

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 and repealing Directive 2004/17/EC (Text with EEA relevance)

TITLE II

RULES APPLICABLE TO CONTRACTS

CHAPTER III

Conduct of the procedure

Section 1

Preparation

Article 58

Preliminary market consultations

Before launching a procurement procedure, contracting entities 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 entities 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 59

Prior involvement of candidates or tenderers

Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting entity, whether in the context of Article 58 or not, or has otherwise been involved in the preparation of the procurement procedure, the contracting entity 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.

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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 100.

Article 60

Technical specifications

1 The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. The technical specifications 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 entity, 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 entities 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 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;

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- 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 to 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 entity 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 ground 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 Article 62, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

6 Where a contracting entity uses the option provided for in point (a) of paragraph 3 to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for supplies, services or works 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, 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 62, that the supplies, service or work in compliance with the standard meets the performance or functional requirements of the contracting entity.

Article 61

Labels

1 Where contracting entities 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, supplies or services 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 the 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.

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Where contracting entities 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 entities requiring a specific label shall accept all labels 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 entity or an equivalent label within the relevant time limits for reasons that are not attributable to that economic operator, the contracting entity shall accept other appropriate means of proof, which may include a technical dossier of the manufacturer, provided that the economic operator concerned proves that the works, supplies and services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting entity.

2 Where a label fulfils the conditions of 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 entities 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, if necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

Article 62

Test reports, certification and other means of proof

1 Contracting entities 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 entities 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 entities.

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⁽¹⁾.

2 Contracting entities 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 such 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 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 60(6), Article 61 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 102.

Article 63

Communication of technical specifications

1 On request from economic operators interested in obtaining a contract, contracting entities shall make available the technical specifications regularly referred to in their supply, works or service contracts, or the technical specifications which they intend to apply to contracts for which the call for competition is a periodic indicative notice. Those specifications shall be made available by electronic means through unrestricted and full direct access free of charge.

However, the technical specifications shall be transmitted by other means than electronic means 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 40(1) or where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered because contracting entities intend to apply Article 39(2).

2 Where the technical specifications are based on documents available by electronic means through unrestricted and full direct access free of charge to interested economic operators, the inclusion of a reference to those documents shall be sufficient.

Article 64

Variants

1 Contracting entities may authorise or require tenderers to submit variants which meet the minimum requirements specified by the contracting entities.

Contracting entities shall indicate in the procurement documents whether or not they authorise or require variants and, if so, 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. Where variants are authorised or required, 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.

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

Article 65

Division of contracts into lots

1 Contracting entities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

Contracting entities shall indicate, in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate, whether tenders may be submitted for one, for several or for all of the lots.

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2 Contracting entities 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, to tender or to negotiate. Contracting entities 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 entities may award a contract combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest, to tender or to negotiate that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.

4 Member States may render 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. The second subparagraph of paragraph 1 and, where appropriate, paragraph 3 shall apply.

Article 66

Setting time limits

1 When fixing the time limits for requests to participate and the receipt of tenders, contracting entities shall take particular 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 45 to 49.

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 45 to 49, shall be fixed, so that all economic operators concerned may be aware of all the information needed to produce tenders.

3 Contracting entities 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 open procedure as referred to in Article 45(3), 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 entities shall not be required to extend the time limits.

Section 2

Publication and Transparency

Article 67

Periodic indicative notices

1 Contracting entities may make known their intentions of planned procurement through the publication of a periodic indicative notice. Those notices shall contain the information set out in part A, section I of Annex VI. They shall be published either by the Publications Office of the European Union or by the contracting entities on their buyer profiles in accordance with point 2(b) of Annex IX. Where the periodic indicative notice is published by the contracting entities on their buyer profile, they shall send a notice of the publication of the periodic indicative notice on a buyer profile to the Publications Office of the European Union in accordance with point 3 of Annex IX. Those notices shall contain the information set out in Annex VI Part B.

2 When a call for competition is made by means of a periodic indicative notice in respect of restricted procedures and negotiated procedures with prior call for competition, the notice shall meet all the following requirements:

- 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 or negotiated procedure 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 part A, section I of Annex VI, the information set out in part A, section II of Annex VI;
- d it has been sent for publication between 35 days and 12 months prior to the date on which the invitation to confirm interest is sent.

Such notices shall not be published on a buyer profile. However, the additional publication at national level pursuant to Article 72, if any, may be made on a buyer profile.

The period covered by the periodic indicative notice shall be a maximum of 12 months from the date the notice is transmitted for publication. However, in the case of contracts for social and other specific services, the periodic indicative notice referred to in point (b) of Article 92(1) may cover a period which is longer than 12 months.

