
SCOTTISH STATUTORY INSTRUMENTS

2015 No. 446

The Public Contracts (Scotland) Regulations 2015

PART 2

RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE

CHAPTER 2

RULES ON PUBLIC CONTRACTS

Choice of Participants and Awarding Contracts

General principles

57.—(1) A contracting authority must award a contract or conclude a framework agreement on the basis of criteria laid down in accordance with regulations 67 to 69, provided that the contracting authority has verified in accordance with regulations 60 to 62 that—

- (a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, regulation 46 (variants); and
- (b) the tenderer—
 - (i) is not excluded in accordance with regulation 58 (exclusion grounds);
 - (ii) meets the selection criteria set out by the contracting authority in accordance with regulation 59 (selection criteria); and
 - (iii) meets, where applicable, the non-discriminatory rules and criteria referred to in regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(2) A contracting authority may decide not to award a contract to, or conclude a framework agreement with, the tenderer submitting the most economically advantageous tender where the authority has established that the tender does not comply with applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Directive as amended from time to time.

(3) In open procedures, a contracting authority may decide to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria in accordance with regulations 58 to 65.

(4) Where a contracting authority makes use of the possibility referred to in paragraph (3), the authority must ensure that the verification of absence of grounds for exclusion and of fulfilment of the selection criteria is carried out in an impartial and transparent manner so that no contract is awarded to, or framework agreement concluded with, a tenderer that—

- (a) should have been excluded under regulation 58 (exclusion grounds); or
- (b) does not meet the selection criteria set out by the contracting authority.

(5) Where information or documentation to be submitted by an economic operator is or appears to be incomplete or erroneous, or where specific documents are missing, a contracting authority may request the economic operator 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.

Exclusion grounds

58.—(1) A contracting authority must exclude an economic operator from participation in a procurement procedure where the authority has established, by verifying in accordance with regulations 60 (European Single Procurement Document: use, content and form of the ESPD), 61 (means of proof) and 62 (recourse to e-Certis), or is otherwise aware that that economic operator or a person to whom paragraph (2) applies has been convicted of any of the following offences—

- (a) the common law offence of conspiracy where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA on the fight against organised crime⁽¹⁾ or an offence under sections 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010⁽²⁾;
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889⁽³⁾ or section 1 of the Prevention of Corruption Act 1906⁽⁴⁾, where the offence relates to active corruption as defined in Article 3 of the Council Act of 26th May 1997⁽⁵⁾ and Article 3(1) of Council Joint Action 98/742/JHA⁽⁶⁾;
- (c) bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003⁽⁷⁾, where the offence relates to active bribery or corruption;
- (d) bribery within the meaning of sections 1 or 6 of the Bribery Act 2010⁽⁸⁾;
- (e) where the offence relates to fraud affecting the European Communities' financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities⁽⁹⁾—
 - (i) the offence of cheating the Revenue;
 - (ii) the common law offence of fraud;
 - (iii) the common law offence of theft or fraud;
 - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985⁽¹⁰⁾, or section 993 of the Companies Act 2006⁽¹¹⁾;
 - (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979⁽¹²⁾ or section 72 of the Value Added Tax Act 1994⁽¹³⁾;

(1) OJ L 300, 11.11.2008, p.42.

(2) 2010 asp 13.

(3) 1889 c.69. This Act was repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(4) 1906 c.34. Section 1 was amended by section 47(2) and (3) of the Criminal Justice Act 1988 (c.33), section 108(2) of the Anti-Terrorism, Crime and Security Act 2001 (c.24) and section 68(2) of the Criminal Justice (Scotland) Act 2003 (asp 7) and repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(5) OJ C 195, 25.6.1997, p.2.

(6) OJ L 358, 31.12.1998, p.2; repealed by Council Framework Decision 2003/568/JHA (OJ L 192, 31.7.2003, p.54).

(7) 2003 asp 7. Sections 68 and 69 were repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(8) 2010 c.23.

