has decided not to send or publish a prior information notice, but
- (b) decides to send to the Publications Office of the European Union a contract notice relating to the awarding of the contract, subsection (1C) below applies.”.

(7) In subsection (1C) for “that notice” substitute “the notice in question”.

(8) In subsection (2) for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006 or the Public Contracts Regulations 2015”.

6. In section 359 (confidential information about waste contracts) in subsection (1)(c) for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006 or the Public Contracts Regulations 2015”.

7.—(1) Section 360(b) (interpretation) is amended as follows.

(2) In subsection (2)—

- (a) in the definition of “buyer profile” for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006 or the Public Contracts Regulations 2015”,
- (b) omit the definition of “the public procurement regulations”, and
- (c) insert in the appropriate place—
  - (i) ““contract notice” has the same meaning as in regulation 49 of the Public Contracts Regulations 2015;”, and
  - (ii) ““prior information notice” has the same meaning as in regulation 48 of the Public Contracts Regulations 2015;”.

(3) In subsection (3)—

- (a) after “waste authority” insert “in compliance with the Utilities Contracts Regulations 2006”,
- (b) omit paragraph (a) (and the “or” immediately following it), and
- (c) in paragraph (b) omit the words from “in a case” to “2006.”.

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(a) Section 358(1), (1A), (1B) and (1C) were amended by s.39(1) to (3) of the Greater London Authority Act 2007 (c.24)

(b) Section 360 was amended by section 39(6) to (8) of the Greater London Authority Act 2007 and regulation 48(a) of and paragraph 1 of Schedule 7 to S.I. 2006/5.

(4) In subsection (4)—

- (a) after “waste authority” insert “in compliance with the Utilities Contracts Regulations 2006”,
- (b) omit paragraph (a) (and the “or” immediately following it), and
- (c) omit the words from “in a case” to “2006,”.

#### **Public Services (Social Value) Act 2012**

**8.**—(1) Section 1 of the Public Services (Social Value) Act 2012(a) (contracts of relevant authorities) is amended as follows.

(2) In subsection (2)(a) for “the Official Journal of the European Union” substitute “the Publications Office of the European Union”.

(3) Subsection (13) is omitted.

(4) In subsection (15)—

- (a) in the definition of “framework agreement” after “Regulations” insert “(whether or not the Regulations apply)”,
- (b) the definition of “public services contract” is omitted,
- (c) in the definition of “the Regulations” for “Public Contracts Regulations 2006 (S.I. 2006/5)” substitute “Part 2 of the Public Contracts Regulations 2015 (S.I. 2015/102)”, and
- (d) in the definition of “relevant authority” for “for the purposes of the Regulations” substitute “within the meaning of the Regulations (whether or not the Regulations apply)”.

(5) After subsection (15) insert—

“(16) For the purposes of this section references to a public services contract are to—

- (a) a public service contract to which the Regulations apply (or which is treated as such a contract by the Regulations), or
- (b) any contract, not being a contract falling within paragraph (a), which would have been a public services contract to which the Public Contracts Regulations 2006 would have applied (or which would have been treated by those Regulations as such a contract) if those Regulations had not been revoked”.

#### **Health and Social Care Act 2012**

**9.** In section 76 of the Health and Social Care Act 2012(b) (regulations under section 75), in subsection (8)(b) for “the Public Contracts Regulations 2006 (S.I. 2006/5)” substitute “the Public Contracts Regulations 2015 (S.I. 2015/102)”.

## **PART 2**

### **Consequential and miscellaneous amendments to other legislation**

#### **Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975**

**10.** For article 3(1)(j) of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975(c) substitute—

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(a) 2012 c.3.

(b) 2012 c.7.

(c) S.I. 1975/1023 amended by S.I. 2006/2143; there are other amending instruments but none is relevant.

- “(j) any question asked by or on behalf of a contracting authority in relation to a conviction for an offence listed in regulation 57(1) of the Public Contracts Regulations 2015 which is a spent conviction (or any circumstances ancillary to such a conviction) for the purpose of determining whether or not a person is excluded—
  - (i) for the purposes of regulation 57 of the Public Contracts Regulations 2015, or
  - (ii) from participation in a design contest for the purposes of regulation 80 of the Public Contracts Regulations 2015,

where the person questioned is informed at the time the question is asked that, by virtue of this Order, spent convictions for such offences are to be disclosed;

- (ja) any question asked by or on behalf of a contracting authority in relation to a conviction for an offence listed in regulation 26(1) of the Utilities Contracts Regulations 2006(a) which is a spent conviction (or any circumstances ancillary to such a conviction) for the purpose of determining whether or not a person is ineligible—
  - (i) for the purposes of regulation 26 of the Utilities Contracts Regulations 2006, or
  - (ii) to participate in a design contest for the purposes of regulation 34 of the Utilities Contracts Regulation 2006,

where the person questioned is informed at the time the question is asked that, by virtue of this Order, spent convictions for such offences are to be disclosed;”.

### **Civil Procedure Rules 1998**

**11.**—(1) Rule 54.5 of the Civil Procedure Rules 1998(b) is amended as follows.

(2) In paragraph (A1)—

- (a) for the definition of “decision governed by the Public Contracts Regulations 2006(c)” substitute—

““decision governed by the Public Contracts Regulations 2015” means any decision the legality of which is or may be affected by a duty owed to an economic operator by virtue of regulations 89 or 90 of those Regulations (and for this purpose it does not matter that the claimant is not an economic operator); and”,

- (b) in the definition of “economic operator” for “regulation 4 of the Public Contracts Regulations 2006” substitute “regulation 2(1) of the Public Contracts Regulations 2015”.

(3) In paragraph (6)—

- (a) for “the Public Contracts Regulations 2006” substitute “the Public Contracts Regulations 2015”;
- (b) for “regulation 47D(2)” substitute “regulation 92”.

### **Service Charges (Consultation Requirements) (England) Regulations 2003**

**12.** In regulation 2(1) of the Service Charges (Consultation Requirements) (England) Regulations 2003(d) in the definition of “public notice” for “in the Official Journal of the European Union pursuant to the Public Contracts Regulations 2006” substitute “by the Publications Office of the EU pursuant to the Public Contracts Regulations 2015”.

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(a) 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.

(b) S.I. 1998/3132; relevant amending instruments are S.I. 2013/1412 and 2000/2092.

(c) S.I. 2006/5, amended by S.I. 2007/3542, 2008/2256, 2683, 2848, 2009/1307, 2992, 2010/133, 976, 2011/1043, 1848, 2053, 2581, 3058, 2013/252, 1431, 2014/834 and by the Enterprise and Regulatory Reform Act 2013 (c.24), Schedule 20, paragraph 2.

(d) S.I. 2003/1987, amended by S.I. 2006/5; there are other amending instruments but none is relevant.

### **Schools Forums (Wales) Regulations 2003**

13. In regulation 9(1) of the Schools Forums (Wales) Regulations 2003(a) for “regulation 8 of the Public Contracts Regulations 2006” substitute “regulation 5 of the Public Contracts Regulations 2015”.

### **Service Charges (Consultation Requirements) (Wales) Regulations 2004**

14. In regulation 2(1) of the Service Charges (Consultation Requirements) (Wales) Regulations 2004(b) in the definition of “public notice” for “in the Official Journal of the European Union pursuant to the Public Contracts Regulations 2006” substitute “by the Publications Office of the EU pursuant to the Public Contracts Regulations 2015”.

### **Utilities Contracts Regulations 2006**

15.—(1) The Utilities Contracts Regulations 2006 are amended as follows.

(2) In regulation 2, in the definition of “contracting authority” for “regulation 3 of the Public Contracts Regulations 2006” substitute “regulation 2(1) of the Public Contracts Regulations 2015”.

(3) In regulation 3(2) for the definition of “local authority” substitute—

““local authority” means—

- (a) in relation to a local authority in England—
  - (i) a county council, a district council, a London borough council, a parish council, the Council of the Isles of Scilly;
  - (ii) the Common Council of the City of London in its capacity as local authority or police authority; or
  - (iii) the Greater London Authority or a functional body within the meaning of the Greater London Authority Act 1999(c);
- (b) in relation to a local authority in Wales, a county council, a county borough council or a community council;
- (c) in relation to Scotland, a local authority within the meaning of section 235(1) of the Local Government (Scotland) Act 1973(d) and also includes a joint board or joint committee within the meaning of section 235(1) of that Act;
- (d) in relation to a local authority in Northern Ireland, a district council within the meaning of the Local Government Act (Northern Ireland) 1972(e).”

(4) In regulations 5 and 21 for “the Public Contracts Regulations 2006”, in each place it occurs, substitute “Part 2 of the Public Contracts Regulations 2015”.

### **Provision of Services Regulations 2009**

16. In regulation 31(5)(g) of the Provision of Services Regulations 2009(f) for “regulations 23(5), 24(1) and 25 of the Public Contracts Regulations 2006” substitute “regulations 60(1) (read with regulation 58(5)), 60(4) and (5) and 62 of the Public Contracts Regulations 2015”.

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(a) S.I. 2003/2909, amended by S.I. 2006/5; there are other amending instruments but none is relevant.

(b) S.I. 2004/684, amended by S.I. 2006/5; there are other amending instruments but none is relevant.

(c) 1999 (c.29), the definition of “functional body” in section 424 was amended by section 3(9) of the Police Reform and Social Responsibility Act 2011 (c.13) and paragraphs 44 and 52 of Schedule 22 and Part 32 of Schedule 25 to the Localism Act 2011 (c.20).

(d) 1973 c.65; section 235(1) was amended by the Local Government etc (Scotland) Act 1994 (c.39), section 180(1), (2) and Schedule 13, paragraph 92(66)(c).

(e) 1972 c.9; section 1 was amended by S.I. 1985/454.

(f) S.I. 2009/2999, to which there are amendments not relevant to these Regulations.

## Quality Contracts Schemes (Tendering Requirements) (England) Regulations 2009

17. In regulation 9 of the Quality Contracts Tendering Schemes (Tendering Requirements) (England) Regulations 2009(a) for “the Public Contracts Regulations 2006, the Utilities Contracts Regulations 2006 or the Defence and Security Public Contracts Regulations 2011(b)” substitute “the Utilities Contracts Regulations 2006, the Defence and Security Public Contracts Regulations 2011 or Part 2 or 3 of the Public Contracts Regulations 2015”.

## Cleaner Road Transport Vehicle Regulations 2011

18.—(1) The Cleaner Road Transport Vehicle Regulations 2011(c) are amended as follows.

(2) In regulation 2(1)—

- (a) omit the definitions of “contracting authority”, “established”, “national of a relevant State” and “relevant State”,
- (b) in the appropriate place insert ““contracting authority” has the meaning given to “contracting authorities” in regulation 2(1) of the Public Contracts Regulations 2015,”,
- (c) in the definition of “contract notice” for “the Public Contracts Regulations 2006” substitute “Part 2 of the Public Contracts Regulations 2015”,
- (d) in the definition of “declaration of ineffectiveness” for “regulation 47(1) of the Public Contracts Regulations 2006” substitute “regulation 88(1) of the Public Contracts Regulations 2015”,
- (e) in the definition of “economic operator” for “Public Contracts Regulations 2006” substitute “Public Contracts Regulations 2015”, and
- (f) in the definition of “procurement procedure” for sub-paragraph (a) substitute—  
““the open procedure, the restricted procedure, the competitive procedure with negotiation, competitive dialogue, the negotiated procedure without prior publication or an innovation partnership within the meaning of the Public Contracts Regulations 2015;””.

(3) In regulation 3—

- (a) in paragraph (3)(a) for “the Public Contracts Regulations 2006” substitute “Part 2 of the Public Contracts Regulations 2015”,
- (b) in paragraph (4)(a) for “Public Contracts Regulations 2006 by regulation 8 (thresholds)” substitute “Public Contracts Regulations 2015 by regulation 5 (threshold amounts)”.

(4) In regulation 6—

- (a) in paragraph (2) for “Part 9 of the Public Contracts Regulations 2006” substitute “Part 3 of the Public Contracts Regulations 2015”,
- (b) in paragraph 2(a) for “regulation 47A” substitute “regulation 89”,
- (c) in paragraph (4) for “Part 9 of the Public Contracts Regulations 2006” substitute “Part 3 of the Public Contracts Regulations 2015”,
- (d) in paragraph (4)(a) for “a national of and established in a relevant State” substitute “ a national of or established in an EEA state”.

## Defence and Security Public Contracts Regulations 2011

19.—(1) The Defence and Security Regulations are amended as follows.

(2) In regulation 2(2) for “will” substitute “must”.

(3) In regulation 3(1)—

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(a) S.I. 2009/3244, amended by S.I. 2011/1848.  
(b) S.I. 2011/1848, amended by S.S.I. 2012/88, 2012/89; there are other amending instruments but none is relevant.  
(c) S.I. 2011/1631.

- (a) in the definition of “central purchasing body” for “regulation 3 of the Public Contracts Regulations 2006(a)” substitute “regulation 2(1) of the Public Contracts Regulations 2015”,
- (b) in the definition of “disabled person” omit the words “and “disabled person” is to be interpreted accordingly”, and
- (c) in the definition of “supply contract” for—
  - (i) “(c)” substitute “(a)”,
  - (ii) “(d)” substitute “(b)”.

(4) In regulation 4(a) for “a “contracting authority” within the meaning of regulation 3 of the Public Contracts Regulations 2006;” substitute ““contracting authorities” within the meaning of regulation 2(1) of the Public Contracts Regulations 2015;”.

(5) In regulation 6 for “the Public Contracts Regulations 2006”, in each place it occurs, substitute “Part 2 of the Public Contracts Regulations 2015”.

(6) In regulation 7(1)(g) omit “, including existing buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land”.

(7) In regulation 12(1) in the definition of “recognised bodies” omit “and “recognised body” shall be interpreted accordingly”.

(8) In regulations 16(2), 31(9) and 33(14) for sub-paragraph (b), in each place it occurs, substitute—

“(b) where the contracting authority is—

- (i) a “body governed by public law” within the meaning of regulation 2(1) of the Public Contracts Regulations 2015 and the Secretary of State for Defence is the authority referred to in sub-paragraph (c) of that definition for that body or the financing, supervisory or appointing body,
- (ii) an association formed by either the Secretary of State for Defence or one or more bodies governed by public law within the meaning of (i), or
- (iii) a contracting authority within the meaning of regulation 3(1)(bb) of the Public Contracts (Scotland) Regulations 2012(b) and the Secretary of State for Defence is “another contracting authority” within the meaning of that provision,

in which case the contracting authority must submit the report to the Ministry of Defence for onward transmission to the Commission.”.

(9) In regulation 21—

- (a) in paragraph 5(b) for “price or the values” substitute “values, which can include the price,”, and
- (b) omit paragraph (19).

(10) In regulation 46 for paragraph (3) substitute—

“(3) This paragraph applies where the contracting authority is—

- (a) a “body governed by public law” within the meaning of regulation 2(1) of the Public Contracts Regulations 2015 and the Secretary of State for Defence is the authority referred to in sub-paragraph (c) of that definition for that body or the financing, supervisory or appointing body,
- (b) an association formed by either the Secretary of State for Defence or one or more bodies governed by public law within the meaning of (i), or

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(a) S.I. 2006/5, amended by S.I. 2007/3542, 2008/2256, 2683, 2848, 2009/1307, 2992, 2010/133, 976, 2011/1043, 1848, 2053, 2581, 3058, 2013/252, 1431, 2014/834 and by the Enterprise and Regulatory Reform Act 2013 (c.24), Schedule 20, paragraph 2.

(b) S.S.I. 2012/88 amended by S.S.I. 2013/119; there is another amending instrument that is not relevant.

- (b) a contracting authority within the meaning of regulation 3(1)(bb) of the Public Contracts (Scotland) Regulations 2012 and the Secretary of State for Defence is “another contracting authority” within the meaning of that provision.”.

### **Schools Forums (England) Regulations 2012**

20. In regulation 9 of the Schools Forum (England) Regulations 2012(a) for “regulation 8” of the Public Contracts Regulations 2006” substitute “regulation 5 of the Public Contracts Regulations 2015”.

### **National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013**

21. In regulations 13(3) and 17 of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(b) (and the corresponding entries in the table of contents for those Regulations) for “Public Contracts Regulations 2006”, in each place it occurs, substitute “Public Contracts Regulations 2015”.

### **Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013**

22. The Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013(c) are amended as follows.

23. In regulation 6(2)—

- (a) in sub-paragraph (a) for “the Public Contracts Regulations 2006 nor the Utilities Contracts Regulations 2006(d)” substitute “the Utilities Contracts Regulations 2006 nor Part 2 of the Public Contracts Regulations 2015”,
- (b) in sub-paragraph (c) omit sub-paragraph (i),
- (c) in sub-paragraph (d) for “regulation 14 of the Public Contracts Regulations 2006” substitute “regulation 32 of the Public Contracts Regulations 2015”.

24. In regulation 8(3)(a) for “the Public Contracts Regulations 2006 or the Utilities Contracts Regulations 2006” substitute “the Utilities Contracts Regulations 2006 or Part 2 of the Public Contracts Regulations 2015”.

25. The provisions of the Utilities Contracts Regulations 2006 applied by the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 have effect with the amendments of those provisions made by these Regulations.

### **Energy Savings Opportunity Scheme Regulations 2014**

26. In regulation 16(2)(b)(i) of the Energy Savings Opportunity Scheme Regulations 2014(e) for “a “contracting authority” as defined in regulation 3 of the Public Contracts Regulations 2006” substitute “any of the “contracting authorities” as defined in regulation 2(1) of the Public Contracts Regulations 2015”.

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(a) S.I. 2012/2261, to which there are amendments not relevant to these Regulations.

(b) S.I. 2013/500.

(c) S.I. 2013/1582.

(d) 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.

(e) S.I. 2014/1643.

## **Tax Relief for Social Investments (Accreditation of Social Impact Contractor) Regulations 2014**

27. In regulation 3(2)(a) of the Tax Relief for Social Investments (Accreditation of Social Impact Contractor) Regulations 2014(a) for “regulation 3(1) of the Public Contracts Regulations 2006” substitute “regulation 2(1) of the Public Contracts Regulations 2015”.

### **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations revoke and replace the Public Contracts Regulations 2006 (“the 2006 Regulations”).

Part 2 implements, for England, Wales and Northern Ireland, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ No L 94, 28.3.2014, p65). The Part imposes obligations on public bodies called contracting authorities in relation to how they award public contracts for the execution of works, the supply of products or the provision of services. In particular

- Chapter 1 sets out the scope of the Part (including by reference to thresholds based on the estimated value of the procurement) and lays down some general rules and principles that apply to procurements within the scope of the Part;
- Chapter 2 sets out detailed rules to be followed in relation to procurement procedures (except where Chapter 3 applies);
- Chapter 3 establishes particular procurement regimes for the procurement of social and other specific services and the use of design contests: these regimes impose less detailed requirements and allow greater flexibilities than under Chapter 2;
- Chapter 4 imposes certain requirements on contracting authorities in relation to records and reports, including requirements about retaining copies of contracts above a certain value, drawing up individual reports about procurements, sending information about procurements to the Cabinet Office and European Commission on request, and documenting the progress of procurement procedures.

Part 3 contains provisions about remedies (and their facilitation) in relation to procurements within the scope of Part 2. These provisions consolidate, with amendments, Part 9 (and some other relevant provisions) of the 2006 Regulations. In so doing, they implement, for England, Wales and Northern Ireland, Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p33) as amended(b).

Part 4 imposes miscellaneous additional obligations (which do not implement EU obligations(c)) on contracting authorities. This Part extends to England and Wales and Northern Ireland but does not apply to a contracting authority if its functions are wholly or mainly Northern Ireland devolved functions or Welsh devolved functions. The Part includes requirements for contracting authorities, subject to exceptions, to

- cause certain information to be published on a web-based portal provided by or on behalf of the Cabinet Office (“Contracts Finder”) when they send contract notices or contract award notices to the EU Publications Office under Part 2;

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(a) S.I. 2014/3066.

(b) By Council Directive 92/50/EEC relating to the coordination of procedures for the award of public services contracts (OJ L 209, 24.7.1992, p1) and by Directive 2007/66/EC of the European Parliament and Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p31).

(c) Although the provisions arise out of and are related to the Directive that is implemented by Part 2 or, in the case of the late payment provisions, Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, as implemented in the UK by the Late Payments of Commercial Debts (Interest) Act 1998 (c.20) and by SI 2002/1674 and 2013/395.

- publish on Contracts Finder information about advertised contract opportunities, and contracts that are awarded, in certain public procurements which have an estimated value less than procurements to which Part 2 applies, and to comply, in such procurements, with certain requirements in assessing the suitability of candidates;
- have regard to guidance issued by the Minister for the Cabinet Office in complying with certain aspects of Part 4 and in relation to certain aspects of the qualitative selection of economic operators in procurements to which Part 2 applies, and to report to the Cabinet Office certain deviations from such guidance;
- include in public contracts which they award certain provisions relating to the payment of undisputed invoices within 30 days by the awarding contracting authority and its relevant contractors and subcontractors. (Where this requirement is not complied with, regulation 112(6) implies terms into the contract between the contracting authority and its contractor).

Part 5 contains provisions which

- revoke the 2006 Regulations and make consequential and miscellaneous amendments to primary and secondary legislation (so far as they extend to England and Wales and Northern Ireland and, in relation to some amendments, Scotland) including, in paragraph 19 of Schedule 7, some amendments to the Defence and Security Public Contracts Regulations 2011 (S.I. 2011/1848) to correct some minor drafting errors;
- make transitional provision and savings, including
  - provision for pending procurements, and certain concession contracts and the procedures for their award, not to be affected by these Regulations, and
  - a temporary exemption for certain NHS procurements.

A transposition note in relation to Part 2 is available at [www.gov.uk/transposing-eu-procurement-directives](http://www.gov.uk/transposing-eu-procurement-directives). It is also annexed to the Explanatory Memorandum which is available alongside the instrument at [www.legislation.gov.uk](http://www.legislation.gov.uk). An impact assessment has not been produced for this instrument as no significant impact on the private or voluntary sectors is foreseen.







**DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of 26 February 2014**

**on public procurement and repealing Directive 2004/18/EC**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1), Article 62 and Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the Committee of the Regions <sup>(2)</sup>,

Acting in accordance with the ordinary legislative procedure <sup>(3)</sup>,

Whereas:

- (1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.
- (2) Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while

ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council <sup>(4)</sup> and Directive 2004/18/EC of the European Parliament and of the Council <sup>(5)</sup> should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

- (3) When implementing this Directive, the United Nations Convention on the Rights of Persons with Disabilities <sup>(6)</sup> should be taken into account, in particular in connection with the choice of means of communications, technical specifications, award criteria and contract performance conditions.
- (4) The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC. The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. It should be clarified that such acquisitions of works, supplies or services should be subject to this Directive whether they are implemented through purchase, leasing or other contractual forms.

The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authorities. Furthermore, the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes

<sup>(1)</sup> OJ C 191, 29.6.2012, p. 84.

<sup>(2)</sup> OJ C 391, 18.12.2012, p. 49.

<sup>(3)</sup> Position of the European Parliament of 15 January 2014 (not yet published in the Official Journal), and decision of the Council of 11 February 2014.

<sup>(4)</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).

<sup>(5)</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

<sup>(6)</sup> Approved by Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (OJ L 23, 27.1.2010, p. 35).

intended, does not usually fall within the scope of the public procurement rules. Similarly, situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorisation schemes (for instance licences for medicines or medical services).

- (5) It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. The provision of services based on laws, regulations or employment contracts should not be covered. In some Member States, this might for example be the case for certain administrative and government services such as executive and legislative services or the provision of certain services to the community, such as foreign affairs services or justice services or compulsory social security services.
- (6) It is also appropriate to recall that this Directive should not affect the social security legislation of the Member States. Nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities, or with the privatisation of public entities providing services.

It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive.

- (7) It should finally be recalled that this Directive is without prejudice to the freedom of national, regional and local authorities to define, in conformity with Union law, services of general economic interest, their scope and the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue their public policy objectives. This Directive should also be without prejudice to the power of national, regional and local authorities to provide, commission and finance services of general economic interest in accordance with Article 14 TFEU and Protocol No 26 on Services of General Interest annexed to the TFEU and to the Treaty on European Union (TEU). In addition, this Directive does not deal with the funding of services of general economic

interest or with systems of aid granted by Member States, in particular in the social field, in accordance with Union rules on competition.

- (8) A contract should be deemed to be a public works contract only if its subject-matter specifically covers the execution of activities listed in Annex II, even if the contract covers the provision of other services necessary for the execution of such activities. Public service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works. However, in so far as such works are incidental to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the public service contract as a public works contract.

However, in view of the diversity of public works contracts, contracting authorities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. This Directive is not intended to prescribe either joint or separate contract awards.

- (9) The realisation of a work corresponding to the requirements specified by a contracting authority requires that the authority in question must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design. Whether the contractor realises all or part of the work by his own means or ensures their realisation by other means should not change the classification of the contract as a works contract, as long as the contractor assumes a direct or indirect obligation that is legally enforceable to ensure that the works will be realised.
- (10) The notion of 'contracting authorities' and in particular that of 'bodies governed by public law' have been examined repeatedly in the case-law of the Court of Justice of the European Union. To clarify that the scope of this Directive *ratione personae* should remain unaltered, it is appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case-law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concepts as elaborated by the case-law. For that purpose, it should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a 'body governed by public law' since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character.

Similarly, the condition relating to the origin of the funding of the body considered, has also been examined in the case-law, which has clarified *inter alia* that being financed for 'the most part' means for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law.

- (11) In the case of mixed contracts, the applicable rules should be determined with respect to the main subject of the contract where the different parts which constitute the contract are objectively not separable. It should therefore be clarified how contracting authorities should determine whether the different parts are separable or not. Such clarification should be based on the relevant case-law of the Court of Justice of the European Union.

The determination should be carried out on a case-by-case basis, in which the expressed or presumed intentions of the contracting authority to regard the various aspects making up a mixed contract as indivisible should not be sufficient, but should be supported by objective evidence capable of justifying them and of establishing the need to conclude a single contract. Such a justified need to conclude a single contract could for instance be present in the case of the construction of one single building, a part of which is to be used directly by the contracting authority concerned and another part to be operated on a concessions basis, for instance to provide parking facilities to the public. It should be clarified that the need to conclude a single contract may be due to reasons both of a technical nature and of an economic nature.

- (12) In the case of mixed contracts which can be separated, contracting authorities are always free to award separate contracts for the separate parts of the mixed contract, in which case the provisions applicable to each separate part should be determined exclusively with respect to the characteristics of that specific contract. On the other hand, where contracting authorities choose to include other elements in the procurement, whatever their value and whatever the legal regime the added elements would otherwise have been subject to, the main principle should be that, where a contract should be awarded pursuant to the provisions of this Directive, if awarded on its own, then this Directive should continue to apply to the entire mixed contract.
- (13) However, special provision should be made for mixed contracts involving defence or security aspects or parts not falling within the scope of the TFEU. In such cases, non-application of this Directive should be possible provided that the award of a single contract is justified

for objective reasons and that the decision to award a single contract is not taken for the purpose of excluding contracts from the application of this Directive or of Directive 2009/81/EC of the European Parliament and of the Council <sup>(1)</sup>. It should be clarified that contracting authorities should not be prevented from choosing to apply this Directive to certain mixed contracts instead of applying Directive 2009/81/EC.

- (14) It should be clarified that the notion of 'economic operators' should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are 'legal persons' in all circumstances.
- (15) It should be clarified that groups of economic operators, including where they have come together in the form of a temporary association, may participate in award procedures without it being necessary for them to take on a specific legal form. To the extent this is necessary, for instance where joint and several liability is required, a specific form may be required when such groups are awarded the contract.

It should also be clarified that contracting authorities should be able to set out explicitly how groups of economic operators are to meet the requirements concerning economic and financial standing as set out in this Directive, or the criteria relating to technical and professional ability, which are required of economic operators participating on their own.

The performance of contracts by groups of economic operators may necessitate setting conditions which are not imposed on individual participants. Such conditions, which should be justified by objective reasons and be proportionate, could for instance include requiring the appointment of a joint representation or a lead partner for the purposes of the procurement procedure or requiring information on their constitution.

<sup>(1)</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76).

- (16) Contracting authorities should make use of all possible means at their disposal under national law in order to prevent distortions in public procurement procedures stemming from conflicts of interest. This could include procedures to identify, prevent and remedy conflicts of interests.
- (17) Council Decision 94/800/EC <sup>(1)</sup> approved in particular the World Trade Organisation Agreement on Government Procurement (the 'GPA'). The aim of the GPA is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. For contracts covered by Annexes 1, 2, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA, as well as by other relevant international agreements by which the Union is bound, contracting authorities should fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.
- (18) The GPA applies to contracts above certain thresholds, set in the GPA and expressed as special drawing rights. The thresholds laid down by this Directive should be aligned to ensure that they correspond to the euro equivalents of the thresholds of the GPA. Provision should also be made for periodic reviews of the thresholds expressed in euros so as to adjust them, by means of a purely mathematical operation, to possible variations in the value of the euro in relation to those special drawing rights. Apart from those periodic mathematical adjustments, an increase in the thresholds set in the GPA should be explored during the next round of negotiations thereof.
- (19) It should be clarified that, for the estimation of the value of a contract, all revenues have to be taken into account, whether received from the contracting authority or from third parties. It should also be clarified that, for the purpose of estimating the thresholds, the notion of similar supplies should be understood as products which are intended for identical or similar uses, such as supplies of a range of foods or of various items of office furniture. Typically, an economic operator active in the field concerned would be likely to carry such supplies as part of his normal product range.
- (20) For the purposes of estimating the value of a given procurement, it should be clarified that it should be allowed to base the estimation of the value on a subdivision of the procurement only where justified by objective reasons. For instance, it could be justified to estimate contract values at the level of a separate operational unit of the contracting authority, such as for instance schools or kindergartens, provided that the unit in question is independently responsible for its procurement. This can be assumed where the separate operational unit independently runs the procurement procedures and makes the buying decisions, has a separate budget line at its disposal for the procurements concerned, concludes the contract independently and finances it from a budget which it has at its disposal. A subdivision is not justified where the contracting authority merely organises a procurement in a decentralised way.
- (21) Public contracts that are awarded by contracting authorities operating in the water, energy, transport and postal services sectors and that fall within the scope of those activities are covered by Directive 2014/25/EU of the European Parliament and of the Council <sup>(2)</sup>. However, contracts awarded by contracting authorities in the context of their operation of maritime, coastal or river transport services fall within the scope of this Directive.
- (22) Being addressed to Member States, this Directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this Directive should be applied to procurement governed by specific international rules.
- (23) The awarding of public contracts for certain audiovisual and radio media services by media providers should allow aspects of cultural or social significance to be taken into account, which renders the application of procurement rules inappropriate. For those reasons, an exception should therefore be made for public service contracts, awarded by the media service providers themselves, for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme. It should also be clarified that that exclusion should apply equally to broadcast media services and on-demand services (non-linear services). However, that exclusion should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes.
- (24) It should be recalled that arbitration and conciliation services and other similar forms of alternative dispute resolution are usually provided by bodies or individuals which are agreed on, or selected, in a manner which cannot be governed by procurement rules. It should be clarified that this Directive does not apply to service contracts for the provision of such services, whatever their denomination under national law.

<sup>(1)</sup> Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994) (O) L 336, 23.12.1994, p. 1).

<sup>(2)</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (see page 243 of this Official Journal).

- (25) A certain number of legal services are rendered by service providers that are designated by a court or tribunal of a Member State, involve representation of clients in judicial proceedings by lawyers, must be provided by notaries or are connected with the exercise of official authority. Such legal services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules, such as for instance the designation of State Attorneys in certain Member States. Those legal services should therefore be excluded from the scope of this Directive.
- (26) It is appropriate to specify that the notion of financial instruments as referred to in this Directive is given the same meaning as in other internal market legislation and, in view of the recent creation of the European Financial Stability Facility and the European Stability Mechanism, it should be stipulated that operations conducted with that Facility and that Mechanism should be excluded from the scope of this Directive. It should finally be clarified that loans, whether or not they are in connection with the issuing of securities or other financial instruments or other operations therewith, should be excluded from the scope of this Directive.
- (27) It should be recalled that Article 5(1) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council <sup>(1)</sup> explicitly provides that Directives 2004/17/EC and 2004/18/EC apply, respectively, to service contracts and public service contracts for public passenger transport services by bus or tramway, whereas Regulation (EC) No 1370/2007 applies to service concessions for public passenger transport by bus or tramway. It should furthermore be recalled that that Regulation continues to apply to public service contracts as well as to service concessions for public passenger transport by rail or metro. To clarify the relationship between this Directive and Regulation (EC) No 1370/2007, it should be provided explicitly that this Directive should not be applicable to public service contracts for the provision of public passenger transport services by rail or metro, the award of which should continue to be subject to that Regulation. In so far as Regulation (EC) No 1370/2007 leaves it to national law to depart from the rules laid down in that Regulation, Member States should be able to continue to provide in their national law that public service contracts for public passenger transport services by rail or metro are to be awarded by a contract award procedure following their general public procurement rules.
- (28) This Directive should not apply to certain emergency services where they are performed by non-profit organisations or associations, since the particular nature of those organisations would be difficult to preserve if the service providers had to be chosen in accordance with

the procedures set out in this Directive. However, the exclusion should not be extended beyond that strictly necessary. It should therefore be set out explicitly that patient transport ambulance services should not be excluded. In that context it is furthermore necessary to clarify that CPV Group 601 'Land Transport Services' does not cover ambulance services, to be found in CPV class 8514. It should therefore be clarified that services, which are covered by CPV code 85143000-3, consisting exclusively of patient transport ambulance services should be subject to the special regime set out for social and other specific services (the 'light regime'). Consequently, mixed contracts for the provision of ambulance services in general would also be subject to the light regime if the value of the patient transport ambulance services were greater than the value of other ambulance services.

- (29) It is appropriate to recall that this Directive applies only to contracting authorities of Member States. Consequently, political parties in general, not being contracting authorities, are not subject to its provisions. However, political parties in some Member States might fall within the notion of bodies governed by public law.

However, certain services (such as propaganda film and video-tape production) are so inextricably connected to the political views of the service provider when provided in the context of an election campaign, that the service providers are normally selected in a manner which cannot be governed by procurement rules.

Finally, it should be recalled that the statute and funding of European political parties and European political foundations are subject to rules other than those laid down in this Directive.

- (30) In certain cases, a contracting authority or an association of contracting authorities may be the sole source for a particular service, in respect of the provision of which it enjoys an exclusive right pursuant to laws, regulations or published administrative provisions which are compatible with the TFEU. It should be clarified that this Directive need not apply to the award of public service contracts to that contracting authority or association.
- (31) There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.

<sup>(1)</sup> Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.

It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.

- (32) Public contracts awarded to controlled legal persons should not be subject to the application of the procedures provided for by this Directive if the contracting authority exercises a control over the legal person concerned which is similar to that which it exercises over its own departments, provided that the controlled legal person carries out more than 80 % of its activities in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority, regardless of the beneficiary of the contract performance.

The exemption should not extend to situations where there is direct participation by a private economic operator in the capital of the controlled legal person since, in such circumstances, the award of a public contract without a competitive procedure would provide the private economic operator with a capital participation in the controlled legal person an undue advantage over its competitors. However, in view of the particular characteristics of public bodies with compulsory membership, such as organisations responsible for the management or exercise of certain public services, this should not apply in cases where the participation of specific private economic operators in the capital of the controlled legal person is made compulsory by a national legislative provision in conformity with the Treaties, provided that such participation is non-controlling and non-blocking and does not confer a decisive influence on the decisions of the controlled legal person. It should further be clarified that the decisive element is only the direct private participation in the controlled legal person. Therefore, where there is private capital participation in the controlling contracting authority or in the controlling contracting authorities, this does not preclude the award of public contracts to the controlled legal person, without applying the procedures provided for by this Directive as such participations do not adversely affect competition between private economic operators.

It should also be clarified that contracting authorities such as bodies governed by public law, that may have private capital participation, should be in a position to avail themselves of the exemption for horizontal cooperation. Consequently, where all other conditions in relation to horizontal cooperation are met, the horizontal cooperation exemption should extend to such contracting authorities where the contract is concluded exclusively between contracting authorities.

- (33) Contracting authorities should be able to choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form. Such cooperation might cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities, such as mandatory or voluntary tasks of local or regional authorities or services conferred upon specific bodies by public law. The services provided by the various participating authorities need not necessarily be identical; they might also be complementary.

Contracts for the joint provision of public services should not be subject to the application of the rules set out in this Directive provided that they are concluded exclusively between contracting authorities, that the implementation of that cooperation is governed solely by considerations relating to the public interest and that no private service provider is placed in a position of advantage vis-à-vis its competitors.

In order to fulfil those conditions, the cooperation should be based on a cooperative concept. Such cooperation does not require all participating authorities to assume the performance of main contractual obligations, as long as there are commitments to contribute towards the cooperative performance of the public service in question. In addition, the implementation of the cooperation, including any financial transfers between the participating contracting authorities, should be governed solely by considerations relating to the public interest.

- (34) Certain cases exist where a legal entity acts, under the relevant provisions of national law, as an instrument or technical service to determined contracting authorities, is obliged to carry out orders given to it by those contracting authorities and has no influence on the remuneration for its performance. In view of its non-contractual nature, such a purely administrative relationship should not fall within the scope of public procurement procedures.

- (35) The co-financing of research and development (R&D) programmes by industry sources should be encouraged. It should consequently be clarified that this Directive applies only where there is no such co-financing and where the outcome of the R&D activities go to the contracting authority concerned. This should not exclude the possibility that the service provider, having carried out those activities, could publish an account thereof as long as the contracting authority retains the exclusive right to use the outcome of the R&D in the conduct of its own affairs. However fictitious sharing of the results of the R&D or purely symbolic participation in the remuneration of the service provider should not prevent the application of this Directive.
- (36) Employment and occupation contribute to integration in society and are key elements in guaranteeing equal opportunities for all. In this context, sheltered workshops can play a significant role. The same is true for other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups. However, such workshops or businesses might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States should be able to reserve the right to participate in award procedures for public contracts or for certain lots thereof to such workshops or businesses or reserve performance of contracts to the context of sheltered employment programmes.
- (37) With a view to an appropriate integration of environmental, social and labour requirements into public procurement procedures it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that apply at the place where the works are executed or the services provided and result from laws, regulations, decrees and decisions, at both national and Union level, as well as from collective agreements, provided that such rules, and their application, comply with Union law. Equally, obligations stemming from international agreements ratified by all Member States and listed in Annex X should apply during contract performance. However, this should in no way prevent the application of terms and conditions of employment which are more favourable to workers.
- The relevant measures should be applied in conformity with the basic principles of Union law, in particular with a view to ensuring equal treatment. Such relevant measures should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council<sup>(1)</sup> and in a way that ensures equal treatment
- and does not discriminate directly or indirectly against economic operators and workers from other Member States.
- (38) Services should be considered to be provided at the place at which the characteristic performances are executed. When services are provided at a distance, for example services provided by call centres, those services should be considered to be provided at the place where the services are executed, irrespective of the places and Member States to which the services are directed.
- (39) The relevant obligations could be mirrored in contract clauses. It should also be possible to include clauses ensuring compliance with collective agreements in compliance with Union law in public contracts. Non-compliance with the relevant obligations could be considered to be grave misconduct on the part of the economic operator concerned, liable to exclusion of that economic operator from the procedure for the award of a public contract.
- (40) Control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders. The necessary verification for that purpose should be carried out in accordance with the relevant provisions of this Directive, in particular those governing means of proof and self-declarations.
- (41) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that those measures are in conformity with the TFEU.
- (42) There is a great need for contracting authorities to have additional flexibility to choose a procurement procedure, which provides for negotiations. A greater use of those procedures is also likely to increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders. Member States should be able to provide for the use of the competitive procedure with negotiation or the competitive dialogue, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes. It should be recalled that use of the competitive dialogue has significantly increased in terms of contract values

<sup>(1)</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997, p. 1).

over the past years. It has shown itself to be of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing. Where relevant, contracting authorities should be encouraged to appoint a project leader to ensure good cooperation between the economic operators and the contracting authority during the award procedure.

- (43) For works contracts, such situations include works that are not standard buildings or where works includes design or innovative solutions. For services or supplies that require adaptation or design efforts, the use of a competitive procedure with negotiation or competitive dialogue is likely to be of value. Such adaptation or design efforts are particularly necessary in the case of complex purchases such as sophisticated products, intellectual services, for example some consultancy services, architectural services or engineering services, or major information and communications technology (ICT) projects. In those cases, negotiations may be necessary to guarantee that the supply or service in question corresponds to the needs of the contracting authority. In respect of off-the-shelf services or supplies that can be provided by many different operators on the market, the competitive procedure with negotiation and competitive dialogue should not be used.
- (44) The competitive procedure with negotiation should also be available in cases where an open or restricted procedure resulted only in irregular or unacceptable tenders. In such cases, contracting authorities should be allowed to conduct negotiations with the aim of obtaining regular and acceptable tenders.
- (45) The competitive procedure with negotiation should be accompanied by adequate safeguards ensuring observance of the principles of equal treatment and transparency. In particular, contracting authorities should indicate beforehand the minimum requirements which characterise the nature of the procurement and which should not be changed in the negotiations. Award criteria and their weighting should remain stable throughout the entire procedure and should not be subject to negotiations, in order to guarantee equal treatment of all economic operators. Negotiations should aim at improving the tenders so as to allow contracting authorities to buy works, supplies and services perfectly adapted to their specific needs. Negotiations may concern all characteristics of the purchased works, supplies and services including, for instance, quality, quantities, commercial clauses as well as social, environmental and innovative aspects, in so far as they do not constitute minimum requirements.

It should be clarified that the minimum requirements to be set by the contracting authority are those conditions and characteristics (particularly physical, functional and legal) that any tender should meet or possess in order to allow the contracting authority to award the contract in accordance with the chosen award criteria. In order to ensure transparency and traceability of the process, all stages should be duly documented. Furthermore, all tenders throughout the procedure should be submitted in writing.

- (46) Contracting authorities should be allowed to shorten certain deadlines applicable to open and restricted procedures and to competitive procedures with negotiation where the deadlines in question would be impracticable because of a state of urgency which should be duly substantiated by the contracting authorities. It should be clarified that this need not be an extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority.
- (47) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for public money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth.

It should be recalled that a series of procurement models have been outlined in the Commission Communication of 14 December 2007 entitled 'Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe', which deals with the procurement of those R&D services not falling within the scope of this Directive. Those models would continue to be available, but this Directive should also contribute to facilitating public procurement of innovation and help Member States in achieving the Innovation Union targets.

- (48) Because of the importance of innovation, contracting authorities should be encouraged to allow variants as often as possible. The attention of those authorities should consequently be drawn to the need to define the minimum requirements to be met by variants before indicating that variants may be submitted.

(49) Where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market, contracting authorities should have access to a specific procurement procedure in respect of contracts falling within the scope of this Directive. This specific procedure should allow contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase. The innovation partnership should be based on the procedural rules that apply to the competitive procedure with negotiation and contracts should be awarded on the sole basis of the best price-quality ratio, which is most suitable for comparing tenders for innovative solutions. Whether in respect of very large projects or smaller innovative projects, the innovation partnership should be structured in such a way that it can provide the necessary 'market-pull', incentivising the development of an innovative solution without foreclosing the market.

Contracting authorities should therefore not use innovation partnerships in such a way as to prevent, restrict or distort competition. In certain cases, setting up innovation partnerships with several partners could contribute to avoiding such effects.

(50) In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should be used only in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract. This is the case for works of art, where the identity of the artist intrinsically determines the unique character and value of the art object itself. Exclusivity can also arise from other reasons, but only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure.

Contracting authorities relying on this exception should provide reasons why there are no reasonable alternatives or substitutes such as using alternative distribution

channels including outside the Member State of the contracting authority or considering functionally comparable works, supplies and services.

Where the situation of exclusivity is due to technical reasons, they should be rigorously defined and justified on a case-by-case basis. They could include, for instance, near technical impossibility for another economic operator to achieve the required performance or the necessity to use specific know-how, tools or means which only one economic operator has at its disposal. Technical reasons may also derive from specific interoperability requirements which must be fulfilled in order to ensure the functioning of the works, supplies or services to be procured.

Finally, a procurement procedure is not useful where supplies are purchased directly on a commodity market, including trading platforms for commodities such as agricultural products, raw materials and energy exchanges, where the regulated and supervised multi-lateral trading structure naturally guarantees market prices.

(51) It should be clarified that the provisions concerning protection of confidential information do not in any way prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes.

(52) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures, as they greatly enhance the possibilities of economic operators to participate in procurement procedures across the internal market. For that purpose, transmission of notices in electronic form, electronic availability of the procurement documents and – after a transition period of 30 months – fully electronic communication, meaning communication by electronic means at all stages of the procedure, including the transmission of requests for participation and, in particular, the transmission of the tenders (electronic submission) should be made mandatory. Member States and contracting authorities should remain free to go further if they so wish. It should also be clarified that mandatory use of electronic means of communications pursuant to this Directive should not, however, oblige contracting authorities to carry out electronic processing of tenders, nor should it mandate electronic evaluation or automatic processing. Furthermore, pursuant to this Directive, no elements of the public procurement process after the award of the contract should be covered by the obligation to use electronic means of communication, nor should internal communication within the contracting authority.

- (53) Contracting authorities should, except in certain specific situations, use electronic means of communication which are non-discriminatory, generally available and interoperable with the ICT products in general use and which do not restrict economic operators' access to the procurement procedure. The use of such means of communication should also take accessibility for persons with disabilities into due account. It should be clarified that the obligation to use electronic means at all stages of the public procurement procedure would be appropriate neither where the use of electronic means would require specialised tools or file formats that are not generally available nor where the communications concerned could only be handled using specialised office equipment. Contracting authorities should therefore not be obliged to require the use of electronic means of communication in the submission process in certain cases, which should be listed exhaustively. This Directive stipulates that such cases should include situations which would require the use of specialised office equipment not generally available to the contracting authorities such as wide-format printers. In some procurement procedures the procurement documents might require the submission of a physical or scale model which cannot be submitted to the contracting authorities using electronic means. In such situations, the model should be transmitted to the contracting authorities by post or other suitable carrier.

It should however be clarified that the use of other means of communication should be limited to those elements of the tender for which electronic means of communications are not required.

It is appropriate to clarify that, where necessary for technical reasons, contracting authorities should be able to set a maximum limit to the size of the files that may be submitted.

- (54) There can be exceptional cases in which contracting authorities should be allowed not to use electronic means of communication where not using such means of communication is necessary in order to protect the particularly sensitive nature of information. It should be clarified that, where the use of electronic tools which are not generally available can offer the necessary level of protection, such electronic tools should be used. Such might for instance be the case where contracting authorities require the use of dedicated secure means of communication to which they offer access.

- (55) Differing technical formats or processes and messaging standards could potentially create obstacles to interoperability, not only within each Member State but also and

especially between the Member States. For example, in order to participate in a procurement procedure in which use of electronic catalogues, which is a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment, is permitted or required, economic operators would, in the absence of standardisation, be required to customise their own catalogues to each procurement procedure, which would entail providing very similar information in different formats depending on the specifications of the contracting authority concerned. Standardising the catalogue formats would thus improve the level of interoperability, enhance efficiency and would also reduce the effort required of economic operators.

- (56) When considering whether there is a need to ensure or enhance interoperability between differing technical formats or process and messaging standards by rendering the use of specific standards mandatory, and if so which standards to impose, the Commission should take the utmost account of the opinions of the stakeholders concerned. It should also consider the extent to which a given standard has already been used in practice by economic operators and contracting authorities and how well it has worked. Before making the use of any particular technical standard mandatory, the Commission should also carefully consider the costs that this might entail, in particular in terms of adaptations to existing e-procurement solutions, including infrastructure, processes or software. Where the standards concerned are not developed by an international, European or national standardisation organisation, they should meet the requirements applicable to ICT standards as set out in Regulation (EU) 1025/2012 of the European Parliament and of the Council<sup>(1)</sup>.
- (57) Before specifying the level of security required for the electronic means of communications to be used at the various stages of the award procedure, Member States and contracting authorities should evaluate the proportionality between on the one hand the requirements aimed at ensuring correct and reliable identification of the senders of the communication concerned as well as the integrity of its content, and on the other hand the risk of problems such as in situations where messages are sent by a different sender than that indicated. All other things being equal, this would mean that the level of security required of, for instance, an email requesting confirmation of the exact address at which an

<sup>(1)</sup> Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ L 316, 14.11.2012, p. 12).

information meeting will be held would not need to be set at the same level as for the tender itself which constitutes a binding offer for the economic operator. Similarly, the evaluation of proportionality could result in lower levels of security being required in connection with the resubmission of electronic catalogues or the submission of tenders in the context of mini-competitions under a framework agreement or the access to procurement documents.

- (58) While essential elements of a procurement procedure such as the procurement documents, requests for participation, confirmation of interest and tenders should always be made in writing, oral communication with economic operators should otherwise continue to be possible, provided that its content is documented to a sufficient degree. This is necessary to ensure an adequate level of transparency that allows for a verification of whether the principle of equal treatment has been adhered to. In particular, it is essential that oral communications with tenderers which could have an impact on the content and assessment of the tenders 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.
- (59) There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs.
- (60) The instrument of framework agreements has been widely used and is considered as an efficient procurement technique throughout Europe. It should therefore be maintained largely as it is. However, certain aspects need to be clarified, in particular that framework agreements should not be used by contracting authorities which are not identified in them. For that purpose, the contracting authorities that are parties to a specific framework agreement from the outset should be clearly indicated, either by name or by other means, such as a reference to a given category of contracting authorities within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified. Likewise, a framework

agreement should not be open to entry of new economic operators once it has been concluded. This implies for instance that where a central purchasing body uses an overall register of the contracting authorities or categories thereof, such as the local authorities in a given geographical area, that are entitled to have recourse to framework agreements it concludes, that central purchasing body should do so in a way that makes it possible to verify not only the identity of the contracting authority concerned but also the date from which it acquires the right to have recourse to the framework agreement concluded by the central purchasing body as that date determines which specific framework agreements that contracting authority should be allowed to use.

- (61) The objective conditions for determining which of the economic operators party to the framework agreement should perform a given task, such as supplies or services intended for use by natural persons, may, in the context of framework agreements setting out all the terms, include the needs or the choice of the natural persons concerned.

Contracting authorities should be given additional flexibility when procuring under framework agreements, which are concluded with more than one economic operator and which set out all the terms.

In such cases, contracting authorities should be allowed to obtain specific works, supplies or services, that are covered by the framework agreement, either by requiring them from one of the economic operators, determined in accordance with objective criteria and on the terms already set out, or by awarding a specific contract for the works, supplies or services concerned following a mini-competition among the economic operators parties to the framework agreement. To ensure transparency and equal treatment, contracting authorities should indicate in the procurement documents for the framework agreement the objective criteria that will govern the choice between those two methods of performing the framework agreement. Such criteria could for instance relate to the quantity, value or characteristics of the works, supplies or services concerned, including the need for a higher degree of service or an increased security level, or to developments in price levels compared to a predetermined price index. Framework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition. Contracting authorities should not be obliged pursuant to this Directive to procure works, supplies or services that are covered by a framework agreement, under that framework agreement.

- (62) It should also be clarified that, while contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement itself, the duration of the individual contracts based on a framework agreement does not need to coincide with the duration of that framework agreement, but might, as appropriate, be shorter or longer. In particular, it should be allowed to set the length of individual contracts based on a framework agreement taking account of factors such as the time needed for their performance, where maintenance of equipment with an expected useful life of more than four years is included or where extensive training of staff to perform the contract is needed.

It should also be clarified that there might be exceptional cases in which the length of the framework agreements themselves should be allowed to be longer than four years. Such cases, which should be duly justified, in particular by the subject of the framework agreement, might for instance arise where economic operators need to dispose of equipment the amortisation period of which is longer than four years and which must be available at any time over the entire duration of the framework agreement.