Article 68

Notices on the existence of a qualification system

1 Where contracting entities choose to set up a qualification system in accordance with Article 77, the system shall be the subject of a notice as referred to in Annex X, indicating the purpose of the qualification system and how to have access to the rules concerning its operation.

2 Contracting entities shall indicate the period of validity of the qualification system in the notice on the existence of the system. They shall notify the Publications Office of the European Union of any change in period of validity, using the following standard forms:

- a where the period of validity is changed without terminating the system, the form for notices on the existence of qualification systems;

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- b where the system is terminated, a contract award notice referred to in Article 70.

Article 69

Contract notices

Contract notices may be used as a means of calling for competition in respect of all procedures. They shall contain the information set out in the relevant part of Annex XI and shall be published in accordance with Article 71.

Article 70

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 entities shall send a contract award notice on the results of the procurement procedure.

Such notice shall contain the information set out in Annex XII and shall be published in accordance with Article 71.

2 Where the call for competition for the contract concerned has been made in the form of a periodic indicative notice and the contracting entity has decided that it will not award further contracts during the period covered by the periodic indicative notice, the contract award notice shall contain a specific indication to that effect.

In the case of framework agreements concluded in accordance with Article 51, contracting entities 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 entities 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 entities shall send the grouped notices within 30 days of the end of each quarter.

Contracting entities 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.

3 The information provided in accordance with Annex XII and intended for publication shall be published in accordance with Annex IX. 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 or would prejudice the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.

In the case of contracts for research-and-development services ('R & D services'), the information concerning the nature and quantity of the services may be limited to:

- a the indication 'R & D services' where the contract has been awarded by a negotiated procedure without a call for competition in accordance with Article 50(b);
- b information at least as detailed as was indicated in the notice that was used as a means of calling for competition.

4 Information provided in accordance with Annex XII and marked as not being intended for publication shall be published only in simplified form and in accordance with Annex IX for statistical purposes.

Article 71

Form and manner of publication of notices

1 Notices referred to in Articles 67 to 70 shall include the information set out in Annexes VI Part A, VI Part B, X, XI, and XII and 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 105.

2 Notices referred to in Articles 67 to 70 shall be drawn up, transmitted by electronic means to the Publications Office of the European Union and published in accordance with Annex IX. Notices shall be published not later than five days after they are sent. The costs of publication of the notices by Publications Office of the European Union shall be borne by the Union.

3 Notices referred to in Articles 67 to 70 shall be published in full in the official language(s) of the institutions of the Union chosen by the contracting entity. 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 periodic indicative notices referred to in Article 67(2), calls for competition setting up a dynamic purchasing system as referred to in point (a) of Article 52(4) and notices on the existence of a qualification system used as a means of calling for competition in accordance with point (b) of Article 44(4) continue to be published:

- a in the case of periodic indicative notices for 12 months or until receipt of a contract award notice as provided for in Article 70(2) indicating that no further contracts will be awarded during the 12 month period covered by the call for competition. However, in the case of contracts for social and other specific services, the periodic indicative notice referred to in point (b) of Article 92(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 70 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;
- c in the case of notices on the existence of a qualification system for its period of validity.

5 Contracting entities 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 entity 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.

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6 Contracting entities may publish notices for works, supply or service contracts that are not subject to the publication requirements 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 IX.

Article 72

Publication at national level

1 Notices referred to in Articles 67 to 70 and the information contained therein shall not be published at national level before the publication pursuant to Article 71. However, publication may in any event take place at the national level where contracting entities have not been notified of the publication within 48 hours after confirmation of the receipt of the notice in accordance with Article 71.

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 Periodic indicative 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 73

Electronic availability of procurement documents

1 Contracting entities 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 71 or the date on which an invitation to confirm interest was sent.

Where the means of calling for competition is a notice on the existence of a qualification system, such access shall be offered as soon as possible and at the latest when the invitation to tender or to negotiate is sent. The text of the notice or of those invitations 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 40(1), contracting entities 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 45(3) and where the time limit is set by mutual agreement pursuant to the second subparagraph of Article 46(2) or the second subparagraph of Article 47(2).

Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered because contracting entities intend to apply Article 39(2), they shall indicate in the notice or the invitation to confirm interest or, where the means of calling for competition is a notice on the existence of a qualification system, in the procurement documents which measures aimed at protecting the confidential nature of the information they require and how access can be obtained to

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the documents concerned. In such 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 45(3) and where the time limit is set by mutual agreement pursuant to the second subparagraph of Article 46(2) or the second subparagraph of Article 47(2).