(9) OJ C 316, 27.11.1995, p.48.

(10) 1985 c.6. Section 458 was modified by regulation 4 of, and Part 1 of Schedule 2 to, the Limited Liability Partnerships Regulations 2001 (S.I. 2001/1090) and repealed by Schedule 16 to the Companies Act 2006 (c.46).

(11) 2006 c.46.

(12) 1979 c.2. There are amendments to this Act which are not relevant to these Regulations.

(13) 1994 c.23. Section 72 was amended by section 17(5) of the Finance Act 2003 (c.14) and partially repealed by Part 5(1) of Schedule 27 to the Finance Act 2007 (c.11). There are other amendments to this Act which are not relevant to these Regulations.

- (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993⁽¹⁴⁾;
- (vii) the common law offence of uttering; or
- (viii) the common law offence of attempting to pervert the course of justice;
- (f) any offence listed in—
 - (i) section 41 of the Counter-Terrorism Act 2008⁽¹⁵⁾; or
 - (ii) Schedule 2 to that Act where the court has determined that there is a terrorist connection.
- (g) money laundering within the meaning of sections 340(11) and 415 of the Proceeds of Crime Act 2002⁽¹⁶⁾;
- (h) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988⁽¹⁷⁾;
- (i) any offence under Part 1 of the Human Trafficking and Exploitation (Scotland) Act 2015⁽¹⁸⁾ or under any provision referred to in the Schedule to that Act;
- (j) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994⁽¹⁹⁾;
- (k) any other offence within the meaning of Article 57(1) of the Directive as defined by the law of any EEA state or any part thereof.

(2) This paragraph applies to a person who is a member of the administrative, management or supervisory body of the economic operator referred to in paragraph (1) or has powers of representation, decision or control in relation to such economic operator.

(3) A contracting authority must exclude an economic operator from participation in a procurement procedure where—

- (a) subject to paragraphs (5) to (7), the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or in accordance with those of any of the jurisdictions of the United Kingdom; or
- (b) the contracting authority is aware that the economic operator has committed an act prohibited under the Employment Relations Act 1999 (Blacklists) Regulations 2010⁽²⁰⁾ and the commission of such an act has been admitted by the economic operator or established by a judicial decision having final and binding effect.

(4) Subject to paragraph (5), a contracting authority may exclude an economic operator from participation in a procurement procedure where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

(5) A contracting authority may not exclude an economic operator pursuant to paragraph (3)(a) or (4) where—

⁽¹⁴⁾ 1993 c.36. There are amendments to this Act which are not relevant to these Regulations.

⁽¹⁵⁾ 2008 c.28

⁽¹⁶⁾ 2002 c.29.

⁽¹⁷⁾ 1988 c.33; sections 93A, 93B and 93C were inserted by sections 29, 30 and 31 of the Criminal Justice Act 1993 (c.36) and repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 12.

⁽¹⁸⁾ 2015 asp 12.

⁽¹⁹⁾ 1994 c.37; sections 49, 50 and 51 were repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 12.

⁽²⁰⁾ S.I. 2010/493.

- (a) the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines; or
 - (b) the obligation to make repayment otherwise ceases.
- (6) A contracting authority may disregard any of the prohibitions imposed by paragraphs (1) to (3), on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.
- (7) A contracting authority may also disregard the prohibition imposed by paragraph (3)(a) where an exclusion would be clearly disproportionate, in particular—
- (a) where only minor amounts of taxes or social security contributions are unpaid; or
 - (b) where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of fulfilling its obligations in a manner described in paragraph (5) before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.
- (8) A contracting authority may exclude an economic operator from participation in a procurement procedure where—
- (a) the contracting authority can demonstrate by any appropriate means a violation by the economic operator of applicable obligations referred to in regulation 57(2) (general principles);
 - (b) the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under laws and regulations to which the economic operator may be subject;
 - (c) the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
 - (d) the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
 - (e) a conflict of interest exists within the meaning of regulation 25 (conflicts of interest) which cannot be effectively remedied by other less intrusive measures;
 - (f) a distortion of competition from the prior involvement of the economic operator in the preparation of the procurement procedure, as referred to in regulation 42 (prior involvement of candidates or tenderers), cannot be remedied by other, less intrusive measures;
 - (g) the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;
 - (h) the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria;
 - (i) the economic operator has withheld information referred to in sub-paragraph (h) or is not able to submit the supporting documents required under regulation 60 (European Single Procurement Document: use, content and form of the ESPD); or
 - (j) the economic operator—

