

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

TITLE II

RULES APPLICABLE TO CONTRACTS

CHAPTER I

Procedures

Article 43

Conditions relating to the GPA and other international agreements

In so far as they are covered by Annexes 3, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA and by the other international agreements by which the Union is bound, contracting entities within the meaning of Article 4(1)(a) shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.

Article 44

Choice of procedures

- 1 When awarding supply, works or service contracts, contracting entities shall apply the procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 47, a call for competition has been published in accordance with this Directive.
- 2 Member States shall provide that contracting entities may apply open or restricted procedures or negotiated procedures with prior call for competition as regulated in this Directive.
- 3 Member States shall provide that contracting entities may apply competitive dialogues and innovation partnerships as regulated in this Directive.
- 4 The call for competition may be made by one of the following means:
 - a a periodic indicative notice pursuant to Article 67 where the contract is awarded by restricted or negotiated procedure;
 - b a notice on the existence of a qualification system pursuant to Article 68 where the contract is awarded by restricted or negotiated procedure or by a competitive dialogue or an innovation partnership;
 - c by means of a contract notice pursuant to Article 69.

In the case referred to in point (a) of this paragraph, economic operators having expressed their interest following the publication of the periodic indicative notice shall

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subsequently be invited to confirm their interest in writing by means of an invitation to confirm interest in conformity with Article 74.

5 In the specific cases and circumstances referred to expressly in Article 50, Member States may provide that contracting entities may apply a negotiated procedure without prior call for competition. Member States shall not allow the application of that procedure in any other cases than those referred to in Article 50.

Article 45

Open procedure

1 In open procedures any interested economic operator may submit a tender in response to a call for competition

The minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent.

The tender shall be accompanied by the information for qualitative selection that is requested by the contracting entity.

2 Where contracting entities have published a periodic indicative notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders, as laid down in the second subparagraph of paragraph 1 of this Article, may be shortened to 15 days, provided that all of the following conditions are fulfilled:

- a the periodic indicative notice included, in addition to the information required by Section I of Part A of Annex VI, all the information required by Section II of Part A of Annex VI, insofar as the latter information 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.

3 Where a state of urgency duly substantiated by the contracting entity renders impracticable the time limit laid down in the second subparagraph of paragraph 1, it may fix a time limit which shall be not less than 15 days from the date on which the contract notice was sent.

4 The contracting entity may reduce by five days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 of this Article where it accepts that tenders may be submitted by electronic means in accordance with first subparagraph of Article 40(4) and Article 40(5) and (6).

Article 46

Restricted procedure

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 contracting entity.

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or the invitation to confirm interest was sent and shall in any event not be less than 15 days.

2 Only those economic operators invited to do so by the contracting entity following its assessment of the information provided may submit a tender. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 78(2).

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

In the absence of 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 was sent.

Article 47

Negotiated procedure with prior call for competition

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 contracting entity.

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest was sent and shall in any event not be less than 15 days.

2 Only those economic operators invited by the contracting entity following its assessment of the information provided may participate in the negotiations. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 78(2).

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

In the absence of 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 was sent.

Article 48

Competitive dialogue

1 In competitive dialogues, any economic operator may submit a request to participate in response to a call for competition in accordance with points (b) and (c) of Article 44(4) by providing the information for qualitative selection that is requested by the contracting entity.

The minimum time limit for receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest was sent and shall in any event not be less than 15 days.

Only those economic operators invited by the contracting entity following the assessment of the information provided may participate in the dialogue. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 78(2). The contract shall be awarded on the

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sole basis of the award criterion of the tender presenting the best price-quality ratio in accordance with Article 82(2).

2 Contracting entities shall set out and define their needs and requirements in the call for competition and/or in a descriptive document. At the same time and in the same documents, they shall also set out and define the chosen award criteria and set out an indicative timeframe.

3 Contracting entities shall open, with the participants selected in accordance with the relevant provisions of Articles 76 to 81, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the procurement with the chosen participants during this dialogue.

During the dialogue, contracting entities shall ensure equality of treatment among all participants. To that end, they shall not provide information in a discriminatory manner which may give some participants an advantage over others.

In accordance with Article 39, contracting entities 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. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

4 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. In the call for competition or the descriptive document, the contracting entity shall indicate whether it will use that option.

5 The contracting entity shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

6 Having declared that the dialogue is concluded and having so informed the remaining participants, contracting entities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. Those tenders shall contain all the elements required and necessary for the performance of the project.

Those tenders may be clarified, specified and optimised at the request of the contracting entity. However, such clarification, specification, optimisation or 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.

7 Contracting entities shall assess the tenders received on the basis of the award criteria laid down in the call for competition or in the descriptive document.

At the request of the contracting entity, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with Article 82(2) 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 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 does not risk distorting competition or causing discrimination.

