
STATUTORY INSTRUMENTS

2016 No. 274

The Utilities Contracts Regulations 2016

PART 2

RULES APPLICABLE TO CONTRACTS

CHAPTER 1

Procedures

Conditions relating to the GPA and other international agreements

43. In so far as they are covered by Annexes 3 to 7 to the EU's Appendix I to the GPA and by the other international agreements by which the EU is bound, utilities within the meaning of regulation 5(1)(a) shall accord to the works, supplies, services and economic operators of signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU.

Choice of Procedures

44.—(1) When awarding supply, works or service contracts, utilities shall apply procedures that conform to these Regulations.

(2) Such contracts may be awarded only if a call for competition has been published in accordance with these Regulations and the Utilities Contracts Directive, except where regulation 50 permits utilities to apply a negotiated procedure without prior call for competition.

(3) Utilities may apply—

- (a) open or restricted procedures or negotiated procedures with prior call for competition as regulated by these Regulations;
- (b) competitive dialogues and innovation partnerships as regulated by these Regulations.

(4) The call for competition may be made by one of the following means—

- (a) a periodic indicative notice in accordance with regulation 67 where the contract is awarded by restricted or negotiated procedure or competitive dialogue;
- (b) a notice on the existence of a qualification system in accordance with regulation 68 where the contract is awarded by restricted or negotiated procedure or by a competitive dialogue or an innovation partnership;
- (c) a contract notice in accordance with regulation 69.

(5) For the purposes of paragraph (4)(a), economic operators which have expressed their interest following the publication of the periodic indicative notice shall subsequently be invited to confirm their interest in writing by means of an invitation to confirm interest in accordance with regulation 74.

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Open Procedure

45.—(1) In open procedures, any interested economic operator may submit a tender in response to a call for competition.

(2) The minimum time limit for the receipt of tenders shall, subject to paragraphs (4) to (6), be 35 days from the date on which the contract notice is sent.

(3) The tender shall be accompanied by the information for qualitative selection that is requested by the utility.

(4) Where utilities have published a periodic indicative notice which was not itself used as a means of calling for competition, the minimum time limit for receipt of tenders, as laid down in paragraph (2), may be shortened to 15 days, provided that both of the following conditions are fulfilled—

- (a) the periodic indicative notice included all the information required by Section I and II of Part A of Annex VI to the Utilities Contracts Directive, insofar as the information in Section II was available at the time the periodic indicative notice was published;
- (b) the periodic indicative notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(5) Where a state of urgency duly substantiated by the utility renders impracticable the time limit laid down in paragraph (2), it may fix a time limit which shall be not less than 15 days from the date on which the contract notice is sent.

(6) The utility may reduce by 5 days the time limit for receipt of tenders set out in paragraph (2) where it accepts that tenders may be submitted by electronic means in accordance with regulation 40.

Restricted Procedure

46.—(1) In restricted procedures, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the utility.

(2) The minimum time limit for the receipt of the requests to participate shall, in general, be fixed at no less than 30 days—

- (a) from the date on which the contract notice is sent; or
- (b) where a periodic indicative notice is used as a means of calling for competition, from the date on which the invitation to confirm interest is sent,

and shall in any event not be less than 15 days.

(3) Only those economic operators invited to do so by the utility following its assessment of the information provided may submit a tender.

(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(3) and (4).

(5) The time limit for the receipt of tenders may be set by mutual agreement between the utility and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

(6) In the absence of such an agreement on the time limit for receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender is sent.

Negotiated Procedure with prior call for competition

47.—(1) In negotiated procedures with prior call for competition, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the utility.

(2) The minimum time limit for the receipt of requests to participate shall, in general, be fixed at no less than 30 days—

- (a) from the date on which the contract notice is sent; or
- (b) where a periodic indicative notice is used as a means of calling for competition, from the date on which the invitation to confirm interest is sent,

and shall in any event not be less than 15 days.

(3) Only those economic operators invited by the utility following its assessment of the information provided may participate in the negotiations.

(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(3) and (4).

(5) The time limit for the receipt of tenders may be set by mutual agreement between the utility and the selected candidates, provided that they all have the same time to prepare and submit their tenders.

(6) In the absence of such an agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender is sent.

Competitive dialogue

General and selection of participants

General and selection of participants

48.—(1) In competitive dialogues, any economic operator may submit a request to participate in response to a call for competition in accordance with regulation 44(4) by providing the information for qualitative selection that is requested by the utility.

(2) The minimum time limit for receipt of requests to participate shall, in general, be fixed at no less than 30 days—

- (a) from the date on which the contract notice is sent; or
- (b) where a periodic indicative notice is used as a means of calling for competition, the date on which the invitation to confirm interest is sent,

and shall in any event not be less than 15 days.

(3) Only those economic operators invited by the utility following the assessment of the information provided may participate in the dialogue.

(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(3) and (4).

(5) The contract shall be awarded on the sole basis of the award criterion of the tender presenting the best price-quality ratio in accordance with regulation 82(1) to (4).

(6) Utilities shall set out and define their needs and requirements in the call for competition, in a descriptive document or in both.

(7) At the same time and in the same documents, utilities shall also set out and define the chosen award criteria and set out an indicative timeframe.

Conduct of the dialogue

(8) Utilities—

- (a) shall open, with the participants selected in accordance with the relevant provisions of regulations 76 to 81, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs, and

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- (b) may discuss all aspects of the procurement with the chosen participants during this dialogue.
- (9) During the dialogue, utilities shall ensure equality of treatment among all participants and, to that end, they shall not provide information in a discriminatory manner which may give some participants an advantage over others.
- (10) In accordance with regulation 39, utilities shall not reveal to the other participants solutions proposed or other confidential information communicated by a participating candidate or tenderer in the dialogue without its agreement.
- (11) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.
- (12) Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria laid down in the call for competition or in the descriptive document.
- (13) In the call for competition or the descriptive document, the utility shall indicate whether it will use the option described in paragraph (12).
- (14) The utility shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

Final tenders

- (15) Having declared that the dialogue is concluded and having so informed the remaining participants, utilities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue.
- (16) Those tenders shall contain all the elements required and necessary for the performance of the project.
- (17) Those tenders may be clarified, specified and optimised at the request of the utility.
- (18) But such clarification, specification or optimisation or any additional information, may not involve changes to the essential aspects of the tender or of the procurement, including the needs and requirements set out in the call for competition or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.
- (19) Utilities shall assess the tenders received on the basis of the award criteria laid down in the call for competition or in the descriptive document.
- (20) At the request of the utility, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 82(1) to (4) may be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract, provided such negotiations—
- (a) do not have the effect of materially modifying essential aspects of the tender or of the procurement, including the needs and requirements set out in the call for competition or in the descriptive document; and
 - (b) do not risk distorting competition or causing discrimination.

Prizes and payments

- (21) Utilities may specify prizes or payments to the participants in the dialogue.

Innovation partnership

49.—(1) In innovation partnerships, any economic operator may submit a request to participate in response to a call for competition in accordance with regulation 44(4)(b) and (c) by providing the information for qualitative selection that is requested by the utility.

(2) In the procurement documents, the utility shall—

- (a) identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market, and
- (b) indicate which elements of this description define the minimum requirements to be met by all tenders.

(3) The information provided under paragraph (2) shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

(4) The utility may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.

(5) The minimum time limit for receipt of requests to participate shall, in general, be fixed at no less than 30 days from the date on which the contract notice is sent and shall in any event not be less than 15 days.

(6) Only those economic operators invited by the utility following the assessment of the information provided may participate in the procedure.

(7) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(3) and (4).

(8) The contracts shall be awarded on the sole basis of the award criterion of the tender presenting the best price-quality ratio in accordance with regulation 82(1) to (4).

(9) The innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the utility and the participants.

(10) The innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of services or the completion of the works.

(11) The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

(12) Based on those targets, the utility may decide after each phase to—

- (a) terminate the innovation partnership; or
- (b) in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts,

provided that the utility has indicated in the procurement documents those possibilities and the conditions for their use.

(13) Subject to the following provisions of this regulation, utilities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

(14) The minimum requirements and the award criteria shall not be subject to negotiations.

(15) During the negotiations, utilities shall ensure the equal treatment of all tenderers and to that end—

- (a) they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others;

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- (b) they shall inform all tenderers, whose tenders have not been eliminated under paragraph (18) in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements; and
- (c) following any such changes, utilities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

(16) In accordance with regulation 39, utilities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

(17) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(18) Negotiations during innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the call for competition, in the invitation to confirm interest or in another procurement document.

