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STATUTORY INSTRUMENTS

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**2011 No. 1848**

**The Defence and Security Public Contracts Regulations 2011**

**PART 3**

**PROCEDURES LEADING TO THE AWARD OF A CONTRACT**

**Prior information notices**

**14.**—(1) Subject to paragraphs (5) and (6), a contracting authority shall send a notice in the form of a prior information notice to the Commission or publish it on that contracting authority's buyer profile at the earliest opportunity after the decision approving the project for which the contracting authority intends to award contracts or framework agreements.

(2) The notice referred to in paragraph (1) shall contain information in respect of—

- (a) the supply contracts, the services contracts or the framework agreements for the purchase or hire of goods or for the provision of services which the contracting authority expects to award or conclude during the period of 12 months beginning with the date of the notice; and
- (b) the works contracts or the framework agreements for the carrying out of work or works which the contracting authority expects to award or conclude;

and that notice shall be sub-divided to give that information separately for each product area of goods by reference to the main vocabulary group CPV nomenclature of each product area of goods and for each class of works or category of services as specified in Schedules 1 and 2.

(3) Where a contracting authority publishes a notice on its buyer profile in accordance with paragraph (1), it shall also send a notice in the form of a notice on a buyer profile informing the Commission by electronic means in accordance with the format and procedure for sending notices specified in paragraph (3) of Annex VI to the Defence and Security Procurement Directive of that publication.

(4) A notice on a buyer profile sent to the Commission must—

- (a) subject to sub-paragraph (b), contain the information specified in Annex IV to the Defence and Security Procurement Directive; or
- (b) if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for this purpose, be in that form and contain the information therein specified.

(5) The obligation to publish a prior information notice applies only where the contracting authority takes the option of shortening the time limit for the receipt of tenders in accordance with regulation 17(20).

(6) This regulation does not apply to a proposed contract where the procedure for the award of the contract is the negotiated procedure without the prior publication of a contract notice in accordance with regulations 16 and 18(1), (2), (9) and (10).

**Selection of contract award procedures**

**15.**—(1) For the purpose of seeking offers in relation to a proposed contract, a contracting authority shall, except in the circumstances specified to in paragraph (2), use—

- (a) the restricted procedure in accordance with regulation 17; or
  - (b) the negotiated procedure with the prior publication of a contract notice in accordance with regulation 18.
- (2) The circumstances referred to in paragraph (1) are where the contracting authority may use—
- (a) the negotiated procedure without the prior publication of a contract notice in accordance with regulations 16 and 18(1), (2), (9) and (10); or
  - (b) the competitive dialogue procedure in accordance with regulation 19.

**Use of the negotiated procedure without prior publication of a contract notice**

**16.**—(1) A contracting authority may use the negotiated procedure without the prior publication of a contract notice in accordance with this regulation and regulation 18(1), (2), (9) and (10) in the following circumstances and must give reasons for the use of this procedure in the contract award notice—

- (a) in the case of a contract—
  - (i) subject to paragraph (2), in the absence of tenders, suitable tenders or applications in response to a restricted procedure, a negotiated procedure with the prior publication of a contract notice or a competitive dialogue procedure but only if the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered in the negotiated procedure;
  - (ii) when, for technical reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;
  - (iii) when the periods laid down for the restricted procedure and negotiated procedure with the prior publication of a contract notice, including the shortened periods referred to in regulations 17(6), 17(19) and 18(8), are incompatible with the urgency resulting from a crisis;
  - (iv) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the contracting authority, the time limits specified in—
    - (aa) regulation 17 for the restricted procedure, or
    - (bb) regulation 18 for the negotiated procedure,
 cannot be met;
- (b) in the case of a supply contract—
  - (i) subject to paragraph (3), when the goods to be purchased or hired under the contract are required by the contracting authority as a partial replacement for, or in addition to, existing goods or an installation and when to obtain the goods from a supplier other than the supplier which supplied the existing goods or the installation would oblige the contracting authority to acquire goods having different technical characteristics which would result in—
    - (aa) incompatibility between the existing goods or the installation and the goods to be purchased or hired under the contract; or
    - (bb) disproportionate technical difficulties in the operation and maintenance of the existing goods or the installation;