8 Contracting entities may specify prizes or payments to the participants in the dialogue.

Article 49

Innovation partnership

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

In the procurement documents, the contracting entity shall 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. It shall indicate which elements of this description define the minimum requirements to be met by all tenders. The indications 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.

The contracting entity may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.

The minimum time limit for receipt of requests to participate shall, as a general rule, 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. Only those economic operators invited by the contracting entity following the assessment of the information provided may participate in the procedure. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 78(2). 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 Article 82(2).

2 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 contracting entities and the participants.

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 the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

Based on those targets, the contracting entity may decide after each phase to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts, provided that the contracting entity has indicated in the procurement documents those possibilities and the conditions for their use.

3 Unless otherwise provided for in this Article, contracting entities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve the content thereof.

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

4 During the negotiations, contracting entities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall inform all tenderers, whose tenders

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have not been eliminated, pursuant to paragraph 5, in writing of any changes to the technical specifications or other procurement documents other than those setting out the minimum requirements. Following those changes, contracting entities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

In accordance with Article 39, contracting entities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

5 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 contract notice, in the invitation to confirm interest or in the procurement documents. In the contract notice, the invitation to confirm interest or in the procurement documents, the contracting entity shall indicate whether it will use that option.

6 In selecting candidates, contracting entities shall in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

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

In the procurement documents, the contracting entity shall define the arrangements applicable to intellectual property rights. In the case of an innovation partnership with several partners, the contracting entity shall not, in accordance with Article 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. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

7 The contracting entity 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. The estimated value of supplies, services or works purchased shall not be disproportionate in relation to the investment for their development.

Article 50

Use of the negotiated procedure without prior call for competition

Contracting entities may use a negotiated procedure without prior call for competition in the following cases:

- (a) where no tenders or no suitable tenders or 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;

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 contracting

entity's needs and requirements as specified in the procurement documents. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Articles 78(1) or 80(1), or does not meet the selection criteria laid down by the contracting entity pursuant to Articles 78 or 80;

- (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.

The exceptions set out in points (ii) and (iii) shall only apply when 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) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting entity, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting entity;
- (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 contracting entity 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 contracting entities awarded an earlier contract, provided that such works or services conform to a basic project for which a first contract was awarded according to a procedure in accordance with Article 44(1).

The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded. As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting entities when they apply Articles 15 and 16;

- (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

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liquidator in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws or regulations;

- (j) where the service contract concerned follows a design contest organised in accordance with this Directive and 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; in the latter case, all the winners shall be invited to participate in the negotiations.

CHAPTER II

Techniques and instruments for electronic and aggregated procurement

Article 51

Framework agreements

1 Contracting entities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.

A framework agreement means an agreement between one or more contracting entities 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.

The term of a framework agreement shall not exceed eight years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

2 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. These rules and criteria shall be set out in the procurement documents for the framework agreement.

The objective rules and criteria referred to in the first subparagraph shall ensure equal treatment of the economic operators who are parties to the agreement. Where a reopening the competition is included, contracting entities shall set a time limit which is sufficiently long to allow tenders for each specific contract to be submitted and contracting entities shall 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.

Contracting entities shall not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

Article 52

Dynamic purchasing systems

1 For commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting entities, they may use a dynamic purchasing system. 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. It 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. 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.

2 In order to procure under a dynamic purchasing system, contracting entities shall follow the rules of the restricted procedure. All the candidates who satisfy 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 Article 78(2). Where contracting entities have divided the system into categories of products, works or services in accordance with paragraph 1 of this Article, they shall specify the applicable selection criteria for each category.

Notwithstanding Article 46, the following time limits shall apply:

- a the minimum time limit for receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest is sent and shall in any event not be less than 15 days. 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.
- b The minimum time limit for receipt of tenders shall be at least 10 days from the date on which the invitation to tender is sent. The second and third subparagraphs of Article 46(2) shall apply.

3 All communications in the context of a dynamic purchasing system shall only be made by electronic means in accordance with Article 40(1), (3), (5) and (6).

4 For the purposes of awarding contracts under a dynamic purchasing system, contracting entities 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 the 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 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 Article 73.

5 Contracting entities 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 paragraph 2. Contracting entities shall finalise their assessment of such requests in accordance with the selection criteria within 10 working days following their receipt. That deadline 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.

Notwithstanding the first subparagraph, as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, contracting entities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period. Contracting entities shall indicate in the procurement documents the length of the extended period that they intend to apply.

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Contracting entities shall inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.

6 Contracting entities shall invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with Article 74. Where the dynamic purchasing system has been divided into categories of works, products or services, contracting entities shall invite all participants having been admitted to the category corresponding to the specific procurement concerned to submit a tender.

They shall award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice for the dynamic purchasing system, 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. Those criteria may, where appropriate, be formulated more precisely in the invitation to tender.

