

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Text with EEA relevance)

TITLE I

SCOPE, DEFINITIONS AND GENERAL PRINCIPLES

CHAPTER IV

General principles

Article 36

Principles of procurement

1 Contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

2 Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex XIV.

Article 37

Economic operators

1 Economic operators that, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of service and works contracts as well as supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff responsible for the performance of the contract in question.

2 Groups of economic operators, including temporary associations, may participate in procurement procedures. They shall not be required by contracting entities to have a specific legal form in order to submit a tender or a request to participate.

Where necessary, contracting entities may clarify in the procurement documents how groups of economic operators are to meet the criteria and requirements for qualification

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and qualitative selection referred to in Articles 77 to 81 provided that this is justified by objective reasons and is proportionate. Member States may establish standard terms for how groups of economic operators are to meet those requirements.

Any conditions for the performance of a contract by such groups of economic operators, which are different from those imposed on individual participants, shall also be justified by objective reasons and shall be proportionate.

3 Notwithstanding paragraph 2, contracting entities may require groups of economic operators to assume a specific legal form once they have been awarded the contract, to the extent that such a change is necessary for the satisfactory performance of the contract.

Article 38

Reserved contracts

1 Member States may reserve the right to participate in procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30 % of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

2 The call for competition shall make reference to this Article.

Article 39

Confidentiality

1 Unless otherwise provided in this Directive or in the national law to which the contracting entity is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 70 and 75, the contracting entity shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

2 Contracting entities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting entities make available throughout the procurement procedure, including information made available in connection with the operation of a qualification system, whether or not this has been the subject of a notice on the existence of a qualification system used as a means of calling for competition.

Article 40

Rules applicable to communication

1 Member States shall ensure that all communication and information exchange under this Directive, in particular electronic submission, are performed using electronic means of communication in accordance with the requirements of this Article. The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators' access to the procurement procedure.

Notwithstanding the first subparagraph, contracting entities shall not be obliged to require electronic means of communication in the submission process in the following situations:

- a due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;
- b the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting entity;
- c the use of electronic means of communication would require specialised office equipment that is not generally available to contracting entities;
- d the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means.

In respect of communications for which electronic means of communication are not used pursuant to the second subparagraph, communication shall be carried out by post or other suitable carrier or by a combination of post or other suitable carrier and electronic means.

Notwithstanding the first subparagraph of this paragraph, contracting entities are not obliged to require electronic means of communication in the submission process to the extent that the use of means of communication other than electronic means is necessary either because of a breach of security of the electronic means of communications or for the protection of the particularly sensitive nature of information requiring such a high level of protection that it cannot be properly ensured by using electronic tools and devices that are either generally available to economic operators or can be made available to them by alternative means of access within the meaning of paragraph 5.

It shall be the responsibility of the contracting entities requiring, in accordance with the second subparagraph of this paragraph, means of communication other than electronic means in the submission process to indicate in the individual report referred to in Article 100 the reasons for this requirement. Where applicable, contracting entities shall indicate in the individual report the reasons why use of means of communication other than electronic means has been considered necessary in application of the fourth subparagraph of this paragraph.

2 Notwithstanding paragraph 1, oral communication may be used in respect of communications other than those concerning the essential elements of a procurement procedure, provided that the content of the oral communication is documented to a sufficient degree. For this purpose, the essential elements of the procurement procedure include the procurement documents, requests for participation and confirmations of interest and tenders. In particular, oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders shall be documented to a sufficient extent and by appropriate means, such as written or audio records or summaries of the main elements of the communication.

3 In all communication, exchange and storage of information, contracting entities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved. They shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

4 For public works contracts and design contests, Member States may require the use of specific electronic tools, such as of building information electronic modelling tools or similar. In such cases the contracting entities shall offer alternative means of access as provided for in

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paragraph 5, until such time as those tools become generally available within the meaning of the second sentence of the first subparagraph of paragraph 1.

5 Contracting entities may, where necessary, require the use of tools which are not generally available, provided that the contracting entities offer alternative means of access.

Contracting entities shall be deemed to offer suitable alternative means of access in any of the following situations, where they:

- a offer unrestricted and full direct access free of charge by electronic means to those tools and devices from the date of publication of the notice in accordance with Annex IX or from the date on which the invitation to confirm interest is sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which those tools and devices are accessible;
- b ensure that tenderers having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the tenderer concerned, may access the procurement procedure through the use of provisional tokens made available free of charge online; or
- c support an alternative channel for electronic submission of tenders.