- (63) In view of the experience acquired, there is also a need to adjust the rules governing dynamic purchasing systems to enable contracting authorities to take full advantage of the possibilities afforded by that instrument. The systems need to be simplified; in particular they should be operated in the form of a restricted procedure, hence eliminating the need for indicative tenders, which have been identified as one of the major burdens associated with dynamic purchasing systems. Thus any economic operator that submits a request to participate and meets the selection criteria should be allowed to take part in procurement procedures carried out through the dynamic purchasing system over its period of validity. This purchasing technique allows the contracting authority to have a particularly broad range of tenders and hence to ensure optimum use of public funds through broad competition in respect of commonly used or off-the-shelf products, works or services which are generally available on the market.
- (64) The examination of those requests to participate should normally be performed within a maximum of 10 working days, given that the evaluation of the selection criteria will take place on the basis of the simplified requirements for documentation that are set out in this Directive. However, when a dynamic purchasing system is first set up, contracting authorities might, in response to the first publication of the contract notice or the invitation to confirm interest, be faced with such a large number of requests for participation that they would need more time to examine the requests. That should be admissible, provided that no specific procurement is launched before all the requests have been examined. Contracting authorities should be free to organise the way in which they intend to examine the requests for participation, for instance by deciding

to conduct such examinations only once a week, provided the deadlines for the examination of each request of admission are observed.

- (65) At any time during the period of validity of the dynamic purchasing system, contracting authorities should be free to require economic operators to submit a renewed and updated self-declaration on the fulfilment of criteria for qualitative selection, within an adequate time limit. It should be recalled that the possibility foreseen in the general provisions on means of proof of this Directive to ask economic operators to submit supporting documents and the obligation to do so of the tenderer to which it has decided to award the contract also apply in the particular context of dynamic purchasing systems.
- (66) In order to further the possibilities of SMEs to participate in a large-scale dynamic purchasing system, for instance one that is operated by a central purchasing body, the contracting authority concerned should be able to articulate the system in objectively defined categories of products, works or services. Such categories should be defined by reference to objective factors which might for instance include the maximum allowable size of specific contracts to be awarded within the category concerned or a specific geographic area in which specific contracts are to be performed. Where a dynamic purchasing system is divided into categories, the contracting authority should apply selection criteria that are proportionate to the characteristics of the category concerned.
- (67) It should be clarified that electronic auctions are typically not suitable for certain public works contracts and certain public service contracts having as their subject-matter intellectual performances, such as the design of works, because only the elements suitable for automatic evaluation by electronic means, without any intervention or appreciation by the contracting authority, namely elements which are quantifiable so that they can be expressed in figures or percentages, may be the object of electronic auctions.

It should, however, also be clarified that electronic auctions may be used in a procurement procedure for the purchase of a specific intellectual property right. It is also appropriate to recall that while contracting authorities remain free to reduce the number of candidates or tenderers as long as the auction has not yet started, no further reduction of the number of tenderers participating in the electronic auction should be allowed after the auction has started.

- (68) New electronic purchasing techniques are constantly being developed, such as electronic catalogues. Electronic catalogues are a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment. An example could be tenders presented

in the form of a spreadsheet. Contracting authorities should be able to require electronic catalogues in all available procedures where the use of electronic means of communication is required. Electronic catalogues help to increase competition and streamline public purchasing, particularly in terms of savings in time and money. Certain rules should however be laid down to ensure that the use of the new techniques complies with this Directive and with the principles of equal treatment, non-discrimination and transparency. Thus, the use of electronic catalogues for the presentation of tenders should not entail the possibility of economic operators limiting themselves to the transmission of their general catalogue. Economic operators should still have to adapt their general catalogues in view of the specific procurement procedure. Such adaptation ensures that the catalogue that is transmitted in response to a given procurement procedure contains only products, works or services that the economic operators estimated - after an active examination - correspond to the requirements of the contracting authority. In so doing, economic operators should be allowed to copy information contained in their general catalogue, but they should not be allowed to submit the general catalogue as such.

Furthermore, where sufficient guarantees are offered in respect of ensuring traceability, equal treatment and predictability, contracting authorities should be allowed to generate tenders in relation to specific purchases on the basis of previously transmitted electronic catalogues, in particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used.

Where tenders have been generated by the contracting authority, the economic operator concerned should be given the possibility to verify that the tender thus constituted by the contracting authority does not contain any material errors. Where material errors are present, the economic operator should not be bound by the tender generated by the contracting authority unless the error is corrected.

In line with the requirements of the rules for electronic means of communication, contracting authorities should avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues and which guarantee compliance with the general principles of non-discrimination and equal treatment.

- (69) Centralised purchasing techniques are increasingly used in most Member States. Central purchasing bodies are responsible for making acquisitions, managing dynamic

purchasing systems or awarding public contracts/framework agreements for other contracting authorities, with or without remuneration. The contracting authorities for whom a framework agreement is concluded should be able to use it for individual or repetitive purchases. In view of the large volumes purchased, such techniques may help increase competition and should help to professionalise public purchasing. Provision should therefore be made for a Union definition of central purchasing bodies dedicated to contracting authorities and it should be clarified that central purchasing bodies operate in two different manners.

Firstly, they should be able to act as wholesalers by buying, stocking and reselling or, secondly, they should be able to act as intermediaries by awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting authorities. Such an intermediary role might in some cases be carried out by conducting the relevant award procedures autonomously, without detailed instructions from the contracting authorities concerned; in other cases, by conducting the relevant award procedures under the instructions of the contracting authorities concerned, on their behalf and for their account.

Furthermore, rules should be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, as between the central purchasing body and the contracting authorities procuring from or through it. Where the central purchasing body has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures. Where a contracting authority conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts.

- (70) Contracting authorities should be allowed to award a public service contract for the provision of centralised purchasing activities to a central purchasing body without applying the procedures provided for in this Directive. It should also be permitted for such public service contracts to include the provision of ancillary purchasing activities. Public service contracts for the provision of ancillary purchasing activities should, when performed otherwise than by a central purchasing body in connection with its provision of central purchasing activities to the contracting authority concerned, be awarded in accordance with this Directive. It should also be recalled that this Directive should not apply where centralised or ancillary purchasing activities are provided other than through a contract for pecuniary interest which constitutes procurement within the meaning of this Directive.

- (71) Strengthening the provisions concerning central purchasing bodies should in no way prevent the current practices of occasional joint procurement, i.e. less institutionalised and systematic common purchasing or the established practice of having recourse to service providers that prepare and manage procurement procedures on behalf and for the account of a contracting authority and under its instructions. On the contrary, certain features of joint procurement should be clarified because of the important role joint procurement may play, not least in connection with innovative projects.

Joint procurement can take many different forms, ranging from coordinated procurement through the preparation of common technical specifications for works, supplies or services that will be procured by a number of contracting authorities, each conducting a separate procurement procedure, to situations where the contracting authorities concerned jointly conduct one procurement procedure either by acting together or by entrusting one contracting authority with the management of the procurement procedure on behalf of all contracting authorities.

Where several contracting authorities are jointly conducting a procurement procedure, they should be jointly responsible for fulfilling their obligations under this Directive. However, where only parts of the procurement procedure are jointly conducted by the contracting authorities, joint responsibility should apply only to those parts of the procedure that have been carried out together. Each contracting authority should be solely responsible in respect of procedures or parts of procedures it conducts on its own, such as the awarding of a contract, the conclusion of a framework agreement, the operation of a dynamic purchasing system, the reopening of competition under a framework agreement or the determination of which of the economic operators party to a framework agreement shall perform a given task.

- (72) Electronic means of communication are particularly well suited to supporting centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs. The use of such electronic means of communication should therefore, as a first step, be rendered compulsory for central purchasing bodies, while also facilitating converging practices across the Union. This should be followed by a general obligation to use electronic means of communication in all procurement procedures after a transition period of 30 months.

- (73) Joint awarding of public contracts by contracting authorities from different Member States currently encounters specific legal difficulties concerning conflicts of national laws. Despite the fact that Directive 2004/18/EC

implicitly allowed for cross-border joint public procurement, contracting authorities are still facing considerable legal and practical difficulties in purchasing from central purchasing bodies in other Member States or jointly awarding public contracts. In order to allow contracting authorities to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting authority, those difficulties should be remedied. Therefore new rules on cross-border joint procurement should be established in order to facilitate cooperation between contracting authorities and enhancing the benefits of the internal market by creating cross-border business opportunities for suppliers and service providers. Those rules should determine the conditions for cross-border utilisation of central purchasing bodies and designate the applicable public procurement legislation, including the applicable legislation on remedies, in cases of cross-border joint procedures, complementing the conflict of law rules of Regulation (EC) No 593/2008 of the European Parliament and the Council<sup>(1)</sup>. In addition, contracting authorities from different Member States should be able to set up joint entities established under national or Union law. Specific rules should be established for such forms of joint procurement.

However, contracting authorities should not make use of the possibilities for cross-border joint procurement for the purpose of circumventing mandatory public law rules, in conformity with Union law, which are applicable to them in the Member State where they are located. Such rules might include, for example, provisions on transparency and access to documents or specific requirements for the traceability of sensitive supplies.

- (74) The technical specifications drawn up by public purchasers need to allow public procurement to be open to competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services.

Consequently, technical specifications should be drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows that objective to be achieved in the best way possible. Functional and performance-related requirements are also appropriate

<sup>(1)</sup> Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

means to favour innovation in public procurement and should be used as widely as possible. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements should be considered by contracting authorities. It should be the responsibility of the economic operator to prove equivalence with the requested label.

To prove equivalence, it should be possible to require tenderers to provide third-party verified evidence. However, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits, provided that the economic operator concerned thereby proves that the works, supplies or services meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

- (75) Contracting authorities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-)national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that those requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate, and that the label is accessible and available to all interested parties. It should be clarified that stakeholders could be public or private bodies, businesses or any sort of non-governmental organisation (an organisation that is not a part of a government and is not a conventional business).

It should equally be clarified that specific national or government bodies or organisations can be involved in setting up label requirements that may be used in connection with procurement by public authorities without those bodies or organisations losing their status as third parties.

References to labels should not have the effect of restricting innovation.

- (76) For all procurement intended for use by persons, whether general public or staff of the contracting authority, it is necessary for contracting authorities to lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users, except in duly justified cases.

- (77) When drawing up technical specifications, contracting authorities should take into account requirements ensuing from Union law in the field of data protection law, in particular in relation to the design of the processing of personal data (data protection by design).
- (78) Public procurement should be adapted to the needs of SMEs. Contracting authorities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled 'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts', providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation. To that end and to enhance competition, contracting authorities should in particular be encouraged to divide large contracts into lots. Such division could be done on a quantitative basis, making the size of the individual contracts better correspond to the capacity of SMEs, or on a qualitative basis, in accordance with the different trades and specialisations involved, to adapt the content of the individual contracts more closely to the specialised sectors of SMEs or in accordance with different subsequent project phases.

The size and subject-matter of the lots should be determined freely by the contracting authority, which, in accordance with the relevant rules on the calculation of the estimated value of procurement, should also be allowed to award some of the lots without applying the procedures of this Directive. The contracting authority should have a duty to consider the appropriateness of dividing contracts into lots while remaining free to decide autonomously on the basis of any reason it deems relevant, without being subject to administrative or judicial supervision. Where the contracting authority decides that it would not be appropriate to divide the contract into lots, the individual report or the procurement documents should contain an indication of the main reasons for the contracting authority's choice. Such reasons could for instance be that the contracting authority finds that such division could risk restricting competition, or risk rendering the execution of the contract excessively technically difficult or expensive, or that the need to coordinate the different contractors for the lots could seriously risk undermining the proper execution of the contract.

Member States should remain free to go further in their efforts to facilitate the involvement of SMEs in the public procurement market, by extending the scope of the obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting authorities to provide a justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory under certain conditions. With the same purpose, Member States should also be free to provide mechanisms for direct payments to subcontractors.

- (79) Where contracts are divided into lots, contracting authorities should, for instance in order to preserve competition or to ensure reliability of supply, be allowed to limit the number of lots for which an economic operator may tender; they should also be allowed to limit the number of lots that may be awarded to any one tenderer.

However, the objective of facilitating greater access to public procurement by SMEs might be hampered if contracting authorities would be obliged to award the contract lot by lot even where this would entail having to accept substantially less advantageous solutions compared to an award grouping several or all of the lots. Where the possibility to apply such a method has been clearly indicated beforehand, it should therefore be possible for contracting authorities to conduct a comparative assessment of the tenders in order to establish whether the tenders submitted by a particular tenderer for a specific combination of lots would, taken as whole, fulfil the award criteria laid down in accordance with this Directive with regard to those lots better than the tenders for the individual lots concerned seen in isolation. If so, the contracting authority should be allowed to award a contract combining the lots in question to the tenderer concerned. It should be clarified that contracting authorities should conduct such a comparative assessment by first determining which tenders best fulfil the award criteria laid down for each individual lot and then comparing it with the tenders submitted by a particular tenderer for a specific combination of lots, taken as a whole.

- (80) In order to make procedures faster and more efficient, time limits for participation in procurement procedures should be kept as short as possible without creating undue barriers to access for economic operators from across the internal market and in particular SMEs. It should therefore be kept in mind that, when fixing the time limits for the receipt of tenders and requests to participate, contracting authorities should take account in particular of the complexity of the contract and the time required to draw up tenders, even if this entails setting time limits that are longer than the minima provided for under this Directive. The use of electronic means of information and communication, in particular full electronic availability to economic operators, tenderers and candidates of procurement documents and electronic transmission of communications leads, on the other hand, to increased transparency and time savings. Therefore, provision should be made for reducing the minimum time limits in line with the rules set by the GPA and subject to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Furthermore, contracting authorities should have the opportunity to further shorten the time limits for receipt of requests to participate and of tenders in cases where a state of urgency renders the regular time limits impracticable, but does not make a regular procedure with publication impossible. Only in exceptional situations where

extreme urgency brought about by events unforeseeable by the contracting authority concerned that are not attributable to that contracting authority makes it impossible to conduct a regular procedure even with shortened time limits, contracting authorities should, in so far as strictly necessary, have the possibility to award contracts by negotiated procedure without prior publication. This might be case where natural catastrophes require immediate action.

- (81) It should be clarified that the need to ensure that economic operators have sufficient time in which to draw up responsive tenders may entail that the time limits which were set initially may have to be extended. This would, in particular, be the case where significant changes are made to the procurement documents. It should also be specified that, in that case, significant changes should be understood as covering changes, in particular to the technical specifications, in respect of which economic operators would need additional time in order to understand and respond appropriately. It should, however, be clarified that such changes should not be so substantial that the admission of candidates other than those initially selected would have been allowed for or additional participants in the procurement procedure would have been attracted. That could, in particular, be the case where the changes render the contract or the framework agreement materially different in character from the one initially set out in the procurement documents.
- (82) It should be clarified that the information concerning certain decisions taken during a procurement procedure, including the decision not to award a contract or not to conclude a framework agreement, should be sent by the contracting authorities, without candidates or tenderers having to request such information. It should also be recalled that Council Directive 89/665/EEC<sup>(1)</sup> provides for an obligation for contracting authorities, again without candidates or tenderer having to request it, to provide the candidates and tenderers concerned with a summary of the relevant reasons for some of the central decisions that are taken in the course of a procurement procedure. It should finally be clarified that candidates and tenderers should be able to request more detailed information concerning those reasons, which contracting authorities should be required to give except where there would be serious grounds for not doing so. Those grounds should be set out in this Directive. To ensure the necessary transparency in the context of procurement procedures involving negotiations and dialogues with tenderers, tenderers having made an admissible tender should, except where there would be serious grounds for not doing so, also be enabled to request information on the conduct and progress of the procedure.

<sup>(1)</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33).

- (83) Overly demanding requirements concerning economic and financial capacity frequently constitute an unjustified obstacle to the involvement of SMEs in public procurement. Any such requirements should be related and proportionate to the subject-matter of the contract. In particular, contracting authorities should not be allowed to require economic operators to have a minimum turnover that would be disproportionate to the subject-matter of the contract; the requirement should normally not exceed at the most twice the estimated contract value. However, in duly justified circumstances, it should be possible to apply higher requirements. Such circumstances might relate to the high risks attached to the performance of the contract or the fact that its timely and correct performance is critical, for instance because it constitutes a necessary preliminary for the performance of other contracts.

In such duly justified cases contracting authorities should remain free to decide autonomously whether higher minimum turnover requirements would be appropriate and pertinent without being subject to administrative or judicial supervision. Where higher minimum turnover requirements are to be applied, contracting authorities should remain free to set the level as long as it is related and proportionate to the subject-matter of the contract. Where the contracting authority decides that the minimum turnover requirement should be set at a level higher than twice the estimated contract value, the individual report or the procurement documents should contain an indication of the main reasons for the contracting authority's choice.

Contracting authorities should also be able to request information on the ratios, for instance, between assets and liabilities in the annual accounts. A positive ratio showing higher levels of assets than of liabilities could provide additional evidence that the financial capacity of economic operators is sufficient.

- (84) Many economic operators, and not least SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example through use of a European Single Procurement Document (ESPD) consisting of an updated self-declaration, could result in considerable simplification for the benefit of both contracting authorities and economic operators.

The tenderer to which it has been decided to award the contract should, however, be required to provide the relevant evidence and contracting authorities should not conclude contracts with tenderers unable to do so. Contracting authorities should also be entitled to request all or part of the supporting documents at any moment where they consider this to be necessary in view of the proper conduct of the procedure. This might in

particular be the case in two-stage procedures – restricted procedures, competitive procedures with negotiation, competitive dialogues and innovation partnerships - in which the contracting authorities make use of the possibility to limit the number of candidates invited to submit a tender. Requiring submission of the supporting documents at the moment of selection of the candidates to be invited could be justified to avoid that contracting authorities invite candidates which later prove unable to submit the supporting documents at the award stage, depriving otherwise qualified candidates from participation.

It should be set out explicitly that the ESPD should also provide the relevant information in respect of entities on whose capacities an economic operator relies, so that the verification of the information regarding such entities can be carried out together with and on the same conditions as the verification in respect of the main economic operator.

- (85) It is important that the decisions of contracting authorities should be based on recent information, in particular as regards exclusion grounds, given that important changes can intervene quite rapidly, for instance in the event of financial difficulties which would render the economic operator unsuitable or, conversely, because an outstanding debt on social contributions would meanwhile have been paid. It is therefore preferable that, whenever possible, contracting authorities should verify such information by accessing relevant databases, which should be national in the sense of being administered by public authorities. At the current stage of development, there might still be cases where doing so is not yet possible because of technical reasons. The Commission should therefore envisage promoting measures that could facilitate easy recourse to up-to-date information electronically, such as strengthening tools offering access to virtual company dossiers, or means of facilitating interoperability between databases or other such flanking measures.

It should also be provided that contracting authorities should not ask for still up-to-date documents, which they already possess from earlier procurement procedures. However, it should also be ensured that contracting authorities will not be faced with disproportionate archiving and filing burdens in this context. Consequently, implementation of this duty should only be applicable once the use of electronic means of communication is obligatory, as electronic document management will render the task much easier for contracting authorities.

- (86) Further simplification for both economic operators and contracting authorities could be obtained by means of a standard form for self-declarations, which could reduce problems linked to the precise drafting of formal statements and declarations of consent as well as language issues.

- (87) The Commission provides and manages an electronic system, e-Certis, which is currently updated and verified on a voluntary basis by national authorities. The aim of e-Certis is to facilitate the exchange of certificates and other documentary evidence frequently required by contracting authorities. Experience acquired so far indicates that voluntary updating and verification is insufficient to ensure that e-Certis can deliver its full potential for simplifying and facilitating documentary exchanges for the benefit of SMEs in particular. Maintenance should therefore be rendered obligatory in a first step. Recourse to e-Certis will be made mandatory at a later stage.
- (88) Contracting authorities should be able to require that environmental management measures or schemes be applied during the performance of a public contract. Environmental management schemes, whether or not they are registered under Union instruments such as Regulation (EC) No 1221/2009 of the European Parliament and of the Council<sup>(1)</sup>, can demonstrate that the economic operator has the technical capability to perform the contract. This includes Ecolabel certificates involving environmental management criteria. Where an economic operator has no access to such environmental management registration schemes or no possibility of obtaining them within the relevant time limits, it should be allowed to submit a description of the environmental management measures implemented, provided that the economic operator concerned demonstrates that those measures ensure the same level of environmental protection as the measures required under the environmental management.
- (89) The notion of award criteria is central to this Directive. It is therefore important that the relevant provisions be presented in as simple and streamlined a way as possible. This can be obtained by using the terminology 'most economically advantageous tender' as the overriding concept, since all winning tenders should finally be chosen in accordance with what the individual contracting authority considers to be the economically best solution among those offered. In order to avoid confusion with the award criterion that is currently known as the 'most economically advantageous tender' in Directives 2004/17/EC and 2004/18/EC, a different terminology should be used to cover that concept, the 'best price-quality ratio'. Consequently, it should be interpreted in accordance with the case-law relating to those Directives, except where there is a clearly materially different solution in this Directive.
- (90) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the

relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender. It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. It is furthermore appropriate to recall that contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions.

In order to encourage a greater quality orientation of public procurement, Member States should be permitted to prohibit or restrict use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate.

To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision. Contracting authorities should therefore be obliged to indicate the contract award criteria and the relative weighting given to each of those criteria. Contracting authorities should, however, be permitted to derogate from that obligation to indicate the weighting of the criteria in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular because of the complexity of the contract. In such cases, they should indicate the criteria in decreasing order of importance.

- (91) Article 11 TFEU requires that environmental protection requirements be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.
- (92) When assessing the best price-quality ratio contracting authorities should determine the economic and qualitative criteria linked to the subject-matter of the contract that they will use for that purpose. Those criteria should thus allow for a comparative assessment of the level of performance offered by each tender in the light of the subject-matter of the contract, as defined in the technical specifications. In the context of the best price-quality ratio, a non-exhaustive list of possible award criteria which include environmental and social aspects is set out in this Directive. Contracting authorities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.

<sup>(1)</sup> Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC (OJ L 342, 22.12.2009, p. 1).

The chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective and fair competition and be accompanied by arrangements that allow the information provided by the tenderers to be effectively verified.

To identify the most economically advantageous tender, the contract award decision should not be based on non-cost criteria only. Qualitative criteria should therefore be accompanied by a cost criterion that could, at the choice of the contracting authority, be either the price or a cost-effectiveness approach such as life-cycle costing. However, the award criteria should not affect the application of national provisions determining the remuneration of certain services or setting out fixed prices for certain supplies.

- (93) Where national provisions determine the remuneration of certain services or set out fixed prices for certain supplies, it should be clarified that it remains possible to assess value for money on the basis of other factors than solely the price or remuneration. Depending on the service or product concerned, such factors could, for instance, include conditions of delivery and payment, aspects of after-sale service (e.g. the extent of advisory and replacement services) or environmental or social aspects (e.g. whether books were stamped on recycled paper or paper from sustainable timber, the cost imputed to environmental externalities or whether the social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract has been furthered). Given the numerous possibilities of evaluating value for money on the basis of substantive criteria, recourse to drawing of lots as the sole means of awarding the contract should be avoided.
- (94) Wherever the quality of the staff employed is relevant to the level of performance of the contract, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this can affect the quality of contract performance and, as a result, the economic value of the tender. This might be the case, for example, in contracts for intellectual services such as consultancy or architectural services. Contracting authorities which make use of this possibility should ensure, by appropriate contractual means, that the staff assigned to contract performance effectively fulfil the specified quality standards and that such staff can only be replaced with the consent of the contracting authority which verifies that the replacement staff affords an equivalent level of quality.
- (95) It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 strategy for smart, sustainable and inclusive growth. In this context, it should be recalled that public procurement is crucial to driving innovation, which is of great importance for future growth in Europe. In view of

the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement.

The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council <sup>(1)</sup>) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council <sup>(2)</sup>). In addition, the definition of common methodologies for life cycle costing has significantly advanced.

It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.

- (96) Those sector-specific measures should be complemented by an adaptation of Directives 2004/17/EC and 2004/18/EC empowering contracting authorities to pursue the objectives of the Europe 2020 strategy for smart, sustainable and inclusive growth in their purchasing strategies. It should hence be made clear that, except where it is assessed on the basis of price only, contracting authorities can determine the most economically advantageous tender and the lowest cost using a life-cycle costing approach. The notion of life-cycle costing includes all costs over the life cycle of works, supplies or services.

This means internal costs, such as research to be carried out, development, production, transport, use, maintenance and end-of-life disposal costs but can also include costs imputed to environmental externalities, such as pollution caused by extraction of the raw materials used in the product or caused by the product itself or its manufacturing, provided they can be monetised and monitored. The methods which contracting authorities use for assessing costs imputed to environmental externalities should be established in advance in an objective and non-discriminatory manner and be accessible to all interested parties. Such methods can be established at national, regional or local level, but they should, to avoid distortions of competition through tailor-made methodologies, remain general in the sense that they should not be set up specifically for a particular public procurement procedure.

<sup>(1)</sup> Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles (OJ L 120, 15.5.2009, p. 5).

<sup>(2)</sup> Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment (OJ L 39, 13.2.2008, p. 1).

Common methodologies should be developed at Union level for the calculation of life-cycle costs for specific categories of supplies or services. Where such common methodologies are developed, their use should be made compulsory.

Furthermore, the feasibility of establishing a common methodology on social life cycle costing should be examined, taking into account existing methodologies such as the Guidelines for Social Life Cycle Assessment of Products adopted within the framework of the United Nations Environment Programme.

- (97) Furthermore, with a view to the better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance. Criteria and conditions referring to such a production or provision process are for example that the manufacturing of the purchased products did not involve toxic chemicals, or that the purchased services are provided using energy-efficient machines. In accordance with the case-law of the Court of Justice of the European Union, this also includes award criteria or contract performance conditions relating to the supply or utilisation of fair trade products in the course of the performance of the contract to be awarded. Criteria and conditions relating to trading and its conditions can for instance refer to the fact that the product concerned is of fair trade origin, including the requirement to pay a minimum price and price premium to producers. Contract performance conditions pertaining to environmental considerations might include, for example, the delivery, package and disposal of products, and in respect of works and services contracts, waste minimisation or resource efficiency.

However, the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place.

- (98) It is essential that award criteria or contract performance conditions concerning social aspects of the production process relate to the works, supplies or services to be

provided under the contract. In addition, they should be applied in accordance with Directive 96/71/EC, as interpreted by the Court of Justice of the European Union and should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States or from third countries parties to the GPA or to Free Trade Agreements to which the Union is party. Thus, requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive.

Contract performance conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life, the protection of the environment or animal welfare and, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, and to recruit more disadvantaged persons than are required under national legislation.

- (99) Measures aiming at the protection of health of the staff involved in the production process, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract or training in the skills needed for the contract in question can also be the subject of award criteria or contract performance conditions provided that they relate to the works, supplies or services to be provided under the contract. For instance, such criteria or conditions might refer, amongst other things, to the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded. In technical specifications contracting authorities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users.
- (100) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering or terrorist financing. The non-payment of taxes or social security contributions should also lead to mandatory exclusion at the level of the Union. Member States should, however, be able to provide for a derogation from those mandatory exclusions in exceptional situations where overriding requirements in the general interest make a contract award indispensable. This might, for example, be the case where urgently needed vaccines or emergency equipment can only be purchased from an economic operator to whom one of the mandatory grounds for exclusion otherwise applies.

- (101) Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. It should be clarified that grave professional misconduct can render an economic operator's integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.

Bearing in mind that the contracting authority will be responsible for the consequences of its possible erroneous decision, contracting authorities should also remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any appropriate means that the economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions, unless otherwise provided by national law. They should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion.

- (102) Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined.

However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.

- (103) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. Where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed result from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions.
- (104) Contract performance conditions are for laying down specific requirements relating to the performance of the contract. Unlike contract award criteria which are the basis for a comparative assessment of the quality of tenders, contract performance conditions constitute fixed objective requirements that have no impact on the assessment of tenders. Contract performance conditions should be compatible with this Directive provided that they are not directly or indirectly discriminatory and are linked to the subject-matter of the contract, which comprises all factors involved in the specific process of production, provision or commercialisation. This includes conditions concerning the process of performance of the contract, but excludes requirements referring to a general corporate policy.

The contract performance conditions should be indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents.

- (105) It is important that observance by subcontractors of applicable obligations in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in this Directive, provided that such rules, and their application, comply with Union law, be ensured through appropriate actions by the competent national authorities within the scope of their responsibilities and remit, such as labour inspection agencies or environmental protection agencies.

It is also necessary to ensure some transparency in the subcontracting chain, as this gives contracting authorities information on who is present at building sites on which works are being performed for them, or on which undertakings are providing services in or at buildings, infrastructures or areas, such as town halls, municipal schools,

sports facilities, ports or motorways, for which the contracting authorities are responsible or over which they have a direct oversight. It should be clarified that the obligation to deliver the required information is in any case incumbent upon the main contractor, either on the basis of specific clauses, that each contracting authority would have to include in all procurement procedures, or on the basis of obligations which Member States would impose on main contractors by means of generally applicable provisions.

It should also be clarified that the conditions relating to the enforcement of observance of applicable obligations in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in this Directive, provided that such rules, and their application, comply with Union law, should be applied whenever the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor. Furthermore, it should be stated explicitly that Member States should be able to go further, for instance by extending the transparency obligations, by enabling direct payment to subcontractors or by enabling or requiring contracting authorities to verify that subcontractors are not in any of the situations in which exclusion of economic operators would be warranted. Where such measures are applied to subcontractors, coherence with the provisions applicable to main contractors should be ensured so that the existence of compulsory exclusion grounds would be followed by a requirement that the main contractor replace the subcontractor concerned. Where such verification shows the presence of non-compulsory grounds for exclusion, it should be clarified that contracting authorities are able to require the replacement. It should, however, also be set out explicitly that contracting authorities may be obliged to require the replacement of the subcontractor concerned where exclusion of main contractors would be obligatory in such cases.

It should also be set out explicitly that Member States remain free to provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors.

- (106) It should be recalled that Council Regulation (EEC, Euratom) No 1182/71 <sup>(1)</sup> applies to the calculation of the time limits contained in this Directive.
- (107) It is necessary to clarify the conditions under which modifications to a contract during its performance require a new procurement procedure, taking into

account the relevant case-law of the Court of Justice of the European Union. A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

Modifications to the contract resulting in a minor change of the contract value up to a certain value should always be possible without the need to carry out a new procurement procedure. To this effect and in order to ensure legal certainty, this Directive should provide for *de minimis* thresholds, below which a new procurement procedure is not necessary. Modifications to the contract above those thresholds should be possible without the need to carry out a new procurement procedure to the extent they comply with the relevant conditions laid down in this Directive.

- (108) Contracting authorities may be faced with situations where additional works, supplies or services become necessary; in such cases a modification of the initial contract without a new procurement procedure may be justified, in particular where the additional deliveries are intended either as a partial replacements or as the extension of existing services, supplies or installations where a change of supplier would oblige the contracting authority to acquire material, works or services having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance.
- (109) Contracting authorities can be faced with external circumstances that they could not foresee when they awarded the contract, in particular when the performance of the contract covers a long period. In this case, a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement procedure. The notion of unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed.

<sup>(1)</sup> Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ - English special edition: Series V Volume 1952-1972 p. 88).

- (110) In line with the principles of equal treatment and transparency, the successful tenderer should not, for instance where a contract is terminated because of deficiencies in the performance, be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract should be able, in particular where the contract has been awarded to more than one undertaking, to undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, take-overs, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all public contracts performed by that tenderer.
- (111) Contracting authorities should, in the individual contracts themselves, have the possibility to provide for modifications to a contract by way of review or option clauses, but such clauses should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial contract. It should consequently be clarified that sufficiently clearly drafted review or option clauses may for instance provide for price indexations or ensure that, for example, communications equipment to be delivered over a given period continues to be suitable, also in the case of changing communications protocols or other technological changes. It should also be possible under sufficiently clear clauses to provide for adaptations of the contract which are rendered necessary by technical difficulties which have appeared during operation or maintenance. It should also be recalled that contracts could, for instance, include both ordinary maintenance as well as provide for extraordinary maintenance interventions that might become necessary in order to ensure continuation of a public service.
- (112) Contracting authorities are sometimes faced with circumstances that require the early termination of public contracts in order to comply with obligations under Union law in the field of public procurement. Member States should therefore ensure that contracting authorities have the possibility, under the conditions determined by national law, to terminate a public contract during its term if so required by Union law.
- (113) The results of the Commission staff working paper of 27 June 2011 entitled 'Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation' suggested that the exclusion of certain services from the full application of Directive 2004/18/EC should be reviewed. As a result, the full application of this Directive should be extended to a number of services.
- (114) Certain categories of services continue by their very nature to have a limited cross-border dimension, namely such services that are known as services to the person, such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for those services, with a higher threshold than that which applies to other services.
- Services to the person with values below that threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects.
- Contracts for services to the person above that threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive take account of that imperative, imposing only the observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services, published by the Social Protection Committee. When determining the procedures to be used for the award of contracts for services to the person, Member States should take Article 14 TFEU and Protocol No 26 into account. In so doing, Member States should also pursue the objectives of simplification and of alleviating the administrative burden for contracting authorities and economic operators; it should be clarified that so doing might also entail relying on rules applicable to service contracts not subject to the specific regime.
- Member States and public authorities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.
- (115) Likewise, hotel and restaurant services are typically offered only by operators located in the specific place of delivery of those services and therefore also have a limited cross-border dimension. They should therefore only be covered by the light regime, as from a threshold of EUR 750 000. Large hotel and restaurant service contracts above that threshold can be of interest for various economic operators, such as travel agencies and other intermediaries, also on a cross-border basis.

- (116) Similarly, certain legal services concern exclusively issues of purely national law and are therefore typically offered only by operators located in the Member State concerned and consequently also have a limited cross-border dimension. They should therefore only be covered by the light regime, as from a threshold of EUR 750 000. Large legal service contracts above that threshold can be of interest for various economic operators, such as international law firms, also on a cross-border basis, in particular where they involve legal issues arising from or having as its background Union or other international law or involving more than one country.
- (117) Experience has shown that a series of other services, such as rescue services, firefighting services and prison services are normally only of cross-border interest as of such time as they acquire sufficient critical mass through their relatively high value. In so far as they are not excluded from the scope of this Directive, they should be included under light regime. To the extent that their provision is actually based on contracts, other categories of services, such as government services or the provision of services to the community, they would normally only be likely to present a cross-border interest as from a threshold of EUR 750 000 and should consequently only then be subject to the light regime.
- (118) In order to ensure the continuity of public services, this Directive should allow that participation in procurement procedures for certain services in the fields of health, social and cultural services could be reserved for organisations which are based on employee ownership or active employee participation in their governance, and for existing organisations such as cooperatives to participate in delivering these services to end users. This provision is limited in scope exclusively to certain health, social and related services, certain education and training services, library, archive, museum and other cultural services, sporting services, and services for private households, and is not intended to cover any of the exclusions otherwise provided for by this Directive. Those services should only be covered by the light regime.
- (119) It is appropriate to identify those services by reference to specific positions of the Common Procurement Vocabulary (CPV) as adopted by Regulation (EC) No 2195/2002 of the European Parliament and of the Council<sup>(1)</sup>, which is a hierarchically structured nomenclature, divided into divisions, groups, classes, categories and subcategories. In order to avoid legal uncertainty, it should be clarified that reference to a division does not implicitly entail a reference to subordinate subdivisions. Such comprehensive coverage should instead be set out explicitly by mentioning all the relevant positions, where appropriate as a range of codes.
- (120) Design contests have traditionally mostly been used in the fields of town and country planning, architecture and engineering or data processing. It should, however, be recalled that these flexible instruments could be used also for other purposes, such as to obtain plans for financial engineering that would optimise SME support in the context of the Joint European Resources for Micro to Medium Enterprises (JEREMIE) or other Union SME support programmes in a given Member State. The design contest used to acquire the plans for such financial engineering could also stipulate that the subsequent service contracts for the realisation of this financial engineering would be awarded to the winner or one of the winners of the design contest by a negotiated procedure without publication.
- (121) The evaluation has shown that there is still considerable room for improvement in the application of the Union public procurement rules. With a view to a more efficient and consistent application of the rules, it is essential to get a good overview on possible structural problems and general patterns in national procurement policies, in order to address possible problems in a more targeted way. That overview should be gained through appropriate monitoring, the results of which should be regularly published, in order to allow an informed debate on possible improvements of procurement rules and practice. Acquiring such a good overview could also allow insights on the application of public procurement rules in the context of the implementation of projects co-financed by the Union. Member States should remain free to decide how and by whom this monitoring should be carried out in practice; in so doing, they should also remain free to decide whether the monitoring should be based on a sample-based ex-post control or on a systematic, ex-ante control of public procurement procedures covered by this Directive. It should be possible to bring potential problems to the attention of the proper bodies; this should not necessarily require that those having performed the monitoring have standing before courts and tribunals.

Better guidance, information and support to contracting authorities and economic operators could also greatly contribute to enhancing the efficiency of public procurement, through better knowledge, increased legal certainty and professionalisation of procurement practices. Such guidance should be made available to contracting authorities and economic operators wherever it appears necessary to improve correct application of the rules. The guidance to be provided could cover all matters relevant to public procurement, such as acquisition planning, procedures, choice of techniques and instruments and good practices in the conduct of the procedures. With regard to legal questions, guidance should not necessarily amount to a complete legal analysis of the issues concerned; it could be limited to a general indication of the elements that should be taken into consideration for the subsequent detailed analysis of

<sup>(1)</sup> Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (OJ L 340, 16.12.2002, p. 1).

the questions, for instance by pointing to case-law that could be relevant or to guidance notes or other sources having examined the specific question concerned.

- (122) Directive 89/665/EEC provides for certain review procedures to be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement of Union law in the field of public procurement or national rules transposing that law. Those review procedures should not be affected by this Directive. However, citizens, concerned stakeholders, organised or not, and other persons or bodies which do not have access to review procedures pursuant to Directive 89/665/EEC do nevertheless have a legitimate interest, as taxpayers, in sound procurement procedures. They should therefore be given a possibility, otherwise than through the review system pursuant to Directive 89/665/EEC and without it necessarily involving them being given standing before courts and tribunals, to indicate possible violations of this Directive to a competent authority or structure. So as not to duplicate existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectoral oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities.
- (123) In order to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 strategy for smart, sustainable and inclusive growth, environmental, social and innovation procurement will also have to play its part. It is therefore important to obtain an overview of the developments in the field of strategic procurement so as to take an informed view on the general trends at the overall level in that area. Any already prepared, appropriate reports can of course be used in this context also.
- (124) Given the potential of SMEs for job creation, growth and innovation it is important to encourage their participation in public procurement, both through appropriate provisions in this Directive as well as through initiatives at the national level. The new provisions provided for in this Directive should contribute towards an improvement of the level of success, by which is understood the share of SMEs in the total value of contracts awarded. It is not appropriate to impose obligatory shares of success, however, the national initiatives to enhance SME participation should be closely monitored given its importance.
- (125) A series of procedures and working methods have already been established in respect of the Commission's communications and contacts with Member States, such as communications and contacts relating to the procedures provided for under Articles 258 and 260 TFEU, the Internal Market Problem Solving Network (SOLVIT) and EU Pilot, which are not modified by this Directive. They should, however, be complemented by the designation of one single point of reference in each Member State for the cooperation with the Commission, which would function as sole entry point for matters concerning public procurement in the Member State concerned. This function may be performed by persons or structures which are already regularly in contact with the Commission on issues relating to public procurement, such as national contact points, members of the Advisory Committee on Public Procurement, Members of the Procurement Network or national coordinating instances.
- (126) The traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud. Contracting authorities should therefore keep copies of concluded high-value contracts, in order to be able to provide access to those documents to interested parties in accordance with applicable rules on access to documents. Furthermore, the essential elements and decisions of individual procurement procedures should be documented in a procurement report. To avoid administrative burdens wherever possible, it should be permitted for the procurement report to refer to information already contained in the relevant contract award notice. The electronic systems for publication of those notices, managed by the Commission, should also be improved with a view to facilitating the entry of data while making it easier to extract global reports and exchange data between systems.
- (127) In the interests of administrative simplification and in order to lessen the burden on Member States, the Commission should periodically examine whether the quality and completeness of the information contained in the notices which are published in connection with public procurement procedures is sufficient to allow the Commission to extract the statistical information that would otherwise have to be transmitted by the Member States.
- (128) Effective administrative cooperation is necessary for the exchange of information needed for conducting award procedures in cross-border situations, in particular with regard to the verification of the grounds for exclusion and the selection criteria, the application of quality and environmental standards and of lists of approved economic operators. The exchange of information is subject to national laws on confidentiality. Hence, this Directive does not entail any obligation for Member States to exchange information that goes beyond what national contracting authorities can access. The Internal Market Information System (IMI) established by Regulation (EU) No 1024/2012 of the European Parliament and of the Council<sup>(1)</sup> could provide a useful electronic means to facilitate and enhance administrative cooperation managing the exchange of information on the basis of simple and unified procedures overcoming language barriers. A pilot project should consequently be

<sup>(1)</sup> Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (the IMI Regulation) (OJ L 316, 14.11.2012, p. 1).

launched as soon as possible to test the suitability of an expansion of IMI to cover the exchange of information under this Directive.

(129) In order to adapt to rapid technical, economic and regulatory developments, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of a number of non-essential elements of this Directive. Due to the need to comply with international agreements, the Commission should be empowered to modify the technical procedures for the calculation methods concerning thresholds as well as to periodically revise the thresholds themselves and to adapt Annex X; the lists of central government authorities are subject to variations due to administrative changes at national level. These are notified to the Commission, which should be empowered to adapt Annex I; references to the CPV nomenclature may undergo regulatory changes at Union level and it is necessary to reflect those changes into the text of this Directive; the technical details and characteristics of the devices for electronic receipt should be kept up to date with technological developments; it is also necessary to empower the Commission to make mandatory technical standards for electronic communication to ensure the interoperability of technical formats, processes and messaging in procurement procedures conducted using electronic means of communication taking into account technological developments; the list of legal acts of the Union establishing common methodologies for the calculation of life-cycle costs should be quickly adapted to incorporate the measures adopted on a sectoral basis. In order to satisfy those needs, the Commission should be empowered to keep the list of legal acts including life-cycle costing methodologies up-to date. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. When preparing and drawing up delegated acts, the Commission should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

(130) In the application of this Directive the Commission should consult appropriate groups of experts in the field of e-procurement, ensuring a balanced composition of the main stakeholder groups.

(131) In order to ensure uniform conditions for the implementation of this Directive, as for the drawing up of the standard forms for the publication of notices and a standard form for self-declarations, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>(1)</sup>.

<sup>(1)</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

(132) The advisory procedure should be used for the adoption of the implementing acts concerning standard forms for the publication of notices, which do not have any impact either from the financial point of view or on the nature and scope of obligations stemming from this Directive. On the contrary, those acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set out in this Directive.

(133) The examination procedure should be used for the adoption of the standard form for self-declarations, due to the impact of those self-declarations on procurement and because they play a central role in the simplification of the documentation requirements in the procurement procedures.

(134) The Commission should review the effects on the internal market resulting from the application of the thresholds and report thereon to the European Parliament and the Council. In so doing, it should take into account factors such as the level of cross-border procurement, SME participation, transaction costs and the cost-benefit trade-off.

In accordance with Article XXII(7) thereof, the GPA shall be the subject of further negotiations three years after its entry into force and periodically thereafter. In that context, the appropriateness of the level of thresholds should be examined, bearing in mind the impact of inflation in view of a long period without changes of the thresholds in the GPA; in the event that the level of thresholds should change as a consequence, the Commission should, where appropriate, adopt a proposal for a legal act amending the thresholds set out in this Directive.

(135) Having regard to current discussions on horizontal provisions governing relations with third countries in the context of public procurement the Commission should closely monitor global trade conditions and assess the Union's competitive position.

(136) Since the objective of this Directive, namely the coordination of laws, regulations and administrative provisions of the Member States applying to certain public procurement procedures, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

- (137) Directive 2004/18/EC should be repealed.
- (138) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more

documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

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## TITLE I

### SCOPE, DEFINITIONS AND GENERAL PRINCIPLES

#### CHAPTER I

#### *Scope and definitions*

##### Section 1

#### **Subject-matter and definitions**

##### Article 1

#### **Subject-matter and scope**

1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.
2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.
3. The application of this Directive is subject to Article 346 TFEU.
4. This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect

the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.

5. This Directive does not affect the way in which the Member States organise their social security systems.

6. Agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or groupings of contracting authorities and do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive.

##### Article 2

#### **Definitions**

1. For the purposes of this Directive, the following definitions apply:
  - (1) 'contracting authorities' means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;
  - (2) 'central government authorities' means the contracting authorities listed in Annex I and, in so far as corrections or amendments have been made at national level, their successor entities;
  - (3) 'sub-central contracting authorities' means all contracting authorities which are not central government authorities;

- (4) 'bodies governed by public law' means bodies that have all of the following characteristics:
- they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
  - they have legal personality; and
  - they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;
- (5) 'public contracts' means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;
- (6) 'public works contracts' means public contracts having as their object one of the following:
- the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;
  - the execution, or both the design and execution, of a work;
  - the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;
- (7) 'a work' means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;
- (8) 'public supply contracts' means public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations;
- (9) 'public service contracts' means public contracts having as their object the provision of services other than those referred to in point 6;
- (10) 'economic operator' means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;
- (11) 'tenderer' means an economic operator that has submitted a tender;
- (12) 'candidate' means an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, in a competitive procedure with negotiation, in a negotiated procedure without prior publication, in a competitive dialogue or in an innovation partnership;
- (13) 'procurement document' means any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;
- (14) 'centralised purchasing activities' means activities conducted on a permanent basis, in one of the following forms:
- the acquisition of supplies and/or services intended for contracting authorities;
  - the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities;
- (15) 'ancillary purchasing activities' means activities consisting in the provision of support to purchasing activities, in particular in the following forms:
- technical infrastructure enabling contracting authorities to award public contracts or to conclude framework agreements for works, supplies or services;
  - advice on the conduct or design of public procurement procedures;
  - preparation and management of procurement procedures on behalf and for the account of the contracting authority concerned;
- (16) 'central purchasing body' means a contracting authority providing centralised purchasing activities and, possibly, ancillary purchasing activities;
- (17) 'procurement service provider' means a public or private body which offers ancillary purchasing activities on the market;

- (18) 'written' or 'in writing' means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information transmitted and stored by electronic means;
- (19) 'electronic means' means electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
- (20) 'life cycle' means all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation;
- (21) 'design contests' means those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes;
- (22) 'innovation' means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth;
- (23) 'label' means any document, certificate or attestation confirming that the works, products, services, processes or procedures in question meet certain requirements;
- (24) 'label requirements' means the requirements to be met by the works, products, services, processes or procedures in question in order to obtain the label concerned.

2. For the purpose of this Article 'regional authorities' includes authorities listed non-exhaustively in NUTS 1 and 2, as referred to in Regulation (EC) No 1059/2003 of the European Parliament and of the Council <sup>(1)</sup>, while 'local authorities' includes all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to in Regulation (EC) No 1059/2003.

<sup>(1)</sup> Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS) (OJ L 154, 21.6.2003, p. 1).

### Article 3

#### Mixed procurement

1. Paragraph 2 shall apply to mixed contracts which have as their subject-matter different types of procurement all of which are covered by this Directive.

Paragraphs 3 to 5 shall apply to mixed contracts which have as their subject-matter procurement covered by this Directive and procurement covered by other legal regimes.

2. Contracts which have as their subject 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 of the contract in question.

In the case of mixed contracts consisting partly of services within the meaning of Chapter I of Title III and partly of other services or of mixed contracts consisting partly of services and partly of supplies, the main subject shall be determined in accordance with which of the estimated values of the respective services or supplies is the highest.

3. Where the different parts of a given contract are objectively separable, paragraph 4 shall apply. Where the different parts of a given contract are objectively not separable, paragraph 6 shall apply.

Where part of a given contract is covered by Article 346 TFEU or Directive 2009/81/EC, Article 16 of this Directive shall apply.

4. In the case of contracts which have as their subject-matter procurement covered by this Directive as well as procurement not covered by this Directive, contracting authorities may choose to award separate contracts for the separate parts or to award a single contract. 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.

Where contracting authorities choose to award a single contract, this Directive shall, unless otherwise provided in Article 16, apply to the ensuing mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

In the case of mixed contracts containing elements of supply, works and service contracts and of concessions, the mixed contract shall be awarded in accordance with this Directive, provided that the estimated value of the part of the contract which constitutes a contract covered by this Directive, calculated in accordance with Article 5, is equal to or greater than the relevant threshold set out in Article 4.

5. In the case of contracts which have as their subject both procurement covered by this Directive and procurement for the pursuit of an activity which is subject to Directive 2014/25/EU, the applicable rules shall, notwithstanding paragraph 4 of this Article, be determined pursuant to Articles 5 and 6 of Directive 2014/25/EU.

6. 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.

## Section 2

### Thresholds

#### Article 4

#### Threshold amounts

This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

- (a) EUR 5 186 000 for public works contracts;
- (b) EUR 134 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;
- (c) EUR 207 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities; that threshold shall also apply to public supply contracts awarded by central government authorities that operate in the field of defence, where those contracts involve products not covered by Annex III;
- (d) EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV.

#### Article 5

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

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.

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.

2. Where a contracting authority is comprised of separate operational units, account shall be taken of the total estimated value for all the individual operational units.

Notwithstanding the first subparagraph, where a separate operational unit is independently responsible for its procurement or certain categories thereof, the values may be estimated at the level of the unit in question.

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

4. That estimated value shall be valid 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 instance, where appropriate, by contacting economic operators in relation to the procurement.

5. With regard to 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.

6. 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.

7. With regard to 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.

8. 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.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 4, this Directive shall apply to the awarding of each lot.

9. 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 points (b) and (c) of Article 4.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 4, this Directive shall apply to the awarding of each lot.

10. Notwithstanding paragraphs 8 and 9, contracting authorities may award contracts for individual lots without applying the procedures provided for under this Directive, provided that the estimated value net of VAT of the lot concerned is less than EUR 80 000 for supplies or services or EUR 1 million for works. However, the aggregate value of the lots thus awarded without applying this Directive 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.

11. 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 the following:

- (a) either 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) or 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.

12. With regard to 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 the term of which cannot be defined, the monthly value multiplied by 48.

13. With regard to public service contracts, the basis for calculating the estimated contract value shall, where appropriate, be the following:

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

14. With regard to 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.

#### Article 6

#### Revision of the thresholds and of the list of central government authorities

1. Every two years from 30 June 2013, the Commission shall verify that the thresholds set out in points (a), (b) and (c) of Article 4 correspond to the thresholds established in the World Trade Organisation Agreement on Government Procurement (GPA) and shall, where necessary, revise them in accordance with this Article.

In accordance with the calculation method set out in the GPA, the Commission shall calculate the value of these thresholds on the basis of the average daily value of the euro in terms of the special drawing rights (SDRs), over a period of 24 months terminating on 31 August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euros so as to ensure that the thresholds in force provided for by the GPA, expressed in SDRs, are observed.

2. When carrying out the revision pursuant to paragraph 1 of this Article, the Commission shall, in addition, revise:

- (a) the threshold established in point (a) of the first paragraph of Article 13 by aligning it with the revised threshold applying to public works contracts;
- (b) the threshold established in point (b) of the first paragraph of Article 13 by aligning it with the revised threshold applying to public service contracts awarded by sub-central contracting authorities.

3. Every two years from 1 January 2014, the Commission shall determine the values, in the national currencies of the Member States, whose currency is not the euro, of the thresholds referred to in points (a), (b) and (c) of Article 4, revised pursuant to paragraph 1 of this Article.

At the same time, the Commission shall determine the value, in the national currencies of the Member States, whose currency is not the euro, of the threshold referred to in point (d) of Article 4.

In accordance with the calculation method set out in the GPA, the determination of such values shall be based on the average daily values of those currencies corresponding to the applicable threshold expressed in euros over the 24 months terminating on 31 August preceding the revision with effect from 1 January.

4. The Commission shall publish the revised thresholds referred to in paragraph 1, their corresponding values in the national currencies referred to in the first subparagraph of paragraph 3, and the value determined in accordance with the second subparagraph of paragraph 3 in the *Official Journal of the European Union* at the beginning of the month of November following their revision.

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 87 to adapt the methodology set out in the second subparagraph of paragraph 1 of this Article to any change in the methodology provided in the GPA for the revision of the thresholds referred to in points (a), (b) and (c) of Article 4 and for the determination of the corresponding values in the national currencies of the Member States, whose currency is not the euro, as referred to in paragraph 3 of this Article.