7 Contracting entities who, pursuant to Article 80, apply exclusion grounds and selection criteria provided for under Directive 2014/24/EU, 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 Article 59(1) of that Directive, within five working days from the date on which that request is transmitted.

Paragraphs 2 to 4 of Article 59 shall apply throughout the entire period of validity of the dynamic purchasing system.

8 Contracting entities shall indicate the period of validity of the dynamic purchasing system in the call for competition. They shall notify the Commission of any change in period of validity, using the following standard forms:

- a where the period of validity is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
- b where the system is terminated, a contract award notice referred to in Article 70.

9 No charges may be billed prior to or during the period of validity of the dynamic purchasing system to the economic operators interested in or party to the dynamic purchasing system.

Article 53

Electronic auctions

1 Contracting entities may use electronic auctions in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

For this purpose, contracting entities 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.

Certain service contracts and certain works contracts having 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.

2 In open or restricted procedures or negotiated procedures with a prior call for competition, the contracting entities 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.

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in Article 51(2) and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 52.

3 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 and/or on the new values of the features of the tenders indicated in the procurement documents, where the contract is awarded on the basis of the best price-quality ratio or to the tender with the lowest cost using a cost-effectiveness approach.

4 Contracting entities 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. The procurement documents shall include at least the information set out in Annex VII.

5 Before proceeding with the electronic auction, contracting entities shall make a full initial evaluation of the tenders in accordance with the award criterion or criteria and with the weighting fixed for them.

A tender shall be considered admissible where it has been submitted by a tenderer, who has not been excluded pursuant to Article 78(1) or 80(1) and who meets the selection criteria laid down pursuant to Articles 78 and 80, and whose tender is in conformity with the technical specifications without being irregular or unacceptable or unsuitable.

In particular, tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low, shall be considered as being irregular. In particular tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure shall be considered as unacceptable.

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 contracting entity's needs and requirements as specified in the procurement documents. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Articles 78(1) or 80(1), or does not meet the selection criteria laid down by the contracting entity pursuant to Articles 78 or 80.

All tenderers that have submitted admissible tenders shall be invited simultaneously by electronic means to participate in the electronic auction using, as of the specified date and time, the connections in accordance with the instructions set out in the invitation. The electronic auction may take place in a number of successive phases. The electronic auction shall not start sooner than two working days after the date on which invitations are sent out.

6 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 the first subparagraph of Article 82(5).

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 and/or new values submitted. Except where the most economically advantageous offer is identified

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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. For that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.

7 Throughout each phase of an electronic auction the contracting entities shall instantaneously communicate to all tenderers sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.

8 Contracting entities 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.

Where the contracting entities intend to close an electronic auction in accordance with point (c) of the first subparagraph, possibly in combination with the arrangements laid down in point (b) thereof, the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

9 After closing an electronic auction the contracting entities shall award the contract in accordance with Article 82 on the basis of the results of the electronic auction.

Article 54

Electronic catalogues

1 Where use of electronic means of communication is required, contracting entities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

Member States may render the use of electronic catalogues mandatory in connection with certain types of procurement.

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

2 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 contracting entity.

Furthermore, electronic catalogues shall comply with the requirements for electronic communication tools as well as with any additional requirements set by the contracting entity in accordance with Article 40.

3 Where the presentation of tenders in the form of electronic catalogues is accepted or required, contracting entities 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 to negotiate;
- b indicate in the procurement documents all the necessary information pursuant to Article 40(6) concerning the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

4 Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, contracting entities may provide that the reopening of competition for specific contracts takes place on the basis of updated catalogues. In such a case, contracting entities 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 announced in the procurement documents for the framework agreement.

5 Where contracting entities reopen competition for specific contracts in accordance with point (b) of paragraph 4, they shall 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 shall give tenderers the possibility to refuse such collection of information.

Contracting entities shall allow for an adequate period between the notification and the actual collection of information.

Before awarding the contract, contracting entities 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.

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

Contracting entities may also award contracts based on a dynamic purchasing system in accordance with point (b) of paragraph 4 and paragraph 5 provided that the request for participation in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting entity. That catalogue shall be completed subsequently by the candidates, when they are informed of the contracting entity's intention to constitute tenders by means of the procedure set out in point (b) of paragraph 4.

Article 55

Centralised purchasing activities and central purchasing bodies

1 Member States may provide that contracting entities may acquire works, supplies and/or services from a central purchasing body offering the centralised purchasing activity referred to in point (a) of point (10) of Article 2.

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Member States may also provide that contracting entities may acquire works, supplies and services by using contracts awarded by a central purchasing body, by using dynamic purchasing systems operated by a central purchasing body or by using a framework agreement concluded by a central purchasing body offering the centralised purchasing activity referred to in point (b) of point (10) of Article 2. Where a dynamic purchasing system which is operated by a central purchasing body may be used by other contracting entities, this shall be mentioned in the call for competition setting up that dynamic purchasing system.