- (i) has or has sought to unduly influence the decision-making process of the contracting authority,
- (ii) has or has sought to obtain confidential information that may confer upon it undue advantages in the procurement procedure; or
- (iii) has negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.

(9) A contracting authority must exclude an economic operator where the authority becomes aware, at any time during the procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (1) to (3).

(10) A contracting authority may exclude an economic operator where the authority becomes aware, at any time during the procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (4) or (8).

(11) In the cases referred to in paragraph (1) and subject to paragraph (6), the period during which the economic operator must be excluded is 5 years from the date of the conviction by final judgment.

(12) In the cases referred to in paragraph (3)(b) or (8), and subject to paragraph (14), the period during which the economic operator may be excluded is 3 years from the date of the relevant event.

(13) Any economic operator that is in one of the situations referred to in paragraph (1), (3)(b) or (8) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

(14) If the contracting authority is satisfied that the evidence proves that the measures are sufficient for the purpose referred to in paragraph (13), the authority must not exclude the economic operator from the procurement procedure.

(15) For the purpose mentioned in paragraph (14), the economic operator must prove that it has—

- (a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- (b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- (c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

(16) The measures taken by the economic operator must be evaluated by the contracting authority taking into account the gravity and particular circumstances of the criminal offence or misconduct.

(17) Where the contracting authority considers that the measures are insufficient, the authority must give to the economic operator a statement of the reasons for that decision.

Selection criteria

59.—(1) Selection criteria may relate to—

- (a) suitability to pursue a professional activity;
- (b) economic and financial standing;
- (c) technical and professional ability.

(2) A contracting authority may impose upon economic operators as requirements for participation only the criteria referred to in paragraphs (5) to (19).

(3) A contracting authority must limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded.

(4) All requirements must be related and proportionate to the subject-matter of the contract.

(5) With regard to suitability to pursue a professional activity, a contracting authority may require economic operators to be enrolled in one of the professional or trade registers kept in their member State of establishment, as described in Schedule 5, or to comply with any other request set out in that Schedule.

(6) In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be a member of a particular organisation in order to be able to perform in their country of origin the service concerned, a contracting authority may require them to prove that they hold such authorisation or membership.

(7) With regard to economic and financial standing, a contracting authority may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract.

(8) A contracting authority may require that economic operators—

(a) in particular, have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract;

(b) provide information on their annual accounts showing the ratios, for example, between assets and liabilities;

(c) have an appropriate level of professional risk indemnity insurance.

(9) The minimum yearly turnover that economic operators are required to have must not exceed twice the estimated contract value, except in duly justified cases, such as by reference to special risks attached to the nature of the works, supplies or services.

(10) Where a contracting authority requires a higher minimum yearly turnover than that referred to in paragraph (9) the authority must state its main reasons for doing so in the procurement documents or in the report referred to in regulation 83(1) (reporting and documentation requirements).

(11) Ratios referred to in paragraph (8)(b) may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents, but such methods and criteria must be transparent, objective and non-discriminatory.

(12) Where a contract is divided into lots this regulation shall apply in relation to each individual lot.

(13) A contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be performed at the same time.

(14) In the case of a framework agreement under which contracts are to be awarded following a reopening of competition, the estimated contract value referred to in paragraph (9) must be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, and in the case of any other framework, on the basis of the estimated value of the framework agreement.