(19) In the call for competition, the invitation to confirm interest or in another procurement document, the utility shall indicate whether it will use the option described in paragraph (18).

(20) In selecting candidates, utilities shall in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

(21) Only those economic operators invited by the utility following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the utility that cannot be met by existing solutions.

(22) In the procurement documents, the utility shall define the arrangements applicable to intellectual property rights.

(23) In the case of an innovation partnership with several partners, the utility shall not, in accordance with regulation 39, reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement.

(24) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(25) The utility shall ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market.

(26) The estimated value of supplies, services or works purchased shall not be disproportionate in relation to the investment for their development.

Use of the negotiated procedure without prior call for competition

50.—(1) Utilities may use the negotiated procedure without prior call for competition in the following cases—

- (a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of the contract are not substantially altered;
- (b) where a contract is purely for the purpose of research, experiment, study or development and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek, in particular, those ends;

- (c) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons—
 - (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
 - (ii) competition is absent for technical reasons;
 - (iii) the protection of exclusive rights, including intellectual property rights, but only in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;
 - (d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the utility, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with;
 - (e) in the case of supply contracts for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the utility to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
 - (f) for new works or services consisting in the repetition of similar works or services assigned to the contractor to which the same utility awarded an earlier contract, provided that such works or services conform to a basic project for which a first contract was awarded following a procedure in accordance with regulation 44(1) and (2);
 - (g) for supplies quoted and purchased on a commodity market;
 - (h) for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;
 - (i) for purchases of supplies or services under particularly advantageous conditions from either a supplier which is definitively winding up its business activities or the liquidator in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws or regulations;
 - (j) where the service contract concerned—
 - (i) follows a design contest organised in accordance with these Regulations, and
 - (ii) is to be awarded, under the rules provided for in the design contest, to the winner or to one of the winners of that contest, provided that all the winners are invited to participate in the negotiations.
- (2) For the purposes of paragraph (1)(a)—
- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the utility's needs and requirements as specified in the procurement documents;
 - (b) a request for participation shall be considered not to be suitable where the economic operator concerned—
 - (i) is to be or may be excluded in accordance with regulation 78(1) or 80(1), or
 - (ii) does not meet the selection criteria.
- (3) For the purposes of paragraph (1)(d), the circumstances invoked to justify extreme urgency must not in any event be attributable to the utility.
- (4) For the purposes of paragraph (1)(f)—

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- (a) the basic project shall indicate the extent of the possible additional works or services and the conditions under which they will be awarded;
- (b) as soon as the first contract is put up for tender, the possible use of the procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the utilities when they apply regulations 16 and 17.

CHAPTER 2

Techniques and instruments for electronic and aggregated procurement

Framework agreements

51.—(1) Utilities may conclude framework agreements provided that they apply the procedures provided for in these Regulations.

(2) In these Regulations “framework agreement” means an agreement between one or more utilities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and where appropriate, the quantities envisaged.

(3) The term of a framework agreement shall not exceed 8 years, save in exceptional cases duly justified, in particular, by the subject-matter of the framework agreement.

(4) Contracts based on a framework agreement shall be awarded on the basis of objective rules and criteria, which may include reopening the competition among those economic operators party to the framework agreement as concluded.

(5) For the purposes of paragraph (4)—

(a) the objective rules and criteria shall—

(i) be set out in the procurement documents for the framework agreement;

(ii) ensure equal treatment of the economic operators who are parties to the framework agreement;

(b) where a reopening of competition is included, utilities shall—

(i) set a time limit which is sufficiently long to allow tenders for each specific contract to be submitted; and

(ii) award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

(6) Utilities shall not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

Dynamic purchasing systems

General features

General features

52.—(1) Utilities may use a dynamic purchasing system for commonly used purchases, the characteristics of which, as generally available on the market, meet their requirements.

(2) The dynamic purchasing system shall be operated as a completely electronic process and shall be open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria.

(3) The dynamic purchasing system may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned.

(4) Such characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.

(5) In order to procure under a dynamic purchasing system, utilities shall follow the rules of the restricted procedure, subject to the following provisions of this regulation.

(6) All candidates satisfying the selection criteria shall be admitted to the system, and the number of candidates to be admitted to the system shall not be limited in accordance with regulations 46(4) and 78(3) and (4).

(7) Where utilities have divided the system into categories of products, works or services in accordance with paragraph (3), they shall specify the applicable selection criteria for each category.

Time limits

(8) The following provisions about time limits shall apply instead of those provided for in regulation 46(2), (5) and (6).

(9) The minimum time limit for receipt of requests to participate shall, in general, be fixed at no less than 30 days from the date on which—

- (a) the contract notice is sent; or
- (b) where a periodic indicative notice is used as a means for calling for competition, the date on which the invitation to confirm interest is sent,

and shall in any event not be less than 15 days.

(10) No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent.

(11) The minimum time limit for receipt of tenders shall, subject to paragraph (12), be at least 10 days from the date on which the invitation to tender is sent.

(12) The time limit for the receipt of tenders may be set by mutual agreement between the utility and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

Requirement to use electronic communication

(13) All communications in the context of a dynamic purchasing system shall only be made by electronic means in accordance with regulation 40(1) to (7) and (11) to (20).

The call for competition etc.

(14) For the purposes of awarding contracts under a dynamic purchasing system, utilities shall—

- (a) publish a call for competition making it clear that a dynamic purchasing system is involved;
- (b) indicate in the procurement documents at least the nature and estimated quantity of purchases envisaged, as well as all the necessary information concerning the dynamic purchasing system, including how the dynamic purchasing system operates, the electronic equipment used and the technical connection arrangements and specifications;
- (c) indicate in the procurement documents any division into categories of products, works or services and the characteristics defining them;
- (d) offer unrestricted and full direct access, as long as the system is valid, to the procurement documents in accordance with regulation 73.

Requests to participate and their evaluation

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(15) Utilities shall give any economic operator, throughout the entire period of validity of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in paragraphs (5) to (12).

(16) Utilities shall finalise their evaluation of such requests in accordance with the selection criteria within 10 working days following their receipt.

(17) That period may be prolonged to 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met.

(18) Despite paragraphs (16) and (17), as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, utilities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period.

(19) Where utilities intend to extend the evaluation period in accordance with paragraph (18), they shall indicate in the procurement documents the length of the extended period that they intend to apply.

(20) Utilities shall inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.

Tendering and the award of the contract

(21) Utilities shall invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with regulation 74.

(22) Where the dynamic purchasing system has been divided into categories of works, products or services, utilities shall invite all participants having been admitted to the category corresponding to the specific procurement concerned to submit a tender.

(23) Utilities shall award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in—

- (a) the contract notice for the dynamic purchasing system;
- (b) the invitation to confirm interest; or
- (c) where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender.

(24) Where those criteria are set out in accordance with paragraph (23)(a) and (b) they may, where appropriate, be formulated more precisely in the invitation to tender.

Means of proof

(25) Utilities which, in accordance with regulation 80, apply exclusion grounds and selection criteria provided for under the Public Contracts Regulations, may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed and updated self-declaration as provided for in regulation 59(1) to (7) of those Regulations, within 5 working days from the date on which that request is transmitted.

(26) Regulation 59(8) to (11) of the Public Contracts Regulations shall apply throughout the entire period of validity of the dynamic purchasing system.

(27) For the purposes of paragraphs (25) and (26)—

- (a) regulations 57-60 and 65 of the Public Contracts Regulations shall have effect as though a reference to a contracting authority in those regulations were a reference to a utility;
- (b) references to regulations 62 and 63 in regulation 59 of the Public Contracts Regulations shall have effect as though such references are to, respectively, regulations 81 and 79 in these Regulations;

- (c) in regulation 59(9) of the Public Contracts Regulations, the words “where such contracts are concluded in accordance with regulations 33(7) or 8(a)” shall be replaced with “ with a single economic operator or where such contracts are concluded without reopening competition in accordance with regulation 51 of the Utilities Contracts Regulations 2016 ”.

Period of validity of the system

(28) Utilities shall indicate the period of validity of the dynamic purchasing system in the call for competition.

(29) Utilities shall notify the Commission of any change in the period of validity, using the following standard forms—

- (a) where the period of validity is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
- (b) where the system is terminated, a contract award notice under regulation 70.