2 Provided that it has been requested in good time, the contracting entities 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 open procedure as referred to in Article 45(3), that period shall be four days.

Article 74

Invitations to candidates

1 In restricted procedures, competitive dialogue procedures, innovation partnerships and negotiated procedures with prior call for competition, contracting entities shall simultaneously and in writing invite the selected candidates to submit their tenders, to take part in the dialogue or to negotiate.

Where a periodic indicative notice is used as a call for competition pursuant to point (a) of Article 44(4), contracting entities 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 third or fourth subparagraph of Article 73(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 XIII.

Article 75

Informing applicants for qualification, candidates and tenderers

1 Contracting entities 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 or award a contract for which there has been a call for competition or to recommence the procedure, or not to implement a dynamic purchasing system.

2 On request from the candidate or tenderer concerned, contracting entities shall, as soon 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 60(5) and (6), the reasons for their decision of non-equivalence or their 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;

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

3 Contracting entities may decide to withhold certain information referred to in paragraphs 1 and 2, regarding the contract award, the conclusion of the framework agreement or the admittance to a dynamic purchasing system is to be withheld where its release would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.

4 Contracting entities which establish and operate a system of qualification shall inform applicants of their decision as to qualification within a period of six months.

If the decision will take longer than four months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.

5 Applicants whose qualification is refused shall be informed of the refusal decision and the reasons for that decision as soon as possible and no more than 15 days later than the date of the refusal decision. The reasons shall be based on the criteria for qualification referred to in Article 77(2).

6 Contracting entities which establish and operate a system of qualification may bring the qualification of an economic operator to an end only for reasons based on the criteria for qualification referred to in Article 77(2). Any intention to bring the qualification to an end shall be notified in writing to the economic operator at least 15 days before the date on which the qualification is due to end, together with the reason or reasons justifying the proposed action.

Section 3

Choice of participants and award of contracts

Article 76

General principles

1 For the purpose of selecting participants in their procurement procedures, the following rules shall all apply:

- a contracting entities having provided rules and criteria for the exclusion of tenderers or candidates in accordance with Article 78(1) or Article 80(1) shall exclude economic operators identified in accordance with such rules and fulfilling such criteria;
- b they shall select tenderers and candidates in accordance with the objective rules and criteria laid down pursuant to Articles 78 and 80;
- c in restricted procedures, in negotiated procedures with a call for competition, in competitive dialogues and in innovation partnerships, they shall where appropriate reduce in accordance with Article 78(2) the number of candidates selected pursuant to points (a) and (b) of this paragraph.

2 When a call for competition is made by means of a notice on the existence of a qualification system and for the purpose of selecting participants in procurement procedures for the specific contracts which are the subject of the call for competition, contracting entities shall:

- a qualify economic operators in accordance with Article 77;

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- b apply to such qualified economic operators those provisions of paragraph 1 that are relevant to restricted or negotiated procedures, to competitive dialogues or to innovation partnerships.

3 When selecting participants for a restricted or negotiated procedure, a competitive dialogue or an innovation partnership, in reaching their decision as to qualification or when the criteria and rules are being updated, contracting entities shall not:

- a impose administrative, technical or financial conditions on certain economic operators which would not be imposed on others;
- b require tests or evidence which would duplicate objective evidence already available.

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 entities may, unless otherwise provided for 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.

5 Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 82 and 84, taking into account Article 64.

6 Contracting entities may decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply with the applicable obligations referred to in Article 36(2).

7 In open procedures, contracting entities may decide to examine tenders before verifying the suitability of tenderers, provided that the relevant provisions of Articles 76 to 84 are observed, including the rule that the contract shall not be awarded to a tenderer who should have been excluded pursuant to Article 80 or who does not meet the selection criteria set out by the contracting entity in accordance with Article 78(1) and Article 80.

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.

8 The Commission shall be empowered to adopt delegated acts in accordance with Article 103 to amend the list in Annex XIV, 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

Qualification and qualitative selection

Article 77

Qualification systems

1 Contracting entities which so wish may establish and operate a system of qualification of economic operators.

Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

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2 The system under paragraph 1 may involve different qualification stages.

Contracting entities shall establish objective rules and criteria for the exclusion and selection of economic operators requesting qualification and objective criteria and rules for the operation of the qualification system, covering matters such as inscription in the system, periodic updating of the qualifications, if any, and the duration of the system.

Where those criteria and rules include technical specifications, Articles 60 to 62 shall apply. The criteria and rules may be updated as required.

3 The criteria and rules referred to in paragraph 2 shall be made available to economic operators on request. Those updated criteria and rules shall be communicated to interested economic operators.