(15) In the case of a dynamic purchasing system, the estimated contract value referred to in paragraph (9) must be calculated on the basis of the expected maximum size of specific contracts to be awarded under that system.

(16) With regard to technical and professional ability, a contracting authority may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

(17) A contracting authority may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

(18) A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

(19) In a procurement procedure for works, for supplies requiring siting or installation work or for services, a contracting authority may evaluate the professional ability of economic operators to execute or provide the works, siting or installation or the services with regard to the skills, efficiency, experience and reliability of the economic operator.

(20) A contracting authority must state the requirements for participation, which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest.

European Single Procurement Document: Use, content and form of the ESPD

60.—(1) At the time of submission of requests to participate or of tenders, a contracting authority must accept the ESPD, consisting of an updated self-declaration as preliminary evidence instead of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils any of the following conditions—

- (a) it is not in one of the situations referred to in regulation 58 (exclusion grounds) in which economic operators must or may be excluded;
- (b) it meets the relevant selection criteria that have been set out under regulation 59 (selection criteria);
- (c) where applicable, it fulfils the objective rules and criteria that have been set out under regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(2) Where the economic operator relies on the capacities of other entities under regulation 64 (reliance upon the capacities of other entities), the ESPD must also contain the information referred to in paragraph (1) in respect of such entities.

(3) The ESPD must consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply or that the relevant selection criterion is fulfilled and must provide the relevant information as required by the contracting authority.

(4) The ESPD must further identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

(5) Where the contracting authority can obtain the supporting documents directly by accessing a database as mentioned in paragraph (11), the ESPD must also contain the information required for this purpose, such as the internet address of the database, any identification data and, where applicable, the necessary declaration of consent.

(6) An economic operator may reuse an ESPD which has already been used in a previous procurement procedure, provided that the economic operator confirms that the information contained in it continues to be correct.

(7) The ESPD must be provided exclusively in electronic form.

(8) A contracting authority may require candidates and tenderers at any moment during the procedure to submit all or any of the supporting documents where this is necessary to ensure the proper conduct of the procedure.

(9) Before awarding the contract, except a contract based on a framework agreement concluded in accordance with regulation 34(6) or (7)(a) (framework agreements), the contracting authority must

require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents in accordance with regulation 61 (means of proof) and, where appropriate, regulation 63 (quality assurance standards and environmental management standards).

(10) The contracting authority may invite economic operators to supplement or clarify the certificates received under regulations 61 (means of proof) and 63 (quality assurance standards and environmental management standards).

(11) Despite paragraphs (8) and (9), a contracting authority must not require economic operators to submit—

- (a) supporting documents or other documentary evidence where and in so far as the contracting authority has the possibility of obtaining the certificates or the relevant information directly by accessing a national database in any member State that is available free of charge, such as a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system; or
- (b) a supporting document which the contracting authority already possesses.

Means of proof

61.—(1) A contracting authority may require the certificates, statements and other means of proof referred to in this regulation as evidence for the absence of grounds for exclusion under regulation 58 (exclusion grounds) and for the fulfilment of the selection criteria in accordance with regulation 59 (selection criteria).

(2) A contracting authority must not require means of proof other than those referred to in this regulation and in regulations 59(17) (selection criteria) and 63 (quality assurance standards and environmental management standards).

(3) In respect of regulation 64 (reliance upon the capacities of other entities), an economic operator may rely on any appropriate means to prove to the contracting authority that the economic operator will have the necessary resources at its disposal.

(4) A contracting authority must accept the following as sufficient evidence that none of the cases specified in regulation 58 (exclusion grounds) apply to the economic operator—

- (a) as regards regulation 58(1) to (3) (exclusion grounds), the production of an extract from the relevant register, such as judicial records or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the member State or country of origin or the country where the economic operator is established showing that those requirements have been met; and
- (b) as regards regulation 58(4) to (6) and (8)(b) (exclusion grounds), a certificate issued by the competent authority in the member State or country concerned.