In relation to the first and second subparagraphs, Member States may provide that certain procurements are to be made by having recourse to central purchasing bodies or to one or more specific central purchasing bodies.

2 A contracting entity fulfils its obligations pursuant to this Directive when it acquires supplies or services from a central purchasing body offering the centralised purchasing activity referred to in point (a) of point (10) of Article 2.

Furthermore, a contracting entity also fulfils its obligations pursuant to this Directive where it acquires works, supplies or services by using contracts awarded by the central purchasing body, by using dynamic purchasing systems operated by the central purchasing body or by using a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in point (b) of point (10) of Article 2.

However, the contracting entity concerned shall be responsible for fulfilling the obligations pursuant to this Directive in respect of the parts 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.

3 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 Article 40.

4 Contracting entities may, without applying the procedures provided for in this Directive, award a service contract for the provision of centralised purchasing activities to a central purchasing body.

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

Article 56

Occasional joint procurement

1 Two or more contracting entities may agree to perform certain specific procurements jointly.

2 Where the conduct of a procurement procedure in its entirety is carried out jointly in the name and on behalf of all the contracting entities concerned, they shall be jointly responsible for fulfilling their obligations pursuant to this Directive. This applies also in cases where one contracting entity alone manages the procurement procedure, acting on its own behalf and on the behalf of the other contracting entities concerned.

Where the conduct of a procurement procedure is not in its entirety carried out in the name and on behalf of the contracting entities concerned, they shall be jointly responsible only for those parts carried out jointly. Each contracting entity shall have sole responsibility for fulfilling its obligations pursuant to this Directive in respect of the parts it conducts in its own name and on its own behalf.

Article 57

Procurement involving contracting entities from different Member States

1 Without prejudice to Articles 28 to 31, contracting entities from different Member States may act jointly in the award of contracts by using one of the means provided for in this Article.

Contracting entities shall not use the means provided in this Article for the purpose of avoiding the application of mandatory public law provisions in conformity with Union law to which they are subject in their Member State.

2 A Member State shall not prohibit its contracting entities from using centralised purchasing activities offered by central purchasing bodies located in another Member State.

In respect of centralised purchasing activities offered by a central purchasing body located in another Member State than the contracting entity, Member States may, however, choose to specify that their contracting entities may only use the centralised purchasing activities as defined in either point (a) or in point (b) of point (10) of Article 2.

3 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.

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.

4 Several contracting entities from different Member States may jointly award a contract, conclude a framework agreement or operate a dynamic purchasing system. They may also award contracts based on the framework agreement or on the dynamic purchasing system. Unless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, the participating contracting entities shall conclude an agreement that determines:

- a the responsibilities of the parties and the relevant applicable national provisions;
- b 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.

A participating contracting entity fulfils its obligations pursuant to this Directive when it purchases works, supplies or services from a contracting entity which is responsible for the procurement procedure. When determining responsibilities and the applicable national law as referred to in point (a), the participating contracting entities may allocate specific responsibilities among them and determine the applicable provisions of the national laws of any of their respective Member States. The allocation of responsibilities

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and the applicable national law shall be referred to in the procurement documents for jointly awarded contracts.

5 Where several contracting entities from different Member States have set up a joint entity, including European Groupings of territorial cooperation under Regulation (EC) No 1082/2006 of the European Parliament and of the Council⁽¹⁾ or other entities established under Union law, the participating contracting entities shall, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules of one of the following Member States:

- a the national provisions of the Member State where the joint entity has its registered office;
- b the national provisions of the Member State where the joint entity is carrying out its activities.

The agreement referred to in the first subparagraph 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.

CHAPTER III

Conduct of the procedure

Section 1

Preparation

Article 58

Preliminary market consultations

Before launching a procurement procedure, contracting entities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.

For this purpose, contracting entities may for example seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

Article 59

Prior involvement of candidates or tenderers

Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting entity, whether in the context of Article 58 or not, or has otherwise been involved in the preparation of the procurement procedure, the contracting entity shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

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Such measures shall include the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment.

Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition. The measures taken shall be documented in the individual report required by to Article 100.

Article 60

Technical specifications

1 The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. The technical specifications shall lay down the characteristics required of a works, service or supply.

Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance, provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

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

For all procurement which is intended for use by natural persons, whether general public or staff of the contracting entity, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.

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

2 Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3 Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

- a in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting entities to award the contract;
- b by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when any of those do not exist — national standards, national technical approvals or national technical specifications relating

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to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words ‘or equivalent’;

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

4 Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words ‘or equivalent’.

5 Where a contracting entity uses the option of referring to the technical specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the ground that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in Article 62, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

6 Where a contracting entity uses the option provided for in point (a) of paragraph 3 to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for supplies, services or works which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where those specifications address the performance or functional requirements which it has laid down.