Charges

(30) No charges may be billed prior to or during the period of validity of the dynamic purchasing system to the economic operators which are interested in or party to the dynamic purchasing system.

Electronic auctions

53.—(1) Utilities may use electronic auctions in which—

- (a) new prices, revised downwards, or
- (b) new values concerning certain elements of tenders,

or both, are presented.

(2) Utilities shall structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

When electronic auctions may and may not be used

(3) Service contracts and works contracts which have as their subject-matter intellectual performances (such as the design of works) which cannot be ranked using automatic evaluation methods, shall not be the object of electronic auctions.

(4) In open or restricted procedures or negotiated procedures with a prior call for competition, utilities may decide that the award of a contract shall be preceded by an electronic auction when the content of the procurement documents, in particular the technical specifications, can be established with precision.

(5) In procurements where the content of procurement documents, in particular the technical specifications, can be established with precision, an electronic auction may be held—

- (a) on the reopening of competition among the parties to a framework agreement as provided for in regulation 51(4) to (6); and
- (b) on the opening for competition of contracts to be awarded under a dynamic purchasing system.

(6) The electronic auction shall be based on one of the following elements of the tenders—

- (a) solely on prices where the contract is awarded on the basis of price only;
- (b) on prices or on the new values of the features of the tenders indicated in the procurement documents, or on both, where the contract is awarded—
 - (i) on the basis of the best price-quality ratio; or

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(ii) to the tender with the lowest cost using a cost-effectiveness approach.

Preliminary requirements

(7) Utilities which decide to hold an electronic auction shall state that fact in the contract notice, in the invitation to confirm interest or, where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender.

(8) Where utilities have decided to hold an electronic auction, the procurement documents shall include at least the following details—

- (a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
- (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject-matter of the contract;
- (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- (d) the relevant information concerning the electronic auction process;
- (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;
- (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

Admissibility of tenders

(9) Before proceeding with the electronic auction, utilities shall make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them.

(10) A tender shall be considered admissible where—

- (a) it has been submitted by a tenderer which has not been excluded under regulation 78(1) or 80(1), and which meets the selection criteria; and
- (b) it is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.

(11) In particular, tenders—

- (a) which do not comply with the procurement documents;
- (b) which were received late;
- (c) where there is evidence of collusion or corruption; or
- (d) which have been found by the utility to be abnormally low,

shall be considered irregular for the purposes of paragraph (10)(b).

(12) In particular—

- (a) tenders submitted by tenderers that do not have the required qualifications; and
- (b) tenders whose price exceeds the utility's budget as determined and documented prior to the launching of the procurement procedure,

shall be considered as unacceptable for the purposes of paragraph (10)(b).

(13) For the purposes of paragraph (10)(b), a tender shall be considered unsuitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the utility's needs and requirements as specified in the procurement documents.

Commencement and structure of the auction

(14) All tenderers that have submitted admissible tenders shall be invited simultaneously by electronic means to participate in the electronic auction using, as of the date and time specified in the invitations, the connections in accordance with the instructions set out in the invitation.

(15) The electronic auction may take place in a number of successive phases.

(16) The electronic auction shall not start sooner than 2 working days after the date on which invitations are sent out.

(17) The invitation shall be accompanied by the outcome of a full evaluation of the relevant tender carried out in accordance with the weighting provided for in regulation 82(9).

The formula to be used

(18) The invitation shall also state the mathematical formula to be used in the electronic auction to determine automatic re-rankings on the basis of the new prices or new values submitted, or both.

(19) Except where the most economically advantageous offer is identified on the basis of price alone, that formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in other procurement documents.

(20) For the purposes of paragraph (19), any ranges shall, however, be reduced beforehand to a specified value.

(21) Where variants are authorised in accordance with regulation 64, a separate formula shall be provided for each variant.

Communication of information

(22) Throughout each phase of an electronic auction the utilities shall instantaneously communicate to all tenderers sufficient information to enable them to ascertain their relative rankings at any moment.

(23) Utilities may also communicate other information concerning other prices or values submitted, provided that this is stated in the specifications.

(24) Utilities may also at any time announce the number of participants in the current phase of the auction.

(25) In no case, however, may utilities disclose the identities of the tenderers during any phase of an electronic auction.

Closing the auction and awarding the contract

(26) Utilities shall close an electronic auction in one or more of the following manners—

- (a) at the previously indicated date and time;
- (b) when they receive no more new prices or new values which meet the requirements concerning minimum differences, provided that they have previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction; or
- (c) when the previously indicated number of phases in the auction has been completed.

(27) Where utilities intend to close an electronic auction in accordance with paragraph (26)(c), whether or not in combination with paragraph (26)(b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

(28) After closing an electronic auction, the utility shall award the contract in accordance with regulation 82 on the basis of the results of the electronic auction.

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Electronic catalogues

Generally

Generally

54.—(1) Where the use of electronic means of communication is required, utilities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

(2) Tenders presented in the form of an electronic catalogue may be accompanied by other documents, completing the tender.

(3) Electronic catalogues shall be established by the candidates or tenderers with a view to participating in a given procurement procedure in accordance with the technical specifications and format established by the utility.

(4) Electronic catalogues shall also comply with the requirements for electronic communication tools set out in regulation 40 as well as with any additional requirements set by the utility in accordance with that regulation.

(5) Where the presentation of tenders in the form of electronic catalogues is accepted or required, utilities shall—

- (a) state so 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 negotiate; and
- (b) indicate in the procurement documents all the necessary information relating to the matters covered by regulation 40(16) to (20) so far as they concern the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

Framework agreements

(6) Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, utilities may provide that the reopening of competition for specific contracts is to take place on the basis of updated catalogues.

(7) In such a case, utilities shall use one of the following methods—

- (a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the contract in question; or
- (b) notify tenderers that they intend to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the contract in question, provided that the use of that method has been indicated in the procurement documents for the framework agreement.

(8) Where utilities reopen competition for specific contracts in accordance with paragraph (7) (b), they shall—

- (a) notify the tenderers of the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question, and
- (b) give tenderers the possibility to refuse such collection of information.

(9) Utilities shall allow for an adequate period between the notification and the actual collection of information.

(10) Before awarding the contract, utilities shall present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.

Dynamic purchasing systems

(11) Utilities may award contracts based on a dynamic purchasing system by requiring that offers for a specific contract are to be presented in the format of an electronic catalogue.

(12) Utilities may also award contracts based on a dynamic purchasing system in accordance with paragraphs (7)(b) and (8) to (10) provided that the request to participate in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the utility.

(13) For the purposes of paragraph (12), the catalogue shall be completed subsequently by the candidates, when they are informed of the utility's intention to constitute tenders by means of the procedure set out in paragraph (7)(b).

Centralised purchasing activities and central purchasing bodies

55.—(1) Utilities may acquire works, supplies and services, or any one or more of them, from a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(a).

(2) Utilities may acquire works, supplies and services, or any one or more of them, by using—

- (a) contracts awarded by a central purchasing body,
- (b) dynamic purchasing systems operated by a central purchasing body or,
- (c) a framework agreement concluded by a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(b).

(3) Where a dynamic purchasing system which is operated by a central purchasing body may be used by other utilities, this shall be mentioned in the call for competition setting up that dynamic purchasing system.

(4) A utility fulfils its obligations under these Regulations when it acquires supplies or services from a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(a).

(5) A utility also fulfils its obligations under these Regulations where it acquires works, supplies or services by using—

- (a) contracts awarded by the central purchasing body;
- (b) dynamic purchasing systems operated by the central purchasing body or;
- (c) a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(b).

(6) However, the utility concerned shall be responsible for fulfilling the obligations imposed by these Regulations in respect of any parts of the procedure that it conducts itself, such as—

- (a) awarding a contract under a dynamic purchasing system which is operated by a central purchasing body; or
- (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body.

(7) All procurement procedures conducted by a central purchasing body shall be performed using electronic means of communication, in accordance with the requirements set out in regulation 40.

(8) Utilities may, without applying the procedures provided for in these Regulations, award a service contract for the provision of centralised purchasing activities to a central purchasing body.

(9) Such service contracts may also include the provision of ancillary purchasing activities.

(10) In these Regulations, “centralised purchasing activities” means activities conducted on a permanent basis in one of the following forms—

- (a) the acquisition of supplies or services, or both, intended for utilities;

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(b) the award of contracts or the conclusion of framework agreements for works, supplies or services intended for utilities.