(5) Where the member State or country in question does not issue such documents or certificates, or to the extent that these do not cover all the cases specified in regulation 58(1) to (6) and (8)(b) (exclusion grounds), they may be replaced by a declaration on oath or, in member States or countries where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the member State or country of origin or in the member State or country where the economic operator is established.

(6) Proof of the economic operator's economic and financial standing may be provided by one or more of the following references—

- (a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

- (b) the presentation of financial statements or extracts from the financial statements, where publication of financial statements is required under the law of the country in which the economic operator is established;
- (c) a statement of the economic operator's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last 3 financial years available, depending on the date on which the economic operator was set up or the economic operator started trading, as far as the information on those turnovers is available.

(7) Where the references mentioned in paragraph (6) are not appropriate in a particular case, the contracting authority may require the economic operator to provide other information to prove its economic and financial standing.

(8) Where, for any valid reason, the economic operator is unable to provide the references or other information required by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate.

(9) Evidence of the economic operator's technical abilities may be provided by one or more of the following means, in accordance with the nature, quantity or importance, and the use, of the works, supplies or services—

- (a) a list of the works carried out over at the most the past 5 years, accompanied by certificates of satisfactory execution and outcome for the most important works; but, where necessary in order to ensure an adequate level of competition, a contracting authority may indicate that evidence of relevant works carried out more than 5 years before will be taken into account;
- (b) a list of the principal deliveries effected or the main services provided over at the most the past 3 years, with the sums, dates and recipients, whether public or private, involved; but, where necessary in order to ensure an adequate level of competition, a contracting authority may indicate that evidence of relevant supplies or services delivered or performed more than 3 years before will be taken into account;
- (c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking especially those responsible for quality control and, in the case of a public works contract, those upon whom the contractor can call in order to carry out the works;
- (d) a description of the technical facilities and measures used by the economic operator for ensuring quality and the undertaking's study and research facilities;
- (e) an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract;
- (f) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on behalf of the authority by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, where necessary, on the means of study and research which are available to it and the quality control measures it will operate;
- (g) the educational and professional qualifications of the service provider or contractor or those of the economic operator's managerial staff, provided that they are not to be evaluated as an award criterion;
- (h) an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;
- (i) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last 3 years;

- (j) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;
- (k) an indication of the proportion of the contract which the economic operator intends possibly to subcontract;
- (l) with regard to the products to be supplied, one or more of the following means—
 - (i) samples, descriptions or photographs, the authenticity of which must be certified where the contracting authority so requests;
 - (ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to technical specifications or standards.

Recourse to e-Certis

62.—(1) A contracting authority must have recourse to e-Certis and must require primarily such types of certificates or forms of documentary evidence as are covered by e-Certis.

(2) In this regulation, “e-Certis” means the online repository established by the Commission and referred to as “e-Certis” in the Directive.

Quality assurance standards and environmental management standards

63.—(1) A contracting authority must, where it requires the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for disabled persons, refer to quality assurance systems based on the relevant European standards series certified by accredited bodies.

(2) A contracting authority must recognise equivalent certificates from bodies established in other member States.

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

(4) Where a contracting authority requires the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, the authority must refer to—

- (a) the Eco-Management and Audit Scheme of the EU referred to in Regulation (EC) No 1221/2009 of the European Parliament and of the Council on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC(21);
- (b) other environmental management systems as recognised in accordance with Article 45 of that Regulation; or
- (c) other environmental management standards based on the relevant European or international standards by accredited bodies,

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

(5) Where an economic operator had demonstrably no access to such certificates referred to in paragraph (4), or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority must accept other evidence

(21) OJ No L 342, 22.12.2009, p.1, amended by Council Regulation (EU) No 517/2013 (OJ No L 158, 10.6.2013, p.1).

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.

