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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**

**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.

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<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.