- (ii) for the purchase or hire of goods quoted and purchased on a commodity market;
  - (iii) to take advantage of particularly advantageous terms for the purchase of goods in a closing down sale or in a sale brought about because a supplier is subject to a procedure referred to in regulation 23(4)(a), (b) or (c);
- (c) in the case of a services contract or a supply contract—
  - (i) for research and development services to which these Regulations apply;
  - (ii) when the goods to be purchased or hired under the contract are to be manufactured solely for the purpose of research or development but not when the goods are to be purchased or hired for quantity production to establish commercial viability or to recover research and development costs;
- (d) in the case of a works contract or a services contract—
  - (i) subject to paragraph (5), when a contracting authority wants an economic operator which has entered into a works contract or a services contract with the contracting authority to carry out additional work or works or provide additional services which were not included in the project initially considered or in the original works contract or services contract but which through unforeseen circumstances have become necessary, and such work, works or services—
    - (aa) cannot for technical or economic reasons be carried out or provided separately from those under the original contract without major inconvenience to the contracting authority; or
    - (bb) can be carried out or provided separately from those under the original contract but are strictly necessary to the later stages of the performance of that contract;
  - (ii) subject to paragraph (6), when a contracting authority wants an economic operator which has entered into a works contract or a services contract with that contracting authority to carry out new work or works or provide new services which are a repetition of the work or works carried out or the services provided under the original contract and which are in accordance with the project for the purpose of which the first contract was entered into;
- (e) in the case of a contract related to the provision of air and maritime transport services for the armed forces or security forces of a member State deployed or to be deployed abroad, when the contracting authority has to procure such services from economic operators that guarantee the validity of their tenders only for such short periods that the time limit for the restricted procedure or the negotiated procedure with the prior publication of a contract notice, including the shortened time limits as referred to in regulations 17(6), 17(19) and 18(8), cannot be complied with;
- (f) in the event that the procedure leading to the award of a contract by the contracting authority using the restricted procedure, the negotiated procedure with the prior publication of a contract notice or the competitive dialogue procedure was discontinued because of—
  - (i) irregular tenders, or
  - (ii) unacceptable tenders following an evaluation made in accordance with regulations 23, 24, 25 and 26,

but only if the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered in the negotiated procedure and the contracting authority invites all of, and only, those economic operators which submitted a tender following an invitation made during the course of the discontinued procedure (not being

a tender which was excluded in accordance with regulation 17(7), 18(9) or 19(10)) to negotiate the contract.

(2) A contracting authority using the negotiated procedure in accordance with paragraph (1)(a)(i) shall, if the Commission requests it, submit a report recording the fact that it has used that procedure to the Cabinet Office for onward transmission to the Commission, except—

- (a) where the contracting authority is the Secretary of State for Defence, in which case the Ministry of Defence must transmit the report to the Commission; or
- (b) where the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006<sup>(1)</sup> or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006<sup>(2)</sup> and the Secretary of State for Defence is “another contracting authority” within the meaning of those provisions, in which case the contracting authority must submit the report to the Ministry of Defence for onward transmission to the Commission.

(3) A contracting authority shall not use the negotiated procedure in accordance with paragraph (1)(b)(i) if the term of the proposed contract, or the term of that contract and of any other contract entered into for the same purposes, is more than five years, unless there are exceptional circumstances which require that this period should be exceeded.

(4) For the purposes of paragraphs (3) and (6)(c), exceptional circumstances are to be determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of economic operator may cause.

(5) A contracting authority shall not use the negotiated procedure in accordance with paragraph (1)(d)(i), where the aggregate value of the consideration to be given under contracts for the additional work, works or services exceeds 50% of the value of the consideration payable under the original contract.

(6) A contracting authority shall not use the negotiated procedure in accordance with paragraph (1)(d)(ii) unless—

- (a) the contract notice relating to the original contract stated that a works contract or a services contract for new work, works or services which would be a repetition of the work or works carried out or the services provided under the original contract may be awarded using the negotiated procedure in accordance with paragraph (1)(d)(ii);
- (b) in determining the estimated value of the original contract for the purposes of regulation 9, the contracting authority took into account the value of the consideration which it expected to be payable for the new work, works or services; and
- (c) the procedure for the award of the new contract is commenced within five years of the original contract being entered into, unless there are exceptional circumstances which require that the procedure for the award of the new contract be commenced outside this period.

### **The restricted procedure**

17.—(1) A contracting authority using the restricted procedure shall comply with this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the contract by sending to the Official Journal as soon as possible after forming the intention, a notice, in the form of the contract notice, inviting requests to be selected to tender.

<sup>(1)</sup> S.I. 2006/5; amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2683, 2008/2848, 2009/1307 and 2009/2992.

<sup>(2)</sup> S.S.I. 2006/1; amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2010/222. S.S.I. 2009/428 was amended by S.S.I. 2009/439.

(3) Subject to paragraph (5), the date which the contracting authority fixes as the last date for the receipt by it of requests to be selected to tender shall be specified in the contract notice and shall not be less than 37 days from the date of the despatch of the notice.

(4) Subject to any minimum time limit specified by this regulation, the contracting authority shall take account of all the circumstances, in particular, the complexity of the contract and the time required for drawing up tenders when fixing time limits for the receipt of requests to be selected to tender and for receipt by it of tenders.

(5) Where the contracting authority has transmitted a contract by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VI to the Defence and Security Procurement Directive, the time limit referred to in paragraph (3) may be reduced by seven days.