The Commission shall be empowered to adopt delegated acts in accordance with Article 87 to revise the thresholds referred to in points (a), (b) and (c) of Article 4 pursuant to paragraph 1 of this Article and to revise the thresholds referred to in points (a) and (b) of the first paragraph of Article 13 pursuant to paragraph 2 of this Article.

6. Where it is necessary to revise the thresholds referred to in points (a), (b) and (c) of Article 4 and the thresholds referred to in points (a) and (b) of the first paragraph of Article 13 and time constraints prevent the use of the procedure set in Article 87 and therefore imperative grounds of urgency so require, the procedure provided for in Article 88 shall apply to delegated acts adopted pursuant to the second subparagraph of paragraph 5 of this Article.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 87 to amend Annex I, in order to update the list of contracting authorities following notifications from Member States, where such amendments prove necessary to correctly identify contracting authorities.

### Section 3

#### Exclusions

##### Article 7

#### **Contracts in the water, energy, transport and postal services sectors**

This Directive shall not apply to public contracts and design contests which, under Directive 2014/25/EU, are awarded or organised by contracting authorities exercising one or more of the activities referred to in Articles 8 to 14 of that Directive and are awarded for the pursuit of those activities, to public contracts excluded from the scope of that Directive under Articles 18, 23 and 34 thereof or, when awarded by a

contracting authority which provides postal services within the meaning of point (b) of Article 13(2) of that Directive, to contracts awarded for the pursuit of the following activities:

- (a) added value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail);
- (b) financial services which are covered by CPV codes 66100000-1 to 66720000-3 and by point (d) of Article 21 of Directive 2014/25/EU and including in particular postal money orders and postal giro transfers;
- (c) philatelic services; or
- (d) logistics services (services combining physical delivery and/or warehousing with other non-postal functions).

##### Article 8

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

This Directive shall not apply to public contracts and design contests for the principal purpose of permitting the contracting authorities to provide or exploit public communications networks or to provide to the public one or more electronic communications services.

For the purposes of this Article, 'public communications network' and 'electronic communications service' shall have the same meaning as in Directive 2002/21/EC of the European Parliament and of the Council<sup>(1)</sup>.

##### Article 9

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

1. This Directive shall not apply to public contracts and design contests which the contracting authority is obliged to award or organise in accordance with procurement procedures different from those laid down in this Directive 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 thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;
- (b) an international organisation.

<sup>(1)</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33).

The Member States shall communicate all legal instruments referred to in point (a) of the first subparagraph of this paragraph to the Commission, which may consult the Advisory Committee on Public Procurement referred to in Article 89.

2. This Directive shall not apply to public contracts and 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 and design contests concerned are fully financed by that organisation or institution; in the case of public contracts and design contests co-financed for the most part by an international organisation or international financing institution the parties shall agree on applicable procurement procedures.

3. Article 17 shall apply to contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules. Paragraphs 1 and 2 of this Article shall not apply to those contracts and design contests.

#### Article 10

##### Specific exclusions for service contracts

This Directive shall not apply to public service contracts for:

- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon;
- (b) 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 contracts for broadcasting time or programme provision that are awarded to audiovisual or radio media service providers. For the purposes of this point, 'audiovisual media services' and 'media service providers' shall, respectively, have the same meaning as pursuant to points (a) and (d) of Article 1(1) of Directive 2010/13/EU of the European Parliament and of the Council<sup>(1)</sup>. 'Programme' shall have the same meaning as pursuant to point (b) of Article 1(1) of that Directive, but shall also include radio programmes and radio programme materials. Furthermore, for the purposes of this provision, 'programme material' shall have the same meaning as 'programme';
- (c) arbitration and conciliation services;

<sup>(1)</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

(d) 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<sup>(2)</sup> in:

— an arbitration or conciliation held in a Member State, a third country or before an international arbitration or conciliation instance; or

— 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 in preparation of any of the proceedings referred to in point (i) of this point or 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 Directive 77/249/EEC;

(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) 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<sup>(3)</sup>, central bank services and operations conducted with the European Financial Stability Facility and the European Stability Mechanism;

(f) loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;

(g) employment contracts;

<sup>(2)</sup> Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ L 78, 26.3.1977, p. 17).

<sup>(3)</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

- (h) 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) public passenger transport services by rail or metro;
- (j) 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.

#### Article 11

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

This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law, regulation or published administrative provision which is compatible with the TFEU.

#### Article 12

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

1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive 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.

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 point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled

legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.

2. Paragraph 1 also applies where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority, or to 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 public 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 controlled legal person.

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive 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.

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

- (i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;
- (ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
- (iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

4. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- (a) the contract establishes or implements a cooperation 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 cooperation 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 cooperation.

5. For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, 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 three years preceding the contract award shall be taken into consideration.

Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

## Section 4 Specific situations

### Subsection 1

#### Subsidised contracts and research and development services

##### Article 13

#### Contracts subsidised by contracting authorities

This Directive shall apply 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 EUR 5 186 000, where those contracts involve one of the following activities:
  - (i) civil engineering activities as listed in Annex II,

- (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 EUR 207 000 and which are connected to a works contract as referred to in point (a).

The contracting authorities providing the subsidies referred to in points (a) and (b) of the first subparagraph shall ensure compliance with this Directive where they do not themselves award the subsidised contract or where they award that contract for and on behalf of other entities.

##### Article 14

#### Research and development services

This Directive shall only apply 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 provided that both of the following conditions are fulfilled:

- (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.

##### Subsection 2

#### Procurement involving defence or security aspects

##### Article 15

#### Defence and security

1. This Directive shall apply 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 Directive 2009/81/EC;
- (b) contracts to which Directive 2009/81/EC does not apply pursuant to Articles 8, 12 and 13 thereof.

2. This Directive shall not apply to public contracts and design contests not otherwise exempted under paragraph 1, to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures, for instance 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 Directive.

Furthermore, and in conformity with point (a) of Article 346(1) TFEU, this Directive shall not apply to public contracts and design contests not otherwise exempted under paragraph 1 of this Article to the extent that the application of this Directive would oblige a Member State 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 declared to be secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State, this Directive shall not apply provided that the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in the first subparagraph of paragraph 2.

#### Article 16

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

1. In the case of mixed contracts which have as their subject-matter procurement covered by this Directive as well as procurement covered by Article 346 TFEU or Directive 2009/81/EC, this Article shall apply.

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.

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.

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 TFEU, the contract may be awarded without applying this Directive, provided that the award of a single contract is justified for objective reasons;
- (b) where part of a given contract is covered by Directive 2009/81/EC, the contract may be awarded in accordance with that Directive, provided that the award of a single contract is justified for objective reasons. This point shall be without prejudice to the thresholds and exclusions for which that Directive provides.

The decision to award a single contract shall not, however, be taken for the purpose of excluding contracts from the application of either this Directive or Directive 2009/81/EC.

3. Point (a) of the third subparagraph of paragraph 2 shall apply to mixed contracts to which both point (a) and point (b) of that subparagraph could otherwise apply.

4. Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying this Directive where it includes elements to which Article 346 TFEU applies; otherwise it may be awarded in accordance with Directive 2009/81/EC.

#### Article 17

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

1. This Directive shall not apply to public contracts and design contests involving defence or security aspects which the contracting authority is obliged to award or organise in accordance with procurement procedures different from those laid down in this Directive 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 thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their 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.

All agreements or arrangements referred to in point (a) of the first subparagraph of this paragraph shall be communicated to the Commission, which may consult the Advisory Committee on Public Procurement referred to in Article 89.

2. This Directive shall not apply to public contracts and 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 and design contests concerned are fully financed by this organisation or institution. In the case of public contracts and design contests co-financed for the most part by an international organisation or international financing institution the parties shall agree on applicable procurement procedures.

#### CHAPTER II

##### **General rules**

#### Article 18

##### **Principles of procurement**

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

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

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

#### Article 19

##### **Economic operators**

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 the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of public service and public works contracts as well as public supply contracts covering 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.

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

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 Article 58 provided that this is justified by objective reasons and is proportionate. Member States may establish standard terms for how groups of economic operators are to meet those requirements.

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.

3. Notwithstanding paragraph 2, 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.

#### Article 20

##### **Reserved contracts**

1. Member States may 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 may 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. The call for competition shall make reference to this Article.

#### Article 21

##### **Confidentiality**

1. Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

2. 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.

#### Article 22

##### **Rules applicable to communication**

1. Member States shall ensure that all communication and information exchange under this Directive, in particular electronic submission, are performed using electronic means of communication in accordance with the requirements of this Article. The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators' access to the procurement procedure.

Notwithstanding the first subparagraph, contracting authorities shall not be 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;
- (d) the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means.

In respect of communications for which electronic means of communication are not used pursuant to the second subparagraph, communication shall be carried out by post or other suitable carrier or by a combination of post or other suitable carrier and electronic means.

Notwithstanding the first subparagraph of this paragraph, 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 because of a breach of security of the electronic means of communications or for the protection of the particularly sensitive nature of information 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 5.

It shall be the responsibility of the contracting authorities requiring, in accordance with the second subparagraph of this paragraph, means of communication other than electronic means in the submission process to indicate in the individual report referred to in Article 84 the reasons for this requirement. Where applicable, contracting authorities shall indicate in the individual report the reasons why use of means of communication other than electronic means has been considered necessary in application of the fourth subparagraph of this paragraph.

2. Notwithstanding paragraph 1, 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. For this purpose, the essential elements of a procurement procedure include the procurement documents, requests for participation, confirmations of interest and tenders. 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.

3. 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. They shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

4. For public works contracts and design contests, Member States may require the use of specific electronic tools, such as of building information electronic modelling tools or similar. In such cases the contracting authorities shall offer alternative means of access, as provided for in paragraph 5, until such time as those tools become generally available within the meaning of the second sentence of the first subparagraph of paragraph 1.

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

Contracting authorities shall be deemed to offer suitable alternative means of access in any of the following situations, where they:

- (a) offer unrestricted and full direct access free of charge by electronic means to those tools and devices from the date of publication of the notice in accordance with Annex VIII or from the date when the invitation to confirm interest is sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which those tools and devices are accessible;

- (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.

6. In addition to the requirements set out in Annex IV, the following rules shall 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) Member States, or contracting authorities acting within an overall framework established by the Member State concerned, shall specify the level of security required for the electronic means of communication in the various stages of the specific procurement procedure; that level shall be proportionate to the risks attached;

(c) where Member States, or contracting authorities acting within an overall framework established by the Member State concerned, conclude that the level of risks, assessed under point (b) of this paragraph, is such that advanced electronic signatures as defined by Directive 1999/93/EC of the European Parliament and of the Council<sup>(1)</sup> are required, contracting authorities shall accept advanced electronic signatures supported by a qualified certificate, taking into account whether those certificates are provided by a certificate services provider, which is on a trusted list provided for in Commission Decision 2009/767/EC<sup>(2)</sup>, created with or without a secure signature creation device, subject to compliance with the following conditions:

(i) the contracting authorities shall establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU<sup>(3)</sup> and shall put in place necessary measures to be able to process these formats technically; 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, which shall be under the responsibility of the Member State. 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.

Member States shall notify information on the provider of validation services to the Commission, which shall make the information received from the Member States available to the public on the Internet;

(ii) where a tender is signed with the support of a qualified certificate that is included on a trusted list, the contracting authorities shall not apply additional requirements that may hinder the use of those signatures by tenderers.

In respect of documents used in the context of a procurement procedure that are signed by a competent authority of a Member State or by another issuing entity, the competent issuing authority or entity may establish the required advanced signature format in accordance with the requirements set out in Article 1(2) of Decision 2011/130/EU. They shall put in place the necessary measures to be able to process that

<sup>(1)</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (OJ L 13, 19.1.2000, p. 12).

<sup>(2)</sup> Commission Decision 2009/767/EC of 16 October 2009 setting out measures facilitating the use of procedures by electronic means through the points of single contact under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (OJ L 274, 20.10.2009, p. 36).

<sup>(3)</sup> Commission Decision 2011/130/EU of 25 February 2011 establishing minimum requirements for the cross-border processing of documents signed electronically by competent authorities under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (OJ L 53, 26.2.2011, p. 66).

format technically by including the information required for the purpose of processing the signature in the document concerned. Such documents 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.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 87 to amend the technical details and characteristics set out in Annex IV to take account of technical developments.

The Commission shall be empowered to adopt delegated acts in accordance with Article 87 to amend the list set out in points (a) to (d) of the second subparagraph of paragraph 1 of this Article where technological developments render continued exceptions from the use of electronic means of communication inappropriate or, exceptionally, where new exceptions must be provided for because of technological developments.

To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission shall be empowered to adopt delegated acts in accordance with Article 87 to establish the mandatory use of such specific technical standards, in particular with regard to the use of electronic submission, electronic catalogues and means for electronic authentication, only where technical standards have been thoroughly tested and proved their usefulness in practice. Before making the use of any technical standard mandatory, the Commission shall also carefully consider the costs that this may entail, in particular in terms of adaptations to existing e-procurement solutions, including infrastructure, processes or software.

#### Article 23

#### Nomenclatures

1. Any references to nomenclatures in the context of public procurement shall be made using the Common Procurement Vocabulary (CPV) as adopted by Regulation (EC) No 2195/2002.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 87 to adapt the CPV codes referred to in this Directive, whenever changes in the CPV nomenclature must be reflected in this Directive and they do not imply a modification of the scope of this Directive.

#### Article 24

#### Conflicts of interest

Member States shall ensure that contracting authorities 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.

The concept of conflicts of interest shall at least cover any situation where 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 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.

## TITLE II

### RULES ON PUBLIC CONTRACTS

#### CHAPTER I

#### Procedures

##### Article 25

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

In so far as they are covered by Annexes 1, 2, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA and by the other international agreements by which the Union 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 Union.

##### Article 26

#### Choice of procedures

1. When awarding public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 32, a call for competition has been published in accordance with this Directive.

2. Member States shall provide that contracting authorities may apply open or restricted procedures as regulated in this Directive.

3. Member States shall provide that contracting authorities may apply innovation partnerships as regulated in this Directive.

4. Member States shall provide that 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 negotiations because of specific circumstances related to the

nature, the complexity or the legal and financial make-up or because of the 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 within the meaning of points 2 to 5 of Annex VII;

- (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. In such situations contracting authorities shall not be 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 Articles 57 to 64 and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

In particular, tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low, shall be considered as being irregular. In particular tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure shall be considered as unacceptable.

- 5. The call for competition shall be made by means of a contract notice pursuant to Article 49.

Where the contract is awarded by restricted procedure or competitive procedure with negotiation, Member States may provide, notwithstanding the first subparagraph of this paragraph, that sub-central contracting authorities or specific categories thereof may make the call for competition by means of a prior information notice pursuant to Article 48(2).

Where the call for competition is made by means of a prior information notice pursuant to Article 48(2), economic operators having 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 conformity with Article 54.

- 6. In the specific cases and circumstances referred to expressly in Article 32, Member States may provide that contracting authorities may apply a negotiated procedure without prior publication of a call for competition. Member States shall not allow the application of that procedure in any other cases than those referred to in Article 32.

##### Article 27

#### Open procedure

- 1. In open procedures, any interested economic operator may submit a tender in response to a call for competition.

The minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent.

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

2. 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 the second subparagraph of paragraph 1 of this Article, may be shortened to 15 days, provided that all 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, in so far 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.

3. Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in the second subparagraph of paragraph 1, it may fix a time limit which shall be not less than 15 days from the date on which the contract notice was sent.

4. The contracting authority may reduce by five days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 of this Article where it accepts that tenders may be submitted by electronic means in accordance with the first subparagraph of Article 22(1), and Article 22(5) and (6).

#### Article 28

##### Restricted procedure

1. In restricted procedures, any economic operator may submit a request to participate in response to a call for competition containing the information set out in Annex V parts B or C as the case may be by providing the information for qualitative selection that is requested by the contracting authority.

The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest was sent.

2. Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65.

The minimum time limit for the receipt of tenders shall be 30 days from the date on which the invitation to tender was sent.

3. 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 the second subparagraph of paragraph 2 of this Article may be shortened to 10 days, provided that all 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, in so far 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.

4. Member States may provide that all or specific categories of sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders. In the absence of agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender was sent.

5. The time limit for receipt of tenders provided for in paragraph 2 of this Article may be reduced by five days where the contracting authority accepts that tenders may be submitted by electronic means in conformity with Article 22(1), (5) and (6).

6. Where a state of urgency duly substantiated by the contracting authorities renders impracticable the time limits laid down in this Article, 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 was sent;
- (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 was sent.

#### Article 29

##### Competitive procedure with negotiation

1. In competitive procedures with negotiation, any economic operator may submit a request to participate in response to a call for competition containing the information set out in Annex V parts B and C by providing the information for qualitative selection that is requested by the contracting authority.

In the procurement documents, contracting authorities shall 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 and specify the contract award criteria. They shall also indicate which elements of the description define the minimum requirements to be met by all tenders.

The information provided 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.

The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest was sent. The minimum time limit for the receipt of initial tenders shall be 30 days from the date on which the invitation was sent. Article 28(3) to (6) shall apply.

2. 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. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65.

3. Unless otherwise provided for in paragraph 4, contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tenders within the meaning of paragraph 7, to improve the content thereof.

The minimum requirements and the award criteria shall not be subject to negotiations.

4. 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.

5. During the negotiations, contracting authorities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall inform all tenderers, whose tenders have not been eliminated pursuant to paragraph 6, in writing of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements. Following these changes, contracting authorities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

In accordance with Article 21, contracting authorities shall not reveal to the other participants confidential information communicated by a candidate or a tenderer participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

6. 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. In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority shall indicate whether it will use that option.

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

### Article 30

#### Competitive dialogue

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.

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

Only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the dialogue. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65. The contract shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with Article 67(2).

2. Contracting authorities shall set out their needs and requirements in the contract notice and they shall define these needs and requirements in that notice and/or in a descriptive document. At the same time and in the same documents, they shall also set out and define the chosen award criteria and set out an indicative timeframe.

3. Contracting authorities shall open, with the participants selected in accordance with the relevant provisions of Articles 56 to 66, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the procurement with the chosen participants during this dialogue.

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

In accordance with Article 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. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

4. 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. In the contract notice or the descriptive document, the contracting authority shall indicate whether it will use that option.

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

6. 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. Those tenders shall contain all the elements required and necessary for the performance of the project.

Those tenders may be clarified, specified and optimised at the request of the contracting authority. However, such clarification, specification, optimisation or 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.

7. 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.

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 Article 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 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 does not risk distorting competition or causing discrimination.

8. Contracting authorities may specify prizes or payments to the participants in the dialogue.

#### Article 31

### Innovation partnership

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.

In the procurement documents, the contracting authority shall 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. It shall indicate which elements of this description define the minimum requirements to be met by all tenders. The information provided 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.

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

The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent. Only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the procedure. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65. The contracts shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with Article 67.

2. 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 authorities and the participants.

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

Based on those targets, the contracting authority may decide after each phase to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to 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.

3. Unless otherwise provided for in this Article, contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve the content thereof.

The minimum requirements and the award criteria shall not be subject to negotiations.

4. During the negotiations, contracting authorities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall inform all tenderers whose tenders have not been eliminated, pursuant to paragraph 5, in writing of any changes to the technical specifications or other procurement documents other than those setting out the minimum requirements. Following those changes, contracting authorities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

In accordance with Article 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. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

5. 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 the procurement documents. In the contract notice, the invitation to confirm interest or in the procurement documents, the contracting authority shall indicate whether it will use that option.

6. 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.

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.

In the procurement documents, the contracting authority shall define the arrangements applicable to intellectual property rights. In the case of an innovation partnership with several partners, the contracting authority shall not, in accordance with Article 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. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

7. 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. The estimated value

of supplies, services or works shall not be disproportionate in relation to the investment required for their development.

#### Article 32

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

1. In the specific cases and circumstances laid down in paragraphs 2 to 5, Member States may provide that contracting authorities may award public contracts by a negotiated procedure without prior publication.

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 or no suitable tenders or 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.

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. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Article 57 or does not meet the selection criteria set out by the contracting authority pursuant to Article 58;

(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;

The exceptions set out in points (ii) and (iii) shall only apply when 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) in so far 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. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.

3. 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; however, contracts awarded pursuant to this point 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; the duration of such contracts as well as that of recurrent contracts shall not, as a general rule, exceed three years;
- (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.

4. The negotiated procedure without prior publication may be used for public service contracts, where the contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest; in the latter case, all winners must be invited to participate in the negotiations.

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

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 authorities when they apply Article 4.

This procedure may be used only during the three years following the conclusion of the original contract.

## CHAPTER II

### *Techniques and instruments for electronic and aggregated procurement*

#### Article 33

#### **Framework agreements**

1. Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.

A 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.

The term of a framework agreement shall not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

2. Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this paragraph and in paragraphs 3 and 4.

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

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 3.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those contracts, contracting authorities may consult the economic operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.

4. 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 all the terms governing the provision of the works, services and supplies concerned and the objective conditions for determining which of the economic operators, party to the framework agreement, shall perform them; the latter 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, partly without reopening of competition in accordance with point (a) and partly with reopening of competition amongst the economic operators parties to the framework agreement in accordance with point (c), where this possibility has been stipulated by the contracting authorities in the procurement documents for the framework agreement. 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. These procurement documents shall also specify which terms may be subject to reopening of competition.
- (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.

#### Article 34

#### Dynamic purchasing systems

1. For commonly used purchases the characteristics of which, as generally available on the market, meet the requirements of the contracting authorities, contracting authorities may use a dynamic purchasing system. 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. It 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. 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.

2. In order to procure under a dynamic purchasing system, contracting authorities shall follow the rules of the restricted procedure. 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 Article 65. Where contracting authorities have divided the system into categories of products, works or services in accordance with paragraph 1 of this Article, they shall specify the applicable selection criteria for each category.

Notwithstanding Article 28, the following time limits shall apply:

5. The competitions referred to in points (b) and (c) of paragraph 4 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;
- (a) the minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent. 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;
- (b) the minimum time limit for receipt of tenders shall be at least 10 days from the date on which the invitation to tender is sent. Where appropriate, Article 28(4) shall apply. Article 28(3) and (5) shall not apply.
3. All communications in the context of a dynamic purchasing system shall only be made by electronic means in accordance with Article 22(1), (3), (5) and (6).

4. 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 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 conformity with Article 53.

5. 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 paragraph 2. Contracting authorities shall finalise their assessment of such requests in accordance with the selection criteria within 10 working days following their receipt. That deadline 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.

Notwithstanding the first subparagraph, 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. Contracting authorities shall indicate in the procurement documents the length of the extended period that they intend to apply.

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.

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

They 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, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest. Those criteria may, where appropriate, be formulated more precisely in the invitation to tender.

7. Contracting authorities may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed and updated self-declaration as provided for in Article 59(1), within five working days from the date on which that request is transmitted.

Article 59(4) to (6) shall apply throughout the entire period of validity of the dynamic purchasing system.

8. Contracting authorities shall indicate the period of validity of the dynamic purchasing system in the call for competition. They 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 referred to in Article 50.

9. No charges may be billed prior to or during the period of validity of the dynamic purchasing system to the economic operators interested in or party to the dynamic purchasing system.

#### Article 35

#### Electronic auctions

1. Contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

For this purpose, 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.

Certain public service contracts and certain public works contracts having as their subject-matter intellectual performances, such as the design of works, which cannot be ranked using automatic evaluation methods, shall not be the object of electronic auctions.

2. In open or restricted procedures or competitive procedures with negotiation, the 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.

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in points (b) or (c) of Article 33(4) and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 34.

3. 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 and/or on the new values of the features of the tenders indicated in the procurement documents where the contract is awarded on the basis of the best price-quality ratio or to the tender with the lowest cost using a cost-effectiveness approach.

4. Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice or in the invitation to confirm interest. The procurement documents shall include at least the information set out in Annex VI.

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

A tender shall be considered admissible where it has been submitted by a tenderer, who has not been excluded pursuant to Article 57 and who meets the selection criteria, and whose tender is in conformity with the technical specifications without being irregular or unacceptable or unsuitable.

In particular, tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low, shall be considered as being irregular. In particular tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure shall be considered as unacceptable.

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. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Article 57 or does not meet the selection criteria set out by the contracting authority pursuant to Article 58

All tenderers that have submitted admissible tenders shall be invited simultaneously to participate in the electronic auction

using, as of the specified date and time, the connections in accordance with the instructions set out in the invitation. The electronic auction may take place in a number of successive phases. The electronic auction shall not start sooner than two working days after the date on which invitations are sent out.

6. 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 the first subparagraph of Article 67(5).

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 and/or new values submitted. 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. For that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.

7. 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. They may, where this has been previously indicated, communicate other information concerning other prices or values submitted. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.

8. 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.

Where the contracting authorities intend to close an electronic auction in accordance with point (c) of the first subparagraph, possibly in combination with the arrangements laid down in point (b) thereof, the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

9. After closing an electronic auction contracting authorities shall award the contract in accordance with Article 67 on the basis of the results of the electronic auction.

#### Article 36

##### Electronic catalogues

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.

Member States may render the use of electronic catalogues mandatory in connection with certain types of procurement.

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

2. 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.

Furthermore, electronic catalogues shall comply with the requirements for electronic communication tools as well as with any additional requirements set by the contracting authority in accordance with Article 22.

3. 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 where a prior information notice is used as a means of calling for competition;
- (b) indicate in the procurement documents all the necessary information pursuant to Article 22(6) concerning the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

4. 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 takes place on the basis of updated catalogues. 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 announced in the procurement documents for the framework agreement.

5. Where contracting authorities reopen competition for specific contracts in accordance with point (b) of paragraph 4, they shall 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 shall give tenderers the possibility to refuse such collection of information.

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

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.

6. 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.

Contracting authorities may also award contracts based on a dynamic purchasing system in accordance with point (b) of paragraph 4 and paragraph 5 provided that the request for participation in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting authority. That 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 point (b) of paragraph 4.

#### Article 37

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

1. Member States may provide that contracting authorities may acquire supplies and/or services from a central purchasing body offering the centralised purchasing activity referred to in point (a) of point (14) of Article 2(1).

Member States may also provide that contracting authorities may acquire works, supplies and services by using contracts awarded by a central purchasing body, by using dynamic purchasing systems operated by a central purchasing body or, to the extent set out in the second subparagraph of Article 33(2), by using a framework agreement concluded by a central purchasing body offering the centralised purchasing activity referred to in point (b) of point (14) of Article 2(1). 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.

In relation to the first and second subparagraphs, Member States may provide that certain procurements are to be made by having recourse to central purchasing bodies or to one or more specific central purchasing bodies.

2. A contracting authority fulfils its obligations pursuant to this Directive when it acquires supplies or services from a central purchasing body offering the centralised purchasing activity referred to in point (a) of point (14) of Article 2(1).

Furthermore, a contracting authority also fulfils its obligations pursuant to this Directive where it acquires works, supplies or services by using contracts awarded by the central purchasing body, by using dynamic purchasing systems operated by the central purchasing body or, to the extent set out in the second subparagraph of Article 33(2), by using a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in point (b) of point (14) of Article 2(1).

However, the contracting authority concerned shall be responsible for fulfilling the obligations pursuant to this Directive in respect of the parts 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) pursuant to points (a) or (b) of Article 33(4), determining 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.

3. 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 Article 22.

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

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

#### Article 38

##### Occasional joint procurement

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 pursuant to this Directive. This 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.

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, they shall be jointly responsible only for those parts carried out jointly. Each contracting authority shall have sole responsibility for fulfilling its obligations pursuant to this Directive in respect of the parts it conducts in its own name and on its own behalf.

#### Article 39

##### Procurement involving contracting authorities from different Member States

1. Without prejudice to Article 12, contracting authorities from different Member States may act jointly in the award of public contracts by using one of the means provided for in this Article.

Contracting authorities shall not use the means provided in this Article for the purpose of avoiding the application of mandatory public law provisions in conformity with Union law to which they are subject in their Member State.

2. A Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State.

In respect of centralised purchasing activities offered by a central purchasing body located in another Member State than the contracting authority, Member States may, however, choose to specify that their contracting authorities may only use the centralised purchasing activities as defined in either point (a) or in point (b) of point (14) of Article 2(1).

3. 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.

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 pursuant to points (a) or (b) of Article 33(4) of which of the economic operators, party to the framework agreement, shall perform a given task.

4. Several contracting authorities from different Member States may jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system. They may also, to the extent set out in the second subparagraph of Article 33(2), award contracts based on the framework agreement or on the dynamic purchasing system. Unless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, the participating contracting authorities shall conclude an agreement that determines:

- (a) the responsibilities of the parties and the relevant applicable national provisions;
- (b) 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.

A participating contracting authority fulfils its obligations pursuant to this Directive when it purchases works, supplies or services from a contracting authority which is responsible for the procurement procedure. When determining responsibilities and the applicable national law as referred to in point (a), the participating contracting authorities may allocate specific responsibilities among them and determine the applicable provisions of the national laws of any of their respective Member States. The allocation of responsibilities and the applicable national law shall be referred to in the procurement documents for jointly awarded public contracts.

5. Where several contracting authorities from different Member States have set up a joint entity, including European Groupings of territorial cooperation under Regulation (EC) No 1082/2006 of the European Parliament and of the Council<sup>(1)</sup> or other entities established under Union law, the participating contracting authorities shall, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules of one of the following Member States:

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

<sup>(1)</sup> Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC) (OJ L 210, 31.7.2006, p. 19).

The agreement referred to in the first subparagraph 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.

### CHAPTER III

#### Conduct of the procedure

##### Section 1

#### Preparation

##### Article 40

#### Preliminary market consultations

Before launching 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.

For this purpose, contracting authorities may for example seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

##### Article 41

#### Prior involvement of candidates or tenderers

Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting authority, whether in the context of Article 40 or not, or 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.

Such measures shall include 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 the fixing of adequate time limits for the receipt of tenders. 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 observe the principle of equal treatment.

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. The measures taken shall be documented in the individual report required by Article 84.

## Article 42

**Technical specifications**

1. The technical specifications as defined in point 1 of Annex VII shall be set out in the procurement documents. The technical specification shall lay down the characteristics required of a works, service or supply.

Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

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

For all procurement which is intended for use by natural persons, whether 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 persons with disabilities or design for all users.

Where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.

2. 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.

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union 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 national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when any of those do not 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; each reference shall be accompanied by the words 'or equivalent';

- (c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;
- (d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

4. 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. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words 'or equivalent'.

5. Where a contracting authority uses the option of referring to the technical specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the grounds that the works, supplies or services tendered 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 Article 44, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

6. Where a contracting authority uses the option laid down in point (a) of paragraph 3 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 specifications address the performance or functional requirements which it has laid down.

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

*Article 43***Labels**

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.

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 referred to.

Contracting authorities requiring a specific label shall accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

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.

2. Where a label fulfils the conditions provided in points (b), (c), (d) and (e) of paragraph 1 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 thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

*Article 44***Test reports, certification and other means of proof**

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.

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.

For the purpose of this paragraph, a conformity assessment body shall be 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>(1)</sup>.

2. Contracting authorities shall accept other appropriate means of proof than those referred to in paragraph 1, 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 paragraph 1, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned and provided that 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.

3. Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with Article 42(6), Article 43 and paragraphs 1 and 2 of this Article. The competent authorities of the Member State of establishment of the economic operator shall provide this information in accordance with Article 86.

*Article 45***Variants**

1. Contracting authorities may authorise or require tenderers to submit variants. They shall indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest whether or not they authorise or require variants. Variants shall not be authorised without such indication. Variants shall be linked to the subject-matter of the contract.

<sup>(1)</sup> Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 (OJ L 218, 13.8.2008, p. 30).

2. 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. They shall also 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.

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

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 service contract rather than a public supply contract or a supply contract rather than a public service contract.

#### Article 46

##### Division of contracts into lots

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.

Contracting authorities shall, except in respect of contracts whose division has been made mandatory pursuant to paragraph 4 of this Article, 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 individual report referred to in Article 84.

2. 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.

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. 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.

3. Member States may provide that, 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.

4. Member States may implement the second subparagraph of paragraph 1 by rendering it obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law. In such circumstances the first subparagraph of paragraph 2 and, where appropriate, paragraph 3 shall apply.

#### Article 47

##### Setting time limits

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 Articles 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 Articles 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 six days before the time limit fixed for the receipt of tenders. In the event of an accelerated procedure as referred to in Article 27(3) and Article 28(6), that period shall be four days;

(b) where significant changes are made to the procurement documents.

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

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

## Section 2

**Publication and transparency**

## Article 48

**Prior information notices**

1. Contracting authorities may make known their intentions of planned procurements through the publication of a prior information notice. Those notices shall contain the information set out in Annex V part B section I. They shall be published either by the Publications Office of the European Union or by the contracting authorities on their buyer profiles in accordance with point 2(b) of Annex VIII. Where the prior information notice is published by the contracting authorities on their buyer profile, they shall send a notice of the publication on their buyer profile to the Publications Office of the European Union in accordance with Annex VIII. Those notices shall contain the information set out in Annex V part A.

2. For restricted procedures and competitive procedures with negotiation, sub-central contracting authorities may use a prior information notice as a call for competition pursuant to Article 26(5), provided that the notice fulfils all of the following conditions:

- (a) it refers specifically to the supplies, works or services that will be the subject 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 Annex V part B section I, the information set out in Annex V part B section II;
- (d) it has been sent for publication between 35 days and 12 months prior to the date on which the invitation referred to in Article 54(1) is sent.

Such notices shall not be published on a buyer profile. However, the additional publication at national level pursuant to Article 52, if any, may be made on a buyer profile.

The period covered by the prior information notice shall be a maximum of 12 months from the date the notice is transmitted for publication. However, in the case of public contracts for social and other specific services, the prior information notice referred to in point (b) of Article 75(1) may cover a period which is longer than 12 months.

## Article 49

**Contract notices**

Contract notices shall be used as a means of calling for competition in respect of all procedures, without prejudice to

the second subparagraph of Article 26(5) and Article 32. Contract notices shall contain the information set out in Annex V part C and shall be published in accordance with Article 51.

## Article 50

**Contract award notices**

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

Such notices shall contain the information set out in Annex V part D and shall be published in accordance with Article 51.

2. 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.

In the case of framework agreements concluded in accordance with Article 33, contracting authorities shall not be bound to send a notice of the results of the procurement procedure for each contract based on that agreement. Member States may provide that contracting authorities shall group notices of the results of the procurement procedure for contracts based on the framework agreement on a quarterly basis. In that case, contracting authorities shall send the grouped notices within 30 days of the end of each quarter.

3. Contracting authorities shall send a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 30 days of the end of each quarter.

4. Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.

## Article 51

**Form and manner of publication of notices**

1. Notices referred to in Articles 48, 49 and 50 shall include the information set out in Annex V in the format of standard forms, including standard forms for corrigenda.

The Commission shall establish those standard forms by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 89(2).

2. Notices referred to in Articles 48, 49 and 50 shall be drawn up, transmitted by electronic means to the Publications Office of the European Union and published in accordance with Annex VIII. Notices shall be published not later than five days after they are sent. The costs of publication of the notices by the Publications Office of the European Union shall be borne by the Union.

3. Notices referred to in Articles 48, 49 and 50 shall be published in full in the official language(s) of the institutions of the Union chosen by the contracting authority. That language version or those language versions shall constitute the sole authentic text(s). A summary of the important elements of each notice shall be published in the other official languages of the institutions of the Union.

4. The Publications Office of the European Union shall ensure that the full text and the summary of prior information notices referred to in Article 48(2) and calls for competition setting up a dynamic purchasing system, as referred to in point (a) of Article 34(4) continue to be published:

(a) in the case of prior information notices, for 12 months or until receipt of a contract award notice as provided for in Article 50 indicating that no further contracts will be awarded during the 12-month period covered by the call for competition. However, in the case of public contracts for social and other specific services, the prior information notice referred to in point (b) of Article 75(1) shall continue to be published until the end of its originally indicated period of validity or until receipt of a contract award notice as provided for in Article 50 indicating that no further contracts will be awarded during the period covered by the call for competition;

(b) in the case of calls for competition setting up a dynamic purchasing system, for the period of validity of the dynamic purchasing system.

5. Contracting authorities shall be able to supply proof of the dates on which notices are dispatched.

The Publications Office of the European Union shall give the contracting authority confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication. Such confirmation shall constitute proof of publication.

6. Contracting authorities may publish notices for public contracts that are not subject to the publication requirement laid down in this Directive provided that those notices are sent to the Publications Office of the European Union by electronic means in accordance with the format and procedures for transmission indicated in Annex VIII.

#### Article 52

##### Publication at national level

1. Notices referred to in Articles 48, 49 and 50 and the information contained therein shall not be published at national level before the publication pursuant to Article 51. However, publication may in any event take place at the national level where contracting authorities have not been notified of the publication within 48 hours after confirmation of the receipt of the notice in accordance with Article 51.

2. Notices published at national level shall not contain information other than that contained in the notices dispatched to the Publications Office of the European Union or published on a buyer profile, but shall indicate the date of dispatch of the notice to the Publications Office of the European Union or its publication on the buyer profile.

3. Prior information notices shall not be published on a buyer profile before the dispatch to the Publications Office of the European Union of the notice of their publication in that form. They shall indicate the date of that dispatch.

#### Article 53

##### Electronic availability of procurement documents

1. Contracting authorities shall by electronic means offer unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice in accordance with Article 51 or the date on which an invitation to confirm interest was sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which the procurement documents are accessible.

Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered for one of the reasons set out in the second subparagraph of Article 22(1), contracting authorities may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by other means than electronic means in accordance with paragraph 2 of this Article. In such a case, the time limit for the submission of tenders shall be prolonged by five days, except in the cases of duly substantiated urgency referred to in Article 27(3), Article 28(6) and in the fourth subparagraph of Article 29(1).

Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered because contracting authorities intend to apply Article 21(2) of this Directive, they 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. In such a case, the time limit for the submission of tenders shall be prolonged by five days, except in the cases of duly substantiated urgency referred to in Article 27(3), Article 28(6) and in the fourth subparagraph of Article 29(1).

2. Provided that it has been requested in good time, the 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 six days before the time limit fixed for the receipt of tenders. In the event of an accelerated procedure as referred to in Article 27(3) and Article 28(6), that period shall be four days.

#### Article 54

##### Invitations to candidates

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.

Where a prior information notice is used as a call for competition pursuant to Article 48(2), contracting authorities shall simultaneously and in writing invite the economic operators which have expressed their interest to confirm their continuing interest.

2. The invitations referred to in paragraph 1 of this Article shall include a reference to the electronic address on which the procurement documents have been made directly available by electronic means. The invitations shall 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 set out in the second or third subparagraph of Article 53(1) and have not already been made otherwise available. In addition, the invitations referred to in paragraph 1 of this Article shall include the information set out in Annex IX.

#### Article 55

##### Informing candidates and tenderers

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 the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement, not to award a contract for which there has been a call for competition, to recommence the procedure or 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 Article 42(5) and (6), 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, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.

### Section 3

#### Choice of participants and award of contracts

##### Article 56

##### General principles

1. Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 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, Article 45;

(b) the tender comes from a tenderer that is not excluded in accordance with Article 57 and that meets the selection criteria set out by the contracting authority in accordance with Article 58 and, where applicable, the non-discriminatory rules and criteria referred to in Article 65.

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 the applicable obligations referred to in Article 18(2).

2. In open procedures, 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 Articles 57 to 64. Where they 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 should have been excluded pursuant to Article 57 or that does not meet the selection criteria set out by the contracting authority.

Member States may exclude the use of the procedure in the first subparagraph for, or restrict it to, certain types of procurement or specific circumstances.

3. 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, unless otherwise provided by the national law implementing this Directive, 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.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 87 to amend the list in Annex X, where necessary, to add new international agreements that have been ratified by all Member States or where the existing international agreements referred to are no longer ratified by all Member States or they are otherwise changed, for instance in respect of their scope, content or denomination.

#### Subsection 1

### Criteria for qualitative selection

#### Article 57

#### Exclusion grounds

1. Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

- (a) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA <sup>(1)</sup>;
- (b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European

Union <sup>(2)</sup> and Article 2(1) of Council Framework Decision 2003/568/JHA <sup>(3)</sup> as well as corruption as defined in the national law of the contracting authority or the economic operator;

- (c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests <sup>(4)</sup>;
- (d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA <sup>(5)</sup> respectively, or inciting or aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;
- (e) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council <sup>(6)</sup>;
- (f) child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council <sup>(7)</sup>.

The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.

2. An economic operator shall be excluded from participation in a procurement procedure where 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 where this 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 the Member State of the contracting authority.

Furthermore, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure an economic operator 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.

<sup>(1)</sup> OJ C 195, 25.6.1997, p. 1.

<sup>(2)</sup> Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p. 54).

<sup>(3)</sup> OJ C 316, 27.11.1995, p. 48.

<sup>(4)</sup> Council Framework Decision of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p. 3).

<sup>(5)</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

<sup>(6)</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.4.2011, p. 1).

<sup>(1)</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ L 300, 11.11.2008, p. 42).

This paragraph shall no longer 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.

3. Member States may provide for a derogation from the mandatory exclusion provided for in paragraphs 1 and 2, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

Member States may also provide for a derogation from the mandatory exclusion provided in paragraph 2, where an exclusion would be clearly disproportionate, in particular where only minor amounts of taxes or social security contributions are unpaid or 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 taking measures as provided for in the third subparagraph of paragraph 2 before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.

4. Contracting authorities may exclude or may be required by Member States to 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 Article 18(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 national laws and regulations;
- (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 Article 24 cannot be effectively remedied by other less intrusive measures;

- (f) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure, as referred to in Article 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 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, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; or
- (i) where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

Notwithstanding point (b) of the first subparagraph, Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator which is in one of the situations referred to in that point, where the contracting authority has established that the economic operator in question will be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business in the case of the situations referred to in point (b).

5. Contracting authorities shall at any time during the procedure exclude an economic operator where it turns out 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 and 2.

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out 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 paragraph 4.

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 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. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.

#### Article 58

##### Selection criteria

1. Selection criteria may relate to:

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

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They 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. All requirements shall be related and proportionate to the subject-matter of the contract.

2. With regard to suitability to pursue the 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 Annex XI, or to comply with any other request set out in that Annex.

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, the contracting authority may require them to prove that they hold such authorisation or membership.

3. 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. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance.

The minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value, except in duly justified cases such as relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate the main reasons for such a requirement in the procurement documents or the individual report referred to in Article 84.

The ratio, for instance, 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. Such methods and criteria shall be transparent, objective and non-discriminatory.

Where a contract is divided into lots this Article shall apply in relation to each individual lot. However, 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.

Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in the second subparagraph of this paragraph 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. In the case of dynamic purchasing systems, the maximum yearly turnover requirement referred to in the second subparagraph shall be calculated on the basis of the expected maximum size of specific contracts to be awarded under that system.

4. 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.

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. 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.

In procurement procedures for supplies requiring siting or installation work, 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.

5. Contracting authorities shall indicate the required conditions of 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.

#### Article 59

### European Single Procurement Document

1. At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement 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 Article 57 in which economic operators shall or may be excluded;
- (b) it meets the relevant selection criteria that have been set out pursuant to Article 58;
- (c) where applicable, it fulfils the objective rules and criteria that have been set out pursuant to Article 65.

Where the economic operator relies on the capacities of other entities pursuant to Article 63, the ESPD shall also contain the information referred to in the first subparagraph of this paragraph in respect of such entities.

The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall

provide the relevant information as required by the contracting authority. 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.

Where the contracting authority can obtain the supporting documents directly by accessing a database pursuant to paragraph 5, 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.

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

2. The ESPD shall be drawn up on the basis of a standard form. The Commission shall establish that standard form, by means of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 89(3).

The ESPD shall be provided exclusively in electronic form.

3. Notwithstanding Article 92, the Commission shall review the practical application of the ESPD taking into account the technical development of databases in the Member States and report thereon to the European Parliament and the Council by 18 April 2017.

Where appropriate, the Commission shall make proposals for solutions optimising the cross-border access to such databases and the use of certificates and attestations in the internal market.

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

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 Article 33(3) or point (a) of Article 33(4), require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents in accordance with Article 60 and, where appropriate, Article 62. The contracting authority may invite economic operators to supplement or clarify the certificates received pursuant to Articles 60 and 62.

5. Notwithstanding paragraph 4, economic operators shall not be required to submit 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.

Notwithstanding paragraph 4, economic operators shall not be required to submit supporting documents where the contracting authority having awarded the contract or concluded the framework agreement already possesses these documents.

For the purpose of the first subparagraph, Member States shall ensure that databases which contain relevant information on economic operators and which may be consulted by their contracting authorities may also be consulted, under the same conditions, by contracting authorities of other Member States.

6. Member States shall make available and up-to-date in e-Certis a complete list of databases containing relevant information on economic operators which can be consulted by contracting authorities from other Member States. Upon request, Member States shall communicate to other Member States any information related to the databases referred to in this Article.

#### Article 60

##### Means of proof

1. Contracting authorities may require the certificates, statements and other means of proof referred to in paragraphs 2, 3 and 4 of this Article and Annex XII as evidence for the absence of grounds for exclusion as referred to in Article 57 and for the fulfilment of the selection criteria in accordance with Article 58.

Contracting authorities shall not require means of proof other than those referred to in this Article and in Article 62. In respect of Article 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.

2. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in Article 57 apply to the economic operator:

- (a) as regards paragraph 1 of that Article, 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 paragraph 2 and point (b) of paragraph 4 of that Article, a certificate issued by the competent authority in the Member State or country concerned.

Where the Member State or country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs 1 and 2 and point (b) of paragraph 4 of Article 57, 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.

A Member State shall, where relevant, provide an official declaration stating that the documents or certificates referred to in this paragraph are not issued or that they do not cover all the cases specified in paragraphs 1 and 2 and point (b) of paragraph 4 of Article 57. Such official declarations shall be made available through the online repository of certificates (e-Certis) referred to in Article 61.

3. Proof of the economic operator's economic and financial standing may, as a general rule, be provided by one or more of the references listed in Annex XII Part I.

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

4. Evidence of the economic operators' technical abilities may be provided by one or more of the means listed in Annex XII Part II, in accordance with the nature, quantity or importance, and use of the works, supplies or services.

5. Upon request, Member States shall make available to other Member States any information relating to the grounds for exclusion listed in Article 57, the suitability to pursue the professional activity, and the financial and technical capacities of tenderers referred to in Article 58, and any information relating to the means of proof referred to in this Article.

#### Article 61

##### Online repository of certificates (e-Certis)

1. With a view to facilitating cross-border tendering, Member States shall ensure that the information concerning certificates and other forms of documentary evidence introduced in e-Certis established by the Commission is constantly kept up-to-date.

2. Contracting authorities shall have recourse to e-Certis and shall require primarily such types of certificates or forms of documentary evidence that are covered by e-Certis.

3. The Commission shall make available all language versions of the ESPD in e-Certis.

*Article 62***Quality assurance standards and environmental management standards**

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. They shall recognise equivalent certificates from bodies established in other Member States. They 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.

2. 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 the Eco-Management and Audit Scheme (EMAS) of the Union or to other environmental management systems as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009 or other environmental management standards based on the relevant European or international standards by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States.

Where an economic operator had demonstrably no access to such certificates, 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 also 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.

3. Upon request, Member States shall make available to other Member States, in accordance with Article 86, any information relating to the documents produced as evidence of compliance with quality and environmental standards referred to in paragraphs 1 and 2.

*Article 63***Reliance on the capacities of other entities**

1. With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), 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. With regard to criteria relating to the educational and professional qualifications as set out in point

(f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. 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.

The contracting authority shall, in accordance with Articles 59, 60 and 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 pursuant to Article 57. 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. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

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.

Under the same conditions, a group of economic operators as referred to in Article 19(2) may rely on the capacities of participants in the group or of other entities.

2. 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 as referred to in Article 19(2), by a participant in that group.

*Article 64***Official lists of approved economic operators and certification by bodies established under public or private law**

1. Member States may establish or maintain either official lists of approved contractors, suppliers or service providers or provide for a certification by certification bodies complying with European certification standards within the meaning of Annex VII.

They shall inform the Commission and the other Member States of the address of the certification body or the body responsible for the official lists, to which applications shall be sent.

2. Member States shall adapt the conditions for registration on the official lists referred to in paragraph 1 and for the issue of certificates by certification bodies to the provisions of this subsection.

Member States shall also adapt those conditions to Article 63 as regards applications for registration submitted by economic operators belonging to a group and claiming resources made available to them by the other companies in the group. In such cases, those operators shall prove to the authority establishing the official list that they will have those resources at their disposal throughout the period of validity of the certificate attesting to their registration on the official list and that throughout the same period those companies continue to fulfil the qualitative selection requirements encompassed by the official list or certificate on which operators rely for their registration.

3. Economic operators registered on the official lists or having a certificate may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the competent certification body.

Those certificates shall state the references which enabled those economic operators to be registered on the official list or to obtain certification and the classification given in that list.

4. Certified registration on official lists by the competent bodies or a certificate issued by the certification body shall constitute a presumption of suitability with regard to requirements for qualitative selection encompassed by the official list or certificate.

5. Information that can be deduced from registration on official lists or certification shall not be questioned without justification. 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.

The contracting authorities of other Member States shall apply paragraph 3 and the first subparagraph of this paragraph 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 Article 60 and, where appropriate, Article 62. For any registration of economic operators of other Member States on an official list or for their certification, no further proof or statements shall be required other than those requested of national economic operators.

Economic operators may request at any time their registration on an official list or the issuance of a certificate. They shall be informed within a reasonably short period of time of the decision of the authority drawing up the official list or of the competent certification body.

7. Economic operators from other Member States shall not be obliged to undergo such registration or certification in order to participate in a public contract. The contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.

8. Upon request, Member States shall make available to other Member States any information relating to the documents produced as evidence that the economic operators fulfil the requirements to be registered on the official list of approved economic operators or as evidence that economic operators from another Member State possess an equivalent certification.

#### Subsection 2

### **Reduction of numbers of candidates, tenders and solutions**

#### *Article 65*

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

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 the minimum number, in accordance with paragraph 2, of qualified candidates is available.

2. The 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 appropriate, the maximum number.

In the restricted procedure the minimum number of candidates shall be five. In the competitive procedure with negotiation, in the competitive dialogue procedure and in the innovation partnership the minimum number of candidates shall be three. In any event the number of candidates invited shall be sufficient to ensure genuine competition.

The contracting authorities shall invite a number of candidates at least equal to the minimum number. However, where the number of candidates meeting the selection criteria and the minimum levels of ability as referred to in Article 58(5) is below the minimum number, the contracting authority may continue the procedure by inviting the candidates with the required capabilities. 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.

#### *Article 66*

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

Where contracting authorities exercise the option of reducing the number of tenders to be negotiated as provided for in Article 29(6) or of solutions to be discussed as provided for in Article 30(4), they shall do so by applying the award criteria stated in the procurement documents. 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.

## Subsection 3

**Award of the contract**

## Article 67

**Contract award criteria**

1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.

2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. Such criteria may comprise, for instance:

- (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.

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.

Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.

3. 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 such factors do not form part of their material substance.

4. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall 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. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

5. 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.

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

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

## Article 68

**Life-cycle costing**

1. Life-cycle costing shall to the extent relevant cover parts 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; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the data to be provided by the tenderers and the method which the contracting authority will use to determine the life-cycle costs on the basis of those data.

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. 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 Union is bound.

3. Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the Union, that common method shall be applied for the assessment of life-cycle costs.

A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XIII. The Commission shall be empowered to adopt delegated acts in accordance with Article 87 concerning the update of that list, when an update of the list is necessary due to the adoption of new legislation making a common method mandatory or the repeal or modification of existing legal acts.

#### Article 69

##### Abnormally low tenders

1. Contracting authorities shall require economic operators 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 referred to in 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 obligations referred to in Article 18(2);

- (e) compliance with obligations referred to in Article 71;
- (f) the possibility of the tenderer obtaining State aid.

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

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2).

4. Where a 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 after consultation with the tenderer where the latter 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 TFEU. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.

5. Upon request, Member States shall make available to other Member States by means of administrative cooperation any information at its disposal, such as laws, regulations, universally applicable collective agreements or national technical standards, relating to the evidence and documents produced in relation to details listed in paragraph 2.