(11) Procurement carried out by a central purchasing body in order to perform centralised purchasing activities shall be deemed to be procurement for the pursuit of an activity referred to in regulations 9 to 15.

Occasional joint procurement

56.—(1) Two or more utilities may agree to perform certain specific procurements jointly.

(2) Where the conduct of the procurement procedure in its entirety is carried out jointly in the name and on behalf of all the utilities concerned, they shall be jointly responsible for fulfilling their obligations under these Regulations.

(3) Such joint responsibility applies also in cases where one utility manages the procurement procedure, acting on its own behalf and on the behalf of the other utilities concerned.

(4) Where the conduct of a procurement procedure is not in its entirety carried out in the name and on behalf of the utility concerned—

- (a) they shall be jointly responsible only for those parts carried out jointly, and
- (b) each utility shall have sole responsibility for fulfilling its obligations under these Regulations in respect of the parts it conducts in its own name and on its own behalf.

Procurement involving utilities from other member States

57.—(1) Without prejudice to regulations 28 to 31, utilities may act jointly with utilities from other member States in the award of contracts by using one of the means provided for in this regulation.

(2) Utilities shall not use the means provided for in this regulation for the purpose of avoiding the application of mandatory public law provisions in the law of the jurisdiction to which they are subject, where those provisions are in conformity with EU law.

Centralised purchasing

(3) Utilities shall be free to use centralised purchasing activities offered by central purchasing bodies located in another member State.

(4) The provision of centralised purchasing activities by a central purchasing body located in another member State shall be conducted in accordance with the national provisions of the member State where the central purchasing body is located.

(5) The national provisions of the member State where the central purchasing body is located shall also apply to the following—

- (a) the award of a contract under a dynamic purchasing system;
- (b) the conduct of a reopening of competition under a framework agreement.

Joint procurement

(6) In the circumstances set out in paragraph (7), utilities may—

- (a) award a contract, conclude a framework agreement or operate a dynamic purchasing system jointly with utilities from other member States; and
- (b) award contracts based on the framework agreement or on the dynamic purchasing system.

(7) The circumstances are that—

- (a) there is an agreement that determines—

- (i) the responsibilities of the parties and the relevant applicable national provisions, and
 - (ii) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts; and
- (b) the allocation of responsibilities and the applicable national law were referred to in the procurement documents.
- (8) For the purposes of paragraph (7)(a)—
 - (a) the agreement may be—
 - (i) an agreement made between the participating utilities, or
 - (ii) an international agreement concluded between the member States concerned; and
 - (b) the agreement may have allocated specific responsibilities among the participating utilities and determined the applicable provisions of the national laws of any of their respective member States.
- (9) In procurements under paragraph (6)—
 - (a) the other provisions of these Regulations apply only where they are the applicable national provisions determined by an agreement referred to in paragraph (7)(a); and
 - (b) where the provisions of these Regulations do apply, a utility fulfils its obligations under these Regulations when it purchases works, supplies or services from a utility which is responsible for the procurement procedure

Joint entities

(10) Utilities may, with utilities from other member States, set up joint entities for the purposes of paragraph (1), subject to compliance with paragraph (11).

(11) This paragraph is complied with if, before undertaking any given procurement, the participating utilities, by a decision of the competent body of the joint entity, have agreed on the applicable national procurement rules of one of the following member States—

- (a) the member State where the joint entity has its registered office;
- (b) the member State where the joint entity is carrying out its activities.

(12) The agreement may either apply for an undetermined period, when fixed in the constitutive act of the joint entity, or may be limited to a certain period of time, certain types of contracts or to one or more individual contract awards.

(13) The other provisions of these Regulations apply to procurement by the joint entity only where they are the national provisions applicable in accordance with paragraphs (11) and (12).

(14) In this regulation, “joint entity”, includes European Groupings of territorial cooperation under Regulation (EC) no. 1082/2006 of the European Parliament and the Council ^{M1} and other entities established under EU law.

Meaning of certain expressions in relation to other member States

(15) In this regulation—

“central purchasing body located in another member State” means any person which is a central purchasing body for the purpose of the Utilities Contracts Directive in the member State in which it is located;

“utilities from another member State” means any person which is a utility for the purposes of the Utilities Contracts Directive in a member State other than the United Kingdom; and references to “participating utilities” shall, to the extent that they are from another member State, be interpreted accordingly.

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Marginal Citations

M1 OJ No L 210, 31.7.2006, p19, amended by Regulation (EU) No 1302/2013 of the European Parliament and of the Council (OJ No L 347, 20.12.2013, p303).

CHAPTER 3

Conduct of the procedure

SECTION 1

Preparation

Preliminary market consultations

58.—(1) Before commencing a procurement procedure, utilities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.

(2) For this purpose, utilities may for example seek or accept advice from independent experts or authorities or from market participants.

(3) Such advice may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

Prior involvement of candidates or tenderers

59.—(1) Where a candidate or tenderer, or an undertaking related to a candidate or tenderer—

(a) has advised the utility, whether in the context of regulation 58 or not; or

(b) has otherwise been involved in the preparation of the procurement procedure,

the utility shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

(2) Such measures shall include—

(a) the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure; and

(b) the fixing of adequate time limits for the receipt of tenders.

(3) The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to treat economic operators equally in accordance with regulation 36(1).

(4) Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

(5) The measures taken under this regulation shall be documented in accordance with regulation 99.

Technical specifications

60.—(1) The technical specifications shall be set out in the procurement documents.

Scope of the technical specifications

(2) The technical specifications shall lay down the characteristics required of works, services or supplies.

(3) In these Regulations, “technical specification” means—

- (a) in the case of works contracts, the totality of the technical prescriptions contained in the procurement documents, defining the characteristics required of a material, product or a supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the utility;
- (b) in the case of service or supply contracts, a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures.

(4) The characteristics referred to in paragraph (3)(a) may include—

- (a) levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, and production processes and methods at any stage of the life cycle of the works;
- (b) rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the utility is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

(5) For the purposes of paragraph (3), the required characteristics may also refer to—

- (a) the specific process or method of production or provision of the requested works, supplies or services; or
- (b) a specific process for another stage of its life cycle,

even where such factors do not form part of their material substance, provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

(6) The technical specifications may also specify whether the transfer of intellectual property rights will be required.

Formulating the technical specifications

(7) For all procurement which is intended for use by natural persons, whether the general public or staff of the utility, 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.

(8) Where mandatory accessibility requirements are adopted by a legal act of the EU, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.

(9) 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.

(10) Without prejudice to mandatory national technical rules, to the extent that they are compatible with EU law, the technical specifications shall be formulated in one of the following ways—

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- (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 utilities to award the contract;
- (b) by reference to technical specifications and, in order of preference, to—
 - (i) national standards transposing European standards;
 - (ii) European Technical Assessments;
 - (iii) common technical specifications;
 - (iv) international standards;
 - (v) other technical reference systems established by the European standardisation bodies; or
 - (vi) when none of the above exist, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies,
 but each reference shall be accompanied by the words “or equivalent”;
- (c) in terms of performance or functional requirements referred to in sub-paragraph (a), with reference to the technical specifications referred to in sub-paragraph (b) as a means of presuming conformity with such performance or functional requirements;
- (d) by reference to the technical specifications referred to in sub-paragraph (b) for certain characteristics, and by reference to the performance or functional requirements referred to in sub-paragraph (a) for other characteristics.

(11) 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.

(12) But such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract in accordance with paragraph (10) is not possible, in which case the reference shall be accompanied by the words “or equivalent”.

Applying the technical specifications

(13) Where a utility uses the option of referring to the technical specifications referred to in paragraph (10)(b), 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 regulation 62, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

(14) Where a utility uses the option provided for in paragraph (10)(a) to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for works, supplies or services which comply with a national standard transposing a European standard, a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where those address the performance or functional requirements which it has laid down.

(15) In its tender, the tenderer shall prove by any appropriate means including those referred to in regulation 62, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the utility.

(16) In this regulation—

“common technical specification” means a technical specification in the field of information and communication technology laid down in accordance with Articles 13 and 14 of Regulation

(EU) 1025/2012 of the European Parliament and of the Council ^{M2} as amended from time to time;

“European Technical Assessment” means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the respective European Assessment Document as defined in point 12 of Article 2 of Regulation (EU) No 305/2011 of the European Parliament and the Council ^{M3} as amended from time to time;

“technical reference” means any deliverable produced by European standardisation bodies, other than European standards, according to procedures adapted to the development of market needs.