(6) Where compliance with the minimum time limit of 37 days referred to in paragraph (3) is rendered impractical for reasons of urgency, the contracting authority may substitute for that time limit—

- (a) a time limit of not less than 15 days from the date of despatch of the contract notice; or
- (b) where the contracting authority has transmitted the contract notice by electronic means in accordance with paragraph (5), a time limit of not less than 10 days from the date of despatch of the contract notice.

(7) The contracting authority shall make its evaluation in accordance with regulations 23, 24, 25 and 26 and may exclude an economic operator from those economic operators from which it will make the selection of economic operators to be invited to tender only if the economic operator—

- (a) may be treated as ineligible to tender on a ground specified in regulation 23; or
- (b) fails to satisfy the minimum standards required of economic operators by the contracting authority of—
  - (i) economic and financial standing; or
  - (ii) technical or professional ability.

(8) The contracting authority shall make the selection of the economic operators to be invited to tender in accordance with regulations 23, 24, 25 and 26 and shall award the contract in accordance with regulation 31.

(9) Where there is a sufficient number of economic operators suitable to be selected to be invited to tender, the contracting authority may limit the number of economic operators which it intends to invite to tender provided that the contract notice specifies—

- (a) the objective and non-discriminatory criteria to be applied in order to limit the number of economic operators in accordance with this paragraph; and
- (b) the minimum number of economic operators, which shall be not less than three, which the contracting authority intends to invite to tender and, where appropriate, the maximum number.

(10) The contracting authority shall ensure that the number of economic operators invited to tender is—

- (a) sufficient to ensure genuine competition; and
- (b) at least equal to the minimum number specified by the contracting authority in accordance with paragraph (9)(b).

(11) Subject to paragraph (10)(a), where—

- (a) the contracting authority carries out a selection in accordance with regulations 23, 24, 25 and 26, and
- (b) the number of economic operators selected to be invited to tender is less than the minimum number specified by the contracting authority in the contract notice,

that contracting authority may continue the award procedure with the economic operators which have been selected, provided that any economic operator not selected or which did not request to participate is not included.

- (12) The contracting authority may require an economic operator to satisfy minimum levels of—
- (a) economic and financial standing, or
  - (b) technical or professional ability,

provided that those minimum levels are specified in the contract notice and are related to and proportionate to the subject matter of the contract.

(13) Without prejudice to the ability of the contracting authority to cancel the ongoing procurement procedure and launch a new procedure, if the contracting authority considers that the number of economic operators suitable to be selected to be invited to tender is too low to ensure genuine competition, it may suspend the procedure and republish the initial contract notice in accordance with paragraph (2) and regulation 48.

(14) Where the contracting authority suspends the procedure and republishes the initial contract notice in accordance with paragraph (13), it must fix a new date as the last date for the receipt by it of requests to be selected to tender and the economic operators selected upon the first publication and those selected upon the second must be invited in accordance with paragraph (15).

(15) The contracting authority shall send invitations in writing simultaneously to each economic operator selected to tender for the contract and the invitation shall—

- (a) be accompanied by the contract documents;
- (b) specify the internet address which offers unrestricted and full direct access by electronic means to the contract documents; or
- (c) where the contract documents are held by an entity other than the contracting authority, specify the address to which requests for contract documents should be sent including any final date for making such requests and the amount and any method of payment of any fee which may be charged for supplying that information.

(16) Where the contract documents are held by an entity other than the contracting authority, the contracting authority shall ensure that the contract documents are sent to economic operators by the most rapid means of communication possible.

(17) The contracting authority shall include the following information in the invitation—

- (a) the final date for the receipt by it of tenders, the address to which they must be sent and the one or more languages in which they must be drawn up;
- (b) a reference to the contract notice published in accordance with paragraph (2);
- (c) an indication of the information to be included with the tender which the contracting authority may require to be provided in accordance with regulations 24, 25, and 26; and
- (d) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice published in accordance with paragraph (2).

(18) Subject to paragraphs (20) and (21), the date which the contracting authority fixes as the last date for the receipt by it of tenders and which shall be specified in the invitation to tender in accordance with paragraph (17)(a), shall be not less than 40 days from the date of the despatch of the invitation.

(19) Where compliance with the minimum time limit of 40 days referred to in paragraph (18) is rendered impractical for reasons of urgency, the contracting authority may substitute for that time limit, a time limit of not less than 10 days from the date of despatch of the invitation.

(20) Where—

- (a) the contracting authority has published a prior information notice in accordance with regulation 14,
- (b) the prior information notice contained as much of the information specified for a contract notice in Annex IV to the Defence and Security Procurement Directive or, if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for that purpose, as much of the information therein specified, as was available at the time of publication, and
- (c) the prior information notice was sent to the Official Journal at least 52 days and not more than 12 months before the date on which the contract notice provided for in paragraph (2) is despatched,

the contracting authority may substitute for the period of not less than 40 days in paragraph (18), a period of generally not less than 36 days and in any event not less than 22 days.