#### CHAPTER IV

##### Contract performance

#### Article 70

##### Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

#### Article 71

##### Subcontracting

1. Observance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.

2. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

3. Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator to whom the public contract has been awarded (the main contractor). Such measures may include appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.

4. Paragraphs 1 to 3 shall be without prejudice to the question of the main contractor's liability.

5. 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 indicate 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 this point in time. The contracting authority shall require the main contractor to notify the contracting authority of any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services.

Notwithstanding the first subparagraph, Member States may impose the obligation to deliver the required information directly on the main contractor.

Where necessary for the purposes of point (b) of paragraph 6 of this Article, the required information shall be accompanied by the subcontractors' self-declarations as provided for in Article 59. The implementing measures pursuant to paragraph 8 of this Article may provide that subcontractors which are presented after the award of the contract shall provide the certificates and other supporting documents instead of the self-declaration.

The first subparagraph shall not apply to suppliers.

Contracting authorities may extend or may be required by Member States to extend the obligations provided for in the first subparagraph to for instance:

- (a) supply contracts, to services contracts other than those concerning services to be provided at the facilities under the direct oversight of the contracting authority or to suppliers involved in works or services contracts;
- (b) subcontractors of the main contractor's subcontractors or further down the subcontracting chain.

6. With the aim of avoiding breaches of the obligations referred to in Article 18(2), appropriate measures may be taken, such as:

(a) Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 18(2).

(b) Contracting authorities may, in accordance with Articles 59, 60 and 61, verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57. In such cases, the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

7. Member States may provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors, for instance by providing for direct payments to subcontractors without it being necessary for them to request such direct payment.

8. Member States having chosen to provide for measures pursuant to paragraphs 3, 5 or 6 shall, by law, regulation or administrative provisions and having regard for Union law, specify the implementing conditions for those measures. In so doing, Member States may limit their applicability, for instance in respect of certain types of contracts, certain categories of contracting authorities or economic operators or as of certain amounts.

#### Article 72

##### Modification of contracts during their term

1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive 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. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall 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 that 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; and
- (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority.

However, any increase in price shall not exceed 50 % of the value of the original contract. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;

- (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 foresee;
  - (ii) the modification does not alter the overall nature of the contract;
  - (iii) any increase in price is not higher than 50 % of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;
- (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either:
  - (i) an unequivocal review clause or option in conformity with point (a);
  - (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 Directive; or
  - (iii) in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation pursuant to Article 71;
- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

Contracting authorities having modified a contract in the cases set out under points (b) and (c) of this paragraph shall publish a notice to that effect in the *Official Journal of the European Union*. Such notice shall contain the information set out in Annex V part G and shall be published in accordance with Article 51.

2. Furthermore, and without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met, contracts may equally be modified without a new procurement procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values:

- (i) the thresholds set out in Article 4; and
- (ii) 10 % of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts.

However, the modification may not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

3. For the purpose of the calculation of the price mentioned in paragraph 2 and points (b) and (c) of paragraph 1, the updated price shall be the reference value when the contract includes an indexation clause.

4. A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

- (a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
- (b) 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;
- (c) the modification extends the scope of the contract or framework agreement considerably;
- (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1.

5. A new procurement procedure in accordance with this Directive shall be required for other modifications of the provisions of a public contract or a framework agreement during its term than those provided for under paragraphs 1 and 2.

*Article 73***Termination of contracts**

Member States shall ensure that contracting authorities have the possibility, at least under the following circumstances and under the conditions determined by the applicable national law, to terminate a public contract during its term, where:

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

## TITLE III

**PARTICULAR PROCUREMENT REGIMES**

## CHAPTER I

***Social and other specific services****Article 74***Award of contracts for social and other specific services**

Public contracts for social and other specific services listed in Annex XIV shall be awarded in accordance with this Chapter, where the value of the contracts is equal to or greater than the threshold indicated in point (d) of Article 4.

*Article 75***Publication of notices**

1. Contracting authorities intending to award a public contract for the services referred to in Article 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 Annex V Part H, in accordance with the standard forms referred to in Article 51; or
- (b) by means of a prior information notice, which shall be published continuously and contain the information set out in Annex V Part I. The prior information notice shall refer specifically to the types of services that will be the subject of the contracts to be awarded. It shall indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing.

The first subparagraph shall, however, not apply where a negotiated procedure without prior publication could have been used in conformity with Article 32 for the award of a public service contract.

2. Contracting authorities that have awarded a public contract for the services referred to in Article 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 Annex V Part J, in accordance with the standard forms referred to in Article 51. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 30 days of the end of each quarter.

3. The Commission shall establish the standard forms referred to in paragraphs 1 and 2 of this Article by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 89(2).

4. The notices referred to in this Article shall be published in accordance with Article 51.

*Article 76***Principles of awarding contracts**

1. Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.

2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.

*Article 77***Reserved contracts for certain services**

1. Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74, 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, 98133110-8.

2. An organisation referred to in paragraph 1 shall fulfil all of the following conditions:

- (a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1;
- (b) profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;
- (c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and
- (d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

3. The maximum duration of the contract shall not be longer than three years.

4. The call for competition shall make reference to this Article.

5. Notwithstanding Article 92, the Commission shall assess the effects of this Article and report to the European Parliament and the Council by 18 April 2019.

## CHAPTER II

### Rules governing design contests

#### Article 78

##### Scope

This Chapter shall apply 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.

In the cases referred to in point (a) of the first paragraph of this Article, the threshold referred to in Article 4 is calculated on the basis of the estimated value net of VAT of the public service contract, including any possible prizes or payments to participants.

In the cases referred to in point (b) of the first paragraph of this Article, the threshold refers to 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 under Article 32(4) if the contracting authority has announced its intention to award such contract in the contest notice.

#### Article 79

##### Notices

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

Where they intend to award a subsequent service contract pursuant to Article 32(4), this shall be indicated in the contest notice.

2. Contracting authorities that have held a design contest shall send a notice of the results of the contest in accordance with Article 51 and shall be able to prove the date of dispatch.

Where the release of information on the outcome of the contest would impede law enforcement, would be contrary to the public interest or would prejudice the legitimate commercial interests of a particular enterprise, whether public or private, or might prejudice fair competition between service providers, such information may be withheld from publication.

3. The notices referred to in paragraphs 1 and 2 of this Article shall be published in accordance with Article 51(2) to (6) and Article 52. They shall include the information set out respectively in Annex V parts E and F in the format of the standard forms.

The Commission shall establish the standard forms by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 89(2).

#### Article 80

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

1. When organising design contests, contracting authorities shall apply procedures which are adapted to the provisions of Title I and this Chapter.

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. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.

*Article 81***Composition of the jury**

The jury shall be composed exclusively of natural persons who are independent of participants in the contest. 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.

*Article 82***Decisions of the jury**

1. The jury shall be autonomous in its decisions or 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.

## TITLE IV

**GOVERNANCE***Article 83***Enforcement**

1. In order to effectively ensure correct and efficient implementation, Member States shall ensure that at least the tasks set out in this Article are performed by one or more authorities, bodies or structures. They shall indicate to the Commission all authorities, bodies or structures competent for those tasks.
2. Member States shall ensure that the application of public procurement rules is monitored.

Where monitoring authorities or structures identify by their own initiative or upon the receipt of information specific violations or systemic problems, they shall be empowered to indicate those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees thereof.

3. The results of the monitoring activities pursuant to paragraph 2 shall be made available to the public through appropriate means of information. These results shall also be made available to the Commission. For instance, they may be integrated in the monitoring reports referred to in the second subparagraph of this paragraph.

By 18 April 2017 and every three years thereafter Member States shall submit to the Commission a monitoring report covering, where applicable, information on the most frequent sources of wrong application or of legal uncertainty, including possible structural or recurring problems in the application of the rules, on the level of SME participation in public procurement and about prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities.

The Commission may, not more than every three years, request Member States to provide information on the practical implementation of national strategic procurement policies.

For the purposes of this paragraph and paragraph 4 of this Article, 'SME' shall be understood as defined in Commission Recommendation 2003/361/EC <sup>(1)</sup>.

On the basis of the data received under this paragraph, the Commission shall regularly issue a report on the implementation and best practices of national procurement policies in the internal market.

4. Member States shall ensure that:
  - (a) information and guidance on the interpretation and application of the Union public procurement law is available free of charge to assist contracting authorities and economic operators, in particular SMEs, in correctly applying the Union public procurement rules; and
  - (b) support is available to contracting authorities with regard to planning and carrying out procurement procedures.
5. Member States shall, without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, designate a point of reference for cooperation with the Commission as regards the application of public procurement legislation.

6. 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:

<sup>(1)</sup> Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, (O) L 124, 20.5.2003, p. 36).

- (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.

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

#### Article 84

##### Individual reports on procedures for the award of contracts

1. For every contract or framework agreement covered by this Directive, 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/or reduction of numbers pursuant to Articles 65 and 66, namely:
  - (i) the names of the selected candidates or tenderers and the reasons for their selection;
  - (ii) the names of the candidates or tenderers rejected 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, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties; and, where known at this point in time, the names of the main contractor's subcontractors, if any;
- (e) for competitive procedures with negotiations and competitive dialogues, the circumstances as laid down in Article 26 which justify the use of those procedures;
- (f) for negotiated procedures without prior publication, the circumstances referred to in Article 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 other means of communication than electronic means have been used for the submission of tenders;

- (i) where applicable, conflicts of interests detected and subsequent measures taken.

This report shall not be required in respect of contracts based on framework agreements where these are concluded in accordance with Article 33(3) or point (a) of Article 33(4).

To the extent that the contract award notice drawn up pursuant to Article 50 or Article 75(2) contains the information required in this paragraph, contracting authorities may refer to that notice.

2. Contracting authorities shall document the progress of all procurement procedures, whether or not those are conducted by electronic means. To that end, they shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on communications with economic operators and internal deliberations, preparation of the procurement documents, dialogue or negotiation if any, selection and award of the contract. The documentation shall be kept for a period of at least three years from the date of award of the contract.

3. The report, or its main elements, shall be communicated to the Commission or the competent authorities, bodies or structures referred to in Article 83 where they so request.

#### Article 85

##### National reporting and statistical information

1. The Commission shall review the quality and completeness of data that can be extracted from the notices, referred to in Articles 48, 49, 50, 75 and 79, which are published in accordance with Annex VIII.

Where the quality and completeness of the data referred to in the first subparagraph of this paragraph is not compliant with the obligations stipulated in Article 48(1), Article 49, Article 50(1), Article 75(2) and Article 79(3), the Commission shall request complementary information from the Member State concerned. Within a reasonable time, the Member State concerned shall supply the missing statistical information requested by the Commission.

2. By 18 April 2017 and every three years thereafter, Member States shall forward to the Commission a statistical report for procurement which would have been covered by this Directive if its value had exceeded the relevant threshold laid down in Article 4, indicating an estimation of the aggregated total value of such procurement during the period concerned. That estimation may in particular be based on data available under national publication requirements or on sample-based estimates.

That report may be included in the report referred to in Article 83(3).

3. Member States shall make available to the Commission information on their institutional organisation related to the implementation, monitoring and enforcement of this Directive, as well as on national initiatives taken to provide guidance on or assist in implementation of Union rules on public procurement, or to respond to challenges confronting the implementation of those rules.

That information may be included in the report referred to in Article 83(3).

#### Article 86

### Administrative cooperation

1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of information on issues referred to in Articles 42, 43, 44, 57, 59, 60, 62, 64 and 69. They shall ensure the confidentiality of the information which they exchange.

2. The competent authorities of all Member States concerned shall exchange information in compliance with personal data protection rules provided for in Directive 95/46/EC of the European Parliament and of the Council<sup>(1)</sup> and Directive 2002/58/EC of the European Parliament and of the Council<sup>(2)</sup>.

3. To test the suitability of using the Internal Market Information System (IMI) established by Regulation (EU) No 1024/2012 for the purpose of exchanging information covered by this Directive, a pilot project shall be launched by 18 April 2015.

#### TITLE V

### DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS

#### Article 87

### Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Articles 6, 22, 23, 56 and 68 shall be conferred on the Commission for an indeterminate period of time from 17 April 2014.

3. The delegation of power referred to in Articles 6, 22, 23, 56 and 68 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the

decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Articles 6, 22, 23, 56 and 68 shall enter into force only where no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

#### Article 88

### Urgency procedure

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.

2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 87(5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or by the Council.

#### Article 89

### Committee procedure

1. The Commission shall be assisted by the Advisory Committee on Public Procurement established by Council Decision 71/306/EEC<sup>(3)</sup>. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

3. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

#### Article 90

### Transposition and transitional provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016. They shall forthwith communicate to the Commission the text of those measures.

<sup>(1)</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

<sup>(2)</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

<sup>(3)</sup> Council Decision 71/306/EEC of 26 July 1971 setting up an Advisory Committee for Public Works Contracts (OJ L 185, 16.8.1971, p. 15).

2. Notwithstanding paragraph 1 of this Article, Member States may postpone the application of Article 22(1) until 18 October 2018, except where use of electronic means is mandatory pursuant to Articles 34, 35 or 36, Article 37(3), Article 51(2) or Article 53.

Notwithstanding paragraph 1 of this Article, Member States may postpone the application of Article 22(1) for central purchasing bodies until 18 April 2017.

Where a Member State chooses to postpone the application of Article 22(1), that Member State shall provide that contracting authorities may choose between the following means of communication for all communication and information exchange:

- (a) electronic means in accordance with Article 22;
- (b) post or other suitable carrier;
- (c) fax;
- (d) a combination of those means.

3. Notwithstanding paragraph 1 of this Article, Member States may postpone the application of the second subparagraph of Article 59(2) until 18 April 2018.

4. Notwithstanding paragraph 1 of this Article, Member States may postpone the application of the second subparagraph of Article 59(5) until 18 October 2018.

5. Notwithstanding paragraph 1 of this Article, Member States may postpone the application of Article 61(2) until 18 October 2018.

6. When Member States adopt the measures referred to in paragraphs 1 to 5, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

7. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### Article 91

##### Repeals

Directive 2004/18/EC is repealed with effect from 18 April 2016.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex XV.

#### Article 92

##### Review

The Commission shall review the economic effects on the internal market, in particular in terms of factors such as the cross-border award of contracts and transaction costs, resulting from the application of the thresholds set in Article 4 and report thereon to the European Parliament and the Council by 18 April 2019.

The Commission shall, where possible and appropriate, consider suggesting an increase of the threshold amounts applicable under the GPA during the next round of negotiations. In the event of any change to the threshold amounts applicable under the GPA, the report shall, where appropriate, be followed by a proposal for a legal act amending the thresholds set out in this Directive.

#### Article 93

##### Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

#### Article 94

##### Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 26 February 2014.

For the European Parliament  
The President  
M. SCHULZ

For the Council  
The President  
D. KOURKOULAS







## DIRECTIVES

## DIRECTIVE 2007/66/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 December 2007

## amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee (1),

Having regard to the opinion of the Committee of the Regions (2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty (3),

Whereas:

- (1) Council Directives 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (4) and 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of

entities operating in the water, energy, transport and telecommunications sectors (5) concern the review procedures with regard to contracts awarded by contracting authorities as referred to in Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (6) and contracting entities as referred to in Article 2 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (7). Directives 89/665/EEC and 92/13/EEC are intended to ensure the effective application of Directives 2004/18/EC and 2004/17/EC.

- (2) Directives 89/665/EEC and 92/13/EEC therefore apply only to contracts falling within the scope of Directives 2004/18/EC and 2004/17/EC as interpreted by the Court of Justice of the European Communities, whatever competitive procedure or means of calling for competition is used, including design contests, qualification systems and dynamic purchasing systems. According to the case law of the Court of Justice, the Member States should ensure that effective and rapid remedies are available against decisions taken by contracting authorities and contracting entities as to whether a particular contract falls within the personal and material scope of Directives 2004/18/EC and 2004/17/EC.
- (3) Consultations of the interested parties and the case law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms

(1) OJ C 93, 27.4.2007, p. 16.

(2) OJ C 146, 30.6.2007, p. 69.

(3) Opinion of the European Parliament of 21 June 2007 (not yet published in the Official Journal) and Council Decision of 15 November 2007.

(4) OJ L 395, 30.12.1989, p. 33. Directive as amended by Directive 92/50/EEC (OJ L 209, 24.7.1992, p. 1).

(5) OJ L 76, 23.3.1992, p. 14. Directive as last amended by Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).

(6) OJ L 134, 30.4.2004, p. 114. Directive as last amended by Directive 2006/97/EC.

(7) OJ L 134, 30.4.2004, p. 1. Directive as last amended by Directive 2006/97/EC.

established by Directives 89/665/EEC and 92/13/EEC do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected. Consequently, the guarantees of transparency and non-discrimination sought by those Directives should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by Directives 2004/18/EC and 2004/17/EC. Directives 89/665/EEC and 92/13/EEC should therefore be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained.

- (4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not.
- (5) The duration of the minimum standstill period should take into account different means of communication. If rapid means of communication are used, a shorter period can be provided for than if other means of communication are used. This Directive only provides for minimum standstill periods. Member States are free to introduce or to maintain periods which exceed those minimum periods. Member States are also free to decide which period should apply, if different means of communication are used cumulatively.
- (6) The standstill period should give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure. When the award decision is notified to them, the tenderers concerned should be given the relevant information which is essential for them to seek effective review. The same applies accordingly to candidates to the extent that the contracting authority or contracting entity has not made available in due time information about the rejection of their application.
- (7) Such relevant information includes, in particular, a summary of the relevant reasons as set out in Article 41 of Directive 2004/18/EC and Article 49 of Directive 2004/17/EC. As the duration of the standstill period varies from one Member State to another, it is also important that the tenderers and candidates concerned should be informed of the effective period available to them to bring review proceedings.
- (8) This type of minimum standstill period is not intended to apply if Directive 2004/18/EC or Directive 2004/17/EC does not require prior publication of a contract notice in the *Official Journal of the European Union*, in particular in cases of extreme urgency as provided for in Article 31(1)(c) of Directive 2004/18/EC or Article 40(3)(d) of Directive 2004/17/EC. In those cases it is sufficient to provide for effective review procedures after the conclusion of the contract. Similarly, a standstill period is not necessary if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned. In this case there is no other person remaining in the tendering procedure with an interest in receiving the notification and in benefiting from a standstill period to allow for effective review.
- (9) Finally, in cases of contracts based on a framework agreement or a dynamic purchasing system, a mandatory standstill period could have an impact on the efficiency gains intended by those tendering procedures. Member States should be able therefore, instead of introducing a mandatory standstill period, to provide for ineffectiveness as an effective sanction in accordance with Article 2d of both Directives 89/665/EEC and 92/13/EEC for infringements of the second indent of the second subparagraph of Article 32(4) and of Article 33(5) and (6) of Directive 2004/18/EC, and of Article 15(5) and (6) of Directive 2004/17/EC.
- (10) In the cases referred to in Article 40(3)(i) of Directive 2004/17/EC, contracts based on a framework agreement do not require prior publication of a contract notice in the *Official Journal of the European Union*. In those cases a standstill period should not be mandatory.
- (11) When a Member State requires a person intending to use a review procedure to inform the contracting authority or contracting entity of that intention, it is necessary to make it clear that this should not affect the standstill period or any other period to apply for review. Furthermore, when a Member State requires that the person concerned has first sought a review with the contracting authority or contracting entity, it is necessary that this person should have a reasonable minimum period within which to refer to the competent review body before the conclusion of the contract, in the event that that person should wish to challenge the reply or lack of reply from the contracting authority or contracting entity.

- (12) Seeking review shortly before the end of the minimum standstill period should not have the effect of depriving the body responsible for review procedures of the minimum time needed to act, in particular to extend the standstill period for the conclusion of the contract. It is thus necessary to provide for an independent minimum standstill period that should not end before the review body has taken a decision on the application. This should not prevent the review body from making a prior assessment of whether the review as such is admissible. Member States may provide that this period shall end either when the review body has taken a decision on the application for interim measures, including on a further suspension of the conclusion of the contract, or when the review body has taken a decision on the merits of the case, in particular on the application for the setting aside of an unlawful decision.
- (13) In order to combat the illegal direct award of contracts, which the Court of Justice has called the most serious breach of Community law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.
- (14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete. Direct awards within the meaning of this Directive should include all contract awards made without prior publication of a contract notice in the *Official Journal of the European Union* within the meaning of Directive 2004/18/EC. This corresponds to a procedure without prior call for competition within the meaning of Directive 2004/17/EC.
- (15) Possible justifications for a direct award within the meaning of this Directive may include the exemptions in Articles 10 to 18 of Directive 2004/18/EC, the application of Article 31, Article 61 or Article 68 of Directive 2004/18/EC, the award of a service contract in accordance with Article 21 of Directive 2004/18/EC or a lawful 'in-house' contract award following the interpretation of the Court of Justice.
- (16) The same applies to contracts which meet the conditions for an exclusion or special arrangements in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of Directive 2004/17/EC, to cases involving the application of Article 40(3) of Directive 2004/17/EC or to the award of a service contract in accordance with Article 32 of Directive 2004/17/EC.
- (17) A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.
- (18) In order to prevent serious infringements of the standstill obligation and automatic suspension, which are prerequisites for effective review, effective sanctions should apply. Contracts that are concluded in breach of the standstill period or automatic suspension should therefore be considered ineffective in principle if they are combined with infringements of Directive 2004/18/EC or Directive 2004/17/EC to the extent that those infringements have affected the chances of the tenderer applying for review to obtain the contract.
- (19) In the case of other infringements of formal requirements, Member States might consider the principle of ineffectiveness to be inappropriate. In those cases Member States should have the flexibility to provide for alternative penalties. Alternative penalties should be limited to the imposition of fines to be paid to a body independent of the contracting authority or entity or to a shortening of the duration of the contract. It is for Member States to determine the details of alternative penalties and the rules of their application.
- (20) This Directive should not exclude the application of stricter sanctions in accordance with national law.
- (21) The objective to be achieved where Member States lay down the rules which ensure that a contract shall be considered ineffective is that the rights and obligations of the parties under the contract should cease to be enforced and performed. The consequences resulting from a contract being considered ineffective should be determined by national law. National law may therefore, for example, provide for the retroactive cancellation of all contractual obligations (*ex tunc*) or conversely limit the scope of the cancellation to those obligations which would still have to be performed (*ex nunc*). This should not lead to the absence of forceful penalties if the obligations deriving from a contract have already been fulfilled either entirely or almost entirely. In such cases Member States should provide for alternative penalties as well, taking into account the extent to which a contract remains in force in accordance with national law. Similarly, the consequences concerning the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible, are to be determined by national law.

- (22) However, in order to ensure the proportionality of the sanctions applied, Member States may grant the body responsible for review procedures the possibility of not jeopardising the contract or of recognising some or all of its temporal effects, when the exceptional circumstances of the case concerned require certain overriding reasons relating to a general interest to be respected. In those cases alternative penalties should be applied instead. The review body independent of the contracting authority or contracting entity should examine all relevant aspects in order to establish whether overriding reasons relating to a general interest require that the effects of the contract should be maintained.
- (23) In exceptional cases the use of the negotiated procedure without publication of a contract notice within the meaning of Article 31 of Directive 2004/18/EC or Article 40(3) of Directive 2004/17/EC is permitted immediately after the cancellation of the contract. If in those cases, for technical or other compelling reasons, the remaining contractual obligations can, at that stage, only be performed by the economic operator which has been awarded the contract, the application of overriding reasons might be justified.
- (24) Economic interests in the effectiveness of a contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned should not constitute overriding reasons.
- (25) Furthermore, the need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective.
- (26) In order to avoid legal uncertainty which may result from ineffectiveness, Member States should provide for an exemption from any finding of ineffectiveness in cases where the contracting authority or contracting entity considers that the direct award of any contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directives 2004/18/EC and 2004/17/EC and has applied a minimum standstill period allowing for effective remedies. The voluntary publication which triggers this standstill period does not imply any extension of obligations deriving from Directive 2004/18/EC or Directive 2004/17/EC.
- (27) As this Directive strengthens national review procedures, especially in cases of an illegal direct award, economic operators should be encouraged to make use of these new mechanisms. For reasons of legal certainty the enforceability of the ineffectiveness of a contract is limited to a certain period. The effectiveness of these time limits should be respected.
- (28) Strengthening the effectiveness of national review procedures should encourage those concerned to make greater use of the possibilities for review by way of interlocutory procedure before the conclusion of a contract. In those circumstances, the corrective mechanism should be refocused on serious infringements of Community law on public procurement.
- (29) The voluntary attestation system provided for by Directive 92/13/EEC, whereby contracting entities have the possibility of having the conformity of their award procedures established through periodic examinations, has been virtually unused. It cannot thus achieve its objective of preventing a significant number of infringements of Community law on public procurement. On the other hand, the requirement imposed on Member States by Directive 92/13/EEC to ensure the permanent availability of bodies accredited for this purpose can represent an administrative maintenance cost which is no longer justified in the light of the lack of real demand by contracting entities. For these reasons, the attestation system should be abolished.
- (30) Similarly, the conciliation mechanism provided for by Directive 92/13/EEC has not elicited any real interest from economic operators. This is due both to the fact that it does not of itself make it possible to obtain binding interim measures likely to prevent in time the illegal conclusion of a contract, and also to its nature, which is not readily compatible with observance of the particularly short deadlines applicable to reviews seeking interim measures and the setting aside of decisions taken unlawfully. In addition, the potential effectiveness of the conciliation mechanism has been weakened further by the difficulties encountered in establishing a complete and sufficiently wide list of independent conciliators in each Member State, available at any time and capable of dealing with conciliation requests at very short notice. For these reasons, the conciliation mechanism should be abolished.
- (31) The Commission should be entitled to request Member States to provide it with information on the operation of national review procedures proportionate to the objective pursued by involving the Advisory Committee for Public Contracts in determining the extent and nature of such information. Indeed, only by making such information available will it be possible to assess correctly the effects of the changes introduced by this Directive at the end of a significant period of implementation.

(32) The Commission should review progress made in the Member States and report to the European Parliament and to the Council on the effectiveness of this Directive no later than three years after its deadline for implementation.

(33) The measures necessary for the implementation of Directives 89/665/EEC and 92/13/EEC should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission <sup>(1)</sup>.

(34) Since, for the reasons stated above, the objective of this Directive, namely improving the effectiveness of review procedures concerning the award of contracts falling within the scope of Directives 2004/18/EC and 2004/17/EC, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective, while respecting the principle of the procedural autonomy of the Member States.

(35) In accordance with point 34 of the Interinstitutional Agreement on better law-making <sup>(2)</sup>, Member States should draw up, for themselves and in the interests of the Community, their own tables illustrating the correlation between this Directive and the transposition measures, and make them public.

(36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.

(37) Directives 89/665/EEC and 92/13/EEC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

**Amendments to Directive 89/665/EEC**

Directive 89/665/EEC is hereby amended as follows:

1. Articles 1 and 2 shall be replaced by the following:

*'Article 1*

**Scope and availability of review procedures**

1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts <sup>(\*)</sup>, unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

<sup>(1)</sup> OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

<sup>(2)</sup> OJ C 321, 31.12.2003, p. 1.

4. Member States may require that the person wishing to use a review procedure has notified the contracting authority of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.

5. Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

#### Article 2

##### Requirements for review procedures

1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.

6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

8. Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

(\*) OJ L 134, 30.4.2004, p. 114. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).;

2. the following articles shall be inserted:

*'Article 2a*

#### **Standstill period**

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/18/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with

effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

- a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive, and,
- a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

*Article 2b*

#### **Derogations from the standstill period**

Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

- (a) if Directive 2004/18/EC does not require prior publication of a contract notice in the *Official Journal of the European Union*;
- (b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;
- (c) in the case of a contract based on a framework agreement as provided for in Article 32 of Directive 2004/18/EC and in the case of a specific contract based on a dynamic purchasing system as provided for in Article 33 of that Directive.

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:

- there is an infringement of the second indent of the second subparagraph of Article 32(4) or of Article 33(5) or (6) of Directive 2004/18/EC, and,
- the contract value is estimated to be equal to or to exceed the thresholds set out in Article 7 of Directive 2004/18/EC.

#### Article 2c

##### Time limits for applying for review

Where a Member State provides that any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/18/EC must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The communication of the contracting authority's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

#### Article 2d

##### Ineffectiveness

1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

- (a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/18/EC;

- (b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/18/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

- (c) in the cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system.

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

3. Member States may provide that the review body independent of the contracting authority may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.

Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

- the contracting authority considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/18/EC,
- the contracting authority has published in the *Official Journal of the European Union* a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:

- the contracting authority considers that the award of a contract is in accordance with the second indent of the second subparagraph of Article 32(4) or with Article 33(5) and (6) of Directive 2004/18/EC,
- the contracting authority has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, to the tenderers concerned, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

#### Article 2e

#### Infringements of this Directive and alternative penalties

1. In the case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) which is not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority shall decide, after

having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

- the imposition of fines on the contracting authority; or,
- the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.

#### Article 2f

#### Time limits

1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:

(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

- the contracting authority published a contract award notice in accordance with Articles 35(4), 36 and 37 of Directive 2004/18/EC, provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*, or
- the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive. This option also applies to the cases referred to in Article 2b(c) of this Directive;

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.;

3. Article 3 shall be replaced by the following:

'Article 3

#### **Corrective mechanism**

1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 2004/18/EC.

2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected;

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a).

4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That notification shall

confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.;

4. the following articles shall be inserted:

'Article 3a

#### **Content of a notice for voluntary ex ante transparency**

The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:

(a) the name and contact details of the contracting authority;

(b) a description of the object of the contract;

(c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*;

(d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and

(e) where appropriate, any other information deemed useful by the contracting authority.

Article 3b

#### **Committee procedure**

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 (\*) (hereinafter referred to as the Committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (\*\*) shall apply, having regard to the provisions of Article 8 thereof.

(\*) OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).

(\*\*) OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).;

5. Article 4 shall be replaced by the following:

'Article 4

#### **Implementation**

1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures.

2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3).;

6. the following article shall be inserted:

'Article 4a

#### **Review**

No later than 20 December 2012, the Commission shall review the implementation of this Directive and report to the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.;

#### *Article 2*

#### **Amendments to Directive 92/13/EEC**

Directive 92/13/EEC is hereby amended as follows:

1. Article 1 shall be replaced by the following:

'Article 1

#### **Scope and availability of review procedures**

1. This Directive applies to contracts referred to in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (\*), unless such contracts are excluded in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive.

Contracts within the meaning of this Directive include supply, works and service contracts, framework agreements and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive

2004/17/EC, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim in respect of harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

4. Member States may require that the person wishing to use a review procedure has notified the contracting entity of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.

5. Member States may require that the person concerned first seek review with the contracting entity. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting entity has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contracting entity has sent a reply or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

(\*) OJ L 134, 30.4.2004, p. 1. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).;

2. Article 2 shall be amended as follows:

(a) the title 'Requirements for review procedures' shall be inserted;

(b) paragraphs 2 to 4 shall be replaced by the following:

'2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting entity, reviews a contract award decision, Member States shall ensure that the contracting entity cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

3a. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

4. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.'

(c) paragraph 6 shall be replaced by the following:

'6. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may

provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.'

(d) in the first subparagraph of paragraph 9, the words 'court or tribunal within the meaning of Article 177 of the Treaty' shall be replaced by the words 'court or tribunal within the meaning of Article 234 of the Treaty';

3. the following articles shall be inserted:

'Article 2a

#### **Standstill period**

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting entities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/17/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting entity has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

- a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC, and,
- a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

#### Article 2b

#### Derogations from the standstill period

Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

- (a) if Directive 2004/17/EC does not require prior publication of a notice in the *Official Journal of the European Union*;
- (b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;
- (c) in the case of specific contracts based on a dynamic purchasing system as provided for in Article 15 of Directive 2004/17/EC.

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:

- there is an infringement of Article 15(5) or (6) of Directive 2004/17/EC, and,
- the contract value is estimated to be equal to or to exceed the thresholds set out in Article 16 of Directive 2004/17/EC.

#### Article 2c

#### Time limits for applying for review

Where a Member State provides that any application for review of a contracting entity's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/17/EC must be made before the expiry of a specified period, this period shall

be at least 10 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of receipt of the contracting entity's decision. The communication of the contracting entity's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for a review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

#### Article 2d

#### Ineffectiveness

1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

- (a) if the contracting entity has awarded a contract without prior publication of a notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/17/EC;
- (b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/17/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;
- (c) in cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a dynamic purchasing system.

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

3. Member States may provide that the review body independent of the contracting entity may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.

Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

- the contracting entity considers that the award of a contract without prior publication of a notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/17/EC,

- the contracting entity has published in the *Official Journal of the European Union* a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and,

- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:

- the contracting entity considers that the award of a contract is in accordance with Article 15(5) and (6) of Directive 2004/17/EC,

- the contracting entity has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, to the tenderers concerned, and,

- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

#### Article 2e

#### Infringements of this Directive and alternative penalties

1. In case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting entity shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

- the imposition of fines on the contracting entity; or,

- the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting entity and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.

*Article 2f***Time limits**

1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:

(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

— the contracting entity published a contract award notice in accordance with Articles 43 and 44 of Directive 2004/17/EC, provided that this notice includes the justification of the decision of the contracting entity to award the contract without prior publication of a notice in the *Official Journal of the European Union*, or

— the contracting entity informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC. This option also applies to the cases referred to in Article 2b(c) of this Directive;

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.;

4. Articles 3 to 7 shall be replaced by the following:

*'Article 3a***Content of a notice for voluntary ex ante transparency**

The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:

(a) the name and contact details of the contracting entity;

(b) a description of the object of the contract;

(c) a justification of the decision of the contracting entity to award the contract without prior publication of a notice in the *Official Journal of the European Union*;

(d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and

(e) where appropriate, any other information deemed useful by the contracting entity.

*Article 3b***Committee procedure**

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 (\*) (hereinafter referred to as the Committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (\*\*) shall apply, having regard to the provisions of Article 8 thereof.

(\*) OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).

(\*\*) OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).;

5. Article 8 shall be replaced by the following:

*'Article 8***Corrective mechanism**

1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of procurement has been committed during a contract award procedure falling within the scope of Directive 2004/17/EC, or in relation to Article 27(a) of that Directive in the case of contracting entities to which that provision applies.

2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected;

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting entity on its own initiative or on the basis of the powers specified in Article 2(1)(a).

4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State concerned shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That new notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.;

6. Articles 9 to 12 shall be replaced by the following:

*Article 12*

#### **Implementation**

1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures.

2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3).

*Article 12a*

#### **Review**

No later than 20 December 2012, the Commission shall review the implementation of this Directive and report to

the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.;

7. the Annex shall be deleted.

*Article 3*

#### **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 20 December 2009. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 4*

#### **Entry into force**

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

*Article 5*

#### **Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 11 December 2007.

For the European Parliament  
The President  
H.-G. PÖTTERING

For the Council  
The President  
M. LOBO ANTUNES



# Public Services (Social Value) Act 2012

## CHAPTER 3

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Explanatory Notes have been produced to assist in the understanding of this Act and are available separately

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£5.75





# Public Services (Social Value) Act 2012

## CHAPTER 3

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- 1 Contracts of relevant authorities
- 2 Local authority contracts
- 3 Financial provisions
- 4 Short title, commencement and extent





# Public Services (Social Value) Act 2012

## 2012 CHAPTER 3

An Act to require public authorities to have regard to economic, social and environmental well-being in connection with public services contracts; and for connected purposes. [8th March 2012]

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

### 1 Contracts of relevant authorities

- (1) If a relevant authority proposes to procure or make arrangements for procuring the provision of services, or the provision of services together with the purchase or hire of goods or the carrying out of works, by—
  - (a) entering into a public services contract that is not a contract based on a framework agreement, or
  - (b) concluding a framework agreement as regards which public services contracts are likely to constitute the greater part by value of the contracts based on the agreement,
 it must comply with the requirements in subsections (3), (6) and (7) before starting the process of procurement.
- (2) The authority is to be treated for the purposes of subsection (1) as having started the process of procurement as regards what is proposed to be procured as soon as it takes whichever of the following steps is the first to occur—
  - (a) sending a notice to the Official Journal of the European Union for the purpose of inviting tenders, requests to be selected to tender or to negotiate or requests to participate in relation to a public services contract or framework agreement relating to what is proposed to be procured;
  - (b) publishing an advertisement seeking offers or expressions of interest in relation to such a contract or framework agreement;
  - (c) contacting a person in order to seek an offer or expression of interest in relation to such a contract or framework agreement;

- (d) contacting a person in order to respond to an unsolicited offer or expression of interest in relation to such a contract or framework agreement;
  - (e) entering into such a contract or concluding such a framework agreement.
- (3) The authority must consider—
- (a) how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area, and
  - (b) how, in conducting the process of procurement, it might act with a view to securing that improvement.
- (4) In subsection (3) “the relevant area” means the area consisting of the area or areas of the one or more relevant authorities on whose behalf a public services contract is, or contracts based on a framework agreement are, intended to be made.
- (5) For the purposes of subsection (4) the area of a relevant authority is an area consisting of the area or areas by reference to which the authority primarily exercises its functions, disregarding any areas outside the United Kingdom.
- (6) The authority must consider under subsection (3)(b) only matters that are relevant to what is proposed to be procured and, in doing so, must consider the extent to which it is proportionate in all the circumstances to take those matters into account.
- (7) The authority must consider whether to undertake any consultation as to the matters that fall to be considered under subsection (3).
- (8) If an urgent need to arrange the procurement in question makes it impractical to comply with the requirements in subsections (3), (6) and (7) before the time indicated by subsection (1), a relevant authority may disregard the requirements to the extent that it is not practical to comply with them.
- (9) Subsection (8) does not apply to the extent that the time available is reduced by undue delay on the part of the authority after this section has come into force.
- (10) Failure to comply with subsection (1), (3), (6) or (7) does not affect the validity of anything done in order to comply with the Regulations.
- (11) The following are not required to comply with subsections (1), (3), (6) and (7)—
- (a) the Welsh Ministers;
  - (b) the First Minister for Wales;
  - (c) the Counsel General to the Welsh Assembly Government;
  - (d) the National Assembly for Wales Commission;
  - (e) a relevant authority whose functions are wholly or mainly Welsh devolved functions.
- (12) For the purposes of subsection (11) a function of a relevant authority is a Welsh devolved function if—
- (a) provision conferring or imposing that function upon the authority is within the legislative competence of the National Assembly for Wales, or
  - (b) provision conferring or imposing that function upon the authority is made by the Welsh Ministers.

- (13) This section has effect in relation to a relevant authority’s proposed procurement or arrangements for procurement only if the public services contract or framework agreement in contemplation is such that the Regulations would have effect in relation to it.
- (14) If anything done before the commencement of this section would to any extent have satisfied the requirements in subsections (1), (3), (6) and (7) if done after that commencement, the requirements are to that extent to be treated as satisfied.
- (15) In this section—
- “framework agreement” has the same meaning as in the Regulations, and a reference to a contract based on a framework agreement is a reference to a contract entered into on terms established by such an arrangement;
  - “public services contract” has the same meaning as in the Regulations (and includes a contract that is treated as being a public services contract by the Regulations);
  - “the Regulations” means the Public Contracts Regulations 2006 (S.I. 2006/5), or any regulations replacing those regulations, as from time to time amended;
  - “relevant authority” means a person or body that is a contracting authority for the purposes of the Regulations.

## 2 Local authority contracts

In section 17 of the Local Government Act 1988 (exclusion of non-commercial considerations in the case of local and other public authority contracts), after subsection (10) insert—

- “(11) This section does not prevent a public authority to which it applies from exercising any function regulated by this section with reference to a non-commercial matter to the extent that the authority considers it necessary or expedient to do so to enable or facilitate compliance with a duty imposed on it by section 1 of the Public Services (Social Value) Act 2012.”

## 3 Financial provisions

There is to be paid out of money provided by Parliament any expenditure incurred in consequence of this Act by a Minister of the Crown, government department or other public authority.

## 4 Short title, commencement and extent

- (1) This Act may be cited as the Public Services (Social Value) Act 2012.
- (2) Section 3 and this section come into force on the day on which this Act is passed.
- (3) Sections 1 and 2 come into force on such day as a Minister of the Crown may by order made by statutory instrument appoint.
- (4) This Act extends to England and Wales.

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# Small Business, Enterprise and Employment Act 2015

## CHAPTER 26

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- (3) Neither the exempt person, nor any person who is (or is acting as) a member, officer or member of staff of the exempt person, is to be liable in damages for anything done, or omitted to be done, for the purposes of or in connection with—
  - (a) the carrying on of those section 16(2) activities of the exempt person that are specified in relation to that person, or
  - (b) the purported carrying on of any such activities.
- (4) Subsection (3) does not apply—
  - (a) if the act or omission is shown to have been in bad faith, or
  - (b) so as to prevent an award of damages in respect of the act or omission on the grounds that it was unlawful as a result of section 6(1) of the Human Rights Act 1998 (acts of public authorities incompatible with Convention rights).
- (5) In this section—
 

“section 16(2) activities” means activities concerned with any of the matters within section 16(2);

“specified” means specified in an order or regulations under this section.
- (6) Orders and regulations under this section—
  - (a) are to be made by statutory instrument;
  - (b) may make different provision for different cases;
  - (c) may make transitional provision and savings.
- (7) A statutory instrument containing an order or regulations under this section is subject to annulment in pursuance of a resolution of either House of Parliament, subject to subsection (8).
- (8) An order or regulations under this section may be included in a statutory instrument which may not be made unless a draft of the instrument is laid before, and approved by a resolution of, each House of Parliament.”
- (2) Omit section 18 of that Act (exemption from liability for bodies to whom grants are paid).
- (3) In section 66(2) of that Act (provisions extending to Northern Ireland) for “18” substitute “18A”.

### PART 3

#### PUBLIC SECTOR PROCUREMENT

#### 39 Regulations about procurement

- (1) The Minister for the Cabinet Office or the Secretary of State may by regulations impose on a contracting authority duties in respect of the exercise of its functions relating to procurement.
- (2) For the purposes of this section “the exercise of functions relating to procurement” includes the exercise of functions in preparation for entering into contracts and in the management of contracts.

- (3) Subject to subsection (4), “contracting authority” has the same meaning as in regulation 2 of the Public Contracts Regulations 2015 (S.I. 2015/102), or any regulation replacing that regulation, as from time to time amended.
- (4) But such an authority is not a contracting authority for the purposes of this section if its functions are wholly or mainly devolved functions, namely –
  - (a) Scottish devolved functions, that is to say functions the exercise of which would be within devolved competence (within the meaning of section 54 of the Scotland Act 1998);
  - (b) Northern Ireland devolved functions, that is to say functions which could be conferred by provision included in an Act of the Northern Ireland Assembly made without the consent of the Secretary of State (see sections 6 to 8 of the Northern Ireland Act 1998), or
  - (c) Welsh devolved functions, that is to say functions which could be conferred by provision falling within the legislative competence of the National Assembly for Wales (as defined in section 108 of the Government of Wales Act 2006).
- (5) Regulations under this section may, in particular, impose –
  - (a) duties to exercise functions relating to procurement in an efficient and timely manner;
  - (b) duties relating to the process by which contracts are entered into (including timescales and the extent and manner of engagement with potential parties to a contract);
  - (c) duties to make available without charge –
    - (i) information or documents;
    - (ii) any process required to be completed in order to bid for a contract;
  - (d) duties relating to the acceptance of invoices by electronic means (including a prohibition on the charging of fees for processing such invoices, the publication of reports relating to the number of such invoices received or the electronic systems that must be used by a contracting authority);
  - (e) duties to publish reports about compliance with the regulations.
- (6) A person making regulations under this section must before making the regulations undertake such consultation as the person considers appropriate.
- (7) The Minister for the Cabinet Office or the Secretary of State may issue guidance relating to regulations under this section.
- (8) A contracting authority must have regard to any guidance for the time being in force under this section.
- (9) Guidance or revised guidance given under this section must be published.
- (10) Regulations under this section are subject to affirmative resolution procedure.

#### **40 Investigation of procurement functions**

- (1) In this section “a Minister” means the Minister for the Cabinet Office or the Secretary of State.
- (2) A Minister may investigate the exercise by a contracting authority of relevant functions relating to procurement.

- (3) A Minister may by notice require a contracting authority to provide such documents or other information, in such form or manner as the Minister may direct, as the Minister may require for the purposes of an investigation under this section.
- (4) A contracting authority must—
- (a) give a Minister such assistance with an investigation as is reasonable in all the circumstances of the case;
  - (b) comply with a notice under subsection (3) before the end of the period of 30 days beginning with the day on which the notice is given.
- (5) In this section—
- “contracting authority” has the same meaning as in section 39, but does not include a Minister of the Crown or a government department;
- “a relevant function relating to procurement” is a function to which—
- (a) the Public Contracts Regulations 2006 (S.I. 2006/5) apply, disregarding for this purpose the operation of regulation 8 (thresholds),
  - (b) the Defence and Security Public Contracts Regulations 2011 (S.I. 2011/1848) apply, disregarding for this purpose the operation of regulation 9 (thresholds),
  - (c) the Public Contracts (Scotland) Regulations 2012 (S.S.I. 2012/88) apply, disregarding for this purpose the operation of regulation 8 (thresholds), or
  - (d) the Public Contracts Regulations 2015 (S.I. 2015/102) apply, disregarding for this purpose the operation of any financial threshold provided for by those regulations;
- a reference to regulations includes a reference to any regulations replacing those regulations, as from time to time amended.
- (6) An investigation under this section may also include an investigation of—
- (a) preparations for the exercise of a relevant function relating to procurement, and
  - (b) the management of a contract entered into in the exercise of such a function.
- (7) But the exercise of a function—
- (a) by—
    - (i) the governing body of a maintained school (see section 19 of the Education Act 2002), or
    - (ii) a person who is the proprietor of an Academy (see section 17(4) of the Academies Act 2010 and section 579(1) of the Education Act 1996), or
  - (b) which is regulated by the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (S.I. 2013/500) (functions relating to the procurement of health care services for the purposes of the NHS),
- may not be investigated under this section.
- (8) A person conducting an investigation under this section may publish the results of the investigation.



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## The Public Contracts Regulations 2015

### **Guidance on changes to procedures**

**(Competitive procedure with negotiation, competitive dialogue & innovation partnerships)**

## **Overview**

### **What is covered in this guidance?**

This guidance covers changes to competitive dialogue and the competitive procedure with negotiation and the new innovation partnerships approach.

### **What has changed?**

The main changes to Competitive Dialogue and Competitive Procedure with Negotiation are:

- the grounds for using the competitive procedure with negotiation and the competitive dialogue procedure have been made the same; and
- these grounds have been broadened, so that more procurements could be carried out using these procedures.

Also, innovation partnerships have been introduced to allow contracting authorities and suppliers/service providers to work together through a Partnership Agreement to develop new products, works or services, where these are not already available on the market. Following a contract notice and negotiation to choose the most suitable partner or partners, the innovation partnership will then be structured in successive phases which could eventually include the manufacturing of the product or the provision of a service.

### **Why is this helpful/necessary?**

The UK has pressed for a long time for more flexibility to use negotiation to achieve the best commercial outcomes. The wider ability to use the competitive procedure with negotiation and competitive dialogue, together with the introduction of innovation partnerships, gives purchasers the toolbox to achieve such outcomes.

### **Which rules do I need to refer to?**

The relevant Regulations are:

- 29 for competitive procedure with negotiation,
- 30 for competitive dialogue and
- 31 for innovation partnership.

These Regulations are attached for quick reference at **Annex A**, as is Regulation 26(4), which sets out the grounds for using the competitive procedure with negotiation and competitive dialogue.

### **Key points**

#### **Competitive procedure with Negotiation (CPN) and Competitive Dialogue (CD)**

The need for purchasers to be able to use a procedure which provides for negotiations is acknowledged in the recitals to the Public Sector Directive (2014/24/EU). Recital 42 comments that there is a great need for contracting authorities to have additional flexibility to choose a procurement procedure which provides for negotiations and that a greater use of these procedures is likely to increase cross border trade. The UK pressed strongly for this flexibility in the negotiations. The recital also notes that, in terms of contract values, there has been an increased use of competitive dialogue, which is helpful in cases where a contracting authority is unable to define up front the means of satisfying their needs.

The grounds for using either CD or CPN are as follows:

- Where needs cannot be met without adaptation of readily available solutions (new justification)
- Where the contract includes design or innovative solutions (new justification)
- Where the requirement is complex in nature, in its legal and financial make-up or because of its risks (extended version of the current justification for competitive dialogue)
- Where the technical specifications cannot be established with sufficient precision (as current negotiated procedure with a call for competition)
- In the case of unacceptable/irregular tenders (as current negotiated procedure with a call for competition)

These grounds offer considerable scope to use these procedures, but recital 43 comments that CPN and CD should not be used for off-the-shelf services or products, which can be provided by many different operators on the market.

#### **Competitive procedure with negotiation.**

In the previous public sector Directive (2004/18/EC,) the process set out for conducting the negotiated procedure with a call for competition was fairly minimal. As the grounds for using CPN have been broadened and as a result it is likely to be used more frequently, various safeguards concerning the conduct of the procedure have been added to ensure equal treatment and transparency.

These safeguards include;

- Setting minimum requirements at the beginning and not changing them during the negotiations (Regulation 29 (14));
- Having stable award criteria and weighting throughout the process (Regulation 29 (14));
- Informing tenderers in writing of any changes to the technical specifications (Regulation 29 (16) b);
- Not revealing confidential information from a candidate or tenderer to other participants without its specific consent (Regulation 29 (17));
- Documenting all stages of the process (Regulation 84(7)) ; and
- The submission of all tenders in writing (recital 45 of 2014/24/EU).

In terms of the process, negotiations may take place:

- On all aspects, other than the minimum requirements, such as quality, quantities, commercial clauses, social, environmental and innovative aspects (recital 45 of 2024/24/EU),
- In stages with successive elimination by applying the award criteria (Regulation 29 (19)), and
- On all tenders but the final one (Regulation 29 (13)).

## **Competitive dialogue**

Apart from the broader grounds for its use, the competitive dialogue procedure has not changed much from the approach adopted when it was introduced in 2004/18/EC.

The changes include:

- An obligation to set out an indicative time frame for the dialogue (Regulation 30 (7))
- Not revealing confidential information from a candidate or tenderer to other participants without its specific consent (Regulation 30 (10));

- More flexibility following the submission of the final tenders, which may be clarified, specified and optimised (Regulation 30 (17)); and
- More flexibility to negotiate with the winning tenderer to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract (Regulation 30 (20)).

### *Timescales*

As for the other procedures, the applicable time limits for CPN and CD have been shortened. The timescales are set out at page 15 of “A brief guide to the EU Public Contracts Directive (2014)”.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/407236/A\\_Brief\\_Guide\\_to\\_the\\_EU\\_Public\\_Contract\\_Directive\\_2014\\_-\\_Feb\\_2015\\_update.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407236/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Feb_2015_update.pdf).

### **Innovation partnerships**

This new procedure is aimed at encouraging the development of innovative products, services or works, which are not already available on the market. A problem for companies which want to provide such new approaches, is the cost of investing in the development of innovative products or services, without any likelihood that these could be taken through to final production or delivery unless there were further procurement processes after an initial R&D services contract.

The process of awarding a partnership agreement is set out in Regulation 31. The procurement process largely follows the competitive procedure with negotiation. Following a contract notice, the contracting authority receives expressions of interest and negotiates with the potential partner(s) it has selected. The partnership agreement is then awarded to one or more partners on the basis of the best price quality ratio.

Following the award, the structure of the process covers two parts, firstly the development of the innovative product, service or works and then the purchase of the resulting supplies, services or works.

The development phase should:

- Be structured in successive phases following the sequence of steps in the R & D process (Regulation 31(10));
- Set intermediate targets and provide for payment in appropriate instalments (Regulation 31 (11)); and on the basis of these targets,
- Provide an option to terminate after each phase, or where there are several partners, allow for competitive development with the reduction of the number of solutions (Regulation 31 (12)).

The subsequent purchase of the resulting innovative product, service or works can then take place provide that they correspond to the performance levels and maximum costs agreed between the contracting authority and the participants (Regulation 31 (9)).

## Q&A

### **As the grounds for using the competitive negotiated procedure and competitive dialogue are the same, why would one choose one procedure rather than the other?**

This will need to be considered on a case by case basis, but some comments can be made about the respective advantages and disadvantages.

