

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 (Text with EEA relevance)

## TITLE II

### RULES ON CONTRACTS

#### CHAPTER IV

#### **Specific rules governing contract documentation**

##### *Article 18*

#### **Technical specifications**

1 The technical specifications as defined in point 1 of Annex III shall be set out in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents).

2 Technical specifications shall afford equal access for tenderers and shall not have the effect of creating unjustified obstacles to the opening up of procurement to competition.

3 Without prejudice to either compulsory national technical rules (including those related to product safety) or the technical requirements to be met by the Member State under international standardisation agreements in order to guarantee the interoperability required by those agreements, and provided they are compatible with Community law, technical specifications shall be drawn up:

- a either by reference to technical specifications defined in Annex III and, in order of preference, to:
  - national civil standards transposing European standards,
  - European technical approvals,
  - common civil technical specifications,
  - national civil standards transposing international standards,
  - other international civil standards,
  - other technical reference systems established by the European standardisation bodies, or, where these do not exist, other national civil standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products,
  - civil technical specifications stemming from industry and widely recognised by it, or,
  - the national ‘defence standards’ defined in point 3 of Annex III and defence materiel specifications similar to those standards,

Every reference shall be followed by the expression ‘or equivalent’;

---

*Status: EU Directives are being published on this site to aid cross referencing from UK legislation. After IP completion day (31 December 2020 11pm) no further amendments will be applied to this version.*

---

- b or in terms of performance or functional requirements; the latter may include environmental characteristics.

However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities/entities to award the contract;

- c or in terms of performance or functional requirements as mentioned in point (b), with reference to the specifications mentioned in point (a) as a means of presuming conformity with such performance or functional requirements;
- d or by referring to the specifications mentioned in point (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in point (b) for other characteristics.

4 Where a contracting authority/entity makes use of the option of referring to the specifications mentioned in paragraph 3(a), it can not reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in its tender to the satisfaction of the contracting authority/entity, by whatever appropriate means, that the solutions which it proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

5 Where a contracting authority/entity uses the option laid down in paragraph 3 to prescribe performance-related or functional requirements, it may not reject a tender for works, products or services which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

In its tender, the tenderer must prove to the satisfaction of the contracting authority/entity and by any appropriate means that the work, product or service in compliance with the standard meets the performance or functional requirements of the contracting authority/entity.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

6 Where contracting authorities/entities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b), they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by any other eco-label, provided that:

- those specifications are appropriate as a means of defining the characteristics of the supplies or services that are the object of the contract,
- the requirements for the label are drawn up on the basis of scientific information,
- the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate, and,
- they are accessible to all interested parties,

Contracting authorities/entities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier from the manufacturer or a test report from a recognised body.

7 'Recognised bodies', within the meaning of this Article, are test and calibration laboratories, and certification and inspection bodies which comply with applicable European standards.

Contracting authorities/entities shall accept certificates from recognised bodies established in other Member States.

8 Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, 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 paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words 'or equivalent'.

#### *Article 19*

##### **Variants**

1 Where the criterion for award is that of the most economically advantageous tender, contracting authorities/entities may authorise tenderers to submit variants.

2 Contracting authorities/entities shall indicate in the contract notice whether or not they authorise variants. Variants shall not be authorised without this indication.

3 Contracting authorities/entities authorising variants shall state in the tender specifications the minimum requirements to be met by the variants and any specific requirements for their presentation.

Only variants meeting the minimum requirements laid down by the contracting authorities/entities shall be taken into consideration.

4 In procedures for awarding supply or service contracts, contracting authorities/entities which have authorised variants may not reject a variant on the sole ground that it would, if successful, lead either to a service contract rather than a supply contract, or to a supply contract rather than a service contract.

#### *Article 20*

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

Contracting authorities/entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents). These conditions may, in particular, concern subcontracting or seek to ensure the security of classified information and the security of supply required by the contracting authority/entity, in accordance with Articles 21, 22 and 23, or take environmental or social considerations into account.

---

*Status: EU Directives are being published on this site to aid cross referencing from UK legislation. After IP completion day (31 December 2020 11pm) no further amendments will be applied to this version.*

---

## Article 21

### Subcontracting

1 The successful tenderer shall be free to select its subcontractors for all subcontracts that are not covered by the requirement referred to in paragraphs 3 and 4, and shall in particular not be required to discriminate against potential subcontractors on grounds of nationality.

2 The contracting authority/entity 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 subcontractor, as well as the subject-matter of the subcontracts for which they are proposed; and/or,
- to indicate any change occurring at the level of subcontractors during the execution of the contract,

3 The contracting authority/entity may oblige or may be required by a Member State to oblige the successful tenderer to apply the provisions set out in Title III to all or certain subcontracts which the successful tenderer intends to award to third parties.

4 Member States may provide that the contracting authority/entity may ask or be required to ask the successful tenderer to subcontract to third parties a share of the contract. The contracting authority/entity that imposes such subcontracting shall express this minimal percentage in the form of a range of values, comprising a minimum and maximum percentage. The maximum percentage may not exceed 30 % of the value of the contract. Such a range shall be proportionate to the object and value of the contract and the nature of the industry sector involved, including the level of competition in that market and the relevant technical capabilities of the industrial base.