(21) The contracting authority may reduce the time limits for the receipt by it of tenders referred to in paragraphs (18) and (20) by five days provided that—

- (a) the contracting authority offers unrestricted and full direct access by electronic means to the contract documents from the date of publication of the contract notice; and
- (b) the contract notice specifies the internet address at which the documents referred to in subparagraph (a) are available.

(22) The contracting authority or entity referred to in paragraph (15)(c) shall supply such further information relating to the contract documents as may be reasonably requested by an economic operator provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than four days before the date specified in the invitation to tender as the final date for the receipt by it of tenders.

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

- (a) an economic operator requests the contract documents in sufficient time to allow the contracting authority to respond in accordance with paragraph (22) and, for whatever reason, the contract documents or further information are not supplied in accordance with that paragraph; or
- (b) it is necessary that the economic operators be given the opportunity to inspect the site or premises or documents relating to the contract documents.

(24) The contracting authority may combine the reductions in the periods of time referred to in paragraphs (5) and (21).

### **The negotiated procedure**

**18.**—(1) Subject to paragraph (2), a contracting authority using the negotiated procedure shall comply with this regulation.

(2) A contracting authority using the negotiated procedure in accordance with regulation 16 need only comply with paragraphs (9) and (10) of this regulation.

(3) The contracting authority shall publicise its intention to seek offers in relation to the contract by sending to the Official Journal as soon as possible after forming the intention, a notice, in the form of the contract notice inviting requests to be selected to negotiate.

(4) The contracting authority shall indicate whether the negotiated procedure will take place in successive stages in accordance with paragraph (24)—

- (a) in the contract notice; or
- (b) in that notice and the contract documents.

(5) Subject to paragraphs (7) and (8), the date which the contracting authority fixes as the last date for the receipt by it of requests to be selected to negotiate shall be specified in the contract notice and shall not be less than 37 days from the date of despatch of the notice.

(6) Subject to any minimum time limit specified by this regulation, the contracting authority shall take account of all the circumstances, in particular, the complexity of the contract when fixing time limits for the receipt by it of requests to be selected to negotiate the contract.

(7) Where the contracting authority has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VI to the Defence and Security Procurement Directive, the time limit referred to in paragraph (5) may be reduced by seven days.

(8) Where compliance with the minimum time limit of 37 days referred to in paragraph (5) is rendered impractical for reasons of urgency, the contracting authority may substitute for that time limit—

- (a) a time limit of not less than 15 days from the date of the despatch of the contract notice; or
- (b) where the contracting authority has transmitted the contract notice by electronic means in accordance with paragraph (7), a time limit of not less than 10 days from the date of despatch of the contract notice.

(9) The contracting authority shall make its evaluation in accordance with regulations 23, 24, 25 and 26 and may exclude an economic operator from those economic operators from which it will make the selection of economic operators to be invited to negotiate the contract only if the economic operator—

- (a) may be treated as ineligible on a ground specified in regulation 23; or
- (b) fails to satisfy the minimum standards required of economic operators by the contracting authority of—
  - (i) economic and financial standing; or
  - (ii) technical or professional ability.

(10) The contracting authority shall make the selection of the economic operators to be invited to negotiate in accordance with regulations 23, 24, 25 and 26 and shall award the contract in accordance with regulation 31.

(11) Where there is a sufficient number of economic operators suitable to be selected to negotiate, the contracting authority may limit the number of economic operators which it intends to invite to negotiate the contract provided that the contract notice specifies—

- (a) the objective and non-discriminatory criteria to be applied in order to limit the number of economic operators in accordance with this paragraph; and
- (b) the minimum number of economic operators, which shall be not less than three, which the contracting authority intends to invite to negotiate and, where appropriate, the maximum number.

(12) The contracting authority shall ensure that the number of economic operators invited to negotiate is—

- (a) sufficient to ensure genuine competition; and
- (b) at least equal to the minimum number specified by the contracting authority in accordance with paragraph (11)(b).

(13) Subject to paragraph (12)(a), where—

- (a) the contracting authority carries out a selection in accordance with regulations 23, 24, 25 and 26, and



(b) the number of economic operators selected to be invited to negotiate is less than the minimum number specified by the contracting authority in the contract notice, that contracting authority may continue the award procedure with the economic operators which have been selected, provided that any economic operator not selected or which did not request to participate is not included.

- (14) The contracting authority may require an economic operator to satisfy minimum levels of—
- (a) economic and financial standing, or
  - (b) technical or professional ability,

provided that those minimum levels are specified in the contract notice and are related to and proportionate to the subject matter of the contract.

(15) Without prejudice to the ability of the contracting authority to cancel the ongoing procurement procedure and launch a new procedure, if the contracting authority considers that the number of economic operators suitable to be selected to negotiate is too low to ensure genuine competition, it may suspend the procedure and republish the initial contract notice in accordance with paragraph (3) and regulation 48.