Competitive dialogue was designed for complex projects, where one was not sure of the best way to meet a particular need. In certain cases, this uncertainty could be addressed by pre-market engagement. Recital 42 gives examples of where the use of CD could be 'beneficial'. These include: the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing. Competitive dialogue has flexibility for addressing issues arising from final tenders, whereas there are no provisions relating to post tender negotiation in the competitive procedure with negotiation.

As set out in the main body of the guidance above, the competitive procedure with negotiation is available in a broad range of cases, which will help to get the best commercial outcome, but as for competitive dialogue, it should not be used for off the shelf products or services.

### **How are Innovation Partnerships different from pre-commercial procurement?**

The innovation partnerships approach has been introduced to allow contracting to establish a long-term innovation partnership for the development **and subsequent purchase** of a new, innovative product, service or works. Where the development is successful in terms of delivery to agreed performance and costs, there will not be a need for a separate procurement procedure for the purchase.

### **What is the situation regarding intellectual property rights under Innovation Partnerships?**

One of the problems for contracting authorities under pre-commercial procurement was the difficulty of purchasing the final product at the end of the R&D phase, without either giving the developer an incumbent advantage or inadvertently disclosing their intellectual property. As the innovation partnerships approach can cover the whole process, this problem is alleviated. Regulation 31(22) states that the arrangements applicable to intellectual property rights should be set out in the procurement documents.

## **ANNEX A – Regulations**

### **Choice of procedures**

26 (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.

### **Competitive procedure with negotiation**

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

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.



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## THE PUBLIC CONTRACTS REGULATIONS 2015

### GUIDANCE ON THE STANDSTILL PERIOD

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## **Contents**

### **The Standstill Period**

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  - Key Points in applying the standstill period
  - FAQs
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-

## **OVERVIEW**

### **What is the standstill period?**

The standstill period provides for a short (at least 10 calendar day) pause between the point when the contract award decision is notified to bidders, and the final contract conclusion, during which time suppliers can challenge the decision. It is a legal requirement imposed through the remedies directives.

### **Why is this helpful/necessary?**

The purpose is that for contracts subject to the EU procurement directives, a contract award decision must be open to review before contract conclusion. This enables the award decision to be set aside by a court where an aggrieved bidder has been prejudiced by a breach of the rules. By properly applying the standstill period, authorities can protect themselves from potential ineffectiveness claims (a very serious post-contractual remedy).

### **What has changed?**

The standstill rules are basically the same as they have been since December 2009 when the (then) new remedies directive was implemented. As the remedies directive has not changed, the essence of the standstill rules has not changed either. These rules are now captured in the new Public Contracts Regulations 2015 ('The Regulations').

**There are two changes to be aware of, regarding the application of standstill to:**

- **Contracts subject to the new Light Touch Regime for certain service contracts (LTR); and**
- **Procurements commenced by sub-central authorities using Prior Information Notices (PIN) as a call for competition**

**Both of these points are discussed in the main section below.**

This note then goes on to provide a reminder of the other essential, longstanding requirements.

### **Which rules do I need to refer to**

The standstill rules at Regulations 85 to 87, and rules on automatic suspension during standstill at Regulation 95

## **The Main Area of Change: CCS Recommends the Application of a Standstill Period to above-threshold LTR Contracts**

### *Summary of the Change*

Under the old rules, as "Part B" Service contracts did not need an OJEU contract notice, they did not need a standstill period, and so ineffectiveness could not have been given as a remedy for failure to publish an OJEU contract notice for a Part B Services contract.

**The legal position is less clear under the new rules for the Light-Touch Regime (LTR). A standstill period may not strictly be required, particularly where a Prior Information Notice (PIN) instead of a contract notice has in fact been used to call for competition. But in the light of uncertainty, CCS suggests that contracting authorities will usually wish to send a standstill notice and observe the standstill period (in the same way as in procurements governed by the main rules), as this will avoid the risk that the contract (or framework agreement) might be subject to the draconian remedy of ineffectiveness if the case law does clarify that these requirements do apply to the LTR.**

On the other hand, where particular circumstances make it important to award the contract urgently, contracting authorities may want to weigh the urgency against the risks of proceeding without a standstill.

These issues apply equally to those procurements by sub-central authorities which are permitted to be commenced by PIN as a call for competition.

It is also good practice to inform participants as soon as possible when they are excluded from a procurement exercise, and the reasons for that exclusion.

Contracts *below* the LTR threshold do not need a standstill period.

## Key Points (these are longstanding requirements that have not changed)

- A “standstill notice” (also referred to as an “award decision notice” or a “Regulation 86 notice”) needs to be sent to all tenderers (which is any tenderer that has not been definitively excluded) and any candidates (candidates being any applicants that have not already been notified of their rejection and the reasons for it).
- The reasons for the award decision must be included with the notice, released at the start of standstill, not given later upon request. This is essentially a written debrief.
- Information about the ending of the standstill period should be included within the standstill notice
- The minimum standstill period is calculated depending on the means of communication used to transmit the standstill notice:
  - i. At least 10 calendar days, when the notice is communicated using electronic means (e.g. fax<sup>1</sup>, email); or
  - ii. When using non-electronic means, there is a choice between either: 15 days from date of sending; or 10 days from date of receipt
- In certain circumstances the standstill period need not be observed. These are:
  - i. Where there is no obligation to advertise the contract in OJEU (eg below-threshold procurements, or negotiated procedures without a call for competition)
  - ii. Where there is only one tenderer remaining and there are no candidates
  - iii. In above-threshold call-off contracts from a framework agreement or Dynamic Purchasing System (DPS), the standstill period is voluntary not mandatory (but we still strongly recommend applying it to protect against possible post-contractual ineffectiveness claims).
- Any legal challenge of the contract award decision prior to entry into the contract (which will most likely be during the standstill period) triggers the automatic suspension of the contract award.
- See the flow-chart overleaf for a quick and easy reminder of the main steps to take

<sup>1</sup> In the Regulations generally, reference is made to facsimile as something different from electronic means, but for convenience this Guidance uses the term ‘electronic means’ to include fax as well as e-mail.

## Main Requirements of the Standstill Notice

- Contracting authorities must as soon as possible after the decision has been made, inform all of the tenderers (ie tenderers that have not already been definitively excluded) and any candidates (i.e. any rejected applicants that have not been informed of the reasons for the rejection of their application) of the decision to:
  - award the contract; or
  - conclude the framework agreement;by sending a standstill notice .
- Where it is to be sent to a tenderer, the standstill notice must include:
  - the criteria for the award of the contract;
  - the reasons for the decision, including: the characteristics and relative advantages of the successful tender; the score (if any) obtained by the economic operator which is to receive the notice and the tenderer to be awarded the contract / become party to the framework agreement;
  - the reasons (if any) why the economic operator did not meet the technical specifications;
  - the name of the tenderer(s) to be awarded the contract / become party to a framework agreement;
  - a precise statement of either:
    - (i) when the standstill period is expected to end and, if relevant, how its ending might be affected by any, and if so what, contingencies; or
    - (ii) the date before which the contracting authority will not, in conformity with regulation 87, enter into the contract or conclude the framework agreement.
- Where it is to be sent to a candidate, the standstill notice must include:
  - the reasons why the candidate was unsuccessful; and
  - all the same information that would be sent to tenderers, except for “relative advantages of the successful tenderer”<sup>2</sup>.

<sup>2</sup> A candidate will, of course, have been given no ‘score’ and so the obligation to include “the score (if any)” of the recipient of the notice will not bite.

## **Frequently asked questions**

Q. How do I comply with the obligation to reveal the “characteristics and relative advantages of the successful tender?”

- To comply with the obligation to reveal the “characteristics and relative advantages of the successful tender”, contracting authorities should release the full breakdown of scores against each criterion and sub-criterion, and support this with narrative explanation of why the winner scored more heavily in the relevant areas
- To reveal the “relative advantages of the successful tender” is to give unsuccessful tenderers a helpful indication of the ways in which the winning tender was better than their offering, but in a sufficiently generic way that does not compromise the confidentiality or intellectual property of the successful tenderer and which may be useful so that unsuccessful tenderers can improve their offerings next time. So the explanation given to each unsuccessful tenderer will need to be bespoke and differ in some ways to the explanations given to other unsuccessful tenderers, as each tender is likely to have different characteristics and therefore the relative advantages of the winning tender to each of the losing tenders will differ.
- Clearly, divulging key innovative features or other confidential aspects offered by the successful tenderer is unlikely to be acceptable. At the other extreme, making comparisons against the published award criteria seems to be clearly acceptable, as the scores of the winner and the tenderer receiving the notice have to be given in any event. Therefore, a relatively safe approach would be to provide a narrative description of the characteristics and relative advantages of the successful tender, in a generic and confidentiality-respecting way, using the award criteria as the basis for comparisons, in the way envisaged in the above examples.

Q. Do I need to do a face-to-face debrief as well as the written debrief in the standstill notice?

- Contracting authorities may still use debriefing sessions where appropriate to explain the outcomes of procurement processes to the participants. However, contracting authorities should be aware that the risks arising from any discrepancy between written and oral debriefing information are high, and so it is important that there is consistency between the legally required information that is provided in written form and any other information that is provided orally. Consequently, where oral debriefing is to be used, a cautious approach is recommended. Such an approach may necessitate carefully planned oral briefings, and clear records being kept of exactly what is said and by whom.

Q. What information is needed in providing information about the ending of the standstill period?

- The key thing that is always needed is to make clear when the standstill period ends. If relevant, the notice must also flag up how the ending might be affected by any contingencies and, if so, what those contingencies are. For instance where the contracting authority is sending at least one of the notices by post, and elects to factor this into the calculation of the standstill period by using the '10 days from receipt' option rather than the '15 days from sending' option. The "precise statement" should be as precise as reasonably can be expected..

Q. Do I have to use electronic communications to send the standstill notice?

- Contracting authorities are obliged to inform economic operators of the award decision in writing by the fastest means practicable, which will in most circumstances be achievable through electronic transmission. In these circumstances, the minimum standstill period is 10 calendar days from the date of sending. This means that the period ends at midnight at the end of the 10th day after the sending date (i.e. counting the day after the sending date as the first day after, etc). We strongly recommend use of electronic means, both for compliance and convenience reasons.

Q. What about procurements using the negotiated procedure without prior publication?

- Where the authority is using this procedure to negotiate with just one bidder from the outset, there is clearly no requirement or useful purpose in applying a standstill period, as no-one other than the single bidder would receive it and who could make a challenge in light of it. However, it is possible that, after the award of the contract, another supplier may feel aggrieved at the absence of a transparent competitive procurement, and challenge the contracting authority's decision that it had legitimate grounds for using this special procedure, and seek a declaration of ineffectiveness. Contracting Authorities can publish a *Voluntary Transparency Notice* instead of a standstill period, to protect against this kind of ineffectiveness claim.

Q. Do I need a standstill period for call-off contracts?

- In above-threshold call-offs from framework agreements and dynamic purchasing systems, to give protection from ineffectiveness claims, a cautious approach would be to send the standstill notice to everyone on the framework/DPS, so as to ensure that parties that were not invited to the mini-competition (who may be aggrieved by their non-invitation) have the chance to seek pre-contractual remedies. Alternatively, if the contracting authority has identified a clear subset of parties on the framework/DPS that have the necessary capability to perform the contract (for example, all the suppliers on the relevant lot), then the authority may prefer to limit the dissemination of the standstill notices to that subset, on the basis that no grievance could be raised by any other framework suppliers. See Regulation 99(7).

Q. What happens when a bidder challenges the award decision?

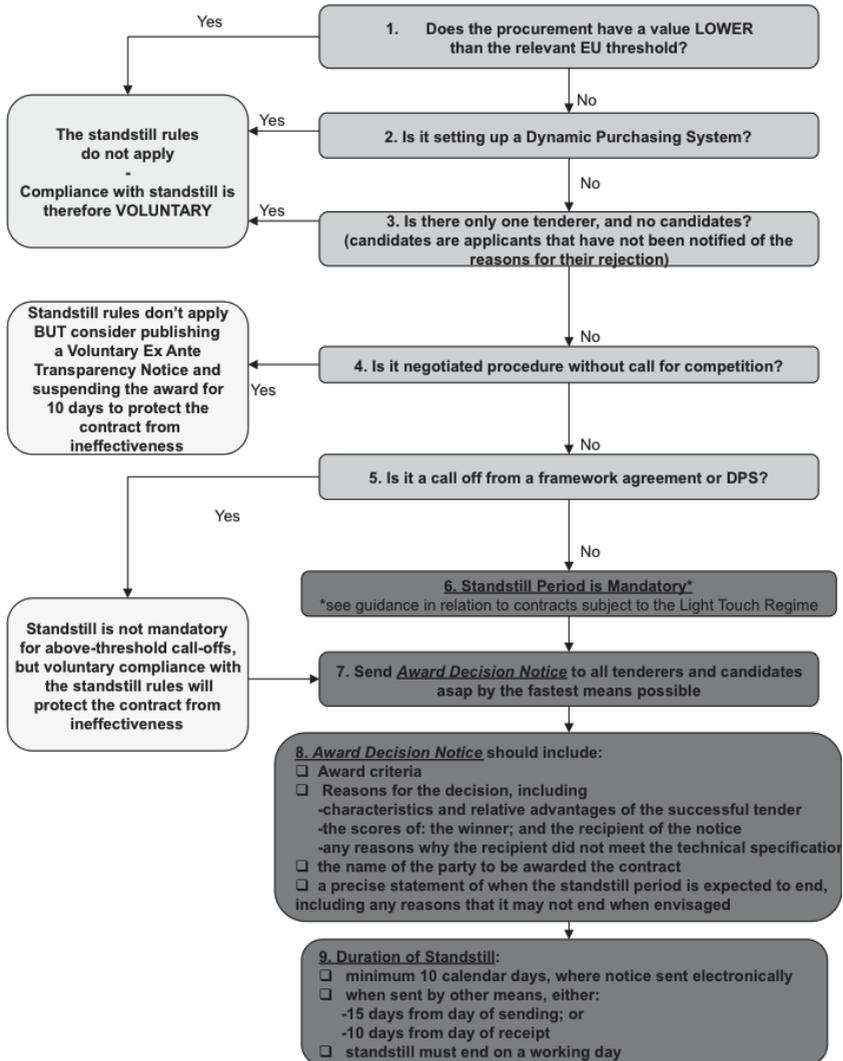
- Contracting authorities are automatically obliged to refrain from entering into the contract when proceedings are brought in respect of the award decision and the contract has not already been entered into (or the framework concluded). An injunction is not necessary to prevent the contract being made. Failure to comply with this requirement can be part of the grounds for an ineffectiveness claim, so it is extremely important that contracting authorities adhere to this requirement. The automatic suspension remains in force until either the court terminates the suspension or the proceedings come to an end. The contracting authority can apply to the Court for the suspension to be terminated, and a contracting authority should take specific legal advice where it would like to evaluate the chances of obtaining such an order.

Q. Do sub-central authorities commencing a procurement using a Prior Information Notice as a call for competition need to apply the standstill period?

- Yes, CCS recommends that standstill is applied in these circumstances, despite the absence of a certain legal position on the matter. The issues discussed at the start of this guidance in relation to LTR contracts apply equally to contracts procured by sub-central authorities using a PIN as call for competition.

## Annex A - Standstill Flow Chart

### Standstill Flow Chart





Crown  
Commercial  
Service

## THE PUBLIC CONTRACTS REGULATIONS 2015

### DYNAMIC PURCHASING SYSTEM

Crown Commercial Service, Customer Service Desk: 0345 410 2222 | [www.gov.uk/ccs](http://www.gov.uk/ccs) | follow us on [Twitter](#) | connect with us on [LinkedIn](#)

## OVERVIEW

### **What is the Dynamic Purchasing System?**

The Dynamic Purchasing System (DPS) is a procedure available for contracts for works, services and goods commonly available on the market. As a procurement tool, it has some aspects that are similar to an electronic framework agreement, but where new suppliers can join at any time. However, it has its own specific set of requirements. It is to be run as a completely electronic process, and should be set up using the restricted procedure and some other conditions (as set out in Regulation 34 of the Public Contracts Regulations 2015).

Contracting authorities, including central purchasing bodies, may set up a DPS. The DPS should be set up for identified types of requirement, which may be divided into categories of products, works or services.

The DPS is a two-stage process. First, in the initial setup stage, all suppliers<sup>1</sup> who meet the selection criteria and are not excluded must be admitted to the DPS. Contracting authorities must not impose any limit on the number of suppliers that may join a DPS. Unlike framework agreements, suppliers can also apply to join the DPS at any point during its lifetime. Individual contracts are awarded during the second stage. In this stage, the authority invites all suppliers on the DPS (or the relevant category within the DPS) to bid for the specific contract. The new directive and Regulations update the existing DPS rules, as discussed below.

### **Why is this helpful / necessary?**

The DPS can streamline procurement for both suppliers and authorities; suppliers don't have to demonstrate suitability and capability every time they wish to compete for a public sector contract, and the award of individual tenders can be quicker than under some other procedures. The DPS is more flexible in some respects than frameworks, particularly as suppliers may join it at any time during its period of validity, meaning that suppliers are not locked out for the duration as they are with traditional frameworks. However the DPS under the old rules was rather cumbersome, so it was little-used either in the UK or in other member States. The new rules provide additional flexibility.

### **What has changed?**

The basic principles remain from the old DPS, but there are several significant changes. Suppliers no longer have to submit an "indicative tender" with their request to join the DPS. The old obligation for authorities to publish a further simplified advertisement in the OJEU each time they wish to award a contract under a DPS no longer applies. The default four-year limit on the duration of a DPS has been removed. These improvements make the DPS significantly more useable and useful.

### **Which rules do I need to refer to?**

Regulation 34 of the PCR 2015 sets out the rules on Dynamic Purchasing Systems. Regulation 34(5) states that in order to procure under a DPS, contracting authorities should

<sup>1</sup> For convenience "supplier" is used in this note to include any economic operator

follow the rules of the restricted procedure, and subject to the provisions of clause 34. Therefore, Regulations that apply to the Restricted Procedure, and to procedures generally, apply to the DPS, except where regulation 34 specifically alters or dis-applies them.

## KEY POINTS

### *Stage 1: Establishing the DPS and adding additional suppliers*

To set up a DPS, a contracting authority must place a call for competition in OJEU to make known the intention to establish a DPS, and suppliers must be allowed at least 30 days to respond. (As with other procedures, sub-central bodies may use a Prior Information Notice to make known their intention). This initial DPS set-up phase only covers the exclusion and selection criteria, as used in other procedures, and as set out in Regulations 57-64 of the PCR 2015. The OJEU contract notice should specify the nature of the requirements and the approximate quantities or values envisaged.

As with other procedures, the procurement documents should be made freely available electronically from the date of the advert. These procurement documents must remain available electronically throughout the duration of the DPS.

A DPS can be divided into categories of works services or goods, which are objectively defined on the basis of characteristics of the procurement to be undertaken under the category. The characteristics used to define a group may include size of contract or geographical area of contract delivery.

If the DPS is divided into categories, the selection requirements for each category should be appropriate to that category, and may vary between categories. In accordance with Regulation 59, suppliers should “self-certify” their compliance with the selection requirements, and confirm that none of the grounds for exclusion apply, in order to gain admittance to the DPS. Normally (subject to Regulation 59(8)), only suppliers who win contracts under the DPS should be expected to provide documentary evidence of their status (consistent with other procedures).

This is also subject to the requirement of Regulation 59(11), so authorities should not request supporting documents where they already hold them or can obtain relevant information from a national database. Where a supplier has already submitted documents under a previous contract (DPS or indeed otherwise) it should be asked to confirm these are still applicable, and only provide new documents as preceding ones expire, or circumstances change. Where CPBs set up DPSs it would be sensible for the CPB to hold information about the evidence submitted, and make this available to its own customers.

All suppliers who meet and pass the exclusion and selection criteria must be admitted to the DPS and/or the relevant categories within it.

Suppliers may join the DPS at any point during its validity if they satisfy the selection requirements, and none of the grounds for exclusion apply. The authority is required to evaluate these suppliers’ requests within 10 working days of receipt; this may be extended to 15 days if justified, for example, by the need to examine documents or to verify whether the selection criteria have been met (examination documents or other verification should not be

the default, and only used if necessary for the proper conduct of the process; as noted as only the winning bidder should normally have to submit documents).

Contracting authorities may provide for award of contracts under a DPS on the basis of updated electronic catalogues, provided that the authority establishes the technical specification and format for the catalogue; supplier's requests to participate should be accompanied by a catalogue.

#### *Stage 2: Awarding specific contracts using the DPS*

Once the DPS is set up, an authority may award specific contracts using a DPS that they are entitled to use by inviting all suppliers admitted to the relevant category to bid, in accordance with regulation 54. As with a framework, the award criteria to be used for the award of individual contracts are to be set out in the original contract notice<sup>2</sup>. These criteria may be "formulated more precisely" for specific contracts, as set out in the invitation to tender for the specific contract.

The award process and permissible award criteria are consistent with those for other procedures; the minimum timescale for return of tenders is 10 days. Where the contracting authority is a sub-central body, this time limit can be reduced by mutual agreement between the contracting authority and all suppliers in the relevant DPS / category.

The authority may choose to require that tenders for a specific contract comprise or include electronic catalogues, adapted to the specific requirement, in which case the authority should have asked the suppliers request to participate to be accompanied by a catalogue as mentioned above.

There is no obligation to undertake a "standstill" period, although there may be some benefits in doing so (see under FAQ section below).

The DPS is to be undertaken as a wholly electronic procedure, in accordance with Regulation 22 (1) to (7) and (11) to (20). Unlike other procedures there is no derogation to postpone the electronic requirements, so this requirement is in force from the date of the new Regulations. However where authorities already use an e-procurement solution it may well be that this can be used or adapted for a DPS; authorities may wish to discuss with their e-procurement solution or service provider. The requirement for an electronic procedure does not prevent "human" evaluation of tenders received under a DPS.

There is no requirement to submit any form of award notice to OJEU following the setting up of the DPS, or when new suppliers are added to the DPS. There *is* a requirement to publish contract award notices (which must be sent to the Publications Office within 30 days of award) for specific contracts awarded under the DPS. However, authorities can choose to group DPS contract award notices on a quarterly basis, which must be sent within 30 days (after) the end of each quarter. Authorities should also abide by the requirements for publication on Contracts Finder about contracts awarded, as explained under Procurement Policy Note 03/15; see

<sup>2</sup> Or in the invitation to confirm interest where a Prior Information Notice was used for the original advertisement.

<https://www.gov.uk/government/publications/procurement-policy-note-0315-reforms-to-make-public-procurement-more-accessible-to-smes>

A DPS may be set up by central purchasing bodies, to undertake centralised purchases by the CPB itself, and / or for the CPB's "customers" to compete contracts.

## Frequently Asked Questions

### General nature and use of DPS

#### **Q. The DPS is to be used for “commonly used purchases...generally available on the market”. What does this mean?**

The rules do not specify how this should be interpreted. It is likely to depend on the specific type of goods, works or services covered by the DPS. The DPS will normally be suitable for largely “off-the-shelf” requirements which can be closely specified in advance. One-off, or heavily bespoke and / or highly complex requirements are unlikely to be suitable

#### **Q. Are there any restrictions on the number or type of category into which a DPS may be divided?**

No restrictions are specified in the rules; the regulations require that categories are objectively defined on the basis of the characteristics of the procurement to be undertaken. The rules state that these characteristics may include the maximum size of contract or geographical area of contract performance. However other characteristics are not excluded, for example the nature or scope of the deliverables might be appropriate. The authority will have to make its decision based on the specifics of its requirements. Early market engagement may be helpful in identifying suitable categories. Of course categories will need to ensure compliance with Treaty principles; so it would not be permissible to have different categories for different sizes or geographical locations of *suppliers*.

#### **Q. Is there a time limit on how long a DPS can operate? And is there any flexibility?**

The “period of validity” must be stated on the original OJEU notice; but the Regulations indicate that the period can be later amended (extended, shortened, terminated) subject to notification on the relevant OJEU standard form. This provides useful flexibility if the authority’s circumstances change, or developments in technology, markets, etc mean the DPS as originally set-up outlives its usefulness. There is now no specific maximum duration of a DPS. Any changes to the period of validity of a DPS should comply with relevant Treaty principles.

#### **Q. What is a suitable duration for a DPS?**

The authority must make its own decision based on its needs and understanding of the market. Early market engagement should help provide insights. A longer-running DPS will reduce the need to re-compete, but if it is too long the DPS may become obsolete if the authority’s circumstances or markets change. As noted above the authority may be able to lengthen or shorten the duration if necessary.

#### **Q. Does the DPS encourage SME access to public contracts?**

As with all procedures, the suitability for SMEs depends more on the authority’s procurement decisions than the particular rules which apply to the process. However the DPS has some features which can potentially encourage SMEs. The selection stage is potentially less onerous, as the supplier only has to complete this stage on entry to the DPS (and thereafter

periodically reconfirm its status) instead of having to do so separately for all procurements. As the DPS is open to suppliers throughout its duration, new start-ups, or businesses that wish to expand into new public sector markets, will not be frozen out of the market.

The division of DPS into categories by type of requirement, size of contract, or geographical place of delivery, could be arranged to ensure that niche suppliers and SMEs have maximum opportunity to compete.

**Q. Is it permissible to have different terms and conditions for contracts under different categories of a DPS?**

The rules do not govern the terms of the contracts awarded under a DPS. It would not be contrary to the rules to have different terms and conditions for contracts awarded under different categories of a DPS provided these complied with the Treaty principles of transparency, equal treatment and proportionality. There should be objective reasons why different terms and conditions are appropriate for different categories. The terms and conditions should be appropriate to contract for “commonly use purchases... available on the market” (so contracts designed for large bespoke requirements, for example, would not be appropriate).

In all cases the intended terms and conditions should be included within the procurement documents made available when the DPS is first advertised.

**Q. Can suppliers be required to sign-up to the standard contractual terms and conditions of the authority setting up the DPS as part of the initial application process?**

The authority can make clear that suppliers will be required to accept the terms and conditions of the authority setting up the DPS when bidding for contracts under the DPS.

**Q. Does the “standstill” period apply to setting up the DPS?**

There is no obligation to hold a standstill before admitting suppliers and commencing the DPS. And as suppliers may apply (or reapply if previously not accepted) at any time during the currency of the DPS, a standstill at initial set up-would be of little value.

Suppliers joining a DPS

**Q. Do suppliers need to submit an “indicative tender” with their initial application?**

No; this requirement in the old rules has been removed from the new DPS.

**Q. If a DPS is divided into categories, may a supplier apply for more than one category?**

Yes, a supplier may apply for as many categories as it wishes.

**Q. Can we limit the number of suppliers on the DPS or in any categories under the DPS?**

No; any and all suppliers who pass the exclusion criteria and meet the selection criteria must be admitted to the DPS [category].

**Q. Can we set the selection criteria at a high level, intended to limit the number of successful applicants?**

No. The selection criteria and pass marks should be proportionate and objectively justifiable according to the requirements to be delivered in the DPS / category. Unnecessary or overly-onerous requirements meant to limit the number of suppliers would breach proportionality and equal treatment, would be likely to discourage SMEs, and would tend to reduce competition.

**Q. Is it permissible to have different selection criteria for different categories under the DPS?**

Yes; where a dynamic purchasing system is divided into categories, the contracting authority should apply selection criteria that are proportionate and relevant to the characteristics of the category concerned.

It is possible that a supplier could pass the selection stage for, and be admitted to, one or several categories but not to others.

**Q. If a supplier fails the exclusion or selection stage, can it reapply later?**

Yes.

If the supplier had failed the exclusion stage, it could reapply if the mandatory or discretionary exclusionary periods had ended, or if the supplier had self-cleaned.

If the supplier did not meet selection criteria, it could reapply if its circumstances changed, for example if it had newly available skills, experience, or if something else which would change its answers to the selection criteria had occurred.

**Q. If a supplier is admitted, is it obliged to bid for any contracts procured under the DPS?**

No.

**Q. Can a supplier be deselected from a DPS?**

A supplier's initial admission to the DPS should normally be based on self-certification that it passes the exclusion criteria and meets the selection requirements. In similar manner to other procedures, the winning bidder for a contract under a DPS should be asked to provide confirmatory evidence before award of contract (unless previously submitted as discussed above). Please see separate guidance on "selection and award" for further information on those rules.

If a supplier ceases to meet the original exclusion or selection criteria during the course of the DPS it is likely that it could be excluded (indeed if it fails one of the mandatory exclusion grounds the authority will be *required* to remove the supplier).

The frequency of updates is for the authority to decide, but at least an annual update might be appropriate. Authorities could also require suppliers to confirm that their exclusion and selection status is not changed before the award of each contract.

It would *not* be permissible to remove or exclude a supplier from a DPS because the supplier had not chosen to bid for any contracts under the DPS, or because the supplier had bid but was unsuccessful in all its bids.

**Q. Can a supplier be excluded for poor performance on contracts under the DPS?**

Poor performance on prior public or utilities contracts which have led to contract termination, damages or other comparable sanctions are now grounds for discretionary exclusion. (Regulation 57(8)(g)). Therefore poor performance on previous contracts under the DPS which had led to sanctions could be used to exclude the supplier from the same, and other, DPSs in future.

As with any other exclusion for poor performance, this must be based on objective failings which led to sanctions; subjective assessment of a supplier's attitude, aptitude, etc must not be used.

If a DPS is set up by a CPB for use by other contracting authorities, the decision on whether to exclude a supplier should rest with the CPB.

**Q. Can a supplier be deselected from one or more categories but not others?**

In principle, yes, if the supplier ceases to meet the selection criteria for some categories but remains compliant with all the criteria for other categories.

If a supplier breaches a mandatory exclusion ground during the course of the DPS, he must of course be excluded from the whole DPS. And most of the discretionary exclusion grounds are unlikely to be category-specific.

However, if a supplier had evinced poor performance in contracts under some categories but not others, although it would be permissible to exclude it from the whole DPS, depending on the case, it might be more proportionate and appropriate to only remove it from the problematic categories.

Authorities will need to make their own case-specific judgements, and treat all suppliers equally.

**Q. How long do we have to complete the assessment of new applicants?**

Regulation 34(16) states that contracting authorities must finalise their evaluation of new applicants (i.e. applications which are received during the period of validity of the DPS) within 10 days of receipt. This may be prolonged to 15 working days in individual cases where this can be justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met. Contracting authorities are under a clear duty to meet these timescales, and should ensure that systems and resources are in place to meet them.

These rules also apply to the initial evaluation of applicants when the DPS is set up. However, as long as the invitation to tender for the first specific contract under the Dynamic

Purchasing System has not been sent, the period may be extended provided that no invitation to tender is issued during the extended evaluation period. If initial evaluation of tenders takes additional time, it is therefore possible to delay the start of the DPS to provide further time for evaluation of applicants.

#### Individual contract award under a DPS

#### **Q. Do I have to run a competition for every requirement under a DPS? Or can the DPS be used for “direct awards”, perhaps for low-value contracts?**

The rules state that each requirement under a DPS must be competed; all suppliers under the DPS or the relevant category must be invited to bid. “Single tender” is not permitted (unless only one eligible supplier has applied for the category), and there is no derogation for low-value contracts.

This reflects the nature of the DPS; admission to the system only requires suppliers to demonstrate their suitability, ability, and capability to deliver the type of requirement in the DPS or category. (There is no requirement to submit any type of tender as part of the application for admission). Therefore the decision on the best value-for-money offering can only be decided at the tender stage for each individual requirement, and equal treatment requires that all suppliers on the DPS [category] have the opportunity to bid.

The European Commission regards impermissible direct awards as the worst type of breach of the procurement rules and Treaty principles, and would probably take legal action, particularly if there was systemic use of direct awards under a DPS. Aggrieved suppliers would also be able to take action under the Remedies rules.

The 10-day minimum for return of tenders (including if applicable completion of a catalogue) in a competition under a DPS is substantially shorter than the total procurement process-time for the other procedures under the directive. As the DPS is intended for commonly used purchases generally available on the market, and must be an electronic process, it should normally be possible to readily undertake a competition.

#### **Q. If we cannot limit the number of suppliers on the DPS or in any category, how will we effectively resource and undertake competitions for individual contracts?**

The DPS is no more onerous than the open procedure for individual contracts; in fact it will be easier, as authorities will only have to examine tenders and not assess supplier’s exclusion and selection status for every contract (although they may need to receive the supporting documents as confirmation, as discussed above). Authorities will also know how many suppliers are on the DPS [category] at any given point, so they will know the maximum number of potential responses in advance. As the DPS is for works, goods and services commonly available on the market, it may be possible in many cases to run relatively straightforward award evaluation criteria, which will help to keep resource requirements in check.

As with any procurement, contracting authorities should adopt the “Lean” approach. This will include early market engagement to understand the supplier base and the potential for the market to meet the authority’s needs. This will help the authority to decide the best division

into categories. Focused categories may help limit the number of suppliers who apply for each category.

Authorities, including CPBs, and authorities with access to DPSs and frameworks put in place by CPBs, will wish to consider the relative merits of DPSs, frameworks, and individual separate procurements, depending on the specific requirements and circumstances.

**Q. Does the standstill period apply to contracts under the DPS?**

The standstill period is not obligatory for individual contracts awarded under a DPS.

**Q. Is there a clear requirement to provide a debrief report for unsuccessful bidders for individual contracts under a DPS?**

The requirement for a “notice of decision” as required in the rules for most procedures is specifically **not** obligatory for award of contracts under a DPS. However authorities are not prohibited from either proactively providing feedback or offering to provide feedback on request, and CCS regards provision of feedback as being good practice. Where an authority provides or offers feedback it should treat all suppliers equally, make known its intention to do so in advance, and abide by good practice on providing feedback, as when providing feedback under procedures where it *is* obligatory.

**Q. May individual contracts “overhang” the duration of the DPS itself?**

This is not specifically covered in the rules, and given the flexibility of DPS duration, need not be a concern. However, the new rules specifically allow “overhang” in frameworks, and there is no reason to consider that proportionate overhang would be impermissible in DPS. As with all procedures, the DPS should not be used in a way which will distort or prevent competition.

Electronic processes and DPS

**Q. The DPS must be a wholly electronic process; what does this mean?**

The provision of Regulation 22, covering electronic communications, apply to the use of the DPS from the entry into force of the Regulations, and Regulation 34(2) states that a DPS must be a ‘completely electronic process.’ The derogation to postpone electronic communications does **not** apply to the DPS. Authorities which wish to use the DPS will therefore need to ensure that they have access to suitable IT systems which enable compliance with Regulation 22, (including the technical and security requirements in Regulation 22 (16) et seq). As noted above, however, existing e-procurement solutions and services may be useable or adaptable for the DPS, as the requirements and processes are similar in principle to those in other procedures under the rules.

The specific derogations in Regulation 22 (8) to (10) for oral communication do not apply. As the DPS is for works, goods and services commonly available on the market, it is unlikely that the derogations for physical models, special formats or office equipment, or specific security requirements in Regulation 22(2) to (7), will normally be pertinent, although they apply where relevant. As mentioned activities not involving communication between the parties, such as tender evaluation, do not have to be electronic, although there is no prohibition on use of electronic evaluation tools.

**Q. Can electronic auctions be used for the award of contracts under a DPS?**

Yes, the rules explicitly allow the use of e-auctions in the award of contracts under a DPS, provided that the subject matter is suitable (including a requirement that the technical specification can be established with precision). All the other rules applicable to e-auctions also apply; see Regulation 35.

Electronic catalogues and DPS

**Q. Can catalogues be used in the DPS?**

Yes, the authority may choose to allow or require the submission of electronic catalogues. These should meet the requirements for electronic communication in Regulation 22 and the provisions on e-catalogues in Regulation 36.

As with all use of catalogues under the public procurement rules, suppliers should not simply submit their general catalogues but should adapt the format and content to the specific requirements of the DPS.

Contracting authorities may require economic operators to submit an electronic catalogue as part of tender for a specific contract under a DPS. Authorities may also ask for submission of a catalogue with the initial request to participate. Please see separate guidance on e-communications for further details of the use of e-catalogues.

**Q. If the request to participate in the DPS is accompanied by a catalogue, what should that catalogue contain?**

The rules do not specify what the catalogue should contain. It should comply with the technical specifications and format specified by the authority, (having regard to Government policy on open standards), and the format and content are likely to depend on the nature of the works, goods or services to be procured. As it is not an indicative tender it is unlikely that it would need to contain detailed pricing information. Specific details of works, services or products and prices for each specific requirement will be completed at tender stage.

**Q. If suppliers have recently completed catalogues can these be used for additional contracts, without further updating, and without going to tender again?**

There is no provision to do so under the rules. The rules envisage that each supplier will be advised every time an authority wishes to award a tender, and invited to complete / update its catalogue and confirm whether it wishes to participate. In practice, in some cases, it may be that the supplier will be able to simply confirm that a previous catalogue still stands unchanged.

DPS and Central Purchasing Bodies

**Q. Can DPSs be set up by Central Purchasing Bodies?**

Yes, CPBs are specifically allowed to set up DPSs. These can be used by the CPB to make central purchases, or to be used by other “customer” authorities of the DPS to award individual contracts. Regulation 37(3) states that where a DPS established by a CPB may be used by other contracting authorities, the call for competition must mention this fact. Where

an authority uses a DPS set up by a CPB to compete and award contracts, the authority will be responsible for proper conduct of the individual competition.

**Q. If a DPS is set up by a CPB, is it necessary for all the potential contracting authority “customers” to be identified in the contract notice or procurement docs?**

Unlike the Regulations governing the award of frameworks by CPBs, there is no explicit requirement for the potential users to be identified (either by name, or as unambiguous members of a particular class or category). There is only the requirement in Regulation 37(3) that where a DPS established by a CPB may be used by other contracting authorities, the call for competition must mention this fact. However, as good practice, for transparency and to reduce the risk of challenge, CCS recommends that CPBs who set up a DPS do clearly identify the permitted and potential user-base.

**Q. Can a sub-central authority which uses a DPS set up by a central government purchasing body, use the derogation to allow less than 10 days for return of tenders?**

This is not explicitly covered in the rules, but it may be possible in principle, if the sub-central body runs the competition. The sub-central body would be responsible for the process and decisions on the award of the contract, and any failure to apply with the regulations. As it would be necessary for the sub-central authority to obtain agreement of all the suppliers on the DPS [category], this derogation might not be greatly helpful in practice.

If a central purchasing body wishes to set up a DPS which will allow sub-central bodies to allow less than 10 days, the CPB may wish to take specific legal advice on the best way to structure the award process.



## **THE PUBLIC CONTRACTS REGULATIONS 2015**

### **GUIDANCE ON THE NEW LIGHT TOUCH REGIME FOR HEALTH, SOCIAL, EDUCATION AND CERTAIN OTHER SERVICE CONTRACTS**

## **Contents**

### **PART 1. The New Light-Touch Rules Regime for Health, Social, Education and certain other Service Contracts:**

- Overview
- Key Points
- FAQs

### **PART 2. Reserved Contracts for Certain Services in the Light-Touch Regime:**

- Overview
  - Key Points
  - FAQs
-

## **PART 1. The New Light-Touch Rules Regime for Health, Social, Education and certain other Service Contracts: Overview, Key Points and FAQs**

### OVERVIEW

#### **What is the new light-touch rules regime?**

The new light-touch regime (LTR) is a specific set of rules for certain service contracts that tend to be of lower interest to cross-border competition. Those service contracts include certain social, health and education services, defined by Common Procurement Vocabulary (CPV) codes. The list of services to which the Light-Touch Regime applies is set out in Schedule 3 of the Public Contracts Regulations 2015 (Annex A).

#### **Why is this helpful/necessary?**

The European Commission was concerned that some Part B Service contracts would be of cross-border interest, but were not being exposed to EU wide competition, which led to the Commission proposing to abolish the Part B Services rules and replace them with a new regime. Although the UK preferred to preserve the existing Part B rules, for simplicity and convenience, the Commission gained enough support to implement the change, albeit subject to certain concessions for those Member States who opposed including the UK.

#### **What has changed?**

The former distinction between Part A and Part B service contracts has been abolished, and a new rules regime has been introduced for certain health, social and other services. This is a significant and fundamental change that all procurement staff and many other stakeholders will need to understand.

There is one temporary exception for certain clinical commissioning contracts: procurement by NHS England or Clinical Commissioning Groups of NHS healthcare services should not be subject to the new rules until the transposition deadline of April 2016, to allow service commissioners the necessary time to adapt. Such procurements will continue to be governed by the pre-existing regulations<sup>1</sup> until that time.

#### **Which rules do I need to refer to?**

The light-touch regime rules - see Regulations 74 to 77.

<sup>1</sup> This includes: The rules on Part B Services in the Public Contracts Regulations 2006; and the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (see guidance at <https://www.gov.uk/government/publications/procurement-patient-choice-and-competition-regulations-guidance>)

## **KEY POINTS**

### Scope of the LTR rules

**There are fewer services in LTR than Part B** (particularly due to the absence of the broad “other services” category that existed in Part B), meaning that some contracts formerly subject to the Part B services rules will now be subject to the full rules. The list of services is contained in Schedule 3 of the Public Contracts Regulations 2015 (Annex A).

**A relatively high threshold** (when compared with the threshold for Part A Services) has been applied to this light-touch regime – 750,000 euros (the current sterling equivalent is £625,050).

**Below the LTR threshold**, contracts do not normally need to be advertised in the OJEU. The Directive recognises that only services above a threshold of 750,000 euros covered by the LTR would normally be likely to be of cross border interest. Following from this, services below this threshold do not need to be advertised in the OJEU, unless there are concrete indications of cross-border interest.

### Mandatory Requirements

**A small number of new procedural rules for above these thresholds.** Contracting authorities now have to follow a new light-touch set of procurement rules for LTR contracts above the relevant threshold. The main mandatory requirements are:

- i) **OJEU Advertising:** The publication of a contract notice (CN) or prior information notice (PIN). Except where the grounds for using the negotiated procedure without a call for competition could have been used, for example where there is only one provider capable of supplying the services required.
- ii) The publication of a **contract award notice** (CAN) following each individual procurement, or if preferred, group such notices on a quarterly basis.
- iii) **Compliance with Treaty principles** of transparency and equal treatment.
- iv) **Conduct the procurement in conformance with the information provided in the OJEU advert** (CN or PIN) regarding: any conditions for participation; time limits for contacting/responding to the authority; and the award procedure to be applied.
- v) **Time limits imposed by authorities on suppliers, such as for responding to adverts and tenders, must be reasonable and proportionate.** There are no stipulated minimum time periods in the LTR rules, so contracting authorities should use their discretion and judgement on a case by case basis.

### Significant Flexibilities

**Authorities have the flexibility to use any process or procedure they choose to run the procurement**, as long as it respects the other obligations above. There is no requirement to use the standard EU procurement procedures (open, restricted and so on) that are available for other (non-LTR) contracts. Authorities can use those procedures if

helpful, or tailor those procedures according to their own needs, or design their own procedures altogether.

**The LTR rules are flexible on the types of award criteria that may be used**, but make clear that certain considerations can be taken into account, including (this is not an exhaustive list):

- the need to ensure quality, continuity, accessibility, affordability availability and comprehensiveness of the services;
- the specific needs of different categories of users<sup>2</sup>, including disadvantaged and vulnerable groups;
- the involvement and empowerment of users; and
- innovation.

**Reserved contracts for certain services in the light-touch regime.** The new rules permit for certain LTR contracts to be “reserved” for organisations meeting certain criteria e.g. public service mutuals and social enterprises. These provisions are covered separately in Part 2 of this guidance.

<sup>2</sup> The rules refer to “users” in the context of services provided “to the person” ie where the contracted services are delivered to members of the public. Examples of such users might include the parents of children receiving education services, patients receiving certain health services, and those in receipt of social care services.

## **FAQs**

### **Why do clinical commissioning contracts stay on the Part B Services rules until April 2016?**

Implementation has been delayed because NHS England and Clinical Commissioning Groups are currently subject to domestic procurement requirements through the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. The Department of Health wishes to use the additional time to work with commissioners and help them adapt to the new requirements of the light-touch regime.

### **Does the higher threshold in the new Light-Touch Regime imply that the Social Value Act no longer applies to procurements valuing less than 750,000 Euros?**

No – the former threshold for Part B Services contracts continues to apply for the purposes of the Social Value Act.

### **Do the provisions in Regulation 12, which cover the conditions where, if met, in-house contracts fall outside the scope of the rules, extend to the Light Touch Regime?**

Yes. Where the conditions for meeting the in-house test in Regulation 12 are met, such a contract, including those for LTR services, would fall outside the scope of the procurement rules.

### **Do I need to publish a contract notice if I have already published a PIN as a call for competition?**

No. The choice is to either publish a PIN as a call for competition, or publish a contract notice. Providing the PIN respects the requirements in regulation 75, there is no need to publish a separate contract notice. Regulation 75 requires that the PIN shall:

- be published continuously;
- contain the information required on the form;
- refer specifically to the types of services that will be the subject of the contracts to be awarded;
- indicate that the contracts will be awarded without further publication and invite interested suppliers to express their interest in writing.

### **How can I publish quarterly groups of contract award notices?**

Contracting Authorities are free to undertake the grouping at whatever level they choose, eg a buyer of social services contracts can group all their notices together and send to OJEU as a batch, or all the social services buyers can group their notices, or the whole authority can group all of its notices.

CCS interprets the phrase “within 30 days of the end of each quarter” as meaning the groups of notices must be sent within 30 days *after* the end of each quarter, not *before* the end of each quarter.

**Isn't it safer just to use the standard procedures in the main rules, rather than design our own process, to avoid the risk of legal challenge?**

The new LTR rules are deliberately designed to give as much flexibility to contracting authorities as possible, and so do not lay down detailed procedural rules. Routinely using similar procedures to those in the main rules would deprive the contracting authority of the many flexibilities that the LTR rules provide.

CCS recommends that authorities take advantage of the various flexibilities where possible, to maximise the possible benefits from the lighter rules regime, such as reduced process burdens on procurers and suppliers. The key things are to be clear about what your process will involve, making sure the process ensures transparency and equal treatment of suppliers, and sticking to the process that you decide to run.

**How much flexibility do authorities really have? For instance, presumably we would still have to seek a tender, even though the rules don't say so explicitly?**

There is a considerable amount of flexibility to design the procurement process in the way the authority chooses, though some of the basics of any well run procurement exercise would of course need to be respected. Generally, the “permissive” aspects of the main rules (i.e. where the rules permit authorities to do certain things, by stating that “contracting authorities may...”) are also permitted in LTR without the LTR rules needing to repeat the same details. So there should be no concern that things are ever *less* flexible in LTR. Whilst most of the mandatory and permissive provisions in the main rules do not have any binding effect on LTR contracts (except for those exceptions that are explained in this guidance), as discussed below some provisions are obviously necessary in any significant procurement exercise.

For instance, it would normally be necessary to at the very least acquire tenders before awarding the contract, in order to ensure that a transparent and competitive procurement has been undertaken, despite the absence of a specific LTR regulation requiring that. It would also be necessary to be transparent about any award criteria to be used, and the weightings for the criteria and sub-criteria, to comply with the general transparency obligations.

But following the initial OJEU advertisement, there is significant flexibility to decide how to get to the contract award stage. For example, authorities wanting to run a straightforward process and go straight to the final tenders stage, could use a “pseudo”<sup>3</sup> Open Procedure. The Open Procedure has very few prescriptive rules anyway, which mainly cover time periods for responding to adverts and which do not apply in the LTR. So authorities could

<sup>3</sup> At various points in this guidance note we use the term “pseudo” before referring to a provision that is available in the main rules. This is to make clear that we are describing a practice in the LTR that inevitably looks and feels similar to the provision prescribed in the main rules, but is not actually a defined provision in the UK's LTR regulations, and so actually none of the formal procedural rules have any direct application when this is practiced in LTR contracts. It is important to make this distinction by the seemingly laborious repeat references to “pseudo” to avoid implying that we are talking about the actual provision prescribed in the main rules.

simply seek tenders from all interested parties by a date of the authority's choosing (ensuring the time is reasonable and proportionate, determined on a case-by-case basis, which might be relatively short for a straight-forward off-the-shelf purchase, or longer for a more complex or bespoke purchase or where the authority wants to allow more time to encourage SMEs to participate, for example).

Alternatively the authority might decide there was a need to run some sort of selection process before seeking tenders, and they would have flexibility in deciding how that worked. Authorities need not follow the detailed selection rules laid down in the Regulations for non-LTR contracts, though many of these rules are permissive and just make clear that authorities may do one thing or another. Should authorities wish to design their own bespoke selection process and criteria, again the key tests are to be certain that the process is transparent and ensures equal and fair treatment.

The authority could decide that it wanted to involve some sort of dialogue or negotiation with suppliers at some stage during the formal procurement exercise, and could design that aspect of the process according to its own needs. The rules on the competitive procedure with negotiation and competitive dialogue need not be followed to the letter, but authorities could use relevant elements of either procedure if useful. It would always be necessary for authorities to avoid giving away sensitive information owned by one company to a competitor.

The grounds for mandatory and discretionary exclusion do not apply as a matter of law, but authorities would still normally exclude suppliers that had been found guilty of the mandatory exclusion offences (corruption, terrorism and so on) as a matter of routine and sensible business practice. The discretionary grounds for exclusion would still be available, but authorities could use additional grounds for exclusion providing the authority: used conditions that were fair and reasonable; communicated those conditions clearly from the outset; and treated suppliers fairly when applying those conditions. However, CCS recommends sticking to the grounds for exclusion in the Regulations, as these grounds are sufficiently broad to cover most concerns, and this practice will help avoid unnecessary legal risks.

### **Do the aggregation rules apply to personal care contracts and other LTR contracts?**

Yes. The methods for determining the value of a contract and the relevant threshold have to be undertaken in a consistent manner regardless of whether the contract is covered by the main rules or the LTR. The rules on the methods of calculation are covered at Regulation 6. Further information on the aggregation rules and thresholds is covered in the handbook<sup>4</sup> on the new rules.

### **What do the LTR rules say about award criteria?**

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/407236/A\\_Brief\\_Guide\\_to\\_the\\_EU\\_Public\\_Contract\\_Directive\\_2014\\_-\\_Feb\\_2015\\_update.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407236/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Feb_2015_update.pdf)

The LTR regulations do not prescribe any rules on award criteria, so contracting authorities have the same flexibilities on use of award criteria that they have always had ie to decide for themselves: this could mean using the Best Price/Quality Ratio, in a similar (or modified) way to the provisions in the main rules; or using lowest-price award criteria where appropriate. Of course, authorities should always have regard to relevant national and local policies e.g. the Government's longstanding procurement policy of obtaining value for money (as set out in the HM Treasury Publication *Managing Public Money*<sup>5</sup>), and the value and nature of the services being procured, to inform decisions on the choice of award criteria. The key factor is whole life cost, not lowest purchase price. Using the Best Price/Quality Ratio criteria is likely to be particularly important when service quality is paramount e.g. services delivered to end users such as social care. That can involve setting a high minimum quality standard, and then accepting the lowest cost bid to meet that standard.

### **Can user/carer/parent choice be used as award criteria when evaluating tenders?**

CCS has received several questions about this, from procurers and other stakeholders active in the health, social services and education services sectors. As CCS understands it, the concern is that on the one hand the procurement rules require equal treatment of suppliers, transparent award criteria and so on. Whilst on the other hand, the nature of service provision in these service sectors where the end user is a citizen, necessitates that those end users can influence or even choose the eventual provider of the services<sup>6</sup>. How can these two apparently competing objectives be resolved?

The new Directive, and the UK's implementing regulations, make specific provisions for this. In particular the UK's regulations state that (regulation 76(8)) "...contracting authorities may take into account any relevant considerations, including...the specific needs of different categories of users; [and] the involvement and empowerment of users". The Directive actually *requires* Member States to include these provisions in their national laws, so it is clear that this is not only allowed but actively encouraged under EU law.

As CCS understands, pseudo framework agreements or pseudo dynamic purchasing systems would often be used by authorities, involving a number of suppliers capable of delivering the services needed, to be "called-off" as and when the authority needs those services. In practice, some authorities engage user representatives in tender evaluation panels.