Marginal Citations

M2 OJ No L 316, 14.11.2012, p12.

M3 OJ No L 88, 4.4.2011,p5, last amended by Directive 2014/68/EU of the European Parliament and of the Council (OJ No L 189, 27.6.2014,p164).

Labels

61.—(1) Where utilities 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.

(2) Where utilities do not require the works, supplies or services to meet all of the label requirements, they shall indicate which label requirements are required.

(3) Utilities requiring a specific label shall accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

(4) Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the utility, or an equivalent label, within the relevant time limits for reasons that are not attributable to that economic operator, the utility 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 or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the utility.

(5) Where a label fulfils the conditions mentioned in paragraph (1)(b), (c), (d) and (e) but also sets out requirements not linked to the subject-matter of the contract, utilities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications

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of that label, or, where necessary, parts of it, that are linked to the subject-matter of the contract and are appropriate to define characteristics of that subject-matter.

Test reports, certification and other means of proof

62.—(1) Utilities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

(2) Where utilities 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 utilities.

(3) In paragraphs (1) and (2), a “conformity assessment body” means a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No. 765/2008 of the European Parliament and the Council ^{M4}.

(4) Utilities shall accept appropriate means of proof other than those referred to in paragraphs (1) and (2), such as a technical dossier of the manufacturer, where the economic operator concerned had no access to the certificates or test reports referred to in paragraphs (1) and (2), or no possibility of obtaining them within the relevant time limits, provided that—

- (a) the lack of access is not attributable to the economic operator concerned, and
- (b) the economic operator concerned thereby proves that the works, supplies or services meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

Marginal Citations

M4 OJ No. L 218, 13.8.2008, p30.

Communication of technical specifications

63.—(1) On request from economic operators interested in obtaining a contract, utilities shall make available—

- (a) the technical specifications regularly referred to in their supply, works or service contracts; or
- (b) the technical specifications which they intend to apply to contracts for which the call for competition is a periodic indicative notice.

(2) Subject to paragraph (3), the technical specifications referred to in paragraph (1) shall be made available by electronic means of communication through unrestricted and full direct access free of charge.

(3) Technical specifications shall be transmitted by means other than electronic means where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered—

- (a) for one of the reasons set out in regulation 40(3), or
- (b) because the utilities intend to apply regulation 39(3).

(4) 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.

Variants

64.—(1) Utilities may authorise or require tenderers to submit variants which meet the minimum requirements specified by those utilities.

(2) Utilities shall indicate in the procurement documents whether or not they authorise or require variants.

(3) Utilities authorising or requiring variants shall indicate in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation, in particular whether variants may be submitted only where a tender, which is not a variant, has also been submitted.

(4) Utilities shall ensure that the chosen award criteria can be applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

(5) In procedures for awarding supply or service contracts, utilities 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.

Division of contracts into lots

65.—(1) Utilities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

(2) Utilities shall indicate—

- (a) in the contract notice;
- (b) in the invitation to confirm interest; or
- (c) 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.

(3) Utilities 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—

- (a) the contract notice; or
- (b) the invitation to confirm interest, to tender or to negotiate.

(4) Utilities 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.

(5) Where more than one lot may be awarded to the same tenderer, utilities may award a contract combining several or all lots where they have specified in the—

- (a) contract notice; or
- (b) 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.

Setting time limits

66.—(1) When fixing the time limits for requests to participate and the receipt of tenders, utilities 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 regulations 45 to 49.

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(2) Where tenders can be made only after a visit to the site or after on-the-spot inspection of documents supporting the procurement documents, the time limits for the receipt of tenders, which shall be longer than the minimum time limits set out in regulations 45 to 49, shall be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.

(3) Utilities shall extend the time limits for the receipt of tenders so that all economic operators concerned may be aware of all the information needed to produce tenders in the following cases—

- (a) where, for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest 6 days before the time limit fixed for receipt of tenders;
- (b) where significant changes are made to the procurement documents.

(4) The length of the extension shall be proportionate to the importance of the information or change.

(5) In the case of an accelerated open procedure, the period mentioned in paragraph (3)(a) shall be 4 days.

(6) Where additional information has either not been requested in good time or its importance with a view to preparing responsive tenders is insignificant, utilities are not required to extend the time limits.

SECTION 2

Publication and transparency

Periodic indicative notices

67.—(1) Utilities may make known their intentions of planned procurements through the publication of a periodic indicative notice.

(2) Such notices shall contain the information set out in part A, section I of Annex VI to the Utilities Contracts Directive.

(3) A utility wishing to publish a periodic indicative notice shall—

- (a) send it for publication in accordance with regulation 71; or
- (b) publish it on the utility's buyer profile in accordance with regulation 72.

(4) Where the periodic indicative notice is published by the utility on its buyer profile the utility shall send for publication, in accordance with regulation 71, a notice containing the information set out in Part B of Annex VI to the Utilities Contracts Directive.

(5) 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 and competitive dialogue, 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 or competitive dialogue without further publication of a call for competition and invites interested economic operators to express their interest;
- (c) it contains, in addition to the information set out in section I of Part A of Annex VI to the Utilities Contracts Directive, the information set out section II of Part A;
- (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 for the purposes of regulation 74(1) or (2).

(6) Where paragraph (5) applies, paragraph (3)(b) shall not apply to the notice, but additional publication at national level under regulation 52, if any, may be made on a buyer profile.

(7) The period covered by the periodic indicative notice shall be a maximum of 12 months from the date on which the notice is transmitted for publication.

(8) In the case of contracts for social and other specific services, the periodic indicative notice referred to in regulation 91(1)(b) may cover a period which is longer than 12 months.

Notices on the existence of a qualification system

68.—(1) Where utilities choose to set up a qualification system in accordance with regulation 77, the system shall be the subject of a notice which shall include the information set out in Annex X to the Utilities Contracts Directive, indicating the purpose of the qualification system and how to have access to the rules concerning its operation.

(2) Utilities shall indicate the period of validity of the qualification system in the notice on the existence of the system.

(3) Utilities shall notify the EU Publications Office of any change in the period of validity, using the following standard forms—

- (a) where the period of validity is changed without terminating the system, the form for notices on the existence of qualification systems;
- (b) where the system is terminated, a contract award notice referred to in regulation 70.

Contract notices

69. Contract notices shall contain the information set out in the relevant part of Annex XI to the Utilities Contracts Directive and shall be sent for publication in accordance with regulation 71.

Contract award notices

70.—(1) Not later than 30 days after the award of a contract or the conclusion of a framework agreement, following the decision to award or conclude it, utilities shall send for publication a contract award notice on the results of the procurement procedure.

(2) Such notices shall contain the information set out in Annex XII to the Utilities Contracts Directive and shall be sent for publication in accordance with regulation 71.

(3) Where the call for competition for the contract concerned has been made in the form of a periodic indicative notice and the utility 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.

(4) In the case of framework agreements, utilities shall not be bound to send a notice of the results of the procurement procedure for each contract based on such an agreement.

(5) In the case of dynamic purchasing systems, utilities shall either—

- (a) send a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system; or
- (b) group such notices on a quarterly basis, in which case they shall send the grouped notices within 30 days of the end of each quarter.

(6) Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release—

- (a) would impede law enforcement or would otherwise be contrary to the public interest;

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- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
 - (c) might prejudice fair competition between economic operators.
- (7) In the case of contracts for research and development 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 regulation 50(1)(b);
 - (b) information as least as detailed as was indicated in the notice that was used as a means of calling for competition.

Form and manner of sending notices for publication at EU level

71.—(1) The notices required by regulations 67 to 70, 88, 91 and 95 to be sent for publication in accordance with this regulation shall be sent by electronic means to the EU Publications Office for publication.

(2) Utilities shall ensure that they are able to supply proof of the dates on which notices are sent to the EU Publications Office for publication.

(3) Where the EU Publications Office has given the utility confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication, that confirmation shall constitute proof of publication.

(4) Utilities may send notices in respect of works, supply or service contracts to the EU Publications Office for publication even where they are not required by these Regulations to do so, provided that the notices are sent by electronic means.

(5) The notices referred to in paragraphs (1) and (4), shall be in the format of the relevant standard forms set out in Commission Implementing Regulation (EU) 2015/1986 ^{M5} as amended from time to time.