(16) Where the contracting authority suspends the procedure and republishes the initial contract notice in accordance with paragraph (15), it must fix a new date as the last date for the receipt by it of requests to be selected to negotiate and the economic operators selected upon the first publication and those selected upon the second must be invited in accordance with paragraph (17).

(17) The contracting authority shall send invitations in writing simultaneously to each economic operator selected to negotiate and the invitation shall—

- (a) be accompanied by the contract documents;
- (b) specify the internet address which offers unrestricted and full direct access by electronic means to the contract documents; or
- (c) where the contract documents are held by an entity other than the contracting authority, specify the address to which requests for contract documents should be sent including any final date for making such requests and the amount and any method of payment of any fee which may be charged for supplying that information.

(18) Where the contract documents are held by an entity other than the contracting authority, the contracting authority shall ensure that the contract documents are sent to economic operators by the most rapid means of communication possible.

(19) The contracting authority shall include in the invitation—

- (a) the final date for the receipt by it of tenders, the address to which they must be sent and the one or more languages in which they must be drawn up;
- (b) a reference to the contract notice published in accordance with paragraph (3);
- (c) an indication of the information to be included with the tender which the contracting authority may require to be provided in accordance with regulations 24, 25 and 26; and
- (d) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice published in accordance with paragraph (3).

(20) The contracting authority or entity referred to in paragraph (17)(c) shall supply to an economic operator such further information relating to the contract documents as may be reasonably requested by that economic operator provided that the request for such information is received in sufficient time to enable the contracting authority to supply it—

- (a) not less than six days before the date specified in the invitation to tender as the final date for the receipt by it of tenders; or

(b) in the case of urgency where paragraph (8) applies, not less than four days before the date specified in the invitation to tender as the final date for the receipt by it of tenders.

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

(a) an economic operator requests the contract documents in sufficient time to allow a contracting authority to respond in accordance with paragraph (20) and, for whatever reason, the contract documents are not supplied in accordance with that paragraph; or

(b) it is necessary that the economic operators be given the opportunity to inspect the site or premises or documents relating to the contract documents.

(22) Where the contracting authority needs to identify the best tender in order to award the contract in accordance with regulation 31(1), that contracting authority shall negotiate with economic operators which have submitted tenders with the aim of adapting the tenders to the requirements specified in the contract documents.

(23) During any negotiations which take place in accordance with this regulation, a contracting authority shall ensure equal treatment among all economic operators and in particular, shall not provide information in a discriminatory manner which may give some economic operators an advantage over other economic operators.

(24) The contracting authority may provide for the negotiated procedure to take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract documents.

(25) Where the contracting authority provides for the negotiated procedure to take place in successive stages in accordance with paragraph (24), it shall ensure that the number of economic operators to be invited to negotiate the contract at the final stage is sufficient to ensure genuine competition to the extent that there is a sufficient number of economic operators to do so.

### **The competitive dialogue procedure**

**19.—**(1) In this regulation—

“particularly complex contract” means a contract where a contracting authority is not objectively able to—

(a) define the technical means in accordance with regulation 12(6), (7) and (8) capable of satisfying its needs or objectives; or

(b) specify either the legal or financial make-up of a project, or both; and

“participant” means an economic operator selected by a contracting authority using the procedure referred to in paragraph (2) to participate in the competitive dialogue procedure.

(2) Where a contracting authority wishes to award a particularly complex contract and considers that the use of the negotiated procedure with the prior publication of a contract notice or restricted procedure will not allow the award of that contract, the contracting authority may use the competitive dialogue procedure.

(3) A contracting authority using the competitive dialogue procedure shall comply with the following paragraphs of this regulation.

(4) The contracting authority shall publicise its intention to seek offers in relation to the contract by sending to the Official Journal, as soon as possible after forming the intention, a notice, in the form of a contract notice inviting requests to participate.

(5) The contracting authority shall specify its needs and requirements in the contract notice and shall define those needs and requirements—

(a) in the contract notice;