In its tender, the tenderer shall prove by any appropriate means including those referred to in Article 62, that the supplies, service or work in compliance with the standard meets the performance or functional requirements of the contracting entity.

Article 61

Labels

1 Where contracting entities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, supplies or services correspond to the required characteristics, provided that all of the following conditions are fulfilled:

- a the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define the characteristics of the works, supplies or services that are the subject-matter of the contract;
- b the label requirements are based on objectively verifiable and non-discriminatory criteria;
- c the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations may participate;

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- 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.

Where contracting entities do not require the works, supplies or services to meet all of the label requirements, they shall indicate which label requirements are referred to.

Contracting entities requiring a specific label shall accept all labels confirm that the works, supplies or services meet equivalent label requirements.

Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the contracting entity or an equivalent label within the relevant time limits for reasons that are not attributable to that economic operator, the contracting entity shall accept other appropriate means of proof, which may include a technical dossier of the manufacturer, provided that the economic operator concerned proves that the works, supplies and services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting entity.

2 Where a label fulfils the conditions of provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting entities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label, or, if necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

Article 62

Test reports, certification and other means of proof

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

Where contracting entities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by the contracting entities.

For the purpose of this paragraph, a conformity assessment body shall be a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council⁽²⁾.

2 Contracting entities shall accept other appropriate means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer where the economic operator concerned had no access to such certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned and provided that the economic operator concerned thereby proves that the works, supplies or services meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

3 Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with Article 60(6), Article 61 and paragraphs 1 and 2 of this Article. The competent authorities of the Member

State of establishment of the economic operator shall provide this information in accordance with Article 102.

Article 63

Communication of technical specifications

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

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

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

Article 64

Variants

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

Contracting entities shall indicate in the procurement documents whether or not they authorise or require variants and, if so, the minimum requirements to be met by the variants and any specific requirements for their presentation, in particular whether variants may be submitted only where a tender, which is not a variant, has also been submitted. Where variants are authorised or required, they shall also ensure that the chosen award criteria can be applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

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

Article 65

Division of contracts into lots

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

Contracting entities shall indicate, in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a

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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.

2 Contracting entities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest, to tender or to negotiate. Contracting entities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

3 Member States may provide that, where more than one lot may be awarded to the same tenderer, contracting entities may award a contract combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest, to tender or to negotiate that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.

4 Member States may render it obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law. The second subparagraph of paragraph 1 and, where appropriate, paragraph 3 shall apply.

Article 66

Setting time limits

1 When fixing the time limits for requests to participate and the receipt of tenders, contracting entities shall take particular account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in Articles 45 to 49.

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

3 Contracting entities shall extend the time limits for the receipt of tenders so that all economic operators concerned may be aware of all the information needed to produce tenders in the following cases:

- a where, for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest six days before the time limit fixed for the receipt of tenders. In the event of an accelerated open procedure as referred to in Article 45(3), that period shall be four days;
- b where significant changes are made to the procurement documents.

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

Where the additional information has either not been requested in good time or its importance with a view to preparing responsive tenders is insignificant, contracting entities shall not be required to extend the time limits.

Section 2

Publication and Transparency

Article 67

Periodic indicative notices

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

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

- a it refers specifically to the supplies, works or services that will be the subject of the contract to be awarded;
- b it indicates that the contract will be awarded by restricted or negotiated procedure without further publication of a call for competition and invites interested economic operators to express their interest;
- c it contains, in addition to the information set out in part A, section I of Annex VI, the information set out in part A, section II of Annex VI;
- d it has been sent for publication between 35 days and 12 months prior to the date on which the invitation to confirm interest is sent.

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

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

Article 68

Notices on the existence of a qualification system

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

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

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

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

Article 69

Contract notices

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

Article 70

Contract award notices

1 Not later than 30 days after the conclusion of a contract or of a framework agreement following the decision to award or conclude it, contracting entities shall send a contract award notice on the results of the procurement procedure.

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

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

In the case of framework agreements concluded in accordance with Article 51, contracting entities shall not be bound to send a notice of the results of the procurement procedure for each contract based on that agreement. Member States may provide that contracting entities shall group notices of the results of the procurement procedure for contracts based on the framework agreement on a quarterly basis. In that case, contracting entities shall send the grouped notices within 30 days of the end of each quarter.

Contracting entities shall send a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 30 days of the end of each quarter.

3 The information provided in accordance with Annex XII and intended for publication shall be published in accordance with Annex IX. Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.

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

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

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

Article 71

Form and manner of publication of notices

1 Notices referred to in Articles 67 to 70 shall include the information set out in Annexes VI Part A, VI Part B, X, XI, and XII and in the format of standard forms, including standard forms for corrigenda.

The Commission shall establish those standard forms by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 105.

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

3 Notices referred to in Articles 67 to 70 shall be published in full in the official language(s) of the institutions of the Union chosen by the contracting entity. That language version or those language versions shall constitute the sole authentic text(s). A summary of the important elements of each notice shall be published in the other official languages of the institutions of the Union.