Marginal Citations

M5 OJ No L 296, 12.11.2015, p1.

Publication at national level

Publication on buyer profiles

Publication on buyer profiles

72.—(1) In addition to the publication of the notices referred to in regulations 67 to 70, 91 and 95 by the EU Publications Office, utilities may publish the information contained in them on the internet on a buyer profile.

(2) A buyer profile may also include (in addition to the periodic indicative notices referred to in regulation 67(3)(b))—

- (a) information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled; and
- (b) any useful general information, such as a contact point, a telephone and a facsimile number, a postal address and an e-mail address.

Timing and content of publication at national level

(3) The notices referred to in regulations 67 to 70, 91 and 95, and the information contained in them shall not be published at national level before they are published by the EU Publications Office.

(4) But publication may in any event take place at the national level where utilities have not been notified of the publication by the EU Publications Office within 48 hours after confirmation of the receipt of the notice in accordance with Article 71(5) of the Utilities Contracts Directive.

(5) Notices published at national level shall not contain information other than that contained in the notices sent to the EU Publications Office or published on a buyer profile, but shall indicate the date of sending of the notice to the EU Publications Office or its publication on the buyer profile.

(6) Where a periodic indicative notice is to be published on a buyer profile for the purposes of regulation 67(3)(b)—

- (a) the periodic indicative notice may not be so published before the notice referred to in regulation 67(4) is sent to the EU Publications Office; and
- (b) the periodic indicative notice shall indicate the date of that sending.

Electronic availability of procurement documents

73.—(1) Utilities shall, by means of the internet, offer unrestricted and full direct access free of charge to the procurement documents from the date of publication in the Official Journal of a notice in accordance with regulation 71 or the date on which an invitation to confirm interest is sent.

(2) But where the means of calling for competition is a notice on the existence of a qualification system, the access referred to in paragraph (1) shall be offered as soon as possible and at the latest when the invitation to tender or to negotiate is sent.

(3) The text of the notice or of the invitation shall specify the internet address at which the procurement documents are accessible.

(4) Where unrestricted and full direct access free of charge to certain procurement documents cannot be offered by means of the internet for one of the reasons set out in regulation 40(3), utilities may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by means other than the internet in accordance with paragraphs (7) and (8).

(5) Where unrestricted and full direct access free of charge to certain procurement documents cannot be offered by means of the internet because utilities intend to apply regulation 39(3), utilities shall indicate in—

- (a) the notice;
- (b) the invitation to confirm interest; or
- (c) where the means of calling for competition is a notice on the existence of a qualification system, the procurement documents,

which measures aimed at protecting the confidential nature of the information they require and how access can be obtained to the documents concerned.

(6) In the cases referred to in paragraphs (4) and (5), the time limit for the submission of tenders shall be prolonged by 5 days, except—

- (a) in the cases of duly substantiated urgency referred to in regulation 45(5), and
- (b) where the time limit is set by mutual agreements in accordance with regulations 46(5) or 47(5).

(7) Provided that it has been requested in good time, utilities shall supply to all tenderers taking part in the procurement procedure additional information relating to the specifications and any supporting documents no later than 6 days before the time limit fixed for the receipt of tenders.

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(8) In the case of an accelerated open procedure, the period mentioned in paragraph (7) shall be 4 days.

Invitations to candidates

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

(2) Where a periodic indicative notice is used as a call for competition in accordance with regulation 44(4)(a), utilities shall simultaneously and in writing invite the economic operators which have expressed their interest to confirm their continuing interest.

(3) The invitations required by paragraphs (1) and (2) shall—

- (a) include a reference to the electronic address at which the procurement documents have been made directly available by electronic means, and
- (b) be accompanied by the procurement documents, where those documents have not been the subject of unrestricted and full direct access, free of charge, for the reasons referred to in regulation 73(4) or (5) and have not been made otherwise available.

(4) The invitations required by paragraph (1) shall also contain at least the following information—

- (a) the final date for receipt of tenders, the address to which they are to be sent and the language or languages in which they are to be drawn up;
- (b) in the case of competitive dialogue, the date and the address set for the start of consultation and the language or languages to be used;
- (c) a reference to any published call for competition;
- (d) an indication of any documents to be attached;
- (e) the criteria for the award of the contract, where they are not indicated in the notice on the existence of a qualification system used as a means of calling for competition;
- (f) the relative weighting of the contract award criteria or, where appropriate, the order of importance of such criteria, if this information is not given in the contract notice, the notice on the existence of a qualification system or the specifications.

(5) But in the case of contracts awarded through a competitive dialogue or an innovation partnership, the information referred to in paragraph (4)(a) shall not appear in the invitation to negotiate but it shall appear in the invitation to submit a tender.

(6) The invitations required by paragraph (2) shall also contain at least the following information—

- (a) nature and quantity, including all options concerning complementary contracts and, where possible, the estimated time available for exercising those options for renewable contracts, the nature and quantity and, where possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;
- (b) type of procedure, namely restricted procedure or negotiated procedure or competitive dialogue;
- (c) where applicable, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;
- (d) where electronic access cannot be offered, the address and closing date for the submission of requests for procurement documents and the language or languages in which they are to be drawn up;
- (e) the address of the utility;

- (f) economic and technical conditions, financial guarantees and information required from economic operators;
- (g) the form of the contract which is the subject of the invitation to tender, namely, purchase, lease, hire or hire-purchase, or any combination of those; and
- (h) the contract award criteria and their weighting or, where appropriate, the order of importance of such criteria, where this information is not given in the indicative notice or the specifications or in the invitation to tender or to negotiate.

Informing applicants for qualification, candidates and tenderers

75.—(1) Utilities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of a contract, or admittance to a dynamic purchasing system, including the grounds for any decision—

- (a) not to conclude a framework agreement;
- (b) not to award a contract for which there has been a call for competition;
- (c) to recommence the procedure; or
- (d) not to implement a dynamic purchasing system.

(2) On request from the candidate or tenderer concerned, a utility 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 regulation 60(14) and (15), the reasons for its 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;
- (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

(3) Utilities may decide to withhold certain information referred to in paragraphs (1) and (2) where the release of such information—

- (a) would impede law enforcement or would otherwise be contrary to the public interest;
- (b) would prejudice the legitimate commercial interests of a particular economic operator, public or private; or
- (c) might prejudice fair competition between economic operators.

Qualification systems

(4) Utilities which establish and operate a system of qualification shall inform applicants of their decision as to qualification within a period of 6 months.

(5) If the decision will take longer than 4 months from the presentation of an application, the utility shall inform the applicant, within 2 months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.

(6) 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.

(7) The reasons shall be based on the criteria for qualification referred to in regulation 77(4).

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(8) Utilities 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 regulation 77(3) to (6).

(9) 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

General principles

76.—(1) For the purpose of selecting participants in their procurement procedures, the following rules shall apply—

- (a) utilities which have provided rules and criteria for the exclusion of tenderers or candidates in accordance with regulations 78(1) or 80(1), shall exclude economic operators identified in accordance with such rules and fulfilling such criteria;
- (b) utilities shall select tenderers and candidates in accordance with the objective rules and criteria mentioned in regulations 78 and 80;
- (c) utilities shall, where appropriate and in accordance with regulation 78(3) and (4), reduce the number of candidates selected in accordance with paragraphs (a) and (b) in:—
 - (i) restricted procedures;
 - (ii) negotiated procedures with a call for competition;
 - (iii) competitive dialogues; and
 - (iv) innovation partnerships.

(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, utilities shall—

- (a) qualify economic operators in accordance with regulation 77;
- (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, utilities 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, utilities may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

(5) Utilities 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 regulations 82 and 84, taking into account regulation 64.

(6) Utilities 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 applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex XIV to the Utilities Contracts Directive as amended from time to time.

(7) In open procedures, utilities may decide to examine tenders before verifying the suitability of tenderers, provided that the relevant provisions of this regulation and regulations 77 to 84 are observed.