- (b) in the descriptive document; or
  - (c) in both those documents.
- (6) The contracting authority shall indicate that it may provide for the competitive dialogue procedure to take place in successive stages in accordance with paragraph (24)—
- (a) in the contract notice; or
  - (b) in that notice and the descriptive document.
- (7) Subject to paragraph (9), the date which the contracting authority fixes as the last date for the receipt by it of requests to be selected to participate shall be specified in the contract notice and shall be not less than 37 days from the date of the despatch of the notice.
- (8) Subject to any minimum time limit specified by this regulation, the contracting authority shall take account of all the circumstances, in particular, the complexity of the contract when fixing time limits for the receipt by it of requests to be selected to participate in the dialogue.
- (9) Where the contracting authority has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VI to the Defence and Security Procurement Directive, the time limit referred to in paragraph (7) may be reduced by seven days.
- (10) The contracting authority shall make its evaluation in accordance with regulations 23, 24, 25 and 26 and may exclude an economic operator from those economic operators from which it will make the selection of economic operators to be invited to participate in the dialogue only if the economic operator—
- (a) may be treated as ineligible on a ground specified in regulation 23; or
  - (b) fails to satisfy the minimum standards required of economic operators by the contracting authority of—
    - (i) economic and financial standing; or
    - (ii) technical or professional ability.
- (11) The contracting authority shall make the selection of the economic operators to be invited to participate in the dialogue in accordance with regulations 23, 24, 25 and 26.
- (12) Where there is a sufficient number of economic operators suitable to be selected to participate in the dialogue, the contracting authority may limit the number of economic operators which it intends to invite to participate in the dialogue provided that the contract notice specifies—
- (a) the objective and non-discriminatory criteria to be applied in order to limit the number of economic operators in accordance with this paragraph; and
  - (b) the minimum number of economic operators, which shall be not less than three, which the contracting authority intends to invite to participate in the dialogue and, where appropriate, the maximum number.
- (13) The contracting authority shall ensure that the number of economic operators invited to participate in the dialogue is—
- (a) sufficient to ensure genuine competition; and
  - (b) at least equal to the minimum number specified by the contracting authority in accordance with paragraph (12)(b).
- (14) Subject to paragraph (13)(a), where—
- (a) the contracting authority carries out a selection in accordance with regulations 23, 24, 25 and 26, and
  - (b) the number of economic operators selected to be invited to participate in the dialogue is less than the minimum number specified by the contracting authority in the contract notice,

that contracting authority may continue the award procedure with the economic operators which have been selected, provided that any economic operator not selected or which did not request to participate is not included.

(15) The contracting authority may require an economic operator to satisfy minimum levels of—

- (a) economic and financial standing, or
- (b) technical or professional ability,

provided that those minimum levels are specified in the contract notice and are related to and proportionate to the subject matter of the contract.

(16) Without prejudice to the ability of the contracting authority to cancel the ongoing procurement procedure and launch a new procedure, if the contracting authority considers that the number of economic operators suitable to be selected to participate in the dialogue is too low to ensure genuine competition, it may suspend the procedure and republish the initial contract notice in accordance with paragraph (4) and regulation 48.

(17) Where the contracting authority suspends the procedure and republishes the initial contract notice in accordance with paragraph (16), it must fix a new date as the last date for the receipt by it of requests to participate and the economic operators selected upon the first publication and those selected upon the second must be invited in accordance with paragraph (18).

(18) The contracting authority shall send invitations in writing simultaneously to each economic operator selected to participate in the dialogue and the invitation shall—

- (a) be accompanied by the contract documents;
- (b) specify the internet address which offers unrestricted and full direct access by electronic means to the contract documents; or
- (c) where the contract documents are held by an entity other than the contracting authority, specify the address to which requests for contract documents should be sent including any final date for making such requests and the amount and any method of payment of any fee which may be charged for supplying that information.

(19) Where the contract documents are held by an entity other than the contracting authority, the contracting authority shall ensure that the contract documents are sent to economic operators by the most rapid means of communication possible.

(20) The contracting authority shall include the following information in the invitation—

- (a) the date specified for the commencement of the competitive dialogue, the address to which replies must be sent and the one or more languages in which they must be drawn up;
- (b) a reference to the contract notice published in accordance with paragraph (4);
- (c) an indication of the information to be included with the reply which the contracting authority may require to be provided in accordance with regulations 24, 25, and 26; and
- (d) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice published in accordance with paragraph (4).

(21) The contracting authority or entity referred to in paragraph (18)(c) shall supply such further information to the economic operator relating to the contract documents or the descriptive document as may reasonably be requested by that economic operator provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than six days before the date specified in the invitation to tender as the final date of the receipt by it of tenders.

(22) The contracting authority shall open with the participants selected in accordance with regulations 23, 24, 25 and 26, a dialogue the aim of which shall be to identify and define the means best suited to satisfying its needs.

- (23) During the competitive dialogue procedure, a contracting authority—
- (a) may discuss all aspects of the contract with the participants selected;
  - (b) shall ensure equality of treatment among all participants and in particular, shall not provide information in a discriminatory manner which may give some participants an advantage over others; and
  - (c) shall not reveal to the other participants solutions proposed or any confidential information communicated by a participant without that participant's agreement.
- (24) The contracting authority may provide for the competitive dialogue procedure to 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 in the contract notice or in the descriptive document.
- (25) Where the contracting authority provides for the competitive dialogue procedure to take place in successive stages in accordance with paragraph (24), it shall ensure that the number of economic operators to be invited to participate at the final stage is sufficient to ensure genuine competition to the extent that there is a sufficient number of economic operators to do so.
- (26) The contracting authority may continue the competitive dialogue procedure until it can identify one or more solutions, if necessary after comparing them, likely to meet its needs.
- (27) Where the contracting authority declares that the dialogue is concluded, it shall—
- (a) inform each participant that the dialogue is concluded;
  - (b) request each participant to submit a final tender containing all the elements required and necessary for the performance of the project on the basis of any solution presented and specified during the dialogue; and
  - (c) specify in the invitation to submit a tender the final date for the receipt by it of tenders, the address to which they must be sent and the language or languages in which they must be drawn up.
- (28) The contracting authority may request a participant to clarify, specify or fine-tune a tender referred to in paragraph (27)(b), but such clarification, specification, fine-tuning or additional information shall not involve changes to the basic features of the tender or the call for tender when those variations are likely to distort competition or have a discriminatory effect.
- (29) The contracting authority shall assess the tenders received on the basis of the award criteria specified in the contract notice or descriptive document and shall award the contract to the participant which submits the most economically advantageous tender in accordance with regulation 31(1)(a).
- (30) The contracting authority may request the participant identified as having submitted the most economically advantageous tender to clarify aspects of that tender or confirm commitments contained in the tender provided that this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.
- (31) The contracting authority may specify that payments may be made to a participant in respect of the participant's expenses incurred in participating in the competitive dialogue procedure.