Where a contracting entity considers that the qualification system of certain other entities or bodies meets its requirements, it shall communicate to interested economic operators the names of such other entities or bodies.

4 A written record of qualified economic operators shall be kept; it may be divided into categories according to the type of contract for which the qualification is valid.

5 When a call for competition is made by means of a notice on the existence of a qualification system, specific contracts for the works, supplies or services covered by the qualification system shall be awarded by restricted procedures or negotiated procedures, in which all tenderers and participants are selected among the candidates already qualified in accordance with such a system.

6 Any charges that are billed in connection with requests for qualification or with updating or conserving an already obtained qualification pursuant to the system shall be proportionate to the generated costs.

Article 78

Criteria for qualitative selection

1 Contracting entities may establish objective rules and criteria for the exclusion and selection of tenderers or candidates; those rules and criteria shall be available to interested economic operators.

2 Where contracting entities need to ensure an appropriate balance between the particular characteristics of the procurement procedure and the resources required to conduct it, they may, in restricted or negotiated procedures, in competitive dialogues or in innovation partnerships, establish objective rules and criteria that reflect this need and enable the contracting entity to reduce the number of candidates that will be invited to tender or to negotiate. The number of candidates selected shall, however, take account of the need to ensure adequate competition.

Article 79

Reliance on the capacities of other entities

1 Where the objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system include requirements relating to the economic and financial capacity of the economic operator, or to its technical and professional

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abilities, the economic operator may where necessary rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. With regard to criteria relating to the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff 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 entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing a commitment by those entities to that effect.

Where, pursuant to Article 80 of this Directive, contracting entities have referred to exclusion or selection criteria provided for under Directive 2014/24/EU, contracting entities shall verify in accordance with Article 80(3) of this Directive whether the other entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria or whether there are grounds for exclusion, to which the contracting entities have referred, pursuant to Article 57 of Directive 2014/24/EU. The contracting entity shall require that the economic operator replaces an entity in respect of which there are compulsory grounds for exclusion to which the contracting entity has referred. The contracting entity may require or may be required by the Member State to require that the economic operator replaces an entity in respect of which there are non-compulsory grounds for exclusion to which the contracting entity has referred.

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting entity 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 37(2) may rely on the capacity of participants in the group or of other entities.

2 Where the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships include requirements relating to the economic and financial capacity of the economic operator, or to its technical and professional abilities the economic operator may where necessary and for a particular contract rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. With regard to criteria relating to the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff 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 entity that the necessary resources will be available to it, for example by delivering a commitment by those entities to that effect.

Where, pursuant to Article 80 of this Directive, contracting entities have referred to exclusion or selection criteria provided for under Directive 2014/24/EU, contracting entities shall verify in accordance with Article 80(3) of this Directive whether the other entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria or whether there are grounds for exclusion, to which the contracting entities have referred, pursuant to Article 57 of Directive 2014/24/EU. The contracting entity 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 to which the contracting entity has referred. The contracting entity may require or may be required by the Member State to require that the economic operator

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replaces an entity in respect of which there are non-compulsory grounds for exclusion to which the contracting entity has referred.

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting entity 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 37 may rely on the capacities of participants in the group or of other entities.

3 In the case of works contracts, service contracts and siting and installation operations in the context of a supply contract, contracting entities 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 37(2), a participant in that group.

Article 80

Use of exclusion grounds and selection criteria provided for under Directive 2014/24/EU

1 The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships may include the exclusion grounds listed in Article 57 of Directive 2014/24/EU on the terms and conditions set out therein.

Where the contracting entity is a contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 57(1) and (2) of Directive 2014/24/EU on the terms and conditions set out in that Article.

If so required by Member States, those criteria and rules shall, in addition, include the exclusion grounds listed in Article 57(4) of Directive 2014/24/EU on the terms and conditions set out in that Article.

2 The criteria and rules referred to in paragraph 1 of this Article may include the selection criteria set out in Article 58 of Directive 2014/24/EU on the terms and conditions set out therein, notably as regards the limits to requirements concerning yearly turnovers, as provided for under the second subparagraph of paragraph 3 of that Article.

3 For the purpose of applying paragraphs 1 and 2 of this Article, Articles 59 to 61 of Directive 2014/24/EU shall apply.

Article 81

Quality assurance standards and environmental management standards

1 Contracting entities 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

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operator proves that the proposed quality assurance measures comply with the required quality assurance standards.

2 Where contracting entities 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 entity 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 any information relating to the documents produced as evidence of compliance with quality and environmental standards referred to in paragraphs 1 and 2.