SUB-SECTION 1

Qualification and qualitative selection

Qualification systems

- 77.—(1) Utilities may establish and operate a system of qualification of economic operators.
- (2) Utilities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.
- (3) The system under paragraph (1) may involve different qualification stages.
- (4) Utilities shall establish objective rules and criteria for—
- (a) the exclusion and selection of economic operators requesting qualification; and
 - (b) the operation of the qualification system, covering matters such as—
 - (i) inscription in the system;
 - (ii) periodic updating of the qualifications, if any; and
 - (iii) the duration of the system.
- (5) Where the rules and criteria referred to in paragraph (4) include technical specifications, regulations 60 to 62 shall apply.
- (6) The rules and criteria referred to in paragraph (4)—
- (a) shall be made available to economic operators upon request;
 - (b) may be updated as required and if so, shall be communicated to interested economic operators
- (7) Where a utility considers that the qualification system of certain other utilities or other bodies meets its requirements, it shall communicate the names of those utilities and bodies to interested economic operators.
- (8) A written record of qualified economic operators shall be kept and may be divided into categories according to type of contract for which the qualification is valid.
- (9) 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 or negotiated procedure or by a competitive dialogue or innovation partnership, in which all tenderers and participants are selected among the candidates already qualified in accordance with such a system.
- (10) Any charges that are billed in connection with requests for qualification or with updating or conserving an already obtained qualification in accordance with the system shall be proportionate to the generated costs.

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Criteria for qualitative selection

78.—(1) Utilities may establish objective rules and criteria for the exclusion and selection of tenderers or candidates.

(2) Those rules and criteria shall be available to interested economic operators.

(3) Where utilities 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 and negotiated procedures, in competitive dialogues or in innovation partnerships, establish objective rules and criteria that reflect that need and enable utilities to reduce the number of candidates that will be invited to tender or to negotiate.

(4) Utilities shall take account of the need to ensure adequate competition when selecting the number of candidates.

Reliance on the capacities of other entities

79.—(1) Where the objective rules and criteria for the exclusion and selection of—

- (a) economic operators requesting qualification in a qualification system; or
- (b) 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 its technical and professional abilities, the economic operator may, where necessary, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them, subject to the following provisions of this regulation.

(2) 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 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.

(3) Where an economic operator wants to rely on the capacities of other entities, it shall prove to the utility that the necessary resources will be available to it, for example by producing a commitment by those entities to that effect.

(4) For the purposes of paragraph (3), an economic operator requesting qualification in a qualification system shall prove that the necessary resources will be available to it throughout the period of validity of the qualification system.

(5) Where, in accordance with regulation 80, utilities have referred to exclusion or selection criteria provided for under the Public Contracts Regulations, utilities shall verify, in accordance with regulation 80(4), 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 utilities have referred, under regulation 57 of the Public Contracts Regulations and,

- (a) the utility shall require that the economic operator replaces an entity in respect of which there are compulsory grounds for exclusion to which the utility has referred; and
- (b) the utility may require that the economic operator replaces an entity in respect of which there are non-compulsory grounds for exclusion to which the utility has referred.

(6) Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the utility may require that the economic operator and those entities be jointly liable for the execution of the contract.

(7) A group of economic operators within the meaning of regulation 37(3) may rely on the capacities of participants in the group or of other entities, and paragraphs (1) to (6) apply in relation to such a group in the same way that they apply in relation to an economic operator.

(8) In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, utilities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators within the meaning of regulation 37(3), by a participant in that group.

Use of exclusion grounds and selection criteria provided for under the Public Contracts Regulations

80.—(1) The objective rules and criteria for the exclusion and selection of—

- (a) economic operators requesting qualification in a qualification system; and
- (b) candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships,

may include the exclusion grounds listed in regulation 57 of the Public Contracts Regulations on the terms and conditions set out in those Regulations.

(2) Where the utility is a contracting authority, the criteria and rules referred to in paragraph (1) shall include the exclusion grounds listed in regulation 57(1) to (5) of the Public Contracts Regulations on the terms and conditions set out in that regulation.

(3) The criteria and rules referred to in paragraph (1) may include the selection criteria set out in regulation 58 of the Public Contracts Regulations on the terms and conditions set out in that regulation, notably as regards the limits to requirements concerning yearly turnovers, as provided for under regulation 58(9) of those Regulations.

(4) For the purposes of applying paragraphs (1), (2) and (3)—

- (a) regulations 59 to 61 of the Public Contracts Regulations apply.
- (b) regulations 57 to 61 and 65 of the Public Contracts Regulations shall have effect as though a reference to a contracting authority in those regulations were a reference to a utility;
- (c) references to regulations 56(2), 24 and 41 in regulation 57(8) of the Public Contracts Regulations shall have effect as though such references are to, respectively, regulations 76(6), 42 and 59 in these Regulations;
- (d) references to regulations 62 and 63 in regulations 59 and 60 of the Public Contracts Regulations shall have effect as though such references are to, respectively, regulations 81 and 79 in these Regulations;
- (e) in regulation 59(9) of the Public Contracts Regulations, the words “where such contracts are concluded in accordance with regulations 33(7) or 8(a)” shall be replaced with “ with a single economic operator or where such contracts are concluded without reopening competition in accordance with regulations 51 of the Utilities Contracts Regulations 2016. ”;
- (f) in regulation 58(9) of the Public Contracts Regulations, the words “in the report referred to in regulation 84(1).” shall be replaced with “ in the information and documentation referred to in regulation 99 of the Utilities Contracts Regulations 2016. ”.

Quality assurance standards and environmental management standards

81.—(1) Utilities shall, where they require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for disabled persons, refer to quality assurance systems based on the relevant European standards series certified by accredited bodies.

(2) Utilities shall recognise equivalent certificates from bodies established in other member States.

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(3) Utilities shall also accept other evidence of equivalent quality assurance measures where the economic operator concerned had no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator, provided that the economic operator proves that the proposed quality assurance measures comply with the required quality assurance standards.

(4) Where utilities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, they shall refer to—

- (a) the Eco-Management and Audit Scheme of the EU,
- (b) other environmental management systems as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council^{M6}, or
- (c) other environmental management standards based on the relevant European or international standards by accredited bodies,

and shall recognise equivalent certificates from bodies established in other member States.

(5) Where an economic operator had demonstrably no access to the certificates referred to in paragraph (4), or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the utility shall accept other evidence of environmental management measures, provided that the economic operator proves that these measures are equivalent to those required under the applicable environmental management system or standard.

Marginal Citations

M6 OJ No L 342, 22.12.2009, p1, amended by Council Regulation 517/2013 (OJ No L 158, 10.6.2013, p1).

SUB-SECTION 2

Award of the Contract

Contract award criteria

82.—(1) Utilities shall base the award of contracts on the most economically advantageous tender assessed from the point of view of the utility.

(2) That tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 83, and may include the best price-quality ratio, which shall be assessed on the basis of criteria linked to the subject-matter of the contract in question, such as any one or more of the following—

- (a) qualitative aspects,
- (b) environmental aspects, and
- (c) social aspects.

(3) Such criteria may comprise, for example:—

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or

- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion, commitments with regard to parts and security of supply.
- (4) The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.
- (5) Award criteria shall be considered to be linked to the subject-matter of the 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.
- (6) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the utility.
- (7) Award criteria shall—
 - (a) ensure the possibility of effective competition; and
 - (b) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.
- (8) In case of doubt, utilities shall verify effectively the accuracy of the information and proof provided by the tenderers.

Weighting

- (9) The utility shall specify in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.
- (10) Those weightings may be expressed by providing for a range with an appropriate maximum spread.
- (11) Where weighting is not possible for objective reasons, the utility shall indicate the criteria in descending order of importance.

Life-cycle costing

- 83.**—(1) Life-cycle costing shall, to the extent relevant, cover part or all of the following costs over the life cycle of a product, service or works—
- (a) costs, borne by the utility or other users, such as—
 - (i) costs relating to acquisition;
 - (ii) costs of use, such as consumption of energy and other resources;
 - (iii) maintenance costs;
 - (iv) end of life costs, such as collection and recycling costs;
 - (b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified.
- (2) The costs mentioned in paragraph (1)(b) may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.
- (3) The method used for the assessment of costs imputed to environmental externalities shall fulfil all of the following conditions—

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- (a) it is based on objectively verifiable and non-discriminatory criteria and, in particular, where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain economic operators;
 - (b) it is accessible to all interested parties;
 - (c) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the EU is bound.
- (4) Where utilities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents—
- (a) the data to be provided by the tenderers; and
 - (b) the method which the utility will use to determine the life-cycle costs on the basis of those data.
- (5) Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the EU, that common method shall be applied for the assessment of life-cycle costs.
- (6) A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XV to the Utilities Contracts Directive as amended from time to time.