Furthermore, where necessary for the delivery of certain services, it may be possible to incorporate an element of user choice at the call-off stage. For instance, the authority might consider that more than one of the providers could deliver a satisfactory, value for money service to the end-user, and proffer options to the user. As there are no specific

<sup>5</sup> <https://www.gov.uk/government/publications/managing-public-money>

<sup>6</sup> For example, the Care Act 2014 introduces wide reaching reforms to adult social care in England, and gives specific rights to users to choose their accommodation and/or care provider. Further information is available at: <https://www.gov.uk/government/publications/care-act-2014-statutory-guidance-for-implementation>

procedural rules in the LTR that cover the awarding of call-offs from pseudo frameworks or pseudo-DPSs, there is a great deal of flexibility in awarding such call-off contracts. A key reference point is whether the possibility of allowing users to choose the provider gives rise to a problem with the general requirements around transparency and treating suppliers equally<sup>7</sup>. Assuming all the providers were treated equally, e.g. by ensuring that all end-users were offered the same rights to influence the choice of final provider, and that this mechanism for end-user choice was made clear to providers transparently from the outset, it is difficult to see on what basis a provider would have grounds for a grievance.

### **How can the Light Touch Regime be reconciled with the unfettered right of individual choice of accommodation under the Care Act?**

CCS is aware that some authorities are concerned at the interplay here and is considering this further, in liaison with the Department of Health and the Department for Communities and Local Government.

### **Do I have to make the procurement documents electronically available, as is the case in the main rules?**

Yes.

### **Is it necessary to inform candidates and tenderers of the award decision in the same way as the main rules, and have a standstill period?**

Although this may not strictly be required (particularly where a PIN has in fact been used to call for competition), the position is not wholly clear. Therefore, CCS suggests that contracting authorities will usually wish to send award notices and observe the standstill period (in the same way as in procurements governed by the main rules), as this will avoid the risk that the contract (or framework agreement) might be subject to the draconian remedy of ineffectiveness if the case law does clarify that these requirements do apply to the LTR. But where particular circumstances make it important to award the contract urgently, contracting authorities may want to weigh the urgency against the risks of proceeding without a standstill.

These issues (which apply equally to those procurements by sub-central authorities which are permitted to be commenced by PIN) will be covered in separate guidance on standstill and remedies.

<sup>7</sup> The case of *AJ v The Borough Council of Calderdale* [2012] EWHC 3552 considered a situation in which service users and their carers had previously been involved in an evaluation panel but the Council had decided stop the practice believing it constituted a breach of regulation 4 of the Public Contracts Regulations 2006 (transparency and equal treatment). The Court found that the Council had erred in law and there was nothing to suggest that inclusion of service users or their carers on evaluation panels would constitute a breach of reg.4. However the case did not look at the wider issue of whether service users and their carers should be included on evaluation panels.

It is also good practice to inform participants as soon as possible when they are excluded from a procurement exercise, and the reasons for that exclusion.

**Are there any circumstances in which it is permissible not to publish an OJEU contract notice or PIN in respect of an above-threshold LTR procurement?**

Yes, but only where the main rules would permit use of the negotiated procedure without prior publication (see Regulation 75(2)).

**What rules apply to below-threshold LTR contracts?**

In the negotiations, the European Commission was clear that contracts below the LTR threshold would not be of cross border interest and so would not need to be advertised in OJEU. Member States only agreed to the new LTR rules on that basis. This is reflected in recital 114 of the Directive, which sets out that it is the services above that threshold which might have a cross border interest. In particular, the recital states that “Services to the person with values below that threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects”

This is different to the position for contracts below the normal thresholds for goods, non-LTR-services and works, where the onus is on the contracting authority to determine whether or not there could be cross-border interest.

**Do the new rules arising from the “Lord Young” recommendations have to be followed for contracts listed in the light-touch regime?**

Part 4 of the new Regulations implements the Government’s procurement policy to make public sector procurement more accessible to smaller firms. These rules do need to be followed by authorities procuring service contracts listed under the light-touch regime, except where the procurement is undertaken by bodies in Northern Ireland and Wales exercising functions that are wholly or mainly devolved. Furthermore, there are exemptions from these obligations where a procuring entity is commissioning clinical services or where a procuring entity is a maintained school or academy. Separate guidance covers the new requirements to help SMEs get better access to public contracts.

**What about the threshold for the elimination of PQQs? The LTR threshold is very high.**

The threshold applicable to the elimination of PQQs in the Light Touch Regime is set at the **lower** EU threshold in the main procurement rules for goods and services, so central government authorities would not use PQQs below the lower threshold for goods and services, whereas sub-central authorities would use the goods and services threshold for sub-central authorities.

**Is it necessary, for LTR contracts, to keep records and reports as per Regulation 83 & 84?**

Yes.

**Is it necessary, in LTR procurements, to justify a decision not to split contracts into lots?**

No, it is not mandatory to do so in LTR procurements. However, contracting authorities can still consider the possible benefits of lotting as a matter of good practice.

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## **PART 2. Reserved Contracts for Certain Services in the Light-Touch Regime:** Overview, Key Points and FAQs

### **OVERVIEW**

#### **What are “reserved contracts” for certain services in the light-touch regime?**

Regulation 77 provides for procurements for certain service contracts to be “reserved” to organisations that meet certain criteria. These contracts may run for a maximum period of 3 years. In essence, this means it is now possible to run a competition in compliance with the new light-touch regime of EU procurement rules where participation is limited to qualifying organisations such as mutuals and social enterprises.

#### **Why is this helpful/necessary?**

One of the main UK aims during the negotiations on the new Directives was to allow public service mutuals to become established before they were subject to EU wide competition under the public procurement rules. As the development of public service mutuals was a UK policy initiative, and was generally unfamiliar to other Member States, this was something that needed to be explained to and extensively negotiated with the European Commission, other Member States and the European Parliament. Regulation 77 (Article 77 of 2014/24/EU) reflects a successful outcome of these negotiations. This provision provides extra flexibility for the public sector to encourage mutuals and social enterprises to compete for and gain experience of delivering government contracts before being exposed to full EU-wide competition.

#### **What has changed?**

This is an entirely new provision. It should not be confused with the longstanding provisions around reserved contracts for sheltered workshops (see regulation 20, which is the subject of separate guidance), which allows contracting authorities to reserve participation in a procurement competition to an entirely different set of qualifying economic operators.

#### **Which rules do I need to refer to?**

Regulation 77 covers reserved contracts for certain services and is attached to this guidance at Annex B. Regulation 77 (2) provides an exhaustive list of the CPV codes of the covered services.

Regulations 74-76 (the other provisions in the Light Touch Regime) also apply.

## KEY POINTS

The CPV codes to which this provision applies are subject to the Light Touch Regime (LTR) within the public sector Directive (Articles 74 – 77). This means that the procedural rules that apply to other contracts covered by the LTR will also apply to reserved contracts. The section on 'Which rules do I need to refer to' in Part 1 of this guidance explains the approach to procedures under the Light Touch Regime.

At present, it is not possible to use the reserved contracts provision for healthcare commissioning by NHS England or Clinical Commissioning Groups in England. This is to ensure consistency with the general requirements in regulation 3 of the existing NHS (Procurement, Patient Choice and Competition Regulations) (No. 2) 2013 Regulations, in particular the prohibition on favouring types of provider. This position is subject to further consultation with the sector. Part of the role of the *Mutuals in Health: Pathfinder Programme* is to consider any potential legislative hurdles to the further development of health mutuals in clinical services.

Contracts for reserved services need to be advertised in OJEU, so this regulation does not permit direct award. The call for competition published in OJEU must explicitly refer to article 77 of the Public Contracts Directive (2014/24/EU).

Participation in any such competition is **reserved** to qualifying organisations that meet the following criteria:

- its objective is the pursuit of a public service mission linked to the delivery of the services covered under the reserved contracts provision;
- its profits are reinvested with a view to achieving the organisation's objective, and where profits are distributed or redistributed, this should be based on participatory considerations;
- the structures of management and ownership of the organisation performing the contract are (or will be, when it performs the contract) based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and
- the organisation has not been awarded a contract for the services concerned by the contracting authority concerned using the reserved contracts provision within the previous three years.

The first three conditions reflect the Commission's definition of a 'social enterprise' as set out in its Communication on "Creating a favourable climate for social enterprises" (SEC (2011) 1278 final).

The fourth condition makes clear that if an organisation that has won a contract under the reserved contracts provision within the previous three years, it cannot be awarded a contract for the same services under the provision. It could, of course, compete for such a contract if the contract were to be advertised in OJEU without the use of the reserved contracts provision. The maximum duration of any contract for reserved services is three

years. This is to make sure that such contracts are not removed from open competition for too long.

## **FAQs**

**Do the rules for reserved contracts mean that a supplier awarded a contract under this provision cannot be awarded a contract again when it is retendered after the first three years?**

It is not possible to award a contract to the incumbent qualifying organisation after the initial 3 year contract awarded under the reserved contracts provision has expired. The qualifying organisation could, however, compete in an open competition if the contracting authority chose to run an open competition rather than a further competition where participation was restricted to qualifying organisations. Alternatively, the contracting authority could elect to run a further competition for the services under this reserved contracts provision at the end of the initial 3 year period. The contracting authority could award a contract for the same services to another qualified organisation under this competition.

**What is the position for contracts for reserved services below the 750,000 Euro threshold?**

The position below threshold is not different from other below threshold services covered by the Light Touch Regime. Unless there are concrete indications to the contrary, such services would typically be regarded as **not** being of interest to service providers from other Member States, so there is no requirement for them to be advertised in OJEU.

**Annex A - List of Services covered by the new Light-Touch Regime**

**SCHEDULE 3 of the Public Contracts Regulations 2015**

Regulations 5(1)(d) and 74

**SOCIAL AND OTHER SPECIFIC SERVICES**

<b>CPV Code</b>	<b>Description</b>
75200000-8; 75231200-6; 75231240-8; 79611000-0; 79622000-0 (Supply services of domestic help personnel); 79624000-4 (Supply services of nursing personnel) and 79625000-1 (Supply services of medical personnel) from 85000000-9 to 85323000-9; 98133100-5, 98133000-4; 98200000-5; 98500000-8 (Private households with employed persons) and 98513000-2 to 98514000-9 (Manpower services for households, Agency staff services for households, Clerical staff services for households, Temporary staff for households, Home-help services and Domestic services)	Health, social and related services
85321000-5 and 85322000-2, 75000000-6 (Administration, defence and social security services), 75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80000000-4 Education and training services to 80660000-8; from 92000000-1 to 92700000-8; 79950000-8 (Exhibition, fair and congress organisation services), 79951000-5 (Seminar organisation services), 79952000-2 (Event services), 79952100-3 (Cultural event organisation services), 79953000-9 (Festival organisation services), 79954000-6 (Party organisation services), 79955000-3 (Fashion shows organisation services), 79956000-0 (Fair and exhibition organisation services)	Administrative social, educational, healthcare and cultural services
75300000-9	Compulsory social security services
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
98000000-3; 98120000-0; 98132000-7; 98133110-8 and 98130000-3	Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services
98131000-0	Religious services
55100000-1 to 55410000-7; 55521000-8 to 55521200-0 (55521000-8 Catering services for private households, 55521100-9 Meals-on-wheels services, 55521200-0 Meal delivery service) 55520000-1 Catering services, 55522000-5 Catering services for transport enterprises, 55523000-2 Catering services for other	Hotel and restaurant services

enterprises or other institutions, 55524000-9 School catering services 55510000-8 Canteen services, 55511000-5 Canteen and other restricted-clientele cafeteria services, 55512000-2 Canteen management services, 55523100-3 School-meal services	
79100000-5 to 79140000-7; 75231100-5;	Legal services, to the extent not excluded by regulation 10(1)(d)
75100000-7 to 75120000-3; 75123000-4; 75125000-8 to 75131000-3	Other administrative services and government services
75200000-8 to 75231000-4	Provision of services to the community
75231210-9 to 75231230-5; 75240000-0 to 75252000-7; 794300000-7; 98113100-9	Prison related services, public security and rescue services to the extent not excluded by regulation 10(1)(h)
79700000-1 to 79721000-4 (Investigation and security services, Security services, Alarm- monitoring services, Guard services, Surveillance services, Tracing system services, Absconder-tracing services, Patrol services, Identification badge release services, Investigation services and Detective agency services) 79722000-1(Graphology services), 79723000-8 (Waste analysis services)	Investigation and security services
98900000-2 (Services provided by extra- territorial organisations and bodies) and 98910000-5 (Services specific to international organisations and bodies)	International services
64000000-6 (Postal and telecommunications services), 64100000-7 (Post and courier services), 64110000-0 (Postal services), 64111000-7 (Postal services related to newspapers and periodicals), 64112000-4 (Postal services related to letters), 64113000-1 (Postal services related to parcels), 64114000-8 (Post office counter services), 64115000-5 (Mailbox rental), 64116000-2 (Post-restante services), 64122000-7 (Internal office mail and messenger services)	Postal services
50116510-9 (Tyre-remoulding services), 71550000-8 (Blacksmith services)	Miscellaneous services

## Annex B – Regulation 77

### 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<sup>(8)</sup>.

<sup>(8)</sup> S.I. 2013/500.



## **The Public Contracts Regulations 2015**

### **Guidance on Awarding Contracts**

## What are the contract award provisions?

This guidance covers the contract award provisions of the Public Contracts Regulations 2015. The Regulations include a revised provision on **contract award criteria**, a brand new provision on **life-cycle costing**, and a revised provision on **abnormally low tenders**.

## What has changed?

The structure of the contract award provisions in the new rules has changed significantly when compared with those in the previous rules<sup>1</sup>. Whether these differences are particularly noticeable in practice is likely to depend on what is being procured. The key changes include changes to the definition of Most Economically Advantageous Tender, more flexibility to take into account a wider range of characteristics as award criteria, and provisions for evaluating the cost-effectiveness of tenders through life-cycle costing.

## Which rules do I need to follow?

Regulation 67 covers contract award criteria, Regulation 68 covers life-cycle costing, and Regulation 69 covers abnormally low tenders. These Regulations are attached for quick reference at **Annex A**.

A significant amount of further background information, which may be helpful to aid interpretation, can also be gained from the recitals to the Directive. This is particularly true for the contracts award provisions, whose final shape reflect compromise approaches reached at the end of the negotiations between the European Commission, the Member States and the European Parliament. The relevant recitals are 89 – 98.

## Key points

The key changes include:

- 1. A significantly amended definition of the concept of “Most Economically Advantageous Tenderer” (MEAT) from that with which procurers will have become familiar, and a requirement to award contracts based upon the new definition**

<sup>1</sup> Public Sector Directive (2004/18/EC) and the Public Contracts Regulations 2006 (regulation 30).

The old rules provided a choice between using MEAT or lowest price award criteria. MEAT, as it was hitherto defined, was synonymous with the UK concept of awarding contracts that provided for the best Value for Money (or best price/quality ratio).

While the new rules **mandate MEAT**, the definition of MEAT has changed significantly, and the new definition is much more flexible. It permits, amongst other things, the awarding of contracts on the basis of lowest price.

There is relevant background here from the negotiation of the 2014 Public Sector Directive. During the course of the EU negotiations on this Directive, there was extended discussion about deleting the use of lowest price as a single award criterion, so that a greater emphasis would be put on quality aspects for awarding contracts. But views amongst negotiators varied widely. The outcome of the negotiations was:

- i) that the Directive would require contracts to be awarded on the basis of a revised definition of Most Economically Advantageous Tender (MEAT), which covers various options (See Regulation 67 at Annex A), **including the use of price only or cost only**; and
- ii) Member States would have the flexibility to decide at the national level, whether price-only criteria should be ruled out. Following public consultation, the UK Government decided not to rule out price-only criteria in the UK's implementing regulations, to provide more flexibility to UK contracting authorities.

## **2. There is more flexibility to take account of a wider range of characteristics of tenders**

The new rules make clear that contracting authorities, when evaluating the most economically advantageous tender, can take account of the best price-quality ratio. The concept of "best price-quality ratio" (BPQR) is synonymous with the old definition of MEAT – in essence, BPQR means price or cost plus other criteria and equates to value for money. So although there are superficial changes in terminology, contracting authorities may be reassured that longstanding flexibilities can prevail in practice. An example of what might be included in a BPQR assessment is given in the Q&A. As set out in the companion guidance on the Light Touch Regime, using BPQR is likely to be particularly important when service quality is paramount.

It should also be noted that Government policy is to secure value for money. This is set out in Annex 4.6 of HM Treasury's Managing Public Money. Value for money means securing the best mix of quality and effectiveness for the least outlay over the period of the use of the goods or services bought. It is not about minimising up front prices.

### Taking account of social aspects

BPQR means price or cost plus other criteria. As set out in Regulation 67(2) of the 2015 Regulations, 'such other criteria' can include qualitative, environmental and/or social aspects, linked to the subject matter of the contract. The inclusion of **social aspects** is a new feature and a change for which the UK Government lobbied in the EU negotiations.

### *Taking account of the experience of staff assigned to the contract, where relevant*

Regulation 67(3)(b) provides for taking into account the 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.

This was another flexibility for which the UK Government campaigned, which provides long-sought legal clarity that buyers can take into account the relevant skills and experience of individuals when awarding contracts for consultants, lawyers, architects, etc. Historically this lack of clarity has been a common problem, as buyers have only been able to consider skills and experience when assessing a supplier's general credentials at the start of a procurement, and have not been able to consider the skills and experience of the specific people when they are actually put forward to deliver the job.

This had previously been in doubt following the judgment in the Lianakis case (C532/06).

### **3. Fair Trade as an award criterion - Clarification resulting from case law**

Regulation 67(3) (a) of the 2015 Regulations refers to trading and its conditions. As recital 97 to the 2014 Directive sets out, award criteria relating to trading and its conditions can for instance refer to the fact that the product concerned is of fair trade origin, including the requirement to pay a minimum price and price premium to producers. The clarification on products of fair trade origin stems from the Max Havelaar case (C368/10), where judgment was reached during the course of the negotiations.

The judgment confirmed that contracting authorities can use fair trade as an award criterion, where the criterion relates to products supplied under a specific contract and not just to a general purchasing policy of the tenderers.

#### **4. Clarification of what counts as “Linked to the subject matter of the contract”**

Every award criterion used must be linked to the subject matter of the contract. What counts as linked, however, has been clarified in the new directive and implemented in Regulation 67(5) of the 2015 Regulations. Contracting authorities should be aware of this change, to ensure that appropriate contract award criteria are used.

Regulation 67(5) states: “Award criteria shall be considered to be linked to the subject-matter of the contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle including factors involved in:

- (a) The specific process of production, provision or trading of those works, supplies or services; or
  - (b) a specific process for another stage of their life cycle,
- even where such factors do not involve part of their material substance.”

#### **5. Life cycle costing**

When a contracting authority uses cost as an award criterion, it should do so on the basis of a cost effectiveness approach. Life cycle costing (LCC) is an example of this approach, but contracting authorities are free to use other approaches.

Life cycle is defined in Regulation 2(1) of the 2015 Regulations (and Article 2(20) of the Directive) and is explained in recital 96 to the Directive as including all costs over the life cycle of works, supplies or services. Recital 96 states: “This means internal costs, such as research to be carried out, development, production, use, maintenance and end-of-life disposal costs but can also include costs imputed to environmental externalities, such as pollution caused by extraction of raw materials used in the product or caused by the product itself or its manufacturing, provided they can be monetised and monitored.”

As set out in Regulation 68(1), LCC should cover all or part of the following costs over the life cycle of the product, service or works, to the extent that they are relevant:

- (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.

Regulation 68(2) adds that the costs mentioned in Regulation 68(1)(b) may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

The method used for the assessment of costs imputed to environmental externalities must meet the requirements set out in Regulation 68(3), the aim of which is to make sure that this approach does not favour a particular supplier.

Regulation 68(5) sets out that where a common method for the calculation of life cycle costs has been made mandatory by a legislative act of the EU, that method has to be used. So far, there is only one such act, namely the Clean and Efficient Vehicles Directive (2009/33/EU).

## **6. Changes to the rules on abnormally low tenders**

Both the old and new rules contain provisions requiring contracting authorities to seek explanations from bidders about abnormally low tenders, before taking action to reject the bidder.

The new provisions are listed in Regulation 69, which place a duty on the contracting authority to investigate tenders it considers abnormally low. The main change to be aware of, is a new requirement to disregard tenders that are abnormally low because they are in breach of international environmental, social or labour law provisions (Regulation 69(5), which refers to Regulation 56(2)).

No action is necessary where no tenders received appear to contain abnormally low prices.

## Frequently Asked Questions

What is the difference between price & cost?

Cost is the acquisition price plus other economic costs. Using the example of buying printers, the award criteria using cost would be the acquisition price plus other costs, such as the cost of consumables (ink), electricity consumption or costs connected to dismantling and recycling.

What other criteria apart from price or cost might a BPQR approach include?

Using the example of printers above, other criteria could include:

use of recyclable materials for the production of the printers, length of warranty, after sales service, noise emission, involvement of persons from a disadvantaged group in the production process and user friendliness.

Recital 93 says that 'value for money' can be assessed on the basis of factors other than solely the price or remuneration where national provisions exist which fix prices for supplies or the remuneration of certain services. Are there examples of such supplies or services?

In some Member States the price of books is fixed. In such cases, other factors, such as delivery or after sales service would need to be evaluated.

## ANNEX A – Regulations 67, 68 and 69

### 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.



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## THE PUBLIC CONTRACTS REGULATIONS 2015

### GUIDANCE ON AMENDMENTS TO CONTRACTS DURING THEIR TERM

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## OVERVIEW

### **What contract amendments are allowed?**

1. The Public Contracts Regulations (PCR) 2015 provide clarity about the extent to which a contract can be amended after award without the need to re-advertise in OJEU. Permissible grounds for amendment include the existence of suitable “clear, precise and unequivocal” review clauses in the contract; or a need for additional supplies or services where a change of supplier is impossible or would cause significant inconvenience, or a need for additional deliveries due to unforeseen circumstances (both subject to 50% maximum increase in contract value); or where a new supplier replaces the existing supplier because of insolvency or genuine restructuring.

### **Why is this helpful/necessary?**

2. The changes here aim to reduce uncertainty arising from European Court cases (in particular, *Presstext, C-454/06*), which found that changes in a contract post award could in certain cases lead to a legal requirement for re-advertisement in OJEU. Their purpose is to provide a “safe harbour” for certain types of amendments. The provisions should be helpful to contracting authorities to ensure that changes to contracts once awarded are controlled properly.

### **What has changed?**

3. The previous rules (The PCR 2006) contained only limited provisions on the extent to which additional or repeat requirements could be procured from the original contractor after contract award. Those limited provisions were contained in the rules on the negotiated procedure without prior publication of a contract notice (regulation 14) and have been maintained in the corresponding provisions of the new rules (regulation 32 of The PCR 2015).

4. The area of substantial change is that following the *Presstext* case, The PCR 2015 now provide more certainty on the type of amendments that can be made without the need to re-advertise, providing a modern and flexible set of express rules for contract amendments. For example, there is no financial limit on an amendment provided for in an option clause in the original contract, provided certain other conditions are met as explained in this guidance. The changes do not provide unlimited discretion, but they do recognise the realities of public procurement and that it should be possible, for example, to adapt the contract because of technological changes, or technical difficulties that have appeared during operation or maintenance, or to react to unforeseen circumstances. These new flexibilities are an important change that all procurement staff, suppliers and many other stakeholders will need to understand.

### **Which rules do I need to refer to?**

5. The rules on modification of contracts during their term, see Regulation 72 (attached at Annex A).

## KEY POINTS

### Any Change

**6. A contract/framework may change without re-advertisement in OJEU where:**

- The change is provided for in the initial procurement documents in a clear, precise and unequivocal review or option clause, which specifies the conditions of use and the scope and nature of the change; and the overall nature of the contract/framework is not altered.
- The change is not “substantial” as defined in regulation 72(8).

### Major Change<sup>1</sup>

**7. A contract/framework may change without re-advertisement in OJEU where:**

- Additional works, services or supplies “have become necessary” and a change of supplier would not be practicable (for economic, technical or interoperability reasons) or would involve substantial inconvenience/duplication of costs (limited to 50% of original contract price); or
- The need for the change could not have been foreseen by a “diligent” contracting authority, provided these changes do not affect the nature of the contract/framework or exceed 50% of the price of the original contract.

8. In these cases, the contracting authority must publish in OJEU a “Notice of modification of a contract during its term”.

### Minor Change<sup>2</sup>

**9. A contract/framework may change without re-advertisement in OJEU where:**

- It is a minor change that does not affect the nature of the contract/framework; and
- Does not exceed the relevant threshold; and
- Does not exceed 10% (services or supplies) or 15% (works) of the initial value.

<sup>1</sup> For brevity, this guidance uses “major change” to describe the changes allowed by regulations 72(1)(b), 72(1)(c) and 72(3). Major change is not a defined term.

<sup>2</sup> For brevity, this guidance uses “minor change” to describe the changes allowed by regulations 72(5) and 72(6). Minor change is not a defined term.

Corporate Changes<sup>3</sup>

10. A contract/framework *may* change without re-advertisement in OJEU where certain corporate changes have occurred in the supplier such as merger, takeover or insolvency, provided:

- The new supplier meets the original qualitative selection criteria; and
- Other substantial modifications are not made to the contract/framework.

<sup>3</sup> Regulation 72(1)(d).

## **FAQs**

### **When do these rules come into force?**

Amendments made to contracts on or after 26 February 2015 need to comply with regulation 72 of the 2015 Regulations, which itself codifies case law including that established in *Presstext*.

### **Do these rules apply to contracts awarded before the 2015 Regulations?**

Yes. Our interpretation is that it is the date on which the amendment is made that matters, not the date when the contract was first awarded.

### **Does this mean all current contracts need to be amended to include a termination clause, to comply with regulation 73?**

No. Regulation 73(1) does not require contracts awarded before 26 February 2015 to be changed. But regulation 73(3) will apply and a termination clause will be implied.

### **Do these rules only codify *Presstext*?**

No, there are some differences. *Presstext* established that for an amendment to be legal it must not be a material amendment to the contract. An amendment is material if it:

- Introduces conditions which would have allowed for the admission or acceptance of a different tender; or
- Extends the scope of the contract considerably; or
- Changes the economic balance of the contract in favour of the contractor.

These are now included in the definition of a substantial change. Regulation 72 goes further in setting out comprehensively all the circumstances in which a contract may be amended.

### **What is a “substantial” change?**

A substantial change is defined in regulation 72(8). It is any change, irrespective of value, which meets one or more of these conditions:

- Materially alters the character of the original contract/framework;
- Would have allowed other potential suppliers to participate or be selected, or another tender to be accepted;
- Changes the economic balance in favour of the contractor;

- Extends the scope of the contract/framework “considerably”;
- A new contractor replaces the original contractor, other than where the change arises from a review or option clause in the original contract or from corporate changes such as merger, takeover or insolvency.

### **Are “materially alter” and “considerably” defined?**

It is not possible to define these terms in a way that will apply in all cases. A material alteration or considerable extension in one case will not necessarily apply in other cases. Contracting authorities will need to use their judgment on a case by case basis, taking legal advice as necessary.

### **Where more than one major change is made, does the 50% limit apply to each amendment or in aggregate?**

Where more than one major change is made, the 50% limit applies each time provided the change is not aimed at avoiding the procurement rules. Note that it remains at 50% of the value of the original contract, not 50% of any increased price resulting from an earlier variation.

### **What about the limits to minor changes?**

The 10% (services or supplies) and 15% (works) limits apply in aggregate, not each time. The value of each change must also be less than the relevant threshold. If a change exceeds these limits, it becomes an illegal change unless it falls within one of the other categories of permitted change.

### **How do the limits to major or minor changes work when the contract includes an indexation clause?**

Where the contract price is subject to an indexation clause (such as a variation of price formula) the updated price as varied by the clause is the reference point for calculating the percentage change in value. So, in a services contract with an updated price of £10M the aggregate value of minor changes cannot exceed £1M, but each change must also have a value less than the relevant threshold.

### **Do bank step-in rights in a PPP/PFI contract meet the review clause condition?**

Yes, provided the step-in rights are clear, precise and unequivocal, state the conditions under which they may be used, and do not alter the overall nature of the contract.

**What happens if the change fails these tests?**

A new procurement procedure, conducted in accordance with the procurement rules, is required.

**What happens if a change is made that is contrary to the Regulations?**

For contracts placed on or after 26 February 2015, the contracting authority should exercise its right to terminate the contract – see regulation 73(1)(a) (also attached at Annex A). For all contracts, the contracting authority also has the option of not agreeing to the change.

If a change is found by a court to be contrary to the Regulations, then the court can declare the contract ineffective (and the parties can agree beforehand what should happen in those circumstances) or make other orders.

## Annex A – Regulations 72 and 73

### 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.



## **THE PUBLIC CONTRACTS REGULATIONS 2015**

### **GUIDANCE ON FRAMEWORK AGREEMENTS**

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## **Overview**

### **What are framework agreements?**

The Public Contract Regulations 2015 (Regulations) define a framework agreement as:

“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.”<sup>1</sup>

In other words, a framework agreement is a general phrase for agreements with providers that set out terms and conditions under which agreements for specific purchases (known as call-off contracts) can be made throughout the term of the agreement. In most cases a framework agreement will not itself commit either party to purchase or supply, but the procurement to establish a framework agreement is subject to the EU procurement rules.

### **What has changed?**

The key changes include the clarification of the rules on identifying the users of the framework agreement, increased flexibility in the rules on setting up and calling off multi-supplier framework agreements, and the requirement to publish award notices for call-offs on Contracts Finder.

### **Why is this helpful/necessary?**

The new rules support the Government’s approach to making the process simpler and more transparent for business and contracting authorities.

### **Which rules do I need to refer to?**

Regulation 33 on Framework Agreements

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<sup>1</sup> Regulation 33(2)

Regulation 108 (1)(b) publishing award notices for call-offs from framework agreements on Contracts Finder<sup>2</sup>

## **Key Points**

### **Identifying contract authorities in contract notices**

The call for competition or invitation to confirm interest has to clearly identify the contracting authorities that can use the framework. The key is that economic operators from any Member State can easily identify who the users of the framework may be. The identification has to be either by name or by other means that makes them clearly identifiable. Where possible a link to a list of relevant authorities should be provided. However potential framework users may be identified by reference to a specific class of contracting authorities in a defined region that can be identified on the internet - such as Inner London Boroughs as listed at <http://www.londoncouncils.gov.uk/londonfacts/londonlocalgovernment/londonboroughs.htm>.

### **Call-offs and mini-competitions**

Call-off contracts based on framework agreements may be longer than four years, and may extend beyond the expiry date of the framework (Recital 62 Public Procurement Directive).

For single provider framework agreements, call-offs are placed according to the terms and conditions laid out in the framework agreement.

Multi-supplier framework agreements can now comprise just two suppliers (previously minimum of three)

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<sup>2</sup> See Regulation 108 (1)(b) and Contract Finder Guidance at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/406820/Guidance\\_on\\_the\\_new\\_transparency\\_requirements\\_for\\_publishing\\_on\\_contracts\\_finder.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406820/Guidance_on_the_new_transparency_requirements_for_publishing_on_contracts_finder.pdf)

For multi-provider frameworks, there are now **three** potential ways to select the provider and place specific contracts: direct award; mini-competition; or a combination of both.

- i. **Direct award without re-opening competition.** If the framework agreement sets out all the terms governing the provision of the works, services and/or supplies concerned and all the objective conditions that are required to make a decision for award of the specific contract, then awarding the contract without re-opening competition amongst the parties to the framework agreement is possible. In this instance, the choice of provider must be based on the objective criteria laid out in the procurement documentation
  
- ii. **Mixture of direct award and mini-competition (New).** This route is available where the procurement documents for the framework agreement state that it may be used, and the framework agreement sets out all the terms governing the provision of the works, supplies and services concerned. The procurement documents for the framework agreement must set out objective criteria which will be used to determine whether a specific contract will be placed following a reopening of competition or directly on the terms set out in the framework agreement so it is clear and transparent for all users and suppliers. The procurement documents should also specify which terms may be subject to the re-opening of competition. For example a direct award could be for those suppliers allocated to provide goods to a specific region and the accompanying objective criteria for selecting to re-open competition could be:
  - a. the contract exceeds a set financial threshold
  - b. the quantity of products required is over a certain level
  - c. the contract has particularly complex requirements
  
- iii. **Mini-competitions.** When the framework agreement does not include all the terms governing the provision of the works, services and supplies concerned,

the contracting authority must organise a ‘mini-competition’ between the providers which are party to the framework agreement.

### **Award Notices**

Contracting authorities must publish award notices for call-offs from framework agreements on Contracts Finder<sup>3</sup>.

### **FAQs**

#### **When do I have to advertise a framework in OJEU?**

All framework agreements subject to Regulation 33 must be advertised in OJEU. Advertising would not be required if the call-off contracts to be awarded under the framework are exempt from the requirement to publish in OJEU – for example because the estimated maximum value of all call-offs under the framework agreement over its lifetime is below the relevant EU threshold<sup>4</sup>, or the procurements in question are covered by one of the exclusions set out in the Regulations. Where this is the case, Regulation 33 will not apply.

When assessing the total value of the framework, a required field in the OJEU Contract Notice, it is important that the estimate should include all the potential call-offs over the lifetime of the agreement that may be made by all contracting authorities that are permitted to use the framework, not just the intended call-offs by the contracting authority which is procuring the framework agreement.

#### **How can my organisation set up a framework that can be used by other contracting authorities in our region?**

Contracting authorities may set up and advertise framework agreements on behalf of other contracting authorities. This is particularly common in the case of contracting

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<sup>3</sup> See Regulation 108 (1)(b) and Contract Finder Guidance at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/406820/Guidance\\_on\\_the\\_new\\_transparency\\_requirements\\_for\\_publishing\\_on\\_contracts\\_finder.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406820/Guidance_on_the_new_transparency_requirements_for_publishing_on_contracts_finder.pdf)

<sup>4</sup> Regulation 5(8)

authorities that act as Central Purchasing Bodies. Where the EU rules have been followed by such Central Purchasing Bodies, other contracting authorities may use the framework agreements as required so long as they have been covered in the call for competition or invitation to confirm interest. The identities of all the contracting authorities entitled to call-off under the terms of the framework agreement must be included in the procurement documentation. See Key Points above for more detail.

The contracting authority using the framework agreement is responsible for awarding call-off agreements in a way which complies with the terms of the framework agreement.

### **What do I need to include in my OJEU Notice?**

The Regulations stipulate what is required in the Contract Notice or PIN as a call for competition, and your portal provider may also include guidance on what is required on the OJEU standard forms and notices. However the following will give you some idea of the information you need to consider and have at hand for completing the forms

- consider how the identities of all the contracting authorities entitled to call-off under the terms of the framework agreement will be easily available for potential bidders.
- consider the length of term of the framework agreement. It will be a maximum of four years “save in exceptional cases duly justified, in particular by the subject-matter of the framework agreement”<sup>5</sup>. You should therefore seek legal advice if you intend to conclude a framework agreement with a longer duration. It is worth considering, in any event, whether a framework agreement is necessarily the best vehicle for a longer term project.

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<sup>5</sup> Regulations 33(3)

- estimate the total value of the goods, works or services for which call-offs are to be placed and, so far as is possible, the value and frequency of the call-offs to be awarded under the agreement. This is necessary for providers to be able to gauge the likely values involved and to provide a figure for the framework overall which, as with other contracts, should not normally be exceeded without a new competition taking place.
- include the other information required by Annex V to the Directive and the relevant form.

**My Authority has a requirement that could be met by a sheltered workshop type organisation. Can we do that for a framework?**

Yes. Regulation 20 enables contracting authorities to reserve the right to participate in a public contract to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons. The ability to reserve contracts in this way applies to framework agreements as well as to contracts generally. The OJEU call for competition, at the start of the procurement for the framework agreement, will need to make it clear that the framework is reserved for sheltered workshops (the term used for supported employment programs, factories and businesses in the EU Directive itself) under Article 20 of the Public Procurement Directive.

**A framework I want to call-off from will expire in 6 months and I need to award the call-off for 2 years. Can I do that?**

The length of call-offs under framework agreements are not specifically limited by the Regulations. The length of call-offs, as with other contracts, should be appropriate to the purchases in question and should reflect value for money considerations. It may be the case that individual call-offs extend beyond the four-year term of the framework itself. However, this should not be done in order to circumvent the EU rules. For example, it might be difficult to justify a 12-month call-off, very near the end of the framework itself, where

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the normal pattern for the goods or services in question had been for such call-offs to last for just one month at a time.

**Do I have to use a particular procedure to award a framework?**

A framework agreement that is over the relevant threshold must be awarded in accordance with one of the procedures set out in the Regulations and the procurement documents. The OJEU call for competition must specify the procedure that will be used. The authority setting up the framework agreement should follow the rules for all phases of the procurement process covered by the Regulations.

**Does having a framework mean we don't have to consider sustainability and other issues such as TUPE?**

The use of framework agreements does not remove the obligation on contracting authorities to address issues such as TUPE, where they are relevant to the contract at the call-off stage.

**How many providers do I have to have on a framework?**

Framework agreements can be concluded with a single provider or with several providers, for the same goods, works or services, it all depends on the market and your procurement strategy. Unlike the previous rules, which required multiple-supplier frameworks to include at least three providers, it is now permissible to have just two providers. The framework agreement will establish the objective criteria that will apply under the framework, for call-off by direct award, mini-competition or a combination thereof.

**Can a multi-provider framework include a term that allows a direct award call-off to one provider i.e. no mini-competition?**

Yes. Where the terms laid down in the framework agreement set out all the terms governing the provision of the specific requirement, and the terms or procurement documents set out the objective conditions for determining which of the economic operators should perform the contract, the authority can

award the call-off without reopening competition. The Regulations do not specify how this should be done, but the mechanism used should comply with general Treaty principles including transparency and non-discrimination.

**Do the award criteria used for awarding the framework agreement have to be the same for mini-competitions?**

No. The award criteria used for mini-competitions need not be the same as those applied in the award of the framework agreement itself. The contracting authority should award the call-off to the provider which has submitted the best tender on the basis of the award criteria set out in the framework agreement focusing on the particular requirement. Contracting authorities must make it clear in the procurement documentation the criteria to be used for awarding call-off contracts.

**Do we have to observe a standstill period before we enter into the framework agreement or after a mini-competition?**

The standstill period applies when you set up a framework agreement. However, there is no mandatory standstill period for a call-off contract under a framework

**Can I make changes to my framework agreement post-award?**

Please see separate guidance on amendments to contracts



# Public Contracts Regulations 2015

## New requirements relating to Pre Qualification Questionnaires to help businesses access Public Sector contracts

### 1. Introduction

The Public Contracts Regulations 2015 contain new requirements in relation to the use of Pre Qualification Questionnaires, for above and below EU thresholds.

These changes implement Lord Young's recommendations to Government in his report 'Growing Your Business' (May 2013), and are set out in Part 4 of the new Public Contracts Regulations 2015.

The new requirements aim to ensure a simpler and more consistent approach to selection across the whole public sector authorities and will remove some of the bureaucracy and barriers which make it difficult for businesses, in particular smaller firms, to access public sector contracts.

For procurements above EU thresholds, contracting authorities should have regard to the attached statutory guidance, at Annex 1, concerning changes to how procurers should select suitable suppliers and administer Pre Qualification Questionnaires in the Public Sector.

### 2. Timing

The requirements will apply to contracting authorities from 26 February 2015.

They apply only to procurements which commence on or after the date on which the Public Contracts Regulations 2015 take effect - they are not intended to apply retrospectively.

### 3. The changes

The following is a high level summary of the key changes. However, it is not an exhaustive list of all the obligations, and contracting authorities must have regard to the statutory guidance at Annex 1 when embarking on a new procurement to ensure that the regulations are being complied with. Annex 1 also sets out any exceptions and exemptions from the changes. Legal advice may also be necessary in certain circumstances.

### 4. Use of Pre Qualification Questionnaires

#### *In above-EU threshold contracts (regulation 107)*

Statutory guidance, at Annex 1 applies for procurements above these threshold values.

Contracting Authorities must have regard to the Crown Commercial Service guidance, at Annex 1, in relation to the qualitative selection of economic operators. This guidance contains a standardised set of questions for us in procurements where the EU rules apply.

#### *In below-EU threshold procurements (regulation 111)*

A Contracting Authority may not include a pre-qualification stage in any procurement where the value of the procurement is below the EU threshold for goods and services, currently £111,676 in central government and £172,514 outside central government. In practical terms, this means that PQQs used as part of a pre-qualification stage are not permitted. However contracting authorities may ask 'suitability assessment questions' relating to a potential supplier provided that the questions are relevant to the subject matter of the procurement and proportionate.

## Annex 1 - Guidance on qualitative selection for above EU threshold procurements

### Introduction

This guidance is issued under regulation 107(1) of the Public Contracts Regulations 2015 (the "Regulations"). Contracting authorities must have regard to this guidance in relation to the qualitative selection of economic operators in procurements to which Chapter 7 of the Regulations applies. Chapter 7 applies to procurements within the scope of Part 2, except for those cases listed in regulation 105(2) (some procurement for the purposes of the NHS) Authorities should look at Regulations 7-12 for general exceptions where Part 2 does not apply, and see general guidance on when the Regulations as a whole apply.

This guidance is aimed at contracting authorities across the public sector, and applies to new procurements that commence from the day upon which the Regulations come into force for most purposes, the 26th February 2015.

In accordance with regulation 107(4) of the Regulations, where a contracting authority conducts a procurement in a way which represents a reportable deviation from this guidance, the contracting authority must send a report explaining the deviation to the Crown Commercial Service. The section below sets out what is a reportable deviation, and explains how to send such a report to the Crown Commercial Service.

This guidance is statutory and underpins regulation 107 of the Regulations. It is not a comprehensive guide to the law. You should seek legal advice if you are unsure about the effect of the Regulations.

For the purpose of this document, 'supplier' means an economic operator as defined in PCR Reg 2 (1).

The Crown Commercial Service recommends that all public sector bodies subject to this guidance should adopt the attached set of standardised selection questions when assessing supplier suitability for providing goods and services (except where they are covered by an exemption, see above).

- For clarity and consistency, these questions are presented in the format of a Pre-Qualification Questionnaire (PQQ), however, these questions (or a selection of these questions) should be adopted across all procurement procedures (see below) and authorities should embed these into their own procurement processes (for example eProcurement systems.)

- The PQQ should be used in accordance with the rules of the supplier selection stage of the relevant procurement procedure. i.e. it should be used:
  - to test that suppliers meet minimum levels of suitability when using the Open procedure and;
  - to pre-qualify suppliers to be invited to tender when using the Restricted procedure, to submit an initial tender under the Competitive procedure with negotiation or to participate in a Competitive Dialogue or Innovation Partnership procedure.
- Not all the questions in the PQQ or the additional modules may be required for every procurement, only those which are relevant and proportionate to the contract (the mandatory and discretionary exclusion questions should always be included)
- Contracting authorities may continue to use the industry-standard PAS91 for public contracts for Works.
- A European Single Procurement Document (ESPD) covering the exclusion and selection criteria, is currently being developed by the European Commission. Further details on this will follow in due course.

### Deviations

From 26th February 2015, contracting authorities should select from the bank of core and additional module questions contained in the PQQ and not deviate from the wording in these questions. There will be a limited number of circumstances where an authority may need to deviate from the wording in these questions; however, authorities need to be able to justify the reasons for any variation if asked. The Crown Commercial Service will be undertaking a series of 'spot checks' as part of the Mystery Shopper Scheme in the coming months to monitor and check compliance to these standard questions. In addition, from 1 September 2015, any deviations in the wording from the bank of core and additional module questions are to be reported to the Crown Commercial Service (for information only), within 30 days of the PQQ being made available to candidates on Contracts Finder, by e-mailing [mysteryshopper@crownccommercial.gov.uk](mailto:mysteryshopper@crownccommercial.gov.uk), with a brief rationale that explains the reason for the deviation(s). The Crown Commercial Service recommends that this should be signed off by the Commercial Director, Head of Procurement or equivalent. Further advice on this will be issued in coming months.

## General principles

- The contracting authority should allow potential providers to self-certify that they are not subject to any of the mandatory/ discretionary grounds for exclusion and then complete the Invitation to Tender/ Invitation to Quote on the basis of this self certification.
- Evidence that the supplier can meet the specified requirements, such as those questions set out in modules B-E of the selection questions, – Insurance, Equality, Environmental Management and Health and Safety, - should normally be obtained following the final tender evaluation decision i.e. from the winning supplier only, (although it can be required sooner if necessary for the proper conduct of the procedure).
- The grounds for mandatory and discretionary exclusion set out in the Regulations should always be applied to the supplier and all members of a consortium bid (this is not compulsory for subcontractors, however contracting authorities may decide to apply them to subcontractors in situations where they deem appropriate).
- Any questions selected should be relevant and proportionate to the complexity and risk associated with their particular requirements. If contracting authorities wish to include any additional project specific questions you should ensure that these are relevant and proportionate to the requirement.
- These specific selection questions are designed to cover all the elements set out in the Regulations governing exclusion and selection and can be applied to all procedures. Any questions asked must fall within the scope of these questions. The Crown Commercial Service will be undertaking a series of 'spot checks' under the Mystery Shopper Service to monitor compliance with these questions.

## Scoring methodology

The contracting authority must ensure that full details including scoring for each question, weightings and any 'pass mark' or minimum threshold for selection are made known to the suppliers at the same time that the PQQ/ selection questions are issued. In addition, if certain questions are sufficiently critical that an unsatisfactory answer may lead to exclusion, irrespective of the score on the rest of the PQQ, this should be made clear to suppliers.

## Approach to consortia

If the Supplier completing this PQQ is doing so as part of a consortium, the following information must be provided;

- names of all consortium members;
- the lead member of the consortium who will be contractually responsible for delivery of the contract (if a separate legal entity is not being created); and
- if the consortium is not proposing to form a legal entity, full details of proposed arrangements within a separate Appendix.

The contracting authority may require members of the consortium to assume a specific legal form if awarded the contract, to the extent that it is necessary for the satisfactory performance of the contract.

All members of the consortium will be required to provide the information required in all sections of the PQQ as part of a single composite response to the contracting authority. i.e. each member of the consortium is required to complete the form.

Where the suppliers are proposing to create a separate legal entity, such as a Special Purpose Vehicle (SPV), they should provide details of the actual or proposed percentage shareholding of the constituent members within the new legal entity in a separate Appendix.

Consortium arrangements may be subject to future changes and any updates to the bidding model should be provided to the contracting authority so that a further assessment can be carried out (by applying the selection criteria to the new information provided). The contracting authority reserves the right to deselect the Supplier prior to any award of contract, based on an assessment of the updated information.

## Guidance on using each section

Each section below refers to a relevant section in the standard PQQ.

### 1. Supplier information

This section should be used to gather the necessary details to understand the nature of the organisation and legal entity participating in the procurement exercise, and the composition of their supply chain. This section would not be scored as the answers to the questions are for information only, but a supplier may be excluded on the grounds of providing insufficient or false information.

### 2. Mandatory grounds for exclusion

This section should always be asked. Contracting authorities are required to exclude suppliers from the procurement if any of the mandatory grounds for rejection apply:

- Evidence of convictions (if the supplier ticks 'Yes' and/or the authority has other external evidence) relating to organised crime, corruption, fraud, money laundering, or
- has been the subject of a binding legal decision which found a breach of legal obligations to pay tax or social security obligations (except where disproportionate e.g. only minor amounts involved)
- and the supplier has failed to provide sufficient evidence of remedial action having taken place subsequently. (See section on 'Self-cleaning' below)

### 3. Discretionary grounds for exclusion – Part 1

Contracting authorities are entitled to exclude suppliers from the procurement if any of the discretionary grounds for exclusion apply. The contracting authority should consider all the relevant circumstances, and may at its discretion allow a supplier to proceed (See section on 'Self-cleaning' below.)

### 4. Discretionary grounds for exclusion – Part 2 Tax Compliance [Central Government only]

In line with Procurement Policy Action Note 03/14: Measures to Promote Tax Compliance, this section only applies to contracts over £5 million and to central government departments including their executive agencies and non departmental public bodies, though other contracting authorities (e.g. in local government and the wider public sector) may choose to apply the measures. Further information is available here from PPN 03/14 dated 6 February 2014.

Where a supplier declares that it has had an Occasion of Non Compliance ("OONC"), the contracting department can, at its discretion, decide whether or not to exclude that supplier from the procurement process. In reaching a judgement, Departments may take into account any mitigating factors provided as part of the supplier's response; for example measures that the supplier has implemented to ensure future tax compliance. However, it should be noted that if an OONC also falls within the mandatory exclusion criteria under the Regulations then the contracting authority will have no discretion. Please be aware that this policy is currently being updated and further guidance will be issued in due course.

### 5. 'Self Cleaning' (Covering both mandatory and discretionary exclusion)

If a supplier provides sufficient evidence that remedial action has taken place subsequently and "self cleans", by paying necessary compensation, collaborating with investigations, and taking concrete technical, organisational and personnel steps to prevent recurrence of the offence or misdeeds, the authority can use its discretion as to whether the supplier may proceed, provided the supplier can demonstrate remedial action to the satisfaction of the authority.

Self-cleaning applies to both mandatory and discretionary exclusion.

In the absence of earlier satisfactory self-cleaning, exclusion must nevertheless end five years from conviction for mandatory exclusion, and three years after the cause, for discretionary exclusion.

Mandatory exclusion for non-payment of tax or social security must end when the supplier has paid or enters a binding agreement to pay, and can also be waived at the authority's discretion if the amounts are only "minor" or the supplier hasn't yet had a chance to finally pay or agree to pay.

Self-cleaning is not applicable to discretionary exclusion grounds which are procurement-specific and which do not arise from supplier misdeeds ("conflict of interest" and "distortion of competition from prior involvement"). Discretionary exclusion arising from the supplier's financial position should be ended when the financial issues are satisfactorily resolved; full self-cleaning is not relevant unless other grounds for exclusion are also engaged.

Exclusion grounds may apply at any point in the procurement process up to the award of contract.

## 6. Economic and Financial Standing

Any minimum financial thresholds should be clearly stated up front and any methodology for assessing financial strength should be clearly articulated to potential suppliers.

The financial assessment of suppliers should be undertaken in a manner that is proportionate, flexible and not overly risk-averse while ensuring taxpayer value and safety is protected and compliant with the Regulations. Furthermore, all suppliers, whatever their size or constitution, should be treated fairly and with equal diligence during the financial appraisal process. Financial standing should only be considered as part of the overall selection criteria. It may not, on its own, reflect the ability of a supplier to deliver.

Assessment should be conducted in line with the principles set out in PPN 02/13 supplier financial risk issues and where the contracting authority wishes to request accounts and other evidence the contracting authority must use the request format laid out in the PQQ. The regulations include a turnover cap which means that a company turnover requirement may not be set at more than two times the contract value unless justified in the particular case (please refer to Regulation 58 (9)). Moreover a potential supplier should not be deselected on the basis of turnover size alone.

Where the contracting authority requires some form of financial guarantee, the type of guarantee should be specified within the PQQ/selection questions i.e. Parent, Performance or Bank.

## 7. Technical and Professional Ability – Part 1

The contracting authority may request details of up to three contracts, in any combination from either the public or private sector, that are relevant to its requirement. Contracts for supplies or services should have been performed during the past three years. Contracts for works should have been performed during the past 5 years.

Suppliers should be asked to submit details of contracts where the named customer contact is prepared to provide written evidence to the contracting authority to confirm the accuracy of the information provided.

Consortia bids should be asked to provide relevant examples of where the consortium has delivered similar requirements. If this is not possible (e.g. the consortium is newly formed or a Special Purpose Vehicle will be created for this contract) then three separate examples should be provided between the principal member(s) of the proposed consortium or Special Purpose Vehicle (three examples are not required from each member).

Where the supplier is a managing agent not intending to be the main provider of the supplies or services, the information requested should be provided in respect of the principal intended provider or sub-contractor who will deliver the supplies and services.

## 8. Technical and Professional Ability – Part 2

### A. Project specific questions for Technical and Professional Ability

Contracting authorities are permitted to ask further project-specific questions relating to the supplier's technical and professional ability as part of selection. Any questions asked must be relevant and proportionate to the requirement. A list of possible topics covering technical and professional ability is set out in Regulations 60 (9) (b) - (k).