### **Framework agreements**

- 20.**—(1) A contracting authority which intends to conclude a framework agreement shall comply with this regulation.
- (2) Where the contracting authority intends to conclude a framework agreement, it shall—
- (a) follow one of the procedures set out in regulation 17, 18 or 19 up to (but not including) the beginning of the procedure for the award of any specific contract set out in this regulation; and

- (b) select an economic operator to be party to a framework agreement by applying award criteria set in accordance with regulation 31.
- (3) Where the contracting authority awards a specific contract based on a framework agreement, it shall—
  - (a) comply with the procedures set out in this regulation; and
  - (b) apply those procedures only to the economic operators which are party to the framework agreement.
- (4) When awarding a specific contract on the basis of a framework agreement neither the contracting authority nor the economic operator shall include in that contract terms that are substantially amended from the terms laid down in that framework agreement.
- (5) Where the contracting authority concludes a framework agreement with one economic operator—
  - (a) it shall award any specific contract within the limits of the terms laid down in the framework agreement; and
  - (b) in order to award a specific contract, the contracting authority may consult in writing the economic operator which is party to the framework agreement requesting that economic operator to supplement its tender if necessary.
- (6) Where the contracting authority concludes a framework agreement with more than one economic operator, the minimum number of economic operators shall be three, insofar as there is a sufficient number of—
  - (a) economic operators to satisfy the selection criteria; or
  - (b) admissible tenders which meet the award criteria.
- (7) Where the contracting authority concludes a framework agreement with more than one economic operator, a specific contract may be awarded—
  - (a) by application of the terms laid down in the framework agreement without re-opening competition; or
  - (b) where not all the terms of the proposed contract are laid down in the framework agreement, by re-opening competition between the economic operators which are parties to that framework agreement and which are capable of performing the proposed contract in accordance with paragraphs (8) and (9).
- (8) Where the contracting authority is following the procedure set out in paragraph (7)(b), it shall re-open the competition on the basis of the same or, if necessary, more precisely formulated terms, and where appropriate other terms referred to in the contract documents based on the framework agreement.
- (9) Where the contracting authority is following the procedure set out in paragraph (7)(b), for each specific contract to be awarded it shall—
  - (a) consult in writing the economic operators capable of performing the contract and invite them within a specified time limit to submit a tender in writing for each specific contract to be awarded;
  - (b) set a time limit for the receipt by it of the tenders which takes into account factors such as the complexity of the subject matter of the contract and the time needed to send in tenders;
  - (c) keep each tender confidential until the expiry of the time limit for the receipt by it of tenders; and
  - (d) award each contract to the economic operator which has submitted the best tender on the basis of the award criteria specified in the contract documents based on the framework agreement.

(10) The contracting authority shall not conclude a framework agreement for a period which exceeds seven years except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause, and where it does conclude a framework agreement for a period which exceeds seven years it shall include the reasons for doing so in the notice referred to in regulation 32(1).

(11) In this regulation, a “specific contract” means a contract based on the terms of a framework agreement.

(12) The contracting authority shall not use a framework agreement improperly or in such a way as to prevent, restrict or distort competition.

### **Electronic auctions**

**21.**—(1) A contracting authority which holds an electronic auction shall comply with this regulation.

(2) Subject to paragraph (3), the contracting authority may hold an electronic auction when using—

- (a) the restricted procedure;
- (b) the negotiated procedure with the prior publication of a contract notice; or
- (c) the procedure set out in regulation 20(7)(b) on the re-opening of competition among the parties to a framework agreement.

(3) The contracting authority shall not hold an electronic auction to precede the award of a services contract or a works contract having as its subject matter intellectual performance, such as the design of works.

(4) The contracting authority may only hold an electronic auction to precede the award of a contract when the contract specification can be established with precision.