Abnormally low tenders

- 84.**—(1) Utilities 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 given in accordance with paragraph (1) may in particular relate to—
- (a) the economics of the manufacturing process, of the services provided or of the construction method;
 - (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
 - (c) the originality of the work, supplies or services proposed by the tenderer;
 - (d) compliance with the applicable obligations referred to in regulation 76(6);
 - (e) compliance with obligations referred to in regulation 87;
 - (f) the possibility of the tenderer obtaining State aid.
- (3) The utility shall assess the information provided by consulting the tenderer.
- (4) The utility may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).
- (5) The utility shall reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 76(6).
- (6) Where the utility establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only—
- (a) after consultation with the tenderer; and
 - (b) where the latter is unable to prove, within a sufficient time limit fixed by the utility, that the aid in question was compatible with the internal market within the meaning of Article 107 of TFEU.
- (7) Where the utility rejects a tender in the circumstances referred to in paragraph (6), it shall inform the Commission.

SECTION 4

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

Tenders comprising products originating in third countries

85.—(1) This regulation applies to tenders covering products originating in third countries with which the EU has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for EU undertakings to the markets of those third countries.

(2) For the purposes of this regulation—

- (a) the origin of products shall be determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code^{M7} as amended from time to time;
- (b) software used in telecommunications network equipment shall be regarded as products; and
- (c) those third countries to which the benefits of the Utilities Contracts Directive has been extended by a Decision of the Council of the EU, shall not be taken into account by utilities for determining the proportion, referred to in paragraph (3), of products originating in third countries.

(3) Utilities may reject any tender submitted for the award of a supply contract where the proportion of the products originating in third countries exceeds 50% of the total value of the products constituting the tender.

(4) Where two or more tenders are equivalent in the light of the contract award criteria defined in regulation 82, utilities shall give preference to those tenders which may not be rejected in accordance with paragraph (3).

(5) However, a tender shall not be preferred to another where acceptance would oblige the utility to acquire equipment having technical characteristics different from those of existing equipment, resulting in—

- (i) incompatibility;
- (ii) technical difficulties in operation and maintenance; or
- (iii) disproportionate costs.

(6) For the purposes of paragraph (4), tenders shall be considered equivalent if the price difference between those tenders does not exceed 3%.

Marginal Citations

M7 OJ No L 302, 19.10.1992, p1, last amended by Regulation (EU) of the European Parliament and of the Council No 952/2013 of 9 October 2013 (OJ No L 269, 10.10.2013, p1).

CHAPTER 4

Contract performance

Conditions for performance of contracts

86.—(1) Utilities may lay down special conditions relating to the performance of a contract, provided that they are—

- (a) linked to the subject-matter of the contract within the meaning of regulation 82(5); and
- (b) indicated in the call for competition or in the procurement documents.

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(2) Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

Subcontracting

Giving information to utilities

Giving information to utilities

87.—(1) In the procurement documents, the utility may ask the tenderer to indicate in its tender any share of the contract that it may intend to subcontract to third parties and any proposed subcontractors.

(2) Paragraph (1) is without prejudice to the question of the main contractor's liability.

(3) In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the utility, after the award of the contract and at the latest when the performance of the contract commences, the utility shall require the main contractor to notify to the utility the name, contact details and legal representatives of its subcontractors, involved in such works or services, insofar as known at the time.

(4) The utility shall require the main contractor to notify the utility of—

- (a) any changes to the information notified under paragraph (3) during the course of the contract; and
- (b) the name, contact details and legal representatives of any new subcontractors which the main contractor subsequently involves in such works or services.

(5) Where necessary for the purposes of paragraph (8), the required information shall be accompanied by ESPDs (within the meaning of regulation 59 of the Public Contracts Regulations) in respect of subcontractors.

(6) Paragraphs (3) and (4) do not apply to suppliers.

(7) Utilities may extend the obligations provided for in paragraphs (3) and (4) to, for example—

- (a) supply contracts, service contracts (other than those concerning services to be provided at the facilities under the direct oversight of the utility) or suppliers involved in works or services contracts;
- (b) subcontractors of the main contractor's subcontractors or subcontractors further down the subcontracting chain.

Excluding subcontractors

(8) Utilities that are contracting authorities may verify whether there are grounds for exclusion of subcontractors under regulation 57 of the Public Contracts Regulations.

(9) In such cases, the utility—

- (a) shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion; and
- (b) may require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

(10) For the purposes of paragraph (8) and (9)—

- (a) regulations 59 to 61 of the Public Contracts Regulations apply;
- (b) references to regulations 56(2), 24 and 41 in regulation 57(8) of the Public Contracts Regulations shall have effect as though such references are to, respectively, regulations 76(6), 42 and 59 in these Regulations;

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- (c) references to regulations 62 and 63 in regulations 59 and 60 of the Public Contracts Regulations shall have effect as though such reference are to, respectively, regulations 81 and 79 in these Regulations;
 - (d) in regulation 59(9) of the Public Contracts Regulations, the words “where such contracts are concluded in accordance with regulations 33(7) or 8(a)” shall be replaced with “ with a single economic operator or where such contracts are concluded without reopening competition in accordance with regulation 51 of the Utilities Contracts Regulations 2016.”;
 - (e) in regulation 58(9) of the Public Contracts Regulations, the words “in the report referred to in regulation 84(1).” shall be replaced with “ in the information and documentation referred to in regulation 99 of the Utilities Contracts Regulations 2016.”.
- (11) For the purposes of paragraph (5), regulation 59 of the Public Contracts Regulations shall have effect as though a reference to a contracting authority in that regulation were a reference to a utility.

Modification of contracts during their term

88.—(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with these Regulations in any of the following cases—

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options, provided that such clauses—
 - (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used; and
 - (ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;
- (b) for additional works, services or supplies by the original contractor, irrespective of their value, that have become necessary and were not included in the initial procurement where a change of contractor—
 - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement; and
 - (ii) would cause significant inconvenience or substantial duplication of costs for the utility;
- (c) where both of the following conditions are fulfilled—
 - (i) the need for modification has been brought about by circumstances which a diligent utility could not have foreseen;
 - (ii) the modification does not alter the overall nature of the contract;
- (d) where a new contractor replaces the one to which the utility had initially awarded the contract as a consequence of—
 - (i) an unequivocal review clause or option in conformity with sub-paragraph (a); or
 - (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of these Regulations;
- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (7); or

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- (f) where paragraph (4) applies.
- (2) Utilities which have modified a contract in either of the cases described in paragraph (1)(b) and (c) shall send a notice to that effect, in accordance with regulation 71, for publication.
- (3) Such a notice shall contain the information set out in Annex XVI to the Utilities Contracts Directive.
- (4) This paragraph applies where the value of the modification is below both of the following values—
- (a) the relevant threshold mentioned in regulation 16; and
 - (b) 10% of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts,
- provided that the modification does not alter the overall nature of the contract or framework agreement.
- (5) For the purposes of paragraph (4), where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.
- (6) For the purpose of the calculation of the values referred to in paragraph (4)(b), the updated figure shall be the reference figure when the contract includes an indexation clause.
- (7) A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of paragraph (1)(e) where one or more of the following conditions is met—
- (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
 - (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—
 - (i) allowed for the admission of other candidates than those initially selected;
 - (ii) allowed for the acceptance of a tender other than that originally accepted; or
 - (iii) attracted additional participants in the procurement procedure;
 - (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
 - (d) the modification extends the scope of the contract or framework agreement considerably;
 - (e) a new contractor replaces the one to which the utility had initially awarded the contract in cases other than those provided for in paragraph (1)(d).
- (8) A new procurement procedure in accordance with these Regulations shall be required for modifications of the provisions of a contract or a framework agreement during its term other than those provided for in this regulation.

Termination of contracts

- 89.**—(1) Utilities shall ensure that every contract which they award contains provisions enabling the utility to terminate the contract where—
- (a) the contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 88(8).
 - (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 57(1) of the Public Contracts Regulations and should therefore have been excluded from the procurement procedure in accordance with regulation 80(2) of these Regulations.

- (c) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Utilities Contracts Directive that has been declared by the European Court in a procedure under Article 258 of TFEU.
- (2) Those provisions may address the basis on which the power is to be exercisable in those circumstances, for example by providing for notice of termination to be given and by addressing consequential matters that will or might arise from the termination.
- (3) To the extent that a contract does not contain provisions enabling the utility to terminate the contract on any of the grounds mentioned in paragraph (1), a power for the utility to do so on giving reasonable notice to the contractor shall be an implied term of that contract.

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