Reliance upon the capacities of other entities

64.—(1) With regard to—

- (a) criteria relating to economic and financial standing as set out under regulation 59(7) to (15) (selection criteria); and
- (b) criteria relating to technical and professional ability as set out under regulation 59(16) to (19) (selection criteria),

an economic operator may, where appropriate and for a particular contract, rely upon the capacities of other entities, regardless of the legal nature of the links which it has with them.

(2) With regard to criteria relating to the educational and professional qualifications mentioned in regulation 61(9)(g) (means of proof), or to relevant professional experience, economic operators may however only rely upon the capacities of other entities where the latter will perform the works or services for which these capacities are required.

(3) Where an economic operator wants to rely upon the capacities of other entities, it must prove to the contracting authority that it will have at its disposal the resources necessary, for example by producing a commitment by those entities to that effect.

(4) The contracting authority must, in accordance with regulations 60 to 62, verify whether the entities upon whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion of those entities under regulation 58 (exclusion grounds).

(5) The contracting authority—

- (a) must require the economic operator to replace an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion; and
- (b) may require the economic operator to substitute an entity in respect of which there are non-compulsory grounds for exclusion.

(6) Where an economic operator relies upon the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require the economic operator and those entities to be jointly liable for the performance of the contract.

(7) A group of economic operators as referred to in regulation 20(4) (economic operators) may rely upon the capacities of participants in the group or of other entities, and paragraphs (1) to (6) apply in relation to such a group in the same way that they apply in relation to an economic operator.

(8) In the case of works contracts, supply contracts requiring siting or installation work or services contracts, a contracting authority may require certain critical tasks to be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in regulation 20(4) (economic operators), by a participant in that group.

Recognition of official lists of approved economic operators and certification by certification bodies.

65.—(1) Economic operators registered on an official list or having a certificate issued by a certification body may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the certification body.

(2) A certificate of either kind shall constitute a presumption of suitability with regard to requirements for qualitative selection encompassed by the certificate or the official list to which it relates.

(3) Information that can be deduced from registration on official lists or certification by certification bodies must not be questioned without justification.

(4) With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is to be awarded.

(5) In relation to an official list established or maintained by a member State other than the United Kingdom, paragraphs (1) and (3) apply only in favour of economic operators established in the member State holding the official list.

(6) The requirements of proof for the criteria for qualitative selection encompassed by the official list or certificate must comply with regulation 61 (means of proof) and, where appropriate, regulation 63 (quality assurance standards and environmental management standards)..

(7) A contracting authority must not require an economic operator to be registered on an official list or to provide a certificate issued by a certification body in order to participate in a public contract.

(8) A contracting authority must—

(a) recognise equivalent certificates from bodies established in other member States; and

(b) accept other equivalent means of proof.

(9) In this regulation—

“official list” means an official list of approved contractors, suppliers or service providers established or maintained by a member State under Article 64 of the Directive;

“certification body” means a certification body complying with European standards of certification, and “certificate issued by a certification body” means a certificate issued by such a body in accordance with certification arrangements for which a member State has provided for the purpose of Article 64 of the Directive.

(10) For the purposes of this regulation, no official list or certification arrangements are established, maintained or provided for in relation to the jurisdictions to which these Regulations extend and, accordingly, in paragraph (9), “member State” includes the United Kingdom only insofar as the official list or the certification arrangements are established, maintained or provided for in respect of any other jurisdiction of the United Kingdom.

Reduction of the number of otherwise qualified candidates to be invited to participate

66.—(1) This regulation applies to restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships.

(2) A contracting authority may limit the number of candidates meeting the selection criteria that the authority will invite to tender or to conduct a dialogue, provided that the minimum number of qualified candidates is available, in accordance with the following paragraphs of this regulation.

(3) A contracting authority must indicate, in the contract notice or in the invitation to confirm interest, the objective and non-discriminatory criteria or rules that the authority intends to apply, the minimum number of candidates the authority intends to invite and, where applicable the maximum number.