4 The Publications Office of the European Union shall ensure that the full text and the summary of periodic indicative notices referred to in Article 67(2), calls for competition setting up a dynamic purchasing system as referred to in point (a) of Article 52(4) and notices on the existence of a qualification system used as a means of calling for competition in accordance with point (b) of Article 44(4) continue to be published:

- a in the case of periodic indicative notices for 12 months or until receipt of a contract award notice as provided for in Article 70(2) indicating that no further contracts will be awarded during the 12 month period covered by the call for competition. However, in the case of contracts for social and other specific services, the periodic indicative notice referred to in point (b) of Article 92(1) shall continue to be published until the end of its originally indicated period of validity or until receipt of a contract award notice as provided for in Article 70 indicating that no further contracts will be awarded during the period covered by the call for competition;
- b in the case of calls for competition setting up a dynamic purchasing system for the period of validity of the dynamic purchasing system;
- c in the case of notices on the existence of a qualification system for its period of validity.

5 Contracting entities shall be able to supply proof of the dates on which notices are dispatched.

The Publications Office of the European Union shall give the contracting entity confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication. Such confirmation shall constitute proof of publication.

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6 Contracting entities may publish notices for works, supply or service contracts that are not subject to the publication requirements laid down in this Directive provided that those notices are sent to the Publications Office of the European Union by electronic means in accordance with the format and procedures for transmission indicated in Annex IX.

Article 72

Publication at national level

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

2 Notices published at national level shall not contain information other than that contained in the notices dispatched to the Publications Office of the European Union or published on a buyer profile, but shall indicate the date of dispatch of the notice to the Publications Office of the European Union or its publication on the buyer profile.

3 Periodic indicative notices shall not be published on a buyer profile before the dispatch to the Publications Office of the European Union of the notice of their publication in that form; they shall indicate the date of that dispatch.

Article 73

Electronic availability of procurement documents

1 Contracting entities shall by electronic means offer unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice in accordance with Article 71 or the date on which an invitation to confirm interest was sent.

Where the means of calling for competition is a notice on the existence of a qualification system, such access shall be offered as soon as possible and at the latest when the invitation to tender or to negotiate is sent. The text of the notice or of those invitations shall specify the internet address at which the procurement documents are accessible.

Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered for one of the reasons set out in the second subparagraph of Article 40(1), contracting entities may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by other means than electronic means in accordance with paragraph 2 of this Article. In such a case, the time limit for the submission of tenders shall be prolonged by five days, except in the cases of duly substantiated urgency referred to in Article 45(3) and where the time limit is set by mutual agreement pursuant to the second subparagraph of Article 46(2) or the second subparagraph of Article 47(2).

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

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the documents concerned. In such case, the time limit for the submission of tenders shall be prolonged by five days, except in the cases of duly substantiated urgency referred to in Article 45(3) and where the time limit is set by mutual agreement pursuant to the second subparagraph of Article 46(2) or the second subparagraph of Article 47(2).

2 Provided that it has been requested in good time, the contracting entities shall supply to all tenderers taking part in the procurement procedure additional information relating to the specifications and any supporting documents not later than six days before the time limit fixed for the receipt of tenders. In the event of an accelerated open procedure as referred to in Article 45(3), that period shall be four days.

Article 74

Invitations to candidates

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

Where a periodic indicative notice is used as a call for competition pursuant to point (a) of Article 44(4), contracting entities shall simultaneously and in writing invite the economic operators which have expressed their interest to confirm their continuing interest.

2 The invitations referred to in paragraph 1 of this Article shall include a reference to the electronic address on which the procurement documents have been made directly available by electronic means. The invitations shall be accompanied by the procurement documents, where those documents have not been the subject of unrestricted and full direct access, free of charge, for the reasons set out in the third or fourth subparagraph of Article 73(1) and have not already been made otherwise available. In addition, the invitations referred to in paragraph 1 of this Article shall include the information set out in Annex XIII.

Article 75

Informing applicants for qualification, candidates and tenderers

1 Contracting entities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure, or not to implement a dynamic purchasing system.

2 On request from the candidate or tenderer concerned, contracting entities shall, as soon as possible, and in any event within 15 days from receipt of a written request, inform:

- a any unsuccessful candidate of the reasons for the rejection of its request to participate;
- b any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in Article 60(5) and (6), the reasons for their decision of non-equivalence or their decision that the works, supplies or services do not meet the performance or functional requirements;
- c any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement;

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

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

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

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

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

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

Section 3

Choice of participants and award of contracts

Article 76

General principles

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

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

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

- a qualify economic operators in accordance with Article 77;

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

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

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

4 Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, contracting entities may, unless otherwise provided for by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

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

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

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

Member States may exclude the use of the procedure in the first subparagraph for, or restrict it to, certain types of procurement or specific circumstances.