### Additional Modules

The contracting authority should only use the following modules if they are relevant and proportionate to the subject matter of the contract. Not all the questions in each section may be relevant and the buyer should exercise their own judgement in deciding which questions to include. Questions in modules B - E should be asked on a self-certify basis i.e. checks against each module will only be carried out on the winning supplier at contract award stage, and responses should be evaluated on a pass/fail basis instead of being scored/weighted.

### B. Insurance

The contracting authority should allow potential providers to self-certify that they have or will undertake to secure any required insurance in the event that they are awarded the contract. It is not appropriate at this point, to insist on the evidence that cover already exists.

### Levels of Cover

The contracting authority should specify the level of cover required on a contract by contract basis. This should be proportionate, reflective of the nature of the work and the risk involved.

Employers' Liability Insurance is generally required by law to cover employees and many insurers incorporate it into their business insurance policies.

Public Liability Insurance provides cover where a client, contractor or member of the public is injured and the service provider is at fault. This is also often combined with Employers' Liability Insurance.

Professional Indemnity Insurance is typically required to cover the provision of professional services such as financial services or IT consultancy. It may be required if advice is being provided to clients, if data belonging to a client is being handled or the service provider is responsible for a client's intellectual property.

### **C. Compliance with equality legislation**

Contracting authorities have a number of reasons to address equal opportunities as part of supplier selection, e.g. there is a legal obligation to do so under various pieces of legislation (as a public sector buyer), to ensure the buyer's policies are promoted throughout the procurement.

If equality is to be assessed at the supplier selection stage it is recommended that the contracting authority only requires suppliers to self-certify that they comply with equality legislation. The contracting authority should assess any remedial action that has been taken to address any breaches of the legislation that have been noted.

If required, the contracting authority may explore specific equality requirements in more detail at award stage (for example on a service contract, the approach to reaching particular ethnic or hard to reach groups might be a consideration). The assessment of equality should be continually reinforced through management of the contract post-award.

### **D. Environmental Management**

Addressing environmental management requires careful consideration of the nature of the requirement, the opportunities and risks, and the most appropriate way of dealing with the risks. This will normally highlight a number of requirement-specific actions to be undertaken at various stages of the project, both during the procurement and the contract delivery.

Contracting authorities should clearly state what is required in the specification, allowing suppliers to self-certify that they can meet the contracting authority's sustainability requirements in delivering the contract, (e.g. confirming that the supplier will comply with the authority's waste management policy, confirming that products to be delivered meet the appropriate sustainability criteria, etc).

Care must be taken not to confuse those elements of sustainability that relate to the technical competence of the supplier (to be assessed at selection) with those that relate to the delivery of the contract (to be assessed at award stage).

At the supplier selection stage it is recommended that the contracting authority only requires suppliers to self-certify that they comply with environmental legislation, and any sustainability-related criteria that have been stated in the specification as required to deliver the contract.

The authority should assess any remedial action that has been taken to address any breaches of the legislation that have been noted. If required, the authority may explore specific equality requirements in more detail at award stage.

### **E. Health and Safety**

#### **Health and Safety Policy**

All UK employers with more than five employees are obliged to have a health and safety policy, signed and dated and updated regularly. The contracting authority should allow potential providers to self-certify that they have a health and safety policy in place and should not require a company with less than five employees to have a health and safety policy unless this is relevant to the procurement.

At the supplier selection stage it is recommended that the contracting authority seeks clarification as to whether any of the supplier's directors or executive officers have received enforcement/ remedial orders in relation to the Health and Safety Executive (or equivalent body) in the last 3 years. If they have, they will need to provide details of any remedial action or changes to procedures they have made as a result. The supplier must be excluded unless they can demonstrate to the authority's satisfaction that appropriate remedial action has been taken to prevent future occurrences breaches.

Additional contract-specific questions may be asked where relevant. Care should be taken to ensure these are asked at the appropriate stage of the procurement. Examples might include questions related to:

- induction and training of employees;
- drug and alcohol misuse;
- control of substances hazardous to health;
- risk assessments; or
- monitoring the track record and health and safety competence of subcontractors.

## Standardised Pre-Qualification Questionnaire (PQQ)

### Notes for completion

1. The “authority” means the public sector contracting authority, or anyone acting on behalf of the contracting authority, that is seeking to invite suitable Suppliers to participate in this procurement process.
2. “You”/ “Your” or “Supplier” means the body completing these questions i.e. the legal entity seeking to be invited to the next stage of the procurement process and responsible for the information provided. The ‘Supplier’ is intended to cover any economic operator as defined by the Public Contracts Regulations 2015 and could be a registered company; charitable organisation; Voluntary Community and Social Enterprise (VCSE); Special Purpose Vehicle; or other form of entity.
3. This Pre-Qualification Questionnaire (PQQ) has been designed to assess the suitability of a Supplier to deliver the authority’s contract requirement(s). If you are successful at this stage of the procurement process, you will be selected for the subsequent award stage of the process.
4. Please ensure that all questions are completed in full, and in the format requested. Failure to do so may result in your submission being disqualified. If the question does not apply to you, please state clearly ‘N/A’.
5. Should you need to provide additional Appendices in response to the questions, these should be numbered clearly and listed as part of your declaration. A template for providing additional information is provided at the end of this document.
6. Please return a completed version of this document to:

Named procurement officer	
Name of contracting authority	
Contact e-mail address	
Postal address	
Deadline for receipt of PQQ (UK date and time)	

### Verification of Information Provided

7. Whilst reserving the right to request information at any time throughout the procurement process, the authority may enable the supplier to self-certify that there are no mandatory/ discretionary grounds for excluding their organisation. When requesting evidence that the supplier can meet the specified requirements (such as the questions in section 7 of this PQQ relating to Technical and Professional Ability) the authority may only obtain such evidence after the final tender evaluation decision i.e. from the winning Supplier only.
9. The authority recognises that arrangements in relation to sub-contracting may be subject to future change, and may not be finalised until a later date. However, Suppliers should be aware that where information provided to the authority indicates that sub-contractors are to play a significant role in delivering key contract requirements, any changes to those sub-contracting arrangements may affect the ability of the Supplier to proceed with the procurement process or to provide the supplies and/or services required. Suppliers should therefore notify the authority immediately of any change in the proposed sub-contractor arrangements. The authority reserves the right to deselect the Supplier prior to any award of contract, based on an assessment of the updated information.

### Sub-contracting arrangements

8. Where the Supplier proposes to use one or more sub-contractors to deliver some or all of the contract requirements, a separate Appendix should be used to provide details of the proposed bidding model that includes members of the supply chain, the percentage of work being delivered by each sub-contractor and the key contract deliverables each sub-contractor will be responsible for.

### Consortia arrangements

10. If the Supplier completing this PQQ is doing so as part of a proposed consortium, the following information must be provided;
  - names of all consortium members;
  - the lead member of the consortium who will be contractually responsible for delivery of the contract (if a separate legal entity is not being created); and
  - if the consortium is not proposing to form a legal entity, full details of proposed arrangements within a separate Appendix.
11. Please note that the authority may require the consortium to assume a specific legal form if awarded the contract, to the extent that a specific legal form is deemed by the authority as being necessary for the satisfactory performance of the contract.
12. All members of the consortium will be required to provide the information required in all sections of the PQQ as part of a single composite response to the authority i.e. each member of the consortium is required to complete the form.
13. Where you are proposing to create a separate legal entity, such as a Special Purpose Vehicle (SPV), you should provide details of the actual or proposed percentage shareholding of the constituent members within the new legal entity in a separate Appendix.
14. The authority recognises that arrangements in relation to a consortium bid may be subject to future change. Suppliers should therefore respond on the basis of the arrangements as currently envisaged. Suppliers are reminded that the authority must be immediately notified of any changes, or proposed changes, in relation to the bidding model so that a further assessment can be carried out by applying the selection criteria to the new information provided. The authority reserves the right to deselect the Supplier prior to any award of contract, based on an assessment of the updated information.

### Confidentiality

15. When providing details of contracts in answering section 6 of this PQQ (Technical and Professional Ability), the Supplier agrees to waive any contractual or other confidentiality rights and obligations associated with these contracts.
16. The authority reserves the right to contact the named customer contact in section 6 regarding the contracts included in section 6. The named customer contact does not owe the authority any duty of care or have any legal liability, except for any deceitful or maliciously false statements of fact.
17. The authority confirms that it will keep confidential and will not disclose to any third parties any information obtained from a named customer contact, other than to the Crown Commercial Service and/or contracting authorities defined by the Public Contract Regulations.

## 1. Supplier information

1.1 Supplier details	Answer	
Full name of the Supplier completing the PQQ		
Registered company address		
Registered company number		
Registered charity number		
Registered VAT number		
Name of immediate parent company		
Name of ultimate parent company		
Please mark 'X' in the relevant box to indicate your trading status	i) a public limited company	<input type="checkbox"/> Yes
	ii) a limited company	<input type="checkbox"/> Yes
	iii) a limited liability partnership	<input type="checkbox"/> Yes
	iv) other partnership	<input type="checkbox"/> Yes
	v) sole trader	<input type="checkbox"/> Yes
	vi) other (please specify)	<input type="checkbox"/> Yes
Please mark 'X' in the relevant boxes to indicate whether any of the following classifications apply to you	i) Voluntary, Community and Social Enterprise (VCSE)	<input type="checkbox"/> Yes
	ii) Small or Medium Enterprise (SME) <sup>1</sup>	<input type="checkbox"/> Yes
	iii) Sheltered workshop	<input type="checkbox"/> Yes
	iv) Public service mutual	<input type="checkbox"/> Yes

<sup>1</sup> See EU definition of SME: <http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/>

1.2 Bidding model	
Please mark 'X' in the relevant box to indicate whether you are;	
a) Bidding as a Prime Contractor and will deliver 100% of the key contract deliverables yourself	<input type="checkbox"/> Yes
b) Bidding as a Prime Contractor and will use third parties to deliver <u>some</u> of the services  If yes, please provide details of your proposed bidding model that includes members of the supply chain, the percentage of work being delivered by each sub-contractor and the key contract deliverables each sub-contractor will be responsible for.	<input type="checkbox"/> Yes
c) Bidding as Prime Contractor but will operate as a Managing Agent and will use third parties to deliver <u>all</u> of the services  If yes, please provide details of your proposed bidding model that includes members of the supply chain, the percentage of work being delivered by each sub-contractor and the key contract deliverables each sub-contractor will be responsible for.	<input type="checkbox"/> Yes
d) Bidding as a consortium but not proposing to create a new legal entity.  If yes, please include details of your consortium in the next column and use a separate Appendix to explain the alternative arrangements i.e. why a new legal entity is not being created.  Please note that the authority may require the consortium to assume a specific legal form if awarded the contract, to the extent that it is necessary for the satisfactory performance of the contract.	<input type="checkbox"/> Yes  <u>Consortium members</u>  <u>Lead member</u>
e) Bidding as a consortium and intend to create a Special Purpose Vehicle (SPV).  If yes, please include details of your consortium, current lead member and intended SPV in the next column and provide full details of the bidding model using a separate Appendix.	<input type="checkbox"/> Yes  <u>Consortium members</u> <u>Current lead member</u> <u>Name of Special Purpose Vehicle</u>

1.3 Contact details	
Supplier contact details for enquiries about this PQQ	
Name	
Postal address	
Country	
Phone	
Mobile	
E-mail	

## 1.4 Licensing and registration (please mark 'X' in the relevant box)

1.4.1	Registration with a professional body If applicable, is your business registered with the appropriate trade or professional register(s) in the EU member state where it is established (as set out in Annex XI of directive 2014/24/EU) under the conditions laid down by that member state).	<input type="checkbox"/> Yes <input type="checkbox"/> No  If Yes, please provide the registration number in this box.
1.4.2	Is it a legal requirement in the state where you are established for you to be licensed or a member of a relevant organisation in order to provide the requirement in this procurement?	<input type="checkbox"/> Yes <input type="checkbox"/> No  If Yes, please provide additional details within this box of what is required and confirmation that you have complied with this.

## 2. Grounds for mandatory exclusion

You will be excluded from the procurement process if there is evidence of convictions relating to specific criminal offences including, but not limited to, bribery, corruption, conspiracy, terrorism, fraud and money laundering, or if you have been the subject of a binding legal decision which found a breach of legal obligations to pay tax or social security obligations (except where this is disproportionate e.g. only minor amounts involved).

If you have answered “yes” to question 2.2 on the non-payment of taxes or social security contributions, and have not paid or entered into a binding arrangement to pay the full amount, you may still avoid exclusion if only minor tax or social security contributions are unpaid or if you have not yet had time to fulfil your obligations since learning of the exact amount due. If your organisation is in that position please provide details using a separate Appendix. You may contact the authority for advice before completing this form.

2.1 Within the past five years, has your organisation (or any member of your proposed consortium, if applicable), Directors or partner or any other person who has powers of representation, decision or control been convicted of any of the following offences?	Please indicate your answer by marking 'X' in the relevant box.	
	Yes	No
(a) conspiracy within the meaning of section 1 or 1A of the Criminal Law Act 1977 or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 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;		
(b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889 or section 1 of the Prevention of Corruption Act 1906;		
(c) the common law offence of bribery;		
(d) bribery within the meaning of sections 1, 2 or 6 of the Bribery Act 2010; or section 113 of the Representation of the People Act 1983;		

(e) any of the following offences, 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:		
(i) the offence of cheating the Revenue;		
(ii) the offence of conspiracy to defraud;		
(iii) fraud or theft within the meaning of the Theft Act 1968, the Theft Act (Northern Ireland) 1969, the Theft Act 1978 or the Theft (Northern Ireland) Order 1978;		
(iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985, article 451 of the Companies (Northern Ireland) Order 1986 or section 993 of the Companies Act 2006;		
(v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979 or section 72 of the Value Added Tax Act 1994;		
(vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993;		
(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 or section 19 of the Theft Act (Northern Ireland) 1969;		
(viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006; 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; 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 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;		
(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 or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996;		
(j) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004;		
(k) an offence under section 59A of the Sexual Offences Act 2003;		
(l) an offence under section 71 of the Coroners and Justice Act 2009		
(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; 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.		

<p><b>Non-payment of taxes</b></p> <p><b>2.2 Has it been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of any part of the United Kingdom or the legal provisions of the country in which your organisation is established (if outside the UK), that your organisation is in breach of obligations related to the payment of tax or social security contributions?</b></p> <p>If you have answered Yes to this question, please use a separate Appendix to provide further details. Please also use this Appendix to confirm whether you have paid, or have entered into a binding arrangement with a view to paying, including, where applicable, any accrued interest and/or fines?</p>		
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### 3. Grounds for discretionary exclusion – Part 1

The authority may exclude any Supplier who answers 'Yes' in any of the following situations set out in paragraphs (a) to (i);

<b>3.1 Within the past three years, please indicate if any of the following situations have applied, or currently apply, to your organisation.</b>	Please indicate your answer by marking 'X' in the relevant box.	
	Yes	No
(a) your organisation has violated applicable obligations referred to in regulation 56 (2) of the Public Contracts Regulations 2015 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;		
(b) your organisation is bankrupt or is the subject of insolvency or winding-up proceedings, where your 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) your organisation is guilty of grave professional misconduct, which renders its integrity questionable;		
(d) your organisation has entered into agreements with other economic operators aimed at distorting competition;		
(e) your organisation has a conflict of interest within the meaning of regulation 24 of the Public Contracts Regulations 2015 that cannot be effectively remedied by other, less intrusive, measures;		
(f) the prior involvement of your organisation in the preparation of the procurement procedure has resulted in a distortion of competition, as referred to in regulation 41, that cannot be remedied by other, less intrusive, measures;		
(g) your organisation 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) your organisation— (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 of the Public Contracts Regulations 2015; or		
(i) your organisation has undertaken to		
(aa) unduly influence the decision-making process of the contracting authority, or		
(bb) obtain confidential information that may confer upon your organisation undue advantages in the procurement procedure; or		
(j) your organisation has negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.		

### Conflicts of interest

In accordance with question 3.1 (e), the authority may exclude the Supplier if there is a conflict of interest which cannot be effectively remedied. The concept of a conflict of interest includes 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.

Where there is any indication that a conflict of interest exists or may arise then it is the responsibility of the Supplier to inform the authority, detailing the conflict in a separate Appendix. Provided that it has been carried out in a transparent manner, routine pre-market engagement carried out by the authority should not represent a conflict of interest for the Supplier.

### Taking Account of Bidders' Past Performance

In accordance with question (g), the authority may assess the past performance of a Supplier (through a Certificate of Performance provided by a Customer or other means of evidence). The authority may take into account any failure to discharge obligations under the previous principal relevant contracts of the Supplier completing this PQQ. The authority may also assess whether specified minimum standards for reliability for such contracts are met.

In addition, the authority may re-assess reliability based on past performance at key stages in the procurement process (i.e. Supplier selection, tender evaluation, contract award stage etc.). Suppliers may also be asked to update the evidence they provide in this section to reflect more recent performance on new or existing contracts (or to confirm that nothing has changed).

### 'Self-cleaning'

Any Supplier that answers 'Yes' to questions 2.1, 2.2 and 3.1 should provide sufficient evidence, in a separate Appendix, that provides a summary of the circumstances and any remedial action that has taken place subsequently and effectively "self cleans" the situation referred to in that question. The Supplier has to demonstrate it has taken such remedial action, to the satisfaction of the authority in each case.

If such evidence is considered by the authority (whose decision will be final) as sufficient, the economic operator concerned shall be allowed to continue in the procurement process.

In order for the evidence referred to above to be sufficient, the Supplier shall, as a minimum, prove that it has;

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

The measures taken by the Supplier shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered by the authority to be insufficient, the Supplier shall be given a statement of the reasons for that decision.

## 4. Grounds for discretionary exclusion – Part 2

The authority reserves the right to use its discretion to exclude a Supplier where it can demonstrate the Supplier's non-payment of taxes/social security contributions where no binding legal decision has been taken.

Please note that Section 4 relating to tax compliance only applies where the authority has indicated that the contract is over £5 million in value, and the authority is a Central Government Department (including their Executive Agencies and Non-Departmental Public Bodies).

“Occasion of Tax Non-Compliance” means:

- (a) any tax return of the Supplier submitted to a Relevant Tax Authority on or after 1 October 2012 is found to be incorrect as a result of:
  1. a Relevant Tax Authority successfully challenging the Supplier under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle;
  2. the failure of an avoidance scheme which the Supplier was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or
- (b) the Supplier's tax affairs give rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax related offences which is not spent at the Effective Date or to a penalty for civil fraud or evasion

**From 1 April 2013 onwards, have any of your company's tax returns submitted on or after 1 October 2012; (Please indicate your answer by marking 'X' in the relevant box).**

4.1	Given rise to a criminal conviction for tax related offences which is unspent, or to a civil penalty for fraud or evasion;	<input type="checkbox"/> Yes <input type="checkbox"/> No
4.2	Been found to be incorrect as a result of: <ul style="list-style-type: none"> <li>• HMRC successfully challenging it under the General Anti-Abuse Rule (GAAR) or the "Halifax" abuse principle; or</li> <li>• A Tax Authority in a jurisdiction in which the legal entity is established successfully challenging it under any tax rules or legislation that have an effect equivalent or similar to the GAAR or the "Halifax" abuse principle; or</li> <li>• the failure of an avoidance scheme which the Supplier was involved in and which was, or should have been, notified under the Disclosure of Tax Avoidance Scheme (DOTAS) or any equivalent or similar regime in a jurisdiction in which the Supplier is established.</li> </ul>	<input type="checkbox"/> Yes <input type="checkbox"/> No

If answering “Yes” to either 4.1 or 4.2 above, the Supplier may provide details of any mitigating factors that it considers relevant and that it wishes the authority to take into consideration. This could include, for example:

- Corrective action undertaken by the Supplier to date;
- Planned corrective action to be taken;
- Changes in personnel or ownership since the Occasion of Non-Compliance (OONC); or
- Changes in financial, accounting, audit or management procedures since the OONC.

In order that the authority can consider any factors raised by the Supplier, the following information should be provided:

- A brief description of the occasion, the tax to which it applied, and the type of “non-compliance” e.g. whether HMRC or the foreign Tax Authority has challenged pursuant to the GAAR, the “Halifax” abuse principle etc.
- Where the OONC relates to a DOTAS, the number of the relevant scheme.
- The date of the original “non-compliance” and the date of any judgement against the Supplier, or date when the return was amended.
- The level of any penalty or criminal conviction applied.

## 5 - Economic and Financial Standing

Financial Information							
5.1	<p>Please provide one of the following to demonstrate your economic/financial standing; Please indicate your answer with an 'X' in the relevant box.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 80%;">(a) A copy of the audited accounts for the most recent two years</td> <td style="width: 20%;"></td> </tr> <tr> <td>(b) A statement of the turnover, profit &amp; loss account, current liabilities and assets, and cash flow for the most recent year of trading for this organisation</td> <td></td> </tr> <tr> <td>(c) A statement of the cash flow forecast for the current year and a bank letter outlining the current cash and credit position</td> <td></td> </tr> </table>	(a) A copy of the audited accounts for the most recent two years		(b) A statement of the turnover, profit & loss account, current liabilities and assets, and cash flow for the most recent year of trading for this organisation		(c) A statement of the cash flow forecast for the current year and a bank letter outlining the current cash and credit position	
	(a) A copy of the audited accounts for the most recent two years						
	(b) A statement of the turnover, profit & loss account, current liabilities and assets, and cash flow for the most recent year of trading for this organisation						
	(c) A statement of the cash flow forecast for the current year and a bank letter outlining the current cash and credit position						
(d) Alternative means of demonstrating financial status if any of the above are not available (e.g. Forecast of turnover for the current year and a statement of funding provided by the owners and/or the bank, charity accruals accounts or an alternative means of demonstrating financial status).							
5.2	<p>Where the authority has specified a minimum level of economic and financial standing and/or a minimum financial threshold within the evaluation criteria for this PQQ, please self-certify by answering 'Yes' or 'No' that you meet the requirements set out here.</p> <p style="text-align: right;"><input type="checkbox"/> Yes <input type="checkbox"/> No</p>						
5.3	<p><b>(a) Are you are part of a wider group (e.g. a subsidiary of a holding/parent company)?</b> If yes, please provide the name below:</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%;">Name of the organisation</td> <td></td> </tr> <tr> <td>Relationship to the Supplier completing the PQQ</td> <td></td> </tr> </table> <p>If yes, please provide Ultimate / parent company accounts if available. If yes, would the Ultimate / parent company be willing to provide a guarantee if necessary?</p> <p>If no, would you be able to obtain a guarantee elsewhere (e.g from a bank?)</p> <p style="text-align: right;"><input type="checkbox"/> Yes <input type="checkbox"/> No  <input type="checkbox"/> Yes <input type="checkbox"/> No</p>	Name of the organisation		Relationship to the Supplier completing the PQQ			
Name of the organisation							
Relationship to the Supplier completing the PQQ							

## 6. Technical and Professional Ability

### 6 Relevant experience and contract examples

Please provide details of up to three contracts, in any combination from either the public or private sector, that are relevant to the authority's requirement. Contracts for supplies or services should have been performed during the past three years. Works contracts may be from the past five years, and VCSEs may include samples of grant funded work.

The named customer contact provided should be prepared to provide written evidence to the authority to confirm the accuracy of the information provided below.

6 Consortia bids should provide relevant examples of where the consortium has delivered similar requirements; if this is not possible (e.g. the consortium is newly formed or a Special Purpose Vehicle will be created for this contract) then three separate examples should be provided between the principal member(s) of the proposed consortium or Special Purpose Vehicle (three examples are not required from each member).

Where the Supplier is a Special Purpose Vehicle, or a managing agent not intending to be the main provider of the supplies or services, the information requested should be provided in respect of the principal intended provider(s) or sub-contractor(s) who will deliver the supplies and services.

		Contract 1	Contract 2	Contract 3
6.1	Name of customer organisation			
6.2	Point of contact in customer organisation Position in the organisation E-mail address			
6.3	Contract start date Contract completion date Estimated Contract Value			
6.4	In no more than 500 words, please provide a brief description of the contract delivered including evidence as to your technical capability in this market.			

6.5 If you cannot provide at least one example for questions 6.1 to 6.4, in no more than 500 words please provide an explanation for this e.g. your organisation is a new start-up.

## 7. Additional PQQ modules

Suppliers who self-certify that they meet the requirements for these additional modules will be required to provide evidence of this if they are successful at contract award stage. Please indicate your answer by marking 'X' in the relevant boxes.

### A – Project specific questions to assess Technical and Professional Ability

Further project specific questions relating to the technical and professional ability of the Supplier.

### B - Insurance

1	<p>Please self-certify whether you already have, or can commit to obtain, prior to the commencement of the contract, the levels of insurance cover indicated below:</p> <p>Employer's (Compulsory) Liability Insurance = £x</p> <p>Public Liability Insurance = £x</p> <p>Professional Indemnity Insurance = £x</p> <p>Product Liability Insurance = £x</p> <p>*It is a legal requirement that all companies hold Employer's (Compulsory) Liability Insurance of £5 million as a minimum. Please note this requirement is not applicable to Sole Traders.</p>	<input type="checkbox"/> Yes  <input type="checkbox"/> No
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### C – Compliance with equality legislation

For organisations working outside of the UK please refer to equivalent legislation in the country that you are located.		
1	<p>In the last three years, has any finding of unlawful discrimination been made against your organisation by an Employment Tribunal, an Employment Appeal Tribunal or any other court (or in comparable proceedings in any jurisdiction other than the UK)?</p>	<input type="checkbox"/> Yes  <input type="checkbox"/> No
2	<p>In the last three years, has your organisation had a complaint upheld following an investigation by the Equality and Human Rights Commission or its predecessors (or a comparable body in any jurisdiction other than the UK), on grounds of alleged unlawful discrimination?</p> <p>If you have answered "yes" to one or both of the questions in this module, please provide, as a separate Appendix, a summary of the nature of the investigation and an explanation of the outcome of the investigation to date.</p> <p>If the investigation upheld the complaint against your organisation, please use the Appendix to explain what action (if any) you have taken to prevent unlawful discrimination from reoccurring.</p> <p>You may be excluded if you are unable to demonstrate to the authority's satisfaction that appropriate remedial action has been taken to prevent similar unlawful discrimination reoccurring.</p>	<input type="checkbox"/> Yes  <input type="checkbox"/> No
3	<p>If you use sub-contractors, do you have processes in place to check whether any of the above circumstances apply to these other organisations?</p>	<input type="checkbox"/> Yes  <input type="checkbox"/> No

## D - Environmental Management

1	<p>Has your organisation been convicted of breaching environmental legislation, or had any notice served upon it, in the last three years by any environmental regulator or authority (including local authority)?</p> <p>If your answer to this question is "Yes", please provide details in a separate Appendix of the conviction or notice and details of any remedial action or changes you have made as a result of conviction or notices served.</p> <p>The authority will not select bidder(s) that have been prosecuted or served notice under environmental legislation in the last 3 years, unless the authority is satisfied that appropriate remedial action has been taken to prevent future occurrences/breaches.</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
2	<p>If you use sub-contractors, do you have processes in place to check whether any of these organisations have been convicted or had a notice served upon them for infringement of environmental legislation?</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No

## E - Health and Safety

1	<p>Please self-certify that your organisation has a Health and Safety Policy that complies with current legislative requirements.</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
2	<p>Has your organisation or any of its Directors or Executive Officers been in receipt of enforcement/remedial orders in relation to the Health and Safety Executive (or equivalent body) in the last 3 years?</p> <p>If your answer to this question was "Yes", please provide details in a separate Appendix of any enforcement/remedial orders served and give details of any remedial action or changes to procedures you have made as a result.</p> <p>The authority will exclude bidder(s) that have been in receipt of enforcement/remedial action orders unless the bidder(s) can demonstrate to the authority's satisfaction that appropriate remedial action has been taken to prevent future occurrences or breaches.</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
3	<p>If you use sub-contractors, do you have processes in place to check whether any of the above circumstances apply to these other organisations?</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No

**8 - Declaration**

2	<p>I declare that to the best of my knowledge the answers submitted to these questions are correct. I understand that the information will be used in the selection process to assess my organisation's suitability to be invited to participate further in this procurement, and I am signing on behalf of..... (Insert name of Supplier).</p> <p>I understand that the authority may reject my submission if there is a failure to answer all relevant questions fully or if I provide false/misleading information. I have provided a full list of any Appendices used to provide additional information in response to questions.</p> <p>I also declare that there is no conflict of interest in relation to the authority's requirement.</p> <p>The following appendices form part of our submission;</p> <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 10px;"> <thead> <tr> <th style="width: 50%;">Section of PQQ</th> <th style="width: 50%;">Appendix number</th> </tr> </thead> <tbody> <tr> <td style="height: 20px;"> </td> <td> </td> </tr> <tr> <td style="height: 20px;"> </td> <td> </td> </tr> </tbody> </table>		Section of PQQ	Appendix number				
Section of PQQ	Appendix number							
<b>PQQ completed by</b>								
8.1	Name							
8.2	Role in organisation							
8.3	Date							
8.4	Signature							

PQQ – Template for Appendices

PQQ – Template for Appendices
PQQ section -
Question number -

## For further information

Please contact the Crown Commercial Service Help Desk on

**T:** 0345 410 2222 **E:** [info@ccs.gsi.gov.uk](mailto:info@ccs.gsi.gov.uk)

**Liverpool** 9th Floor  
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Aviation House  
125 Kingsway  
London WC2B 6SE

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## Procurement Policy Note – Reforms to make public procurement more accessible to SMEs

Information Note 03/15 18<sup>th</sup> February 2015

### Issue

Following PPN 02/15 that confirmed the dates on which the Public Contracts Regulations 2015 were made and come into force, this PPN provides guidance on a number of new reforms to make public procurement more accessible to businesses, in particular, Small and Medium-Sized Enterprises (SMEs)<sup>1</sup>

These reforms are implemented in Part 4 of the new Public Contracts Regulations 2015, which will, primarily, come into force on 26<sup>th</sup> February 2015 (for timing, see the section below).

### Reforms

The key reforms are:

- Abolition of a pre-qualification stage for procurements below the EU thresholds, and a requirement to have regard to guidance on qualitative selection issued by Cabinet Office for above EU threshold procurements.
- A requirement for contracting authorities to insert provisions in all public contracts to ensure prompt payment through the supply chain
- The requirement to advertise as many public sector opportunities in one place (Contracts Finder), and to publish award notices for contracts and call-offs from framework agreements.

This document sets out the main features of this legislation but is not a complete guide. It is not legal advice. You should refer to the Public Contracts Regulations 2015, and seek legal advice where necessary.

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<sup>1</sup> <http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/>

## **Timing**

The requirements relating to Pre-Qualification Questionnaires (PQQs) and Prompt Payment, will apply to all contracting authorities from 26<sup>th</sup> February 2015.

All other requirements will apply to central government contracting authorities from 26<sup>th</sup> February 2015 and non central government contracting authorities including NHS Trusts from 1<sup>st</sup> April 2015.

These reforms apply only to procurements that commence on or after the date on which they take effect. They are not intended to apply retrospectively.

## **Dissemination and Scope**

This PPN is directly applicable to Central Government, Agencies, Non departmental Public Bodies, wider public sector, local authorities and NHS bodies.

Please circulate this document (for information) within your organisation, its Executive Agencies and Non Departmental Public Bodies and to all Contracting Authorities for which you are responsible, drawing it to the attention of those with a purchasing role.

## **Background and new requirements**

These new reforms take account of the wide consultation and engagement that the Government has undertaken with public bodies, small businesses and trade bodies over the last two years and in response to Lord Young's recommendations to Government in his report on 'Growing Your Business' (May 2013).

These reforms improve the way public bodies administer PQQs, the accessibility of contract opportunities and prompt payment of suppliers.

They provide a valuable opportunity for contracting authorities to achieve increased quality and value for money in the procurement of goods and services, in particular by making procurement opportunities more accessible to smaller businesses and voluntary organisations.

The reforms are set out in Part 4 of the new Public Contracts Regulations 2015. They will help ensure a simpler and more consistent approach to procurement across all public sector authorities.

## **Explanation of the new requirements:**

### **Use of PQQs**

#### ***In below-threshold procurements (regulation 111)***

A contracting authority may not include a pre-qualification stage in any procurement where the value of the procurement is below the EU threshold for goods and services, currently £111,676 in central government and £172,514 outside central government. In practical terms, this means that PQQs used as part of a pre-qualification stage are not permitted. However contracting authorities may ask questions relating to a potential supplier provided that the questions are relevant to the subject matter of the procurement and proportionate.

Regulation 111 does not apply to procurements where the estimated value net of VAT is less than £10,000 (central contracting authorities), or £25,000 (for sub central contracting authorities and NHS Trusts). However, a PQQ is unlikely to be necessary or proportionate for contracts below these thresholds.

#### ***In above-threshold contracts (regulation 107)***

For procurements above these threshold values, contracting authorities must have regard to any guidance issued by Cabinet Office in relation to the qualitative selection of economic operators.

#### ***Prompt Payment (regulations 113 and 122)***

Contracting authorities must ensure that all public contracts contain suitable provisions stating that valid undisputed invoices will be paid by the contracting authority within 30 days. Public contracts must also contain a condition requiring contractors to include similar provisions in their contracts, and so on down the supply chain.

Additionally, each contracting authority must publish statistics showing the proportion of invoices paid in accordance with these obligations; the total amount of any liability to pay interest which arose during the year; and the total amount of interest actually paid in discharge of any such liability. This figure must be published annually in relation to the previous 12-month period at the end of the authority's accounting year.

#### ***Publishing contract opportunity advertisements and contract award information on the new Contracts Finder portal (regulations 106 and 110)***

Contracting authorities must ensure that when they advertise a new procurement opportunity above certain thresholds, that the advert is placed on the new national Contracts Finder portal. <https://www.gov.uk/contracts-finder>

This website must be used in addition to, or instead of any local or regional portals currently being used. Authorities must subsequently ensure that contract award information is placed on Contracts Finder once the contract is awarded.

The thresholds are as follows:

Central Contracting Authorities: £10,000

Sub Central Contracting Authorities and NHS Trusts\*: £25,000

\*Note: where existing standing orders in local government are in place that have a higher value for advertising opportunities, the higher value applies rather than £25,000.

### **Exemptions**

The main exemptions from these regulations are:

- Contracting authorities carrying out devolved or mainly devolved functions in Scotland, Wales and Northern Ireland.
- 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.
- Maintained Schools and Academies are exempt from Contracts Finder obligations and the Prompt Payment obligations.

Note: This is not an exhaustive list and contracting authorities should refer to the Public Contracts Regulations 2015 for further information.

More Detailed Guidance on these reforms can be found here:

<https://www.gov.uk/transposing-eu-procurement-directives>

### **Contact**

Enquiries about this PPN should be directed to the Crown Commercial Service Helpdesk (telephone 0345 410 2222, email [info@ccs.gsi.gov.uk](mailto:info@ccs.gsi.gov.uk)).



# Procurement Policy Note – Taking Account of Suppliers’ Past Performance

Action Note 04/15 25<sup>th</sup> March 2015

## Issue

1. To ensure good delivery of public services and value for money, it is important that suppliers with the necessary technical and professional ability are selected to bid for contracts. One aspect of a supplier’s technical and professional ability is its reliability as demonstrated by its performance of past contracts. This Procurement Policy Note ("PPN") incorporates the requirements of the new Public Contracts Regulations 2015 (Regulations) and sets out Government policy to ensure suppliers’ past performance is taken into account in certain procurements.

## Dissemination and Scope

2. The contents of this PPN apply to all Central Government Departments, their Executive Agencies and Non Departmental Public Bodies. Together these are referred to in this PPN as ‘In-Scope Organisations’. Please circulate this PPN within your organisation, drawing it to the attention of those with a purchasing role. This PPN replaces PPN 09/12 dated 8<sup>th</sup> November 2012. In this PPN, references to suppliers includes those bidding for contracts but who do not have any existing contracts to supply Government.

## Timing

3. This PPN applies from 1 April 2015 to the procurements in respect of all in-scope stand-alone public contracts and framework agreements (as set out in paragraphs 5 and 6 below) for which an OJEU Notice has not yet been published.

## Action

4. This PPN sets out two sets of actions.

5. **Part A - Selection Criteria** sets out requirements relating to the assessment of suppliers' reliability as demonstrated by their performance of past contracts. The requirements in Part A apply to In-Scope Organisations when procuring goods and/or services in respect of information and communications technology, facilities management or business processing outsourcing with a total anticipated contract value of £20 million or greater (excluding VAT). It applies in relation to framework agreements only where it is anticipated that there will be Call-off Agreements in respect of such goods and/or services with an individual anticipated value of £20 million or greater (excluding VAT).

6. **Part B – Provision of Information** concerns the provision of information about suppliers' past performance both to and by In-Scope Organisations. This has two aspects.

- a. First, all In-Scope Organisations are required under this policy to provide Certificates of performance to their suppliers on request in the form set out in Annex F (Certificates) This form should also be used where In Scope Organisations obtain Certificates from other organisations (both public and private sector).
- b. Secondly, where In-Scope Organisations carrying out procurement processes collect information about the past performance of suppliers, they are required to provide the information to the CCS, to support the collation of a central database of information.

7. A summary of the key actions is set out in paragraphs 8- 17 below. Annex A to this PPN sets out in more detail what actions should be taken and how this policy should be applied.

### **Part A – Selection criteria relating to suppliers' past performance**

8. For procurements falling within the scope of Part A of this PPN (see paragraph 5 above), In-Scope Organisations are required, as a matter of policy, to establish selection criteria relating to a supplier's reliability as demonstrated by its performance of past contracts. In-Scope Organisations should satisfy themselves:

- a. that suppliers' principal relevant contracts in the last three years are being or have been satisfactorily performed in accordance with their terms; or
- b. where there is evidence that this has not occurred in any case, that the reasons for any such failure will not recur if that supplier were to be awarded the relevant contract.

9. In-Scope Organisations should:

- a. Include a paragraph informing suppliers of the policy in all relevant procurement documentation (see Annex B);
- b. Ensure that selection criteria relating to past performance, and the information required in relation to such criteria, are specified in OJEU Notices (reference to OJEU Notices shall also include the requirement to publish the OJEU Notice on Contracts Finder).
- c. Incorporate the same criteria and requests for evidence from suppliers in other

documentation relating to the selection stage (for example, PQQs or ITTs depending on which procedure is adopted).

d. Obtain necessary information about the contracts suppliers have performed in the last 3 years including, a list of past contracts and Certificates of performance, to allow an assessment against the criterion;

e. where appropriate, verify information provided by any supplier in relation to past performance;

f. apply the selection criteria based on the available information and exclude suppliers which fail to meet them, communicating the outcome to the supplier;

g. re-assess whether a supplier continues to meet the selection criteria at subsequent stages in the procurement process, taking into account updated performance evidence from suppliers;

h. submit all information about past performance which has been collected, including Certificates, to the CCS central database (see paragraph 17 below).

10. Suppliers which rely on sub-contractors or which bid as part of a consortium raise distinct issues which are considered in Annex A. Additional considerations arise in relation to framework agreements as discussed in Annex E.

## **Part B – Provision of Information including Certificates of Performance**

11. Assessing a supplier's compliance with the selection criteria relating to past performance requires the provision of information about past contracts to the contracting authority. The Public Contracts Regulations 2015 (Regulations) state that this information may include references and Certificates of satisfactory performance.

12. Certificates will be provided by In-Scope Organisations in their capacities as customers. Although called a Certificate, the required information should normally be provided in the form of an email. All Certificates should contain the relevant text provided at Annex F. Completed certificates should be provided to the supplier along with a copy to CCS at [pastperformance@crownccommercial.gov.uk](mailto:pastperformance@crownccommercial.gov.uk)

13. Suppliers may also request and submit Certificates for relevant contracts from other public and private sector organisations beyond In-Scope Organisations. Procuring In-Scope Organisations should make it clear in their procurement documentation, that these Certificates should contain the relevant text as provided in Annex F

14. Where a Certificate indicates that the supplier has not performed satisfactorily, it should include reasons why performance was not in accordance with the contract. The reasons may include:

- a. delays in providing the goods and/or services in accordance with the contract;
- b. failure to supply all the goods and/or services in accordance with the scope set out in the contract;
- c. failures to meet any service levels and/or supply the goods and/or services in accordance with quality standards;
- d. any other failure by the supplier to comply with its obligations under the contract.

15. In addition to the provision of Certificates in their capacity as customers (as outlined in paragraph 12), In-Scope Organisations carrying out procurement processes will collect information about the past performance of suppliers bidding for the contract. This will include not only Certificates but any other information provided by suppliers to the In-Scope Organisation in relation to past performance, such as information explaining why any past performance problems are unlikely to recur.

16. At the completion of the selection stage under any procurement process, In-Scope Organisations are required under this policy to provide all of the information they have collected, i.e. the Certificates and any other information in relation to past performance, to the CCS to support the collation of the central database referred to above. All information and any queries should be sent to [pastperformance@crowncommercial.gov.uk](mailto:pastperformance@crowncommercial.gov.uk). Exceptions may be agreed with the CCS where the In-Scope Organisation is aware of any objection to the provision of particular items of information.

17. Centrally storing both these issued Certificates and the information collected from suppliers during each relevant procurement will enable the reduction of the burden of providing evidence, the verification of the information provided by suppliers against previous submissions and may be used in the co-ordination of supplier management more generally.

## Contact

18. Enquiries about this PPN should be directed to the Service Desk 0345 410 2222 or [service\\_desk@crowncommercial.gov.uk](mailto:service_desk@crowncommercial.gov.uk). The CCS is also keen to receive feedback on this policy in order to improve its application. Feedback should be directed to the Service Desk entitled "Supplier Past Performance - Feedback".

## Background

19. The Regulations provide that contracting authorities can choose the suppliers who will be invited to tender. This has two aspects. First, suppliers may be disqualified on the basis of various grounds for exclusion (see regulation 57). Secondly, suppliers may need to meet stated

selection criteria (see regulation 58).

20. This PPN is concerned with the second of these possibilities - the application of selection criteria relating to suppliers' past performance. However, In-Scope Organisations should note that regulation 57(8)(g) creates a new discretionary ground for exclusion relating to past contractual performance. In particular, an economic operator may be excluded if it 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.

21. In-Scope Organisations are reminded of the requirement to observe the general principles of equal treatment, non discrimination, transparency and proportionality which apply to all aspects of a procurement including the identification and application of selection criteria.

22. The Regulations provide that compliance with selection criteria may in due course be addressed through the European Single Procurement Document (ESPD) which is intended to simplify the process of qualification for tendering (see regulation 59). The ESPD is not yet in effect, and pending its introduction this PPN should apply. This PPN will be revised and updated as and when the ESPD comes into effect.

# Annex A: Detailed Guidance on Application of the Policy

## Legal Framework

1. Under the Regulations, contracting authorities are entitled to establish selection criteria as conditions for participation in a procurement process. These criteria may relate to technical or professional ability and economic and professional standards. Selection criteria may be expressed as minimum levels of ability (see generally regulation 58).
2. In relation to technical and professional ability, contracting authorities may impose requirements ensuring that suppliers possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard (regulation 58(15)). In addition, the regulations provide that in relation to contracts for services (as well as works and certain supply contracts), the professional ability of suppliers to provide the service may be evaluated with regard to their skills, efficiency, experience and reliability (regulation 58(18)).
3. The Regulations also set out the information which contracting authorities are entitled to require from suppliers in order to assess compliance with any selection criteria. In particular, contracting authorities may require that the supplier has a sufficient level of experience demonstrated by suitable references from contracts performed in the past (regulation 58(16)). The provision of information relating to past contracts including Certificates of satisfactory performance is further addressed in regulation 60(9).
4. Any selection criteria to be applied, and the means of proving compliance with the criterion, must be stated in the OJEU notice – see Regulation 58(19).

## Actions

5. The actions In-Scope Organisations should take at each stage of the procurement process in relation to in-scope procurements are set out below.

## Informing suppliers of the policy

6. A paragraph informing suppliers of the policy set out in this PPN should be included in all relevant procurement documentation, such as PQQs and ITTs, to ensure they are aware of Government's approach to managing supplier performance. Template wording is included at Annex B to this PPN.

## OJEU Notice

7. Selection criteria which suppliers have to meet, including those relating to reliability based

on past performance, must be stated in the OJEU Notice along with details of the information required for the In-Scope Organisation to assess whether or not a supplier meets the selection criteria. The following paragraphs consider the choice of criterion and the information required.

### **Choice of selection criteria**

8. Selection criteria should be chosen and defined with reference to the particular procurement. However, in general terms, In-Scope Organisations should assess whether a supplier's principal contracts for goods or services delivered in the previous 3 years have been provided satisfactorily in accordance with the contracts in question. This criterion will be assessed on the basis of a list of past contracts which suppliers will be required to provide.
9. In-Scope Organisations may also require satisfactory performance of a specified minimum number of contracts. This approach may however exclude suppliers who have provided goods and/or services on a sufficient scale under a smaller number of contracts. Instead therefore, the requirement may instead apply to a specified value, quantity or description of contracts.
10. In-Scope Organisations should also consider whether the requirement should be limited to particular categories of goods sold and/or services provided (see further below).
11. Template wording that presents a range of alternatives and can be used by In-Scope Organisations with appropriate modifications is set out in Annex C to this PPN.

### **Information required**

12. As part of the material provided to satisfy any selection criteria, suppliers should provide a list comprising a statement of the principal goods sold and/or services provided by the supplier in the previous 3 years. However, In-Scope Organisations may wish to define or limit what are regarded as relevant goods and/or services for this purpose.
13. The performance of a previous contract may assist an assessment of the reliability of the supplier even if the goods or services provided under that contract were not the same as those being procured. However, In-Scope Organisations may be most concerned with the past performance of contracts of a similar scale, complexity, value and/or duration as that to be awarded. In-Scope Organisations may therefore wish to limit the type of the goods and services which will be used for the purposes of assessing reliability. Further, given the size of the contracts to which this PPN relates and the entities likely to bid for them (who may supply many different types of goods and/or services), In-Scope Organisations may wish to limit the Certificates of performance and other information required from suppliers to that which is directly relevant.
14. In deciding whether to limit the relevant goods or services, In-Scope Organisations should ensure both that they have sufficient evidence to make a proper assessment of reliability and also that suppliers have sufficient opportunity to demonstrate their reliability by reference to a sufficient number, type or nature of contracts in that period. In-Scope

Organisations should take account of the administrative burden on suppliers of these requests.

15. As regards each contract on the list, In-Scope Organisations should request Certificates of performance prepared by the customer to whom the goods and/or services on the list were provided. The format of the certificate is in Annex F. This indicates that the Certificate will be held on CCS' central database. The process for obtaining a Certificate is considered in paragraphs 20-22 below.
16. In order to reduce the burden on suppliers, a supplier shall be entitled to submit Certificates already previously obtained in the following two situations. First, Certificates obtained after performance of the contract has ended and there have been no further developments and secondly, Certificates which were prepared in the last 3 months for contracts, which are still being performed. Both provisions are subject to paragraphs 17 and 22 below.
17. Paragraph 16 above is subject to the supplier's responsibility not to mislead a contracting authority. This will be particularly relevant where there has been a relevant change of circumstance since the Certificate was prepared. Contracting authorities have the power to exclude a supplier which provides misleading, material information.
18. If a Certificate prepared by the customer cannot be obtained, the certification may be prepared by the supplier itself. Suppliers will appreciate the need to provide accurate and not misleading information.
19. If a Certificate does not state that the goods and/or services have been provided satisfactorily in accordance with the terms of the contract under which they were to be provided, then suppliers should provide information to show that the reason or reasons for such failure will not recur in the performance of the contract being procured. All Certificates submitted by the Supplier should be accompanied by a covering email which makes clear whether or not additional information is being provided with the Certificate. The format of the covering email is in Annex F.

### **Process for obtaining Certificates**

20. The Regulations provide that contracting authorities should not require suppliers to submit documentary evidence where the authority has the possibility of obtaining the document from a national database or similar, or is already held by the contracting authority.
21. The CCS maintains a central database of Certificates. Although use may be made of this database to obtain Certificates, it is important that information provided about contract performance remains current and up to date. For this reason, it will generally be reasonable for In-Scope Organisations to require suppliers to provide up to date Certificates together with their lists of principal contracts.
22. Nevertheless, if a supplier is aware that a copy of a Certificate which was prepared in the last 3 months and has not been subject to any change of circumstances, or which relates to a completed contract, is held by the CCS, the supplier may inform the In-Scope Organisation accordingly, rather than provide a copy itself. However, the supplier may be willing to provide a copy of the Certificate in any event.

## Clarification / verification of information provided by suppliers

23. The Regulations provide that a contracting authority may invite economic operators to supplement or clarify Certificates and the Supplier's list of contracts. The need for clarification should be assessed on a case by case basis, recognising the limits on the permitted scope of clarification (see regulation 56(4)).
24. In-Scope Organisations are not however obliged to accept whatever information a supplier may provide without question, but are entitled to take reasonable steps to verify whether or not what the supplier says is correct. This may concern:
  - a. whether the list of contracts provided is comprehensive;
  - b. whether a supplier has tried to obtain a Certificate from a person to whom it supplied goods or services and has been unable to do so;
  - c. whether a contract has in fact been performed satisfactorily in accordance with its terms, notwithstanding a Certificate stating that to be the case;
  - d. whether the reasons given for any past performance not being in accordance with the relevant entity's contractual obligations are comprehensively stated; or
  - e. whether any remedial action taken in regard to these reasons will be effective in ensuring that they will not recur in the performance of any contract to be awarded as a result of the procurement.
25. It will generally be appropriate to verify on the basis of a random selection of such Certificates. It is advisable to make this clear in the tender documents, or (if a different approach is to be adopted) to state what other approach is to be taken.
26. Any verification carried out must be done in a consistent and non-discriminatory way. However, this does not necessarily mean treating every case identically. For instance, it may be easier or more practical (and hence more proportionate) for a In-Scope Organisation to verify in some cases than in others. The fact that verification is difficult to achieve in certain cases should not preclude an In-Scope Organisation from taking steps to verify where it is proportionate to do so.
27. To illustrate this point, one source of information for verification purposes is the central database established by the CCS. The information held by the CCS will not however be comprehensive. That should not prevent verification through the central database where practicable. Other means of verification should however be considered.
28. It is recommended that decisions on whether or not to verify information supplied by suppliers and how to do so should be documented with reasons.
29. Before taking any decision adverse to a supplier in the light of any further information obtained as a result of a verification process, In-Scope Organisations should inform the supplier of that information and give the supplier an opportunity to make representations or to provide further information in response.

## **Reliance on others including sub-contractors and consortia**

30. The Regulations provide that suppliers are entitled to rely on the capacities of other entities if those other entities will in fact perform the contract (see regulation 63). These provisions should be applied where a supplier proposes to rely on a sub-contractor, or forms part of a consortium, and in other similar situations – for example where a supplier relies on another group entity.
31. In these situations, the supplier must prove that the resources of the other entity are at its disposal, and further that the other entity meets any selection criterion. In-Scope Organisations may wish this requirement to be subject to a minimum threshold – say that the value of the sub-contract is at least 5% of the total contract value. The template in Annex C contains draft wording.
32. A supplier that intends to appoint a sub-contractor may not always have done at the point when selection criteria are to be applied. That need not in itself require the supplier to be disqualified. As described below, a supplier's reliability should be re-assessed at various points during the procurement process. If at any such point, the sub-contractor has been appointed, its reliability can and should be assessed as part of that re-assessment. If the sub-contractor is appointed after any contract has been concluded, In-Scope Organisations should ensure that, under the terms of the contract, their approval is required and that the sub-contractor at least meets the requirement for reliability based on past performance that it would have had to meet had it been appointed earlier.
33. A supplier for a public contract may be a consortium rather than a single entity. Consortia may wish to rely on the resources of the members of the consortium to meet any selection criteria. In-Scope Organisations should enable suppliers to satisfy the selection criteria relating to reliability by reference to the past performance of such other entities.
34. Where bids are made by consortia, and a particular consortium member is only responsible for one function under that consortium, it may only be relevant to seek information in relation to function which a particular member is to perform.
35. A supplier may also be a recently formed entity that is continuing an undertaking or undertakings (or part of an undertaking or undertakings) previously conducted by one or more other entities. In-Scope Organisations should enable such suppliers to satisfy selection criteria for reliability by reference to the previous performance by the relevant undertaking or undertakings (or parts of them).