Subsection 2

Award of the contract

Article 82

Contract award criteria

1 Without prejudice to national laws, regulations or administrative provisions on the price of certain supplies or the remuneration of certain services, contracting entities shall base the award of contracts on the most economically advantageous tender.

2 The most economically advantageous tender from the point of view of the contracting entity 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 83, 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 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, commitments with regard to parts and security of supply.

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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 entities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting entities 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 entity. 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 entities shall verify effectively the accuracy of the information and proof provided by the tenderers.

5 The contracting entity 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 entity shall indicate the criteria in descending order of importance.

Article 83

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 entity 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 cost 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 entities 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

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method which the contracting entity 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 XV.

The Commission, shall be empowered to adopt delegated acts in accordance with Article 103 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 84

Abnormally low tenders

1 Contracting entities 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 supplies, services or work proposed by the tenderer;
- d compliance with obligations referred to in Article 36(2);
- e compliance with obligations referred to in Article 88;
- f the possibility of the tenderer obtaining State aid.

3 The contracting entity 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 entities 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 36(2).

4 Where a contracting entity 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

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consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting entity, that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU. Where the contracting entity 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.

Section 4

Tenders comprising products originating in third countries and relations with those countries

Article 85

Tenders comprising products originating in third countries

1 This Article shall apply to tenders covering products originating in third countries with which the Union has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Union undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Union or its Member States in respect of third countries.

2 Any tender submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries, as determined in accordance with Regulation (EU) No 952/2013 of the European Parliament and of the Council⁽²⁾, exceeds 50 % of the total value of the products constituting the tender.

For the purposes of this Article, software used in telecommunications network equipment shall be regarded as products.

3 Subject to the second subparagraph of this paragraph, where two or more tenders are equivalent in the light of the contract award criteria defined in Article 82, preference shall be given to those tenders which may not be rejected pursuant to paragraph 2 of this Article. The prices of those tenders shall be considered equivalent for the purposes of this Article, if the price difference does not exceed 3 %.

However, a tender shall not be preferred to another pursuant to the first subparagraph where its acceptance would oblige the contracting entity to acquire equipment having technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance, or disproportionate costs.

4 For the purposes of this Article, those third countries to which the benefit of this Directive has been extended by a Council Decision in accordance with paragraph 1 shall not be taken into account for determining the proportion, referred to in paragraph 2, of products originating in third countries.

5 By 31 December 2015 and every year thereafter, the Commission shall submit an annual report to the Council, on progress made in multilateral or bilateral negotiations regarding access for Union undertakings to the markets of third countries in the fields covered by this

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Directive, on any result which such negotiations may have achieved, and on the implementation in practice of all the agreements which have been concluded.

Article 86

Relations with third countries as regards works, supplies and service contracts

1 Member States shall inform the Commission of any general difficulties, in law or in fact, encountered and reported by their undertakings in securing the award of service contracts in third countries.

2 The Commission shall report to the Council by 18 April 2019, and periodically thereafter, on the opening up of service contracts in third countries and on progress in negotiations with these countries on this subject, particularly within the framework of the World Trade Organisation (WTO).

3 The Commission shall endeavour, by approaching the third country concerned, to remedy any situation whereby it finds, on the basis either of the reports referred to in paragraph 2 or of other information, that, in the context of the award of service contracts, a third country:

- a does not grant Union undertakings effective access comparable to that granted by the Union to undertakings from that country;
- b does not grant Union undertakings national treatment or the same competitive opportunities as are available to national undertakings; or
- c grants undertakings from other third countries more favourable treatment than Union undertakings.

4 Member States shall inform the Commission of any difficulties, in law or in fact, encountered and reported by their undertakings and which are due to the non-observance of the international labour law provisions listed in Annex XIV when those undertakings have tried to secure the award of contracts in third countries.

5 In the circumstances referred to in paragraphs 3 and 4, the Commission may at any time propose that the Council adopt an implementing act to suspend or restrict, over a period to be laid down in that implementing act, the award of service contracts to:

- a undertakings governed by the law of the third country in question;
- b undertakings affiliated to the undertakings specified in point (a) and having their registered office in the Union but having no direct and effective link with the economy of a Member State;
- c undertakings submitting tenders which have as their subject-matter services originating in the third country in question.

The Council shall act, by qualified majority, as soon as possible.

The Commission may propose those measures on its own initiative or at the request of a Member State.

6 This Article shall be without prejudice to the commitments of the Union in relation to third countries ensuing from international agreements on public procurement, particularly within the framework of the WTO.

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- (1) 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) Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code ([OJ L 269, 10.10.2013, p. 1](#)).