8 The Commission shall be empowered to adopt delegated acts in accordance with Article 103 to amend the list in Annex XIV, where necessary, to add new international agreements that have been ratified by all Member States or where the existing international agreements referred to are no longer ratified by all Member States or they are otherwise changed, for instance in respect of their scope, content or denomination.

Subsection 1

Qualification and qualitative selection

Article 77

Qualification systems

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

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

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

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

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

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

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

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

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

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

Article 78

Criteria for qualitative selection

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

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

Article 79

Reliance on the capacities of other entities

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

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abilities, the economic operator may where necessary rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. With regard to criteria relating to the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing a commitment by those entities to that effect.

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

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

Under the same conditions, a group of economic operators as referred to in Article 37(2) may rely on the capacity of participants in the group or of other entities.

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

Where, pursuant to Article 80 of this Directive, contracting entities have referred to exclusion or selection criteria provided for under Directive 2014/24/EU, contracting entities shall verify in accordance with Article 80(3) of this Directive whether the other entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria or whether there are grounds for exclusion, to which the contracting entities have referred, pursuant to Article 57 of Directive 2014/24/EU. The contracting entity shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion to which the contracting entity has referred. The contracting entity may require or may be required by the Member State to require that the economic operator

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

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

Under the same conditions, a group of economic operators as referred to in Article 37 may rely on the capacities of participants in the group or of other entities.

3 In the case of works contracts, service contracts and siting and installation operations in the context of a supply contract, contracting entities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 37(2), a participant in that group.

Article 80

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

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

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

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

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

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

Article 81

Quality assurance standards and environmental management standards

1 Contracting entities shall, where they require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for disabled persons, refer to quality assurance systems based on the relevant European standards series certified by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures where the economic operator concerned had no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator provided that the economic

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

2 Where contracting entities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, they shall refer to the Eco-Management and Audit Scheme (EMAS) of the Union or to other environmental management systems as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009 or other environmental management standards based on the relevant European or international standards by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States.

Where an economic operator had demonstrably no access to such certificates, or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the contracting entity shall also accept other evidence of environmental management measures, provided that the economic operator proves that these measures are equivalent to those required under the applicable environmental management system or standard.

3 Upon request, Member States shall make available to other Member States any information relating to the documents produced as evidence of compliance with quality and environmental standards referred to in paragraphs 1 and 2.

Subsection 2

Award of the contract

Article 82

Contract award criteria

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

2 The most economically advantageous tender from the point of view of the contracting entity shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 83, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the contract in question. Such criteria may comprise, for instance:

- a quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- b organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- c after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion, commitments with regard to parts and security of supply.

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The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

Member States may provide that contracting entities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting entities or certain types of contracts.

3 Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

- a the specific process of production, provision or trading of those works, supplies or services; or
- b a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance.

4 Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting entity. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting entities shall verify effectively the accuracy of the information and proof provided by the tenderers.

5 The contracting entity shall specify in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting entity shall indicate the criteria in descending order of importance.

Article 83

Life-cycle costing

1 Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works

- a costs, borne by the contracting entity or other users, such as:
 - (i) costs relating to acquisition,
 - (ii) costs of use, such as consumption of energy and other resources,
 - (iii) maintenance costs,
 - (iv) end of life costs, such as collection and recycling costs
- b cost imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

2 Where contracting entities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the data to be provided by the tenderers and the

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method which the contracting entity will use to determine the life-cycle costs on the basis of those data.

The method used for the assessment of costs imputed to environmental externalities shall fulfil all of the following conditions:

- a it is based on objectively verifiable and non-discriminatory criteria. In particular where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain economic operators;
- b it is accessible to all interested parties;
- c the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the Union is bound.

3 Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the Union that common method shall be applied for the assessment of life-cycle costs.

A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XV.

The Commission, shall be empowered to adopt delegated acts in accordance with Article 103 concerning the update of that list, when an update of the list is necessary due to the adoption of new legislation making a common method mandatory or the repeal or modification of existing legal acts.

Article 84

Abnormally low tenders

1 Contracting entities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

2 The explanations referred to in paragraph 1 may in particular relate to:

- a the economics of the manufacturing process, of the services provided or of the construction method;
- b the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
- c the originality of the supplies, services or work proposed by the tenderer;
- d compliance with obligations referred to in Article 36(2);
- e compliance with obligations referred to in Article 88;
- f the possibility of the tenderer obtaining State aid.

3 The contracting entity shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph 2.

Contracting entities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 36(2).

4 Where a contracting entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after

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consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting entity, that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU. Where the contracting entity rejects a tender in those circumstances, it shall inform the Commission thereof.