## **Assessment and the exclusion of suppliers**

36. In-Scope Organisations should normally have an appropriately qualified panel to determine whether any supplier meets any minimum standards for professional and technical ability.
37. If following receipt and review of all the information initially provided by the supplier, that obtained as a result of verification and any further supplementary or clarifying information supplied by the supplier, the supplier does not meet the minimum standards of reliability set, the In-Scope Organisation should exclude the supplier from the procurement. Decisions to

exclude should be documented with reasons and suppliers should be notified accordingly.

38. The In-Scope Organisation may also find itself considering a difference of views between a customer and a supplier as to whether performance of a previous contract was in accordance with its terms (for example where there is a continuing dispute between the parties). In such cases, the In-Scope Organisation will need to form its own view as to whether it is satisfied that performance was or was not satisfactory based on the available evidence, notwithstanding that the same issue may be under consideration in court or arbitration proceedings. If the In-Scope Organisation is not satisfied that performance was satisfactory, then the selection criterion will not have been met.

**Re-assessment during subsequent stages in the procurement process (not relevant to procurements adopting the open procedure)**

39. The suitability of the supplier may be assessed more than once at different stages in the procurement process. Particularly in complex or lengthy procurement processes, In-Scope Organisations should take steps to ensure that any material changes to the suppliers' circumstances since the initial assessment of reliability at selection stage are considered at appropriate points, (for example, before appointment of a preferred supplier or the conclusion of any contract). This will allow the In-Scope Organisation to take into account performance on more recent contracts and any new developments in relation to contracts which had already commenced at the time of the selection stage.

40. This can be achieved by:

- a. ensuring that appropriate wording to make this clear to suppliers is included in the OJEU Notice (see Annex C); and
- b. asking the suppliers to update the evidence provided in relation to past performance at an earlier selection stage to reflect more recent performance on new or existing contracts (or confirm if nothing has changed) and re-assessing whether they meet any specified minimum standards.

41. The selection criteria must however remain the same throughout the procurement and should be replicated in any invitation to tender for the open procedure, any pre-qualification questionnaire or any other document setting out the selection criteria and information required to assess whether or not they have been met.

42. In-Scope Organisations may verify evidence which suppliers provide in their update as set out above.

## Annex B - Template Wording Informing Suppliers of the Policy

This template wording should be included in all relevant procurement documentation, such as PQQs and ITTs and in other appropriate correspondence with suppliers in respect of contracts to which the PPN applies, to ensure they are aware of Government's approach to ensuring that there can be confidence that, based on their past performance, those suppliers who are awarded contracts can be relied on to perform them satisfactorily in accordance with their terms.

*"The Government has developed an approach to ensuring that previous poor performance by suppliers can be taken into account and robustly assessed prior to entering into certain new contracts (as described in "Procurement Policy Note 04/15 Taking Account of Suppliers' Past Performance". This will give the Government confidence, based on past performance, in the reliability of suppliers.*

*The policy is that, as part of any assessment of a supplier's technical and professional ability, contracting authorities should ensure that any failure by the supplier to provide satisfactory performance of previous principal contracts is taken into account in the assessment of whether specified minimum standards for reliability for such contracts are met.*

*Evidence will be collected from suppliers to enable this assessment to be made [and a random sample of the evidence collected may be verified].*

*In addition, under the policy, contracting authorities will re-assess reliability based on past performance before key points in the procurement process (i.e. short listing, preferred bidder status, conclusion of contract etc.). Suppliers will accordingly be asked to update the evidence they provide in relation to past performance to reflect more recent performance on new or existing contracts (or to confirm that nothing has changed)."*

# Annex C - Template Wording for OJEU Notices

## Part 1 – Standard Wording

<p><b>III.2.3) Technical capacity</b></p>	
<p><b>Information and formalities necessary for evaluating if requirements are met:</b></p>	<p><b>Minimum level(s) of standards possibly required (if applicable):</b></p>
<p>(1) The supplier must supply a list comprising a statement of all the [relevant]<sup>1</sup> principal goods sold and/or services provided in the previous 3 years.</p> <p>(2) The supplier must also provide:</p> <p>(a) Certificates in the form attached [for hyperlink] from those to whom goods and/or services on the list were provided; or</p> <p>(b) if any such Certificate cannot be obtained, a Certificate in the same form from the entity that provided the goods and/or services; together with an explanation of the steps taken to obtain a Certificate from the customer and the reason why a Certificate from the customer is not available.</p> <p>If any Certificate does not state that the goods and/or services have been provided satisfactorily in accordance with the terms of the contract in question, information to show that the reason why the contract was not performed satisfactorily will not recur in the performance of the contract [framework agreement] to be awarded.</p> <p>Where the supplier proposes to rely on other entities (including sub-contractors or consortium members) to perform the contract, the supplier must describe the function that each such other entity will perform under the contract [framework agreement], and provide the information required in relation to each entity.</p>	<p>Any supplier must meet the selection criterion in relation to reliability based on performance of past contracts – namely, the [Contracting Authority] is satisfied that</p> <ul style="list-style-type: none"> <li>• the contracts on the list to be provided by the supplier have been satisfactorily performed in accordance with their terms or,</li> <li>• where that has not occurred, the reason or reasons why that has not occurred in relation to any such contract, will not recur in the performance of the contract [or framework agreement] to be awarded.</li> </ul> <p>Where the supplier proposes to rely on other entities (including sub-contractors or consortium members) to perform the contract, then the selection criterion for reliability must be met by each such entity, save as regards contracts or sub-contracts with a value of less than 5% of the total contract value [and] any sub-contractors not yet appointed.</p> <p>The [Contracting Authority] will assess whether or not this criterion is satisfied at the selection stage [and will re-assess it is satisfied prior to [the down selection of suppliers, the grant of preferred supplier status, contract award and/or the conclusion of the contract [or framework agreement]. <b>Delete / amend as applicable</b></p>

<sup>1</sup> See Part 2 below.

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## **Part 2 – Defining the Scope of the information required**

1. As set out in paragraphs 12 to 19 of Annex A, In-Scope Organisations should consider whether to define or limit the categories of contract in relation to which information should be provided by suppliers. Their approach to this issue should be set out in the first column of section III.2.3 of the OJEU Notice (see Part 1 above).
2. If the In-Scope Organisation does not define or limit the information to be provided, suppliers should be asked to explain the basis on which they have identified the principal goods and/or services – for instance

“Suppliers should explain the basis on which the principal goods or services have been identified.”

3. Where In-Scope Organisations do wish to define or limit the contracts to be covered by the list and the Certificates to be provided by suppliers may wish to use one or more of the following options.

### **Option 1 – defining “relevant” goods and/or services**

4. As noted in paragraphs 12 to 14 of Annex A, In-Scope Organisations may wish to define what is to be treated as a “relevant” contract for the purposes of the list and Certificates to be provided – for instance:

“[For the purposes of the list of relevant goods and/or services, relevant goods and/or services are [insert].

OR

[The list of relevant goods or services should include at least any contracts for....]”

## Option 2 – setting minimum requirements for the list

5. Alternatively, In-Scope Organisations may state minimum requirements for the list of contracts to be provided (see paragraphs 12 to 14 of Annex A) – for instance:

"The list referred to above must include at least...

... [minimum number of] contracts under which [relevant] goods and/or services have been provided by the supplier] OR

... [a contract] [minimum number of contracts) under which [relevant] goods or services [of some specific value, quantity or description]

## Annex D –Template Wording Governing Conditions of Entry to Competition

This template wording should be included in all relevant procurement documentation, such as PQQs and ITTs and in other appropriate correspondence with suppliers in respect of contracts to which the PPN applies, to ensure that they are aware of these conditions of entry to the procurement.

*1. The tenderer waives any contractual right or other confidentiality obligation in connection with the customers mentioned in a list of contracts used to demonstrate evidence of past performance and agrees that these customers may provide information to the [Contracting Authority] in the form of certificates of performance (in the form set out in [the Annex to the OJEU Notice]) and answer any clarifications that the [Contracting Authority] or anyone acting on behalf of the [Contracting Authority] in connection with this procurement may have. The tenderer confirms that save for any deceitful or maliciously false statements of fact or purported fact included in a certificate or subsequent clarification the customer will not owe the tenderer any duty of care for or otherwise have any legal liability to the tenderer in respect of any factual inaccuracies, whether innocent or negligent, and/or in respect of any expressions of opinion by the customer. This provision is for the benefit of each customer and may be relied on by them for the purposes of the Contracts (Rights of Third Parties) Act 1999.*

*2. The Crown Commercial Service may hold a copy of the certificate of performance on a central database and the content of any certificates of performance from a customer may be shared with Contracting Authorities, acting as part of the Crown.*

*3. If in breach of this provision [1] any tenderer commences legal proceedings against a customer in relation to any certificate of performance or subsequent clarification in the courts of any jurisdiction the [relevant entity] agrees that the customer shall be entitled to bring proceedings against the tenderer in the English Courts to enforce the terms of this provision (regardless of whether it is enforceable in the jurisdiction where the proceedings are brought) and to be indemnified in full for any legal costs incurred in defending such proceedings and indemnified in respect of any compensation that the customer is ordered to pay to the tenderer as a result of such proceedings. This provision will not relate to any proceedings commenced in good faith for any liability that falls outside the scope of this provision.*

## Annex E - Framework Agreements

1. This PPN applies to both owners and users of framework agreements in so far as (i) they cover goods and/or services in respect of information and communications technology, facilities management or business processing outsourcing and (ii) they may involve an individual Call-off Agreement for such matters with an anticipated value of £20 million or greater (excluding VAT).

### **New Framework Agreements**

2. In-Scope Organisations letting new framework agreements, to which this PPN applies, should comply with this PPN in establishing the framework agreements
3. They should include provision for the re-assessment of suppliers' compliance with the selection criteria on request from any framework agreement user prior to the proposed award of a Call-off Agreement with a value of £20 million or greater (excluding VAT).
4. New framework agreements should also include contract conditions that a supplier will not be eligible to be awarded a Call-off Agreement under the framework agreement if it does not comply with the specified minimum standards for reliability based on past performance at the time of the proposed award of the Call-off Agreement.
5. To do this, In-Scope Organisations must include wording in the OJEU Notice and in the framework agreement.

### **Template wording for New OJEU Notices and Framework Agreements**

#### *OJEU Notice*

The [Contracting Authority] will also assess whether this selection criterion is met on request from the framework agreement user prior to the proposed conclusion of a call-off agreement with a value of £20 million or greater (excluding VAT). Failure to meet the selection criterion set will render the supplier ineligible for that call-off agreement.

#### *Framework Agreement*

##### **1. Re-assessment of Minimum Standards**

1.1. No Call-Off Agreement with an anticipated contract value in excess of £20 million (excluding VAT) shall be awarded to the Contractor if it does not show that it meets the Selection Criterion at the time of proposed award of that Call-Off Agreement.

1.2. The [framework agreement owner] shall assess the Contractor's compliance with the Selection Criterion upon the request of the Call-Off Agreement User.

1.3. In the event that the Contractor does not demonstrate that it meets the Selection Criterion in an assessment carried out pursuant to clause 1.2 [of this Agreement], the [framework agreement owner] shall so notify the Contractor and the Call-Off Agreement User in writing.

#### **Definition**

" **Selection Criterion** " means the minimum standards for reliability as set out in OJEU Notice Reference [insert OJEU Notice reference]

### **Existing Framework agreements**

6. It may be that an existing framework agreement does not contain provisions permitting a reassessment of the supplier's compliance with the selection criteria before a call off is awarded, particularly if such frameworks pre-date PPN 09/12 dated 8<sup>th</sup> November 2012.
7. In such cases, where performance issues become apparent with a supplier on an existing framework agreement (whether in delivering contracts under that framework agreement or in delivering other contracts to the In-Scope Organisation or other customers) framework agreement owners and users should work together to ascertain the scope of action possible under the contractual terms and conditions of the framework agreement.

# Annex F – Certificate of Past Performance

## Performance Certificate - Source Email Form

**Directions** – to be completed and returned to Supplier and additional copy to be sent to CCS via [pastperformance@crownccommercial.gov.uk](mailto:pastperformance@crownccommercial.gov.uk)

Performance Certificate under Procurement Policy Note 04/15 as requested by:	<i>[In-Scope Organisation issuing tender]</i>
Requested under Contract Notice:	<i>[OJEU Contract Notice e.g. 2011/S 239-387260]</i>
Name of Entity Providing Certificate:	<i>[Customer or Supplier for Self Certification]</i>
<b>Performance Certificate - Contract Header Information (details of the contract to be certified)</b>	
Name of Contract Customer ("Customer"):	<i>[Registered Name]</i>
Name of Contracted Supplier ("Supplier"):	<i>[Registered Name]</i>
Contract Title ("Contract"):	<i>[Agreed Contract Name for Contract]</i>
FOR PUBLIC SECTOR CONTRACTS ONLY - OJEU Award Notice Reference:	<i>[OJEU reference e.g. 2011/S 239-387260]</i>
<b>Person Submitting this Certificate - Contact Details (with whom further queries, if any, can be raised)</b>	
Source Contact Name:	<i>[Name of source authorised by entity providing Certificate]</i>
Source Contact Address:	<i>[Authorised source business address]</i>
Source Contact Direct Line:	<i>[Authorised source direct telephone line]</i>
Source Contact Email:	<i>[Authorised source email]</i>
<b>Further Contract Detail</b>	
Description of the goods and/or services:	<i>[Brief description max 50 words]</i>
Consideration received:	<i>[Monetary value or equivalent]</i>
Goods/Services provision start date:	<i>[dd/mm/yyyy]</i>
Goods/Services provision end date:	<i>[dd/mm/yyyy]</i>

<b>Performance (Please submit either Option A or B)</b>	
<b>OPTION A:</b>	
We hereby certify that, to the best of our knowledge and belief, the Supplier has satisfactorily supplied the goods and/or services described in the table above in accordance with the Contract.	
<b>OR</b>	
<b>OPTION B:</b>	
We are unable to certify that the Supplier has satisfactorily supplied the goods and/or services described in the table above in accordance with the Contract for the following reasons:	<i>Reason 1;</i> <i>Reason n; etc.</i>
<b><i>By submitting this information ("Certificate") you are agreeing that it will be added to the central database held by the CCS and may be made available to other Crown bodies.</i></b>	
<u><i>Liability of any Customer certifying</i></u> <i>Whilst the information in this Certificate has been provided in good faith in the belief that it is truthful and accurate, the Customer does not assume any responsibility or any liability nor make any guarantee, representation or warranty as to the contents of this Certificate. The Customer shall not be liable for and hereby excludes liability for any loss, damage (including any special, exemplary, indirect, incidental, consequential damages, costs or associated legal fees) that may be suffered as a result of use of the Certificate and its content, to the fullest extent permitted by law. Nothing in this Certificate shall affect, or constitute a waiver of, the Customer's rights or remedies in relation to the Contract.</i>	
<b>Guidance for Entities providing Certificates</b>	
<i>If you are unable to certify that the Supplier has satisfactorily supplied the goods and/or services in accordance with the Contract, please provide the reason or reasons why performance was not in accordance with the Contract. These may include the following or other reasons:</i> 1. <i>delays in supplying the goods and/or services;</i> 2. <i>failures to supply all the goods and/or services in accordance with the scope set out in the Contract;</i> 3. <i>failures to meet any service levels and/or supply the goods and/or services in accordance with quality standards;</i> 4. <i>any other failure by the Supplier to comply with its obligations under the Contract.</i>	

**Performance Certificate - Supplier Submission Covering E-Mail (for submitting Certificates in response to PQQs and selection questions)**

<b>Performance Certificate - Supplier Submission Covering E-Mail</b>	
Name of Supplier:	<i>[Registered Name]</i>
Submitted for Contract Notice:	<i>[OJEU Contract Notice e.g. 2011/S 239-387260]</i>
Performance Certificate Contract Title:	<i>[The "Contract" field from the Performance Certificate]</i>
For Public Sector Contracts Only - OJEU Award Notice Reference:	<i>[OJEU Award ref e.g. 2011/S 239-387260]</i>
<b>Supplier Representative Submitting the Performance Certificate - Contact Details (with whom further queries, if any, can be raised)</b>	
Supplier Contact Name:	<i>[Name of authorised representative forwarding Certificate]</i>
Supplier Contact Address:	<i>[Authorised representative business address]</i>
Supplier Contact Direct Line:	<i>[Authorised representative direct telephone line]</i>
Supplier Contact Email:	<i>[Authorised representative email]</i>
<b>Supplier's Additional Information</b> (please provide details of the Supplier's response to the content of the Performance Certificate or such other information as the Supplier wishes to be made known in the section below. If the Supplier does not have anything to add please state 'no additional information to be provided'):	



# Guidance on the new transparency requirements for publishing on Contracts Finder

**This guidance is aimed at contracting authorities across the public sector. It applies to new procurements from the day upon which the Public Contracts Regulations 2015 (the Regulations) come into force.**

This guidance supplements, but does not replace or supersede, existing transparency guidance or codes of practice in central government, the NHS, and local government. This guidance is not statutory.

The guidance underpins Regulations 106, 108, 109, 110, 112 of the Public Contracts Regulations 2015. It explains the main features of the relevant Regulations, but is not a comprehensive guide to the law. You should seek legal advice if you are unsure about the effect of the Regulations.

**For exclusions see below.**

## 1. Introduction

A number of new reforms to make public sector procurement more accessible, particularly to smaller businesses and voluntary or charitable organisations, have now been implemented in the Public Contracts Regulations 2015, following consultation in September 2013. ([www.gov.uk/government/consultations/making-public-sector-procurement-more-accessible-to-smes](http://www.gov.uk/government/consultations/making-public-sector-procurement-more-accessible-to-smes)).

These reforms include new transparency obligations on all contracting authorities (with a few exceptions listed below,) which will mean that new public sector opportunities will be available in one place, the Contracts Finder portal. In addition contract award information relating to the winning contractor will also be available on Contracts Finder.

The Contracts Finder portal has been fully redeveloped and will be launched on 26 February 2015  
[www.gov.uk/contracts-finder](http://www.gov.uk/contracts-finder)

## 2. The new requirements

Contracting authorities are required to ensure that any new procurement opportunities, above thresholds, are published on Contracts Finder (in addition to, or instead of any other portal or publications route they may currently use).

Once a contract has been awarded as a result of a procurement process, contracting authorities must also publish details of who has won the contract, the contract value, and for procurements below the EU thresholds, indicate whether the winning supplier is a small business or voluntary sector organisation.

## 3. Thresholds for publishing opportunities

The threshold for publishing is £10,000 contract value, for Central Government and £25,000 contract value, for non Central Government contracting authorities, including NHS Trusts.

#### **4. Specific requirements for placing contract opportunities on Contracts Finder**

The requirement to publish on Contracts Finder applies where a contracting authority advertises an opportunity. Where a contracting authority is satisfied it is lawful not to advertise an opportunity and chooses not to advertise the opportunity at all, for example because it has internal policies such as standing orders which do not require a competition, the requirement to advertise on Contracts Finder does not apply to that contract.

If the opportunity appears on other portals or sites, for example a local portal or the TED portal, the information must also be published on Contracts Finder within 24 hours of the time when it is first advertised. For contracts advertised on TED, the information must be published on Contracts Finder within 24 hours of the time when the contracting authority becomes entitled to publish the notice at national level.

Where a contracting authority has an existing electronic link between their own portal and Contracts Finder, which means that the opportunities (or information contained within) are automatically published on Contracts Finder, this link will normally be sufficient to comply with these new requirements, as long as the advertisement contains the minimum data requirements listed in para 5. The contracting authority remains responsible for ensuring that this is the case.

For below-EU threshold contracts, the requirement to publish does not apply where a contracting authority is making an opportunity known to a closed group of suppliers who have already been selected onto a Framework Agreement or Dynamic Purchasing System. However the requirement does apply when the contracting authority is in the process of establishing a new Framework Agreement or Dynamic Purchasing System.

#### **5. Minimum data requirements for publication Procurement opportunities**

The following information must be published as a minimum however contracting authorities are advised to consult the Regulations to ensure that all the necessary requirements have been met.

##### **Procurements above EU thresholds**

- I. The time by which any interested supplier must respond if it wishes to be considered;
- II. How and to whom an interested supplier is to respond, with appropriate contact details; and,
- III. Any other requirements for participating in the procurement, (e.g. suitability requirements or explanatory information);

##### **Procurements below EU thresholds**

- I. The time by which any interested supplier must respond if it wishes to be considered. This period must be sufficient to enable interested suppliers to respond to the opportunity and proportionate to the value of the procurement. (Where the contracting authority is seeking a tender response, it is recommended that the minimum time required to submit a tender response is 10 working days.)
- II. How and to whom an interested supplier is to respond, with appropriate contact details etc; and,
- III. Any other requirements for participating in the procurement. (e.g. suitability requirements or explanatory information.)

It is recommended that contracting authorities, where appropriate, record the relevant information in the fields which are prompted by the system when they log on as buyers, however they may also choose to upload documents containing the required information.

For all opportunities either above or below EU thresholds, please refer to the regulations to determine the appropriate requirements for making procurement documents freely available and accessible.

## Contract award

Once a contract has been awarded contracting authorities are required to publish at least the following information on Contracts Finder. It is recommended that this information is published in the Award Details section.

- I. the full company name of the winning contractor;
- II. the date on which the contract was entered into;
- III. the total value of the contract in pounds sterling; and,
- IV. an indication of whether the contractor is an Small or Medium-sized Enterprise (SME) or a Voluntary Community and Social Enterprise (VCSE) (this information is only required for below EU threshold procurements, see below for definitions).

This information should also be published in relation to contracts awarded as a result of a Framework Agreement (e.g. as a result of a mini competition).

The information must be published within a reasonable time. It is recommended that the information be published no later than 90 calendar days after the contract award date. Where a Contract Award Notice is published on TED, the contracting authority should not publish the notice in Contracts Finder before the time when they are entitled to publish the notice at national level in accordance with Regulation 52 of the PCRs.

There are some exceptions to this requirement, and a contracting authority may withhold contract award information from publication where its release:

- would impede law enforcement or would otherwise be contrary to the public interest;
- would prejudice the legitimate commercial interests of a particular supplier; or
- might prejudice fair competition between suppliers.

Legal advice should be sought in determining whether any information may be withheld.

## 6. Definitions

'SME' means an enterprise falling within the category of micro, small and medium-sized enterprises defined by the European Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; and

'VCSE' means a non-governmental organisation that is value-driven and which principally reinvests its surpluses to further social, environmental or cultural objectives.

## 7. Exemptions

- Contracting authorities carrying out devolved or mainly devolved functions in Scotland, Wales and Northern Ireland;
- 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(b);
- Maintained Schools and Academies are exempt from Contracts Finder obligations.

## For further information

Please contact the Crown Commercial Service Help Desk on

**T:** 0345 410 2222 **E:** [info@ccs.gsi.gov.uk](mailto:info@ccs.gsi.gov.uk)

**Liverpool** 9th Floor  
Capital Building  
Old Hall Street  
Liverpool L3 9PP

**London**  
Aviation House  
125 Kingsway  
London WC2B 6SE

**Newport** Room 2Y92  
Concept House  
Cardiff Road  
Newport NP10 8QQ

**Norwich**  
Rosebery Court  
St Andrews Business Park  
Norwich NR7 0HS





# Public Contracts Regulations 2015

## Statutory guidance for contracting authorities and Suppliers on paying undisputed invoices in 30 days down the supply chain

### 1. Introduction

This guidance is issued under r113 of the Public Contracts Regulations 2015 (the "Regulations"). Contracting authorities must have regard to this guidance in relation to the payment of valid and undisputed invoices within 30 days.

This guidance has been prepared to provide general guidance only. This guidance does not constitute legal advice. The interpretation of the law is ultimately a matter for the courts and users of this guidance should seek their own legal advice where appropriate.

This guidance has effect from 26 February 2015.

### 2. Background

Government is committed to creating a supportive environment in which ambitious businesses can flourish. It recognises that the public sector should set a strong example by paying promptly. Over time central Government has been improving its payment times to assist the cash flow of businesses. The policy and legislation framework is;

- Following a Government policy commitment in 2010, central government pays 80% of undisputed invoices within 5 days.
- Late payment legislation<sup>1</sup> enables suppliers to claim statutory interest for payments made more than 30 days after receipt of the invoice.
- Additionally many Local Authorities have commitments to pay within 10 days.

<sup>1</sup> The term Late Payment legislation refers to the Late Payments of Commercial Debts (Interest) Act 1998, the Late Payment of Commercial Debts Regulations 2002 and the Late Payment of Commercial Debts Regulations 2013. See BIS guidance at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/360834/bis-14-1116-a-users-guide-to-the-recast-late-payment-directive.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360834/bis-14-1116-a-users-guide-to-the-recast-late-payment-directive.pdf)

### 3. Scope of this reform

Regulation 113 of the Public Contracts Regulations 2015 requires contracting authorities to ensure that every public contract they award contains suitable provisions requiring:

- a. The contracting authority to pay invoices submitted by the contractor under the contract no later than the end of a period of 30 days from the date on which the invoice is regarded as valid and undisputed;
- b. The contracting authority to consider and verify any invoices for payment submitted by the contractor in a timely fashion;
- c. That any undue delay in considering and verifying an invoice is not sufficient justification for failing to regard it as valid and undisputed;
- d. That any subcontract awarded by the contractor contains suitable provisions to impose, as between the parties to the subcontract:
  - i. Requirements to the same effect as those set out above; and
  - ii. A requirement for the subcontractor to include in any subcontract which it in turn awards suitable provisions to impose, as between the parties to that subcontract, requirements to the same effect.

Regulation 113(7) requires contracting authorities to publish on the internet each year how they have performed on this including the proportion of invoices paid on time to their first tier suppliers /prime contractors.

Where a contract contains terms or provisions requiring payment more quickly than 30 days (for example because of statutory requirements, or because the parties choose a shorter payment period) then these shorter payment periods will apply to that contract.

Central government will continue to follow the policy of paying 80% of all invoices in 5 days. (This is not a legal obligation).

A model term can be found in Annex 1 that is recommended for use. Alternative versions can be used if the same outcome is achieved. In accordance with regulation 113(6), if no suitable provision is included in a relevant public contract, the terms set out in regulation 113(6) will be implied into that public contract.

These requirements will apply to all public contracts except the following:

- Contracts for 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; and
- Contracts awarded by a contracting authority which is a maintained school or an Academy.

### 4. Publication of performance

Contracting authorities will be required to publish performance data on the Internet starting with their performance over financial year 2015/16<sup>2</sup> and then at the end of each financial year. The data will demonstrate their performance on paying in 30 days to first tier suppliers /prime contractors over the previous 12 months. The data should be freely available via the Internet and maintained until replaced by a more recent set of statistics. Good practice would be to leave all past years' data up for comparison purposes.

The statistics will be;

- i) Percentage of invoices paid within 30 days
- ii) The amount of interest paid to suppliers due to late payment.

Additionally, it will be a requirement to publish the total amount of interest that the contracting authority was liable to pay, i.e. whether or not paid, whether statutory or otherwise, due to a breach of the Regulations. This figure must be published annually in relation to the previous 12-month period at the end of March 2017. This includes a 12-month grace period which is to allow contracting authorities the time to change their internal systems to account for liabilities. A model template for publication can be found in Annex 1.

<sup>2</sup> Regulation 113(7) states that the information must be published in accordance with the contracting authority's financial year. This guidance assumes a financial year ending in March, which is common amongst contracting authorities.

## Annex 1

### Model term

This model term is set out pursuant to regulation 113(6) of the Public Contracts Regulations 2015. It is recommended for use by contracting authorities, but its use is not mandatory.

It refers to the contracting authority as the Authority, and to the contractor as the Contractor. These terms should be amended to reflect the defined terms used in the relevant agreement.

Drafting in square brackets should be used where appropriate, and removed where inappropriate.

### Prompt Payment

1. Where the Contractor submits an invoice to the Authority [in accordance with paragraph [●]], the Authority will consider and verify that invoice in a timely fashion.
2. The Authority shall pay the Contractor any sums due under such an invoice no later than a period of 30 days from the date on which the Authority has determined that the invoice is valid and undisputed.
3. Where the Authority fails to comply with paragraph 1 and there is an undue delay in considering and verifying the invoice, the invoice shall be regarded as valid and undisputed for the purposes of paragraph (2) after a reasonable time has passed.
4. Where the Contractor enters into a Sub-Contract, the Contractor shall include in that Sub-Contract:
  - a) Provisions having the same effect as clauses 1-3 of this Agreement; and
  - b) A provision requiring the counterparty to that Sub-Contract to include in any Sub-Contract which it awards provisions having the same effect as clauses 1-4 of this Agreement.
  - c) In clause 4, "Sub-Contract" means a contract between two or more suppliers, at any stage of remoteness from the Authority in a subcontracting chain, made wholly or substantially for the purpose of performing (or contributing to the performance of) the whole or any part of this Agreement.

### Model template for performance data

Financial year 2015/2016	Proportion of valid & undisputed invoices paid within 30 days in accordance with regulation 113	The amount of interest paid to suppliers due to a breach of the requirement in regulation 113

## Annex 2 General guidance

### 1. Verification & acceptance of invoices

- All contracting authorities and suppliers must agree payment procedures before the contract (s) are in place.
- Where a contracting authority has verification and acceptance procedures for handling invoices, the duration of these must be clearly expressed in the tender and contract documentation.
- The supplier should take care to ensure the details of their invoice are correct, reflects works carried out and/or products and services supplied and includes the relevant information specified by the contracting authority.
- The contracting authority must verify the invoice in a timely manner e.g. check that what was ordered and received matches what was invoiced and /or that the charges are correct. As a guide contracting authorities should verify invoices in 7 calendar days of receipt.
- Undue delay in verifying the invoice will not be justification for failing to treat it as valid and undisputed. This will be monitored by Crown Commercial's Mystery Shopper service.

### 2. The 30 days period

- For the purposes of the Regulations, the 30 calendar days period starts on the date the contracting authority deems the invoice to be valid and undisputed.
- Contracting authorities should verify, accept and pay within the 30-day period unless otherwise expressly agreed.
- Where the late payment legislation requires the invoice to be paid within a shorter period of time, the late payment legislation will prevail over the Regulations and the invoice must be paid within that shorter timescale.

- Project Bank Accounts (PBAs) were pioneered by the construction industry and are a practical example of how payments can be made quickly to suppliers in a supply chain. PBAs should be used where appropriate although it should be noted that they provide shorter payment timescales than 30 days.
- [www.gov.uk/government/publications/project-bank-accounts](http://www.gov.uk/government/publications/project-bank-accounts)

### 3. When a supplier is paid late

- The late payment legislation allows a supplier to charge statutory interest if the contracting authority pays after the required date. This guidance does not deal with the effects of the late payment legislation.
- For further guidance see the Users Guide on the recast Late Payment Directive:  
[www.gov.uk/government/publications/late-payment-directive-user-guide-to-the-recast-directive](http://www.gov.uk/government/publications/late-payment-directive-user-guide-to-the-recast-directive)

### 4. Monitoring compliance with the 30 days payment terms requirement

- The Cabinet Office runs a "Mystery Shopper" service that investigates issues of poor procurement practices, both from public bodies and in public procurement supply chains. Suppliers can use this service anonymously to escalate issues about problems in Government supply chains. Such problems may include the question of prompt payment. Mystery Shopper will name and shame any suppliers that are proved to be poor payers.
- The Government has included clauses in the Small Business Enterprise & Employment Bill 2015, that subject to Parliamentary processes and the Bill receiving Royal Assent, give new statutory powers to Mystery Shopper in terms of investigating complaints about procurement and requiring cooperation by contracting authorities.

## For further information

Please contact the Crown Commercial Service Help Desk on

T: 0345 410 2222 E: [info@ccs.gsi.gov.uk](mailto:info@ccs.gsi.gov.uk)

**Liverpool** 9th Floor  
Capital Building  
Old Hall Street  
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**London**  
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125 Kingsway  
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**Newport** Room 2Y92  
Concept House  
Cardiff Road  
Newport NP10 8QQ

**Norwich**  
Rosebery Court  
St Andrews Business Park  
Norwich NR7 0HS





# Procurement Policy Note: Availability of Standard EU Forms and Notices for Public Procurement

Action Note 17/15 2 December 2015

## Issue

1. This PPN announces that the new EU standard forms and notices for public procurement have been published in the Official Journal of the EU and will come into force on 3rd December 2015.
2. Contracting authorities should now prepare to use the new standard forms and notices in relation to procurements under the Public Contracts Regulations 2015.

## Dissemination and Scope

3. This PPN is directly applicable to all contracting authorities, including Central Government, Executive Agencies, Non Departmental Public Bodies, wider public sector, local authorities and NHS bodies. Please circulate this document (for information) within your organisation, including where relevant to Executive Agencies and Non Departmental Public Bodies and other contracting authorities for which you are responsible, drawing it to the attention of those with a purchasing role.

## Timing

4. The new standard forms and notices will be accessible on the Tenders Electronic Daily (TED) website, under eNotices, on 3rd December. E-senders will provide access to the new standard forms and notices when they have received TED re-qualification.

## Action

5. Contracting authorities must use the new standard forms in relation to procurements under the Public Contracts Regulations 2015 when they become available. The forms and notices are to be electronically

transmitted to the Publications Office, using either the TED eNotices online application or the TED e-Sender system.

### **Background**

6. Directives 2014/24/EU, 2014/23/EU and 2014/25/EU set out the information for public and utilities procurements and concessions that must be included on standard forms and notices submitted to the Official Journal European Union (OJEU).
7. The UK transposed Public Sector Procurement Directive 2014/24/EU early and transitional arrangements had to be employed for completion of the standard forms and notices until new forms were adopted within the EU.
8. The EU Commission's Implementing Regulation (EU) 2015/1986 of 11 November 2015 gives legal effect to the new forms. It was published in the Official Journal on 12<sup>th</sup> November 2015 (see hyperlink below) and comes into force on 3rd December 2015.
9. Transitional arrangements of augmenting the information on the existing forms and notices will end when the new standard forms and notices are available from TED eNotices or the TED e-Sender system.
10. Due to the requirement to adapt systems to accept the new standard forms and notices, and the time needed to re-qualify, some e-Senders may not have the new standard forms and notices available in December. The transitional arrangements may continue whilst re-qualification phase is taking place.

### **Further Information**

11. More information on the new standard forms and notices is available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2015.296.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.296.01.0001.01.ENG)

### **Contact**

12. Enquiries about this PPN should be directed to the Crown Commercial Service Helpdesk: telephone 0345 410 2222, email [info@crowncommercial.gov.uk](mailto:info@crowncommercial.gov.uk)

# Scope and remit of the Mystery Shopper Scheme

## Referrals

We accept feedback from suppliers who have concerns about the conduct of a procurement process which they have been part of.

## Acceptance criteria for feedback

To be accepted for intervention, feedback must meet one or more of the following criteria:

- Does it concern poor procurement practice highlighting a potential conflict with best practice guidance? This includes all aspects of the procurement life cycle, for example pre-procurement activities, formal tendering processes and the management of contracts, including payments to suppliers and sub-contractors.
- Does it relate to a procurement conducted by a UK Government Department or an English contracting authority in the wider public sector that has taken place in the last 2 years? (We will forward referrals received concerning the devolved administrations to the appropriate departments in Scotland, Wales and Northern Ireland)
- Does it form part of a series of enquiries/issues that have been raised in the past 2 years about a particular contract, project, government department or prime contractor sufficient for the Crown Commercial Service to investigate further?
- Does it represent endemic poor practice?
- Does it concern any of the February 11th 2011 and March 9th 2012 announcements aimed at SMEs?
- Does it concern supply chain issues between prime contractors and sub contractors?
- Does it concern issues relating to the Public Services (Social Value) Act 2012?

## What outcomes can you expect?

We will seek to provide a reasoned response to the enquirer in respect of matters raised relating to procurement with Government. We aim to complete our action in 2 months for Central Government referrals and 3 months for issues in the wider public sector (for example in local government and the NHS).

The Crown Commercial Service may issue instructions to the contracting authority or prime contractor on how to remedy the specific problem for central government issues - and may work with a lead authority to do the same for wider public sector issues.

The Crown Commercial Service may issue a set of recommendations to help the central government body avoid similar issues in the future. For the wider public sector, the Crown Commercial Service will decide whether to work with a lead authority to produce recommendations for the contracting authority that is the focus of the feedback.

If we consider that the issues raised in a particular matter may have wider applicability to public procurement practice, the Crown Commercial Service may issue general guidance to all public bodies (for example, through a Procurement Policy Note), or take other forms of action to help reduce the likelihood of similar issues arising in other authorities.

We may contact contracting authorities directly and keep lead authorities aware of the concerns raised.

The Crown Commercial Service may use learning from the function to feed into other areas of our activity to improve public procurement practice.

If it appears that there are shortcomings with a "live" procurement exercise, The Crown Commercial Service may make recommendations to the contracting authority as to how those shortcomings might be resolved. For example, if the contract has yet to be awarded, the Crown Commercial Service may recommend that the contracting authority delays, restarts or suspends a procurement exercise in order to resolve the enquirer's concerns. However, the Crown Commercial Service does not have the power to require a contracting authority to delay or suspend award.

We will publish the outcome of cases on the Crown Commercial Service website and through social media, only the contracting authority involved in the issue will be named.

Serious or persistent supply chain issues will be raised with the Crown Representative in addition to our investigations.

**The Crown Commercial Service will not intervene:**

Where there is a dispute between a supplier and contracting authority that is already subject to formal proceedings whether administrative (e.g. An internal appeal process) or legal (e.g. in the UK courts or European Infractions proceedings).

Where there is a dispute between a subcontractor and a prime contractor working with a contracting authority that is already subject to formal proceedings whether administrative (e.g. An internal appeal process such as a Merlin standards dispute or other internal dispute process) or legal (e.g. in the UK or European courts).

If we understand that the enquirer is contemplating legal action. Where the enquirer starts legal proceedings whilst we are considering a case, we will suspend our involvement until the legal action is concluded.

Where the case relates to the 10-day (or 15 days as appropriate) mandatory standstill period.

Where bodies with a statutory right to investigate the activities of certain public authorities - including their procurement functions - have been, or will be, involved. For example, complaints

to an Ombudsman or any statutory body with powers to investigate the activities of local authorities and some other public authorities.

We will not review or pre-empt any findings of a review or other body with statutory powers concerning public procurement.

If a supplier raises a concern which either does not relate to public procurement or is a whistleblowing disclosure, the Mystery Shopper Scheme is not the appropriate mechanism for addressing such matters. There is specific legislation in relation to whistleblowing, (the Public Interest Disclosure Act 1998) which is designed to protect members of staff from harm. If you are considering such action you should first refer to your employer's internal procedures for whistleblowing or, alternatively, you can contact Public Concern at Work for free, impartial advice. A guide to whistleblowing can be found on the BIS website –

<https://www.gov.uk/whistleblowing/overview>

Where the case relates to procurement activity by the devolved administrations of Scotland, Wales or Northern Ireland.

If a request for feedback is either: (a) expressed in abusive terms or (b) appears malicious on its face and without any issues that can be taken up with a contracting authority.

Where the feedback does not directly relate to a procurement process

If the procurement has been concluded 2 years prior to contacting the Crown Commercial Service

### **Disclaimer**

The Crown Commercial Service does not provide legal advice and is not a legal avenue to resolve complaints, or to obtain compensation. Enquirers should not regard the Mystery Shopper Scheme as a precursor to legal action, or a potential means to obtain redress of a type that would otherwise require legal action. If you are seeking legal redress, we advise you to consult your own legal advisors to determine the most appropriate course of action.

We cannot require or advise a contracting authority to award a contract, or refrain from awarding a contract, to a particular bidder.

We cannot form a view as to the extent of any financial or other loss suffered by a supplier, or comment on the accuracy of any statement made by the supplier as to a possible loss.

### **Anonymity**

There may be some scenarios where concerned individuals are uncomfortable raising issues relating to public procurement with the contracting authority directly. The Crown Commercial Service occasionally receives such concerns from suppliers and where it is possible to raise the concern without identifying the supplier who has requested feedback; we will pursue these with the contracting authority or lead authority as appropriate.

## **Disclosure pursuant to the Freedom of Information Act 2000**

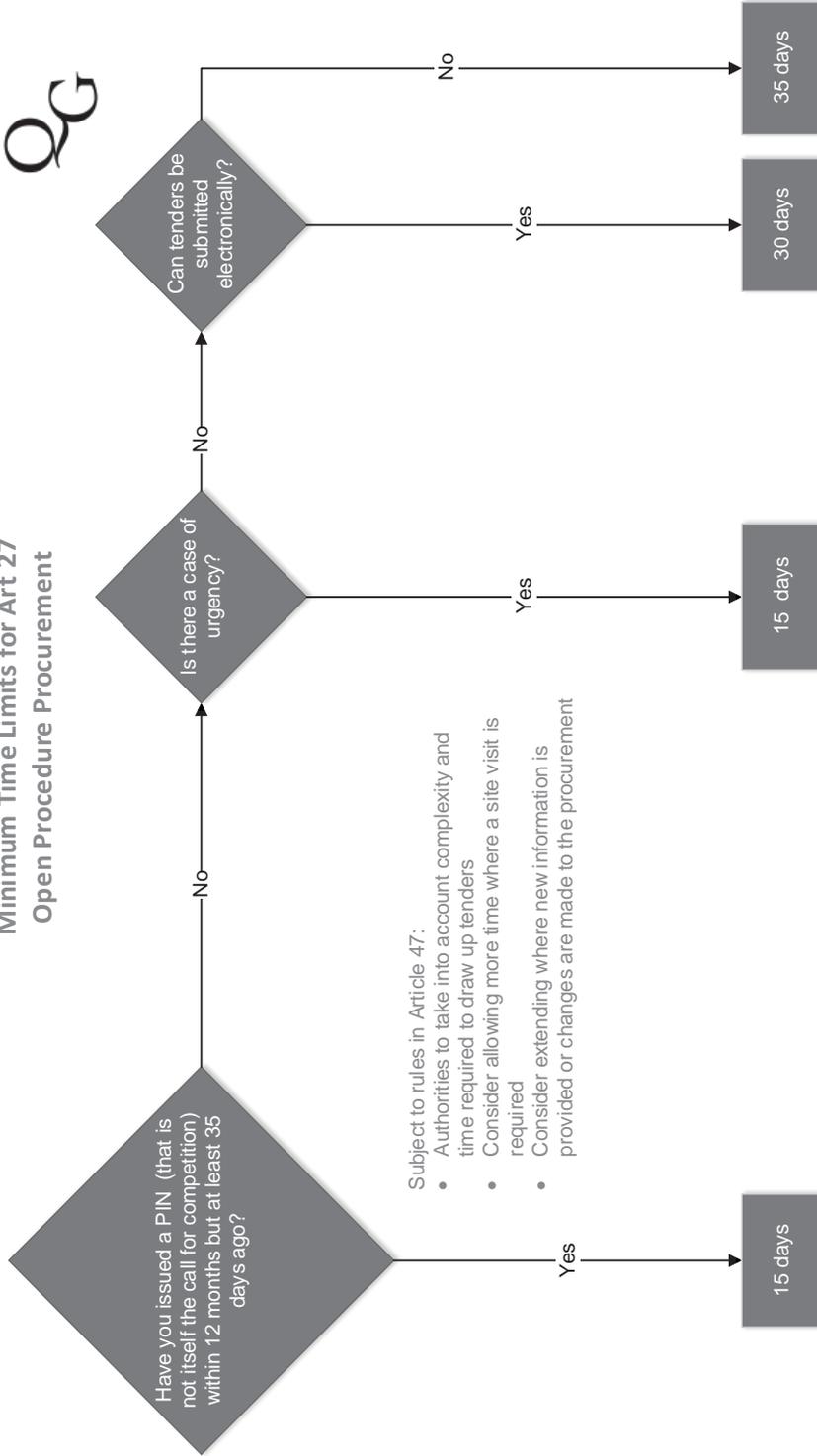
1. In accordance with the obligations and duties placed upon public authorities by the Freedom of Information Act 2000 (the 'FoIA'), all information submitted may be disclosed by the Crown Commercial Service in response to a request made pursuant to the FoIA.
2. In respect of any information submitted by an enquirer that it considers to be commercially sensitive the enquirer should:
  - A. Clearly identify such information as commercially sensitive;
  - B. Explain the potential implications of disclosure of such information; and
  - C. Provide an estimate of the period of time during which the enquirer believes that such information will remain commercially sensitive.
3. Where information is identified as commercially sensitive by an enquirer, the team will endeavour to maintain confidentiality. Enquirers should note, however, that, even where information is identified as commercially sensitive, the Crown Commercial Service might be required to disclose such information in accordance with the FoIA. Accordingly, the Crown Commercial Service cannot guarantee that any information provided by an enquirer will not be disclosed even where it is marked as "confidential".

## **Spot Checks**

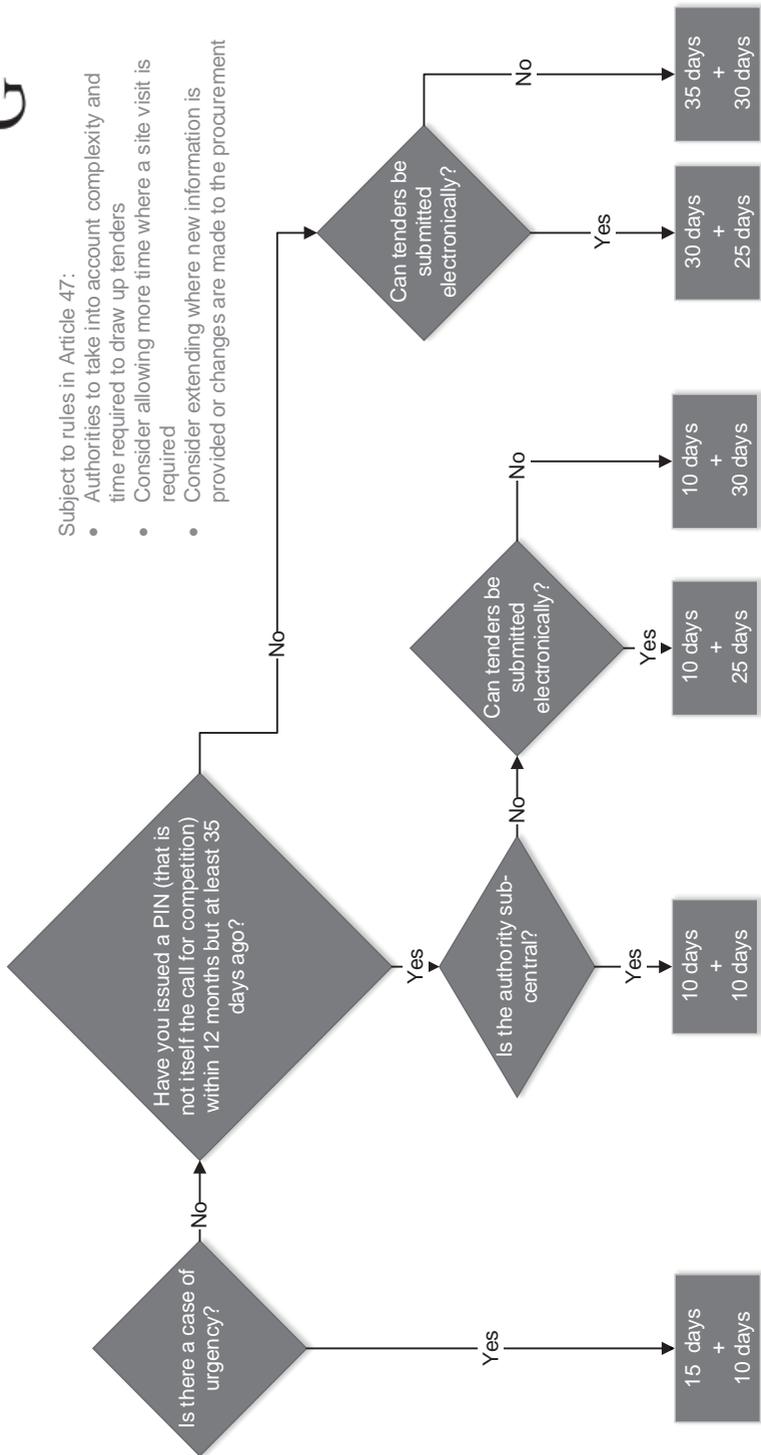
Ministers announced the extension of the scheme to include spot checks on procurement processes in the report Small Business GREAT Ambition<sup>1</sup>. Contracting authorities for which we accept feedback from concerned suppliers and others will be covered by the spot checking function.

Relevant documents, which are typically posted on line in procurement portals, will be examined to check compliance with relevant law and procurement policy, particularly policy set out in procurement policy notes. Where we find concerns these will be discussed with the relevant body and results will be published on GOV.UK

## Minimum Time Limits for Art 27 Open Procedure Procurement



## Minimum Time Limits for Art 28 Restricted Procedure Procurement



Subject to rules in Article 47:

- Authorities to take into account complexity and time required to draw up tenders
- Consider allowing more time where a site visit is required
- Consider extending where new information is provided or changes are made to the procurement



# Procurement Policy Note: New Threshold Levels 2016

Information Note 18/15

9<sup>th</sup> December 2015

## Issue

1. This PPN provides advanced notification of the new threshold levels to apply for the purposes of the procurement Regulations with effect from 1<sup>st</sup> January 2016.

## Dissemination and Scope

2. This PPN applies to all contracting authorities, as defined by the Public Contracts Regulations. This will include all central government departments, their Executive Agencies, Non-Departmental Public Bodies, Executive Agencies and the wider public sector. This note also contains information relevant to utilities as defined by the Utilities Contracts Regulations.

## Timing

3. The new thresholds come in to effect on 1<sup>st</sup> January 2016.

## Background

4. The Commission has provided the finalised and agreed threshold values to apply from 1<sup>st</sup> January 2016 to 31<sup>st</sup> December 2017.
5. The revised thresholds show a decrease, which are due to fluctuations in exchange rates over the previous two years.
6. Annex A is a summary of all the changes to threshold levels for both public contracts, utilities contracts and defence and security contracts from 1<sup>st</sup> January 2016.

## Contact

7. Enquiries about this PPN should be directed to the Crown Commercial Service Helpdesk (telephone 0345 410 2222, email [info@crowcommercial.gov.uk](mailto:info@crowcommercial.gov.uk))

## Annex A – Summary of Threshold Levels from 1<sup>st</sup> January 2016

### The Public Contracts Regulations

#### Supplies & Services (except subsidised services contracts)

Schedule 1 bodies - £106,047

Others - £164,176

#### Subsidised services contracts

All bodies - £164,176

#### Works

All bodies - £4,104,394

#### Light Touch Regime for Services

All bodies - £589,148

#### Small lots

Supplies and services - £62,842

Works - £785,530

### The Utilities Contracts Regulations

#### Supplies and Services

All sectors - £328,352

#### Works

All sectors - £4,104,394

#### Small lots

Supplies and Services - £62,842

Works - £785,530

### The Defence and Security Public Contracts Regulations

#### Supplies and Services

All sectors - £328,352

#### Works

All sectors - £4,104,394

#### Small lots

Supplies and Services - £62,842

Works - £785,530

## Procurement Threshold Levels

1 January 2016 - 31 December 2017

<b><u>Public Contracts</u></b>		
<i><u>Supplies and Services</u></i>		
Schedule 1 bodies	€ 135,000	£ 106,047
Others	€ 209,000	£ 164,176
<i><u>Subsidised Services</u></i>		
All bodies	€ 209,000	£ 164,176
<i><u>Work</u></i>		
All bodies	€ 5,225,000	£ 4,104,394
<i><u>Light Touch Services</u></i>		
All bodies	€ 750,000	£ 589,148
<i><u>Small lots</u></i>		
Supplies and services	€ 80,000	£ 62,842
Works	€ 1,000,000	£ 785,530

<b><u>Utility Contracts</u></b>		
Supplies and Services	€ 418,000	£ 328,352
Works	€ 5,225,000	£ 4,104,394
<i><u>Small lots</u></i>		
Supplies and services	€ 80,000	£ 62,842
Works	€ 1,000,000	£ 785,530

<b><u>Defence and Security Contracts</u></b>		
Supplies and Services	€ 418,000	£ 328,352
Works	€ 5,225,000	£ 4,104,394
<i><u>Small lots</u></i>		
Supplies and services	€ 80,000	£ 62,842
Works	€ 1,000,000	£ 785,530

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