Any percentage of subcontracting falling within the range of values indicated by the contracting authority/entity shall be considered to fulfil the subcontracting requirement set out in this paragraph.

Tenderers may propose to subcontract a share of the total value which is above the range required by the contracting authority/entity.

The contracting authority/entity shall ask tenderers to specify in their tender which part or parts of their offer they intend to subcontract to fulfil the requirement referred to in the first subparagraph.

The contracting authority/entity may ask or may be required by a Member State to ask tenderers also to specify which part or parts of their offer they intend to subcontract beyond the required percentage, as well as the subcontractors they have already identified.

The successful tenderer shall award subcontracts corresponding to the percentage which the contracting authority/entity requires it to subcontract in accordance with the provisions of Title III.

5 In all cases, where a Member State provides that contracting authorities/entities may reject the subcontractors selected by the tenderer at the stage of the award procedure of the main contract or by the successful tenderer during the performance of the contract, such rejection may only be based on criteria applied for the selection of the tenderers for the main contract. If the contracting authority/entity rejects a subcontractor, it must produce a written justification to

the tenderer or the successful tenderer, setting out why it considers that the subcontractor does not meet the criteria.

6 Requirements referred to in paragraphs 2 to 5 shall be indicated in the contract notices.

7 Paragraphs 1 to 5 shall be without prejudice to the question of the principal economic operator's liability.

## Article 22

### Security of information

When contracts involve, require and/or contain classified information, the contracting authority/entity shall specify in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents) the measures and requirements necessary to ensure the security of such information at the requisite level.

To this end, the contracting authority/entity may require that the tender contain, *inter alia*, the following particulars:

- (a) a commitment from the tenderer and the subcontractors already identified to appropriately safeguard the confidentiality of all classified information in their possession or coming to their notice throughout the duration of the contract and after termination or conclusion of the contract, in accordance with the relevant laws, regulations and administrative provisions;
- (b) a commitment from the tenderer to obtain the commitment provided in point (a) from other subcontractors to which it will subcontract during the execution of the contract;
- (c) sufficient information on subcontractors already identified to enable the contracting authority/entity to determine that each of them possesses the capabilities required to appropriately safeguard the confidentiality of the classified information to which they have access or which they are required to produce when carrying out their subcontracting activities;
- (d) a commitment from the tenderer to provide the information required under point (c) on any new subcontractor before awarding a subcontract.

In the absence of harmonisation at Community level of national security clearance systems, Member States may provide that the measures and requirements referred to in the second subparagraph have to comply with their national provisions on security clearance. Member States shall recognise the security clearances which they consider equivalent to those issued in accordance with their national law, notwithstanding the possibility to conduct and take into account further investigations of their own, if considered necessary.

## Article 23

### Security of supply

The contracting authority/entity shall specify in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents) its security of supply requirements.

---

*Status: EU Directives are being published on this site to aid cross referencing from UK legislation. After IP completion day (31 December 2020 11pm) no further amendments will be applied to this version.*

---

To this end, the contracting authority/entity may require that the tender contain, *inter alia*, the following particulars:

- (a) certification or documentation demonstrating to the satisfaction of the contracting authority/entity that the tenderer will be able to honour its obligations regarding the export, transfer and transit of goods associated with the contract, including any supporting documentation received from the Member State(s) concerned;
- (b) the indication of any restriction on the contracting authority/entity regarding disclosure, transfer or use of the products and services or any result of those products and services, which would result from export control or security arrangements;
- (c) certification or documentation demonstrating that the organisation and location of the tenderer's supply chain will allow it to comply with the requirements of the contracting authority/entity concerning security of supply set out in the contract documents, and a commitment to ensure that possible changes in its supply chain during the execution of the contract will not affect adversely compliance with these requirements;
- (d) a commitment from the tenderer to establish and/or maintain the capacity required to meet additional needs required by the contracting authority/entity as a result of a crisis, according to terms and conditions to be agreed;
- (e) any supporting documentation received from the tenderer's national authorities regarding the fulfilment of additional needs required by the contracting authority/entity as a result of a crisis;
- (f) a commitment from the tenderer to carry out the maintenance, modernisation or adaptation of the supplies covered by the contract;
- (g) a commitment from the tenderer to inform the contracting authority/entity in due time of any change in its organisation, supply chain or industrial strategy that may affect its obligations to that authority/entity;
- (h) a commitment from the tenderer to provide the contracting authority/entity, according to terms and conditions to be agreed, with all specific means necessary for the production of spare parts, components, assemblies and special testing equipment, including technical drawings, licenses and instructions for use, in the event that it is no longer able to provide these supplies.

A tenderer may not be required to obtain a commitment from a Member State that would prejudice that Member State's freedom to apply, in accordance with relevant international or Community law, its national export, transfer or transit licensing criteria in the circumstances prevailing at the time of such a licensing decision.

#### *Article 24*

### **Obligations relating to taxes, environmental protection, employment protection provisions and working conditions**

1 A contracting authority/entity may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, region, locality or third country in which the works are to be carried out or

services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

2 The contracting authority/entity which supplies the information referred to in paragraph 1 shall request the tenderers to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the works are to be carried out or the service is to be provided.

The first subparagraph shall be without prejudice to the application of the provisions of Article 49 concerning the examination of abnormally low tenders.