(4) The minimum number of candidates that may be indicated by a contracting authority is—

(a) in the restricted procedure, 5;

(b) in the competitive procedure with negotiation, the competitive dialogue procedure and in the innovation partnership procedure, 3.

(5) In any event the number of candidates invited must be sufficient to ensure genuine competition.

(6) Subject to paragraph (7), a contracting authority must invite a number of candidates at least equal to the minimum number indicated in accordance with paragraph (3).

(7) Where the number of candidates meeting the selection criteria and the minimum levels of ability as referred to in regulation 59(20) (selection criteria) is below the minimum number, the contracting authority may continue the procedure by inviting the candidates with the required capabilities.

(8) In the context of the same procedure, the contracting authority must not include economic operators that did not request to participate, or candidates that do not have the required capabilities.

Contract award criteria

67.—(1) A contracting authority—

- (a) must base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority; and
- (b) may not use price only or cost only as the sole award criteria.

(2) A contracting authority must identify the most economically advantageous tender on the basis of the best price-quality ratio, which must be assessed on the basis of criteria linked to the subject-matter of the public contract in question and must include the price or cost, using a cost-effectiveness approach.

(3) A cost-effectiveness approach referred to in paragraph (2) may include life-cycle costing in accordance with regulation 68 (life-cycle costing).

(4) Criteria referred to in paragraph (2) may comprise or include—

- (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.

(5) 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.

(6) Award criteria must be considered to be linked to the subject-matter of the contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in—

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

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

(7) Award criteria must—

- (a) not have the effect of conferring an unrestricted freedom of choice upon the contracting authority;
- (b) ensure the possibility of effective competition; and
- (c) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

(8) In case of doubt, the contracting authority must verify effectively the accuracy of the information and proof provided by the tenderers.

(9) The contracting authority must specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

(10) The weightings referred to in paragraph (9) may be expressed by providing for a range with an appropriate maximum spread.

(11) Where weighting is not possible for objective reasons, the contracting authority must indicate the criteria in decreasing order of importance.

Life-cycle costing

68.—(1) Life-cycle costing must, to the extent relevant, cover part or all of the following costs over the life cycle of a product, service or works—

- (a) costs, borne by the contracting authority 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; and
- (b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified.

(2) The costs mentioned in paragraph (1)(b) may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

(3) The method used for the assessment of costs imputed to environmental externalities must fulfil all of the following conditions—

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

(4) Where a contracting authority assesses costs using a life-cycle costing approach, the authority must indicate in the procurement documents—

- (a) the data to be provided by the tenderers; and
- (b) the method which the contracting authority will use to determine the life-cycle costs on the basis of those data.

(5) Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the EU, that common method must be applied for the assessment of life-cycle costs.

(6) Legislative acts referred to in paragraph (5) include those set out in Annex XIII to the Directive as amended from time to time.

Abnormally low tenders

69.—(1) A contracting authority must require a tenderer to explain the price or costs proposed in the tender where the tender appears to be abnormally low in relation to the works, supplies or services.

- (2) The explanations given in accordance with paragraph (1) may, in particular, relate to—

- (a) the economics of the manufacturing process, of the services provided or of the construction method;
 - (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the execution of the works or for the supply of the products or services;
 - (c) the originality of the works, supplies or services proposed by the tenderer;
 - (d) compliance with obligations referred to in regulation 57(2) (general principles);
 - (e) compliance with obligations referred to in regulation 71 (subcontracting);
 - (f) the possibility of the tenderer obtaining State aid.
- (3) The contracting authority must assess the information provided by consulting the tenderer.
- (4) The contracting authority may only reject the tender where the explanations given and any evidence supplied do not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).
- (5) The contracting authority must reject the tender where the authority has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 57(2) (general principles).
- (6) Where the contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone—
- (a) after consultation with the tenderer; and
 - (b) where the tenderer is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the TFEU.
- (7) Where the contracting authority rejects a tender in the circumstances referred to in paragraph (6), it must inform the Commission.