6 In addition to the requirements set out in Annex V, the following rules shall apply to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate:

- a information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, shall be available to interested parties;
- b Member States, or contracting entities acting within an overall framework established by the Member State concerned, shall specify the level of security required for the electronic means of communication to be used in the various stages of the specific procurement procedure; that level shall be proportionate to the risks attached;
- c where Member States, or contracting entities acting within an overall framework established by the Member State concerned, conclude that the level of risks, assessed under point (b) of this paragraph, is such that advanced electronic signatures as defined by Directive 1999/93/EC of the European Parliament and of the Council⁽¹⁾ are required, contracting entities shall accept advanced electronic signatures supported by a qualified certificate, taking into account whether those certificates are provided by a certificate services provider, which is on a trusted list as provided for in Commission Decision 2009/767/EC⁽²⁾, created with or without a secure signature creation device, subject to compliance with the following conditions:
 - (i) the contracting entities shall establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU⁽³⁾ and shall put in place necessary measures to be able to process those formats technically; in case a different format of electronic signature is used, the electronic signature or the electronic document carrier shall include information on existing validation possibilities, which shall be under the responsibility of the Member State. The validation possibilities shall allow the contracting entity to validate online, free of charge and in a way that is understandable for non-native speakers, the received electronic signature as an advanced electronic signature supported by a qualified certificate. Member States shall notify information on the provider of validation services to the Commission, which shall make the information received from the Member States available to the public on the internet;

- (ii) where a tender is signed with the support of a qualified certificate that is included on a trusted list, the contracting entities shall not apply additional requirements that may hinder the use of those signatures by tenderers.

In respect of documents used in the context of a procurement procedure that are signed by a competent authority of a Member State or by another issuing entity, the competent issuing authority or entity may establish the required advanced signature format in accordance with the requirements set out in Article 1(2) of Decision 2011/130/EU. They shall put in place the necessary measures to be able to process that format technically by including the information required for the purpose of processing the signature in the document concerned. Such documents shall contain in the electronic signature or in the electronic document carrier information on existing validation possibilities that allow the validation of the received electronic signature online, free of charge and in a way that is understandable for non-native speakers.

7 The Commission shall be empowered to adopt delegated acts in accordance with Article 103 to amend the technical details and characteristics set out in Annex V to take account of technical developments.

The Commission shall be empowered to adopt delegated acts in accordance with Article 103 to amend the list set out in points (a) to (d) of the second subparagraph of paragraph 1 of this Article where technological developments render continued exceptions from the use of electronic means of communication inappropriate or, exceptionally, where new exceptions must be provided for because of technological developments.

To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission shall be empowered to adopt delegated acts in accordance with Article 103 to establish the mandatory use of such specific technical standards, in particular with regard to the use of electronic submission, electronic catalogues and means for electronic authentication, only where technical standards have been thoroughly tested and proved their usefulness in practice. Before making the use of any technical standard mandatory, the Commission shall also carefully consider the costs that this may entail, in particular in terms of adaptations to existing e-procurement solutions, including infrastructure, processes or software.

Article 41

Nomenclatures

1 Any references to nomenclatures in the context of public procurement shall be made using the Common Procurement Vocabulary (CPV) as adopted by Regulation (EC) No 2195/2002.

2 The Commission shall be empowered to adopt delegated acts in accordance with Article 103 to adapt the CPV codes referred to in this Directive, whenever changes in the CPV nomenclature have to be reflected in this Directive and they do not imply a modification of the scope of this Directive.

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Article 42

Conflicts of interest

Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

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- (1) Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures ([OJ L 13, 19.1.2000, p. 12](#)).
- (2) Commission Decision 2009/767/EC of 16 October 2009 setting out measures facilitating the use of procedures by electronic means through the points of single contact under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market ([OJ L 274, 20.10.2009, p. 36](#)).
- (3) Commission Decision 2011/130/EU of 25 February 2011 establishing minimum requirements for the cross-border processing of documents signed electronically by competent authorities under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market ([OJ L 53, 26.2.2011, p. 66](#)).