5 Upon request, Member States shall make available to other Member States by means of administrative cooperation any information at its disposal, such as laws, regulations, universally applicable collective agreements or national technical standards, relating to the evidence and documents produced in relation to details listed in paragraph 2.

Section 4

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

Article 85

Tenders comprising products originating in third countries

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

2 Any tender submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries, as determined in accordance with Regulation (EU) No 952/2013 of the European Parliament and of the Council⁽³⁾, exceeds 50 % of the total value of the products constituting the tender.

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

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

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

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

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

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

Article 86

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

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

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

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

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

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

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

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

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

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

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

CHAPTER IV

Contract performance

Article 87

Conditions for performance of contracts

Contracting entities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 82(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

Article 88

Subcontracting

1 Observance of the obligations referred to in Article 36(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.

2 In the procurement documents, the contracting entity may ask, or may be required by a Member State to ask, the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

3 Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting entity shall transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator to whom the contract has been awarded (the main contractor). Such measures may include appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.

4 Paragraphs 1 to 3 shall be without prejudice to the question of the main contractor's liability.

5 In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting entity, after the award of the contract and at the latest when the performance of the contract commences, the contracting entity shall require the main contractor to indicate to the contracting entity the name, contact details and legal representatives of its subcontractors, involved in such works or services, insofar as known at this point in time. The contracting entity shall require the main contractor to notify the contracting entity of any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services.

Notwithstanding the first subparagraph, Member States may impose the obligation to deliver the required information directly on the main contractor.

Where necessary for the purposes of point (b) of paragraph 6 of this Article, the required information shall be accompanied by the subcontractors' self-declarations as referred to in Article 80(3). The implementing measures pursuant to paragraph 8 of this Article may provide that subcontractors which are presented after the award of the contract shall provide the certificates and other supporting documents instead of the self-declaration.

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The first subparagraph shall not apply to suppliers.

Contracting entities may extend or may be required by Member States to extend the obligations provided for in the first subparagraph to for instance:

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

6 With the aim of avoiding breaches of the obligations referred to in Article 36(2), appropriate measures may be taken, such as:

- a Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 36(2).
- b Contracting authorities may, in accordance with Article 80(3) of this Directive, verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57 of Directive 2014/24/EU. In such cases, the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

7 Member States may provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors, for instance by providing for direct payments to subcontractors without it being necessary for them to request such direct payment.

8 Member States having chosen to provide for measures pursuant to paragraphs 3, 5 or 6 shall, by law, regulation or administrative provisions and having regard for Union law, specify the implementing conditions for those measures. In so doing, Member States may limit their applicability, for instance in respect of certain types of contracts, certain categories of contracting entities or economic operators or as of certain amounts.

Article 89

Modification of contracts during their term

1 Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive 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. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or 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 contracting entity;
 - c where all of the following conditions are fulfilled:
 - (i) the need for modification has been brought about by circumstances which a diligent contracting entity could not foresee;
 - (ii) the modification does not alter the overall nature of the contract;
 - d Where a new contractor replaces the one to which the contracting entity had initially awarded the contract as a consequence of either:
 - (i) an unequivocal review clause or option in conformity with point (a),
 - (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 this Directive; or
 - (iii) in the event that the contracting entity itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation pursuant to Article 88;
 - e where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

Contracting entities having modified a contract in the cases set out under points (b) and (c) of this paragraph shall publish a notice to that effect in the *Official Journal of the European Union*. Such notice shall contain the information set out in Annex XVI and shall be published in accordance with Article 71.

2 Furthermore, and without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met, contracts may equally be modified without a new procurement procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values:

- (i) the thresholds set out in Article 15; and
- (ii) 10 % of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts.

However, the modification may not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

3 For the purpose of the calculation of the price referred to in paragraph 2, the updated price shall be the reference value when the contract includes an indexation clause.

4 A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially

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concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

- a the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
- b 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;
- c the modification extends the scope of the contract or framework agreement considerably;
- d where a new contractor replaces the one to which the contracting entity had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1.

5 A new procurement procedure in accordance with this Directive shall be required for other modifications of the provisions of a works, supply or service contract or a framework agreement during its term than those provided for under paragraphs 1 and 2.

Article 90

Termination of contracts

Member States shall ensure that contracting entities have the possibility, at least under the following circumstances and under the conditions determined by the applicable national law, to terminate a works, supply or service contract during its term, where:

- (a) the contract has been subject to a substantial modification which would have required a new procurement procedure pursuant to Article 89;
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in Article 57(1) of Directive 2014/24/EU and should therefore have been excluded from the procurement procedure pursuant to the second subparagraph of Article 80(1) of this Directive;
- (c) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and this Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 TFEU.

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

- (1) Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC) ([OJ L 210, 31.7.2006, p. 19](#)).
- (2) Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 ([OJ L 218, 13.8.2008, p. 30](#)).
- (3) Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code ([OJ L 269, 10.10.2013, p. 1](#)).