(5) The contracting authority shall base an electronic auction on—

- (a) price alone where the contract is to be awarded on the basis of the lowest price; or
- (b) price or the values of quantifiable elements of tenders indicated in the contract documents, where the contract is to be awarded on the basis of the offer which is the most economically advantageous in accordance with regulation 31(1)(a).

(6) Where the contracting authority intends to hold an electronic auction it shall state this in the contract notice.

(7) Contract documents prepared by the contracting authority in relation to a contract the award of which is to be preceded by an electronic auction shall include—

- (a) the quantifiable elements of tenders capable of expression in figures or percentages which will be the subject of the electronic auction;
- (b) any limitations on the values for the quantifiable elements of tenders (resulting from the contract documents) which may be submitted in the electronic auction;
- (c) the information to be made available to economic operators during the electronic auction and, where appropriate, an indication of when it will be made available to them;
- (d) a description of the electronic auction process;
- (e) the conditions under which the economic operators will be able to bid and, in particular, the minimum differences which may be required when bidding; and
- (f) all relevant information concerning—

- (i) the electronic system to be used in the electronic auction; and

- (ii) the arrangements for and technical specifications relevant to connection to the electronic system to be used.
- (8) Before proceeding with an electronic auction, the contracting authority shall—
- (a) make an initial evaluation of the tenders in accordance with the award criteria specified and with any weighting fixed for them; and
  - (b) by electronic means simultaneously invite all the economic operators which have submitted admissible tenders to submit new prices or new values in the electronic auction.
- (9) Where the contracting authority is to award a contract on the basis of the offer which is the most economically advantageous to it in accordance with regulation 31(1)(a), each invitation referred to in paragraph (8)(b) shall include the outcome of the evaluation of the tender submitted by the economic operator to which the invitation is sent, carried out in accordance with the weighting described in regulation 31(3).
- (10) The contracting authority shall include in the invitation referred to in paragraph (8)(b)—
- (a) all relevant information concerning individual connection to the electronic system to be used in the electronic auction;
  - (b) the date and time of the start of the electronic auction;
  - (c) the number of phases in the electronic auction;
  - (d) the mathematical formula to be used in the electronic auction to determine automatic re-ranking of tenders on the basis of the new prices or new values submitted by economic operators and incorporating the weighting of all the criteria set to determine the most economically advantageous tender;
  - (e) where variant bids are authorised by the contracting authority, a separate mathematical formula for each variation; and
  - (f) the basis on which the electronic auction is to be closed and the appropriate additional information specified in paragraph (16).
- (11) In relation to the formula referred to in paragraph (10)(d), any ranges used in the weighting of criteria shall be set at a specified value before the invitation is sent to economic operators.
- (12) At least two working days must elapse between the date on which the invitation referred to in paragraph (8)(b) is sent and the date of the electronic auction.
- (13) During each phase of an electronic auction, the contracting authority—
- (a) shall instantaneously communicate to all economic operators participating in the auction at least sufficient information to enable them to ascertain their relative rankings in the auction at any time;
  - (b) may communicate to each economic operator other information concerning prices or values submitted by other economic operators provided that this has been stated in the contract documents; and
  - (c) may disclose the number of economic operators participating in that phase of the auction.
- (14) During any phase of an electronic auction, the contracting authority shall not disclose the identity of any economic operator participating in the auction.
- (15) The contracting authority shall close an electronic auction—
- (a) at the date and time fixed for closure in the invitation referred to in paragraph (8)(b);
  - (b) when it receives no further new prices or new values which meet the requirements concerning minimum differences; or
  - (c) when the phases in the electronic auction specified in the invitation referred to in paragraph (8)(b) have been completed.



- (16) Where the contracting authority intends to close an electronic auction—
- (a) as described in paragraph (15)(b), it shall state in the invitation referred to in paragraph (8)
    - (b) the period which it intends to allow to elapse before it closes the auction after receiving a submission from an economic operator participating in the auction; or
  - (b) as described in paragraph (15)(c), it shall state in the invitation referred to in paragraph (8)
    - (b) the timetable for each phase in the auction.

(17) After closing an electronic auction the contracting authority shall award the contract in accordance with regulation 31 on the basis of the results of the electronic auction.

(18) The contracting authority shall not use an electronic auction improperly or in such a way as to prevent, restrict or distort competition or to change the subject matter of the contract as referred to in the contract notice and defined in the contract documents.

(19) The references to values in paragraphs (5)(b), (8)(b), (10)(d), (13)(b) and (15)(b) shall be interpreted as including price.

### **Central purchasing bodies**

**22.**—(1) A contracting authority may purchase work, works, goods or services from or through a central purchasing body.

(2) Where a contracting authority makes purchases in accordance with paragraph (1), it shall be deemed to have complied with these Regulations to the extent that—

- (a) the central purchasing body has complied with them; or
- (b) when the central purchasing body is not a contracting authority, the contract award rules applied by it are compliant with these Regulations and the contracts awarded can be subject to efficient remedies comparable to those provided for in Part 9.