
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

SECTION 3

Procedures

Conditions relation to the GPA and other international agreements

26. In so far as they are covered by Annexes 1, 2 and 4 to 7 to the EU's Appendix I to the GPA and by the other international agreements by which the EU is bound, a contracting authority must 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 EU.

Choice of procedures

27.—(1) When undertaking a procurement a contracting authority must apply a procedure which complies with these Regulations and includes publication of a call for competition except where regulation 33 (use of the negotiated procedure without prior notification) permits a contracting authority to award a contract using negotiated procedure without prior publication.

(2) A call for competition must be made—

- (a) where permitted by paragraph (8), by means of a prior information notice in accordance with regulation 49(6) to (8) (prior information notices); or
- (b) by means of a contract notice in accordance with regulation 50 (contract notices).

(3) A contracting authority may, in accordance with these Regulations, apply—

- (a) an open or a restricted procedure; or
- (b) an innovation partnership.

(4) A contracting authority may apply a competitive procedure with negotiation or a competitive dialogue where—

- (a) the needs of the contracting authority cannot be met without adaptation of readily available solutions;
- (b) the works, supplies or services required include design or innovative solutions;
- (c) the contract cannot be awarded without prior negotiations because of specified circumstances related to the nature or complexity of the works, supplies or services or the legal and financial make-up or because of the risks attaching to any of them;

- (d) the technical specifications of the works, supplies or services cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference; or
- (e) in response to an open or restricted procedure only irregular or unacceptable tenders are submitted.

(5) Where paragraph (4)(e) applies, a contracting authority is not required to publish a contract notice where the authority includes in the procedure all of, and only, the tenderers which satisfy the criteria set out in regulations 57 to 64 and which, during the prior open or restricted procedure submitted tenders in accordance with the formal requirements of the procurement procedure.

(6) A tender must be considered irregular, for the purpose of paragraph (4)(e), where—

- (a) it does not comply with the procurement documents;
- (b) it was received late;
- (c) there is evidence of collusion or corruption; or
- (d) it has been found by the contracting authority to be abnormally low.

(7) A tender must be considered unacceptable, for the purpose of paragraph (4)(e), where—

- (a) it was submitted by a tenderer which does not have the required qualifications; or
- (b) the price tendered exceeds the contracting authority's budget as determined and documented prior to the commencement of the procurement procedure.

(8) Where the contract is to be awarded following a restricted procedure or competitive procedure with negotiation, a sub-central contracting authority may make the call for competition by means of a prior information notice.

(9) Nothing in these Regulations prevents an authority which has commenced a procurement from terminating that procurement at any time.

Open Procedure

28.—(1) In an open procedure, a contracting authority must permit any interested economic operator to submit a tender in response to a call for competition within the time period set by the authority in accordance with this regulation.

(2) The tender must be accompanied by the information for qualitative selection that is required by the contracting authority.

(3) Subject to paragraphs (4) to (6), the minimum time period for the receipt of tenders shall be 35 days from the date on which the contract notice is sent for publication.

(4) Where a contracting authority has published a prior information notice which was not itself used as a means of calling for competition under regulation 27(8) (choice of procedures), the minimum time limit for the receipt of tenders may be reduced to 15 days, provided that—

- (a) the prior information notice included all the information required for the contract notice in section I of Part B of Annex V to the Directive insofar as that information was available at the time the prior information notice was published; and
- (b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent for publication.

(5) Where a state of urgency duly substantiated by a contracting authority renders it impracticable to apply the minimum time limit set out in paragraph (3), the authority may fix a time limit which must not be less than 15 days from the date on which the contract notice was sent for publication.

(6) A contracting authority may reduce the minimum time period referred to in paragraph (3) by a period of up to 5 days where it accepts that tenders may be submitted by electronic means in accordance with regulation 23 (rules applicable to communication).

Restricted Procedure

29.—(1) In a restricted procedure, a contracting authority must permit any economic operator to submit a request to participate in response to a call for competition within the time period set in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the contracting authority.

(3) Subject to paragraph (11), the minimum time period for receipt of requests to participate shall be 30 days from the date on which—

- (a) the contract notice was sent for publication; or
- (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest was sent.

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

(5) A contracting authority may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(6) Subject to paragraphs (7) to (11), the minimum time limit for the receipt of tenders shall be 30 days from the date on which the invitation to tender is sent.

(7) Where a contracting authority has published a prior information notice which was not itself used as a means of calling for competition, the minimum time period for the receipt of tenders referred to in paragraph (6), may be reduced to a minimum of 10 days provided that the prior information notice—

- (a) included all the information required in section I of Part B of Annex V to the Directive, insofar as that information was available at the time the prior information notice was published; and
- (b) was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(8) A sub-central contracting authority may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected candidates, provided that all the selected candidates have the same time to prepare and submit their tenders.

(9) In the absence of such an agreement, the time limit must be at least 10 days from the date on which the invitation to tender was sent.

(10) The time limit for the receipt of tenders provided for by paragraph (6) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 23 (rules applicable to communication).

(11) Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in this regulation, it may fix a time limit—

- (a) for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice was sent; and
- (b) for the receipt of tenders which shall not be less than 10 days from the date on which the invitation to tender was sent.

Competitive procedure with negotiation

30.—(1) In a competitive procedure with negotiation, a contracting authority must permit any economic operator to submit a request to participate in response to a call for competition within the time period set in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the contracting authority.

(3) In the procurement documents, the contracting authority must—

- (a) identify the subject-matter of the procurement by providing a description of the authority's needs and the characteristics required of the works, supplies or services to be procured;
- (b) indicate which elements of the description define the minimum requirements to be met by all tenders; and
- (c) specify the contract award criteria.

(4) The information provided by the contracting authority in accordance with paragraph (3) must be sufficiently precise to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the procedure.

(5) The minimum time period for the receipt of requests to participate shall, subject to paragraph (11), be 30 days from the date on which—

- (a) the contract notice was sent for publication; or
- (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest was sent.

(6) The minimum time period for the receipt of initial tenders shall, subject to paragraphs (7) to (11), be 30 days from the date on which the invitation to tender was sent.

(7) Where a contracting authority has published a prior information notice which was not itself used as a means of calling for competition, the minimum time period for the receipt of initial tenders referred to in paragraph (6), may be reduced to a minimum of 10 days provided that the prior information notice—

- (a) included all the information required in section I of Part B of Annex V, insofar as that information was available at the time the prior information notice was published; and
- (b) was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(8) A sub-central contracting authority may set the time limit for the receipt of initial tenders by mutual agreement between the contracting authority and the selected candidates, provided that all the selected candidates have the same time to prepare and submit their initial tenders.

(9) In the absence of such an agreement, the time limit must be at least 10 days from the date on which the invitation to tender was sent.

(10) The time limit for the receipt of initial tenders provided for by paragraph (6) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 23 (rules applicable to communication).

(11) Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in this regulation, it may fix a time limit—

- (a) for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice was sent;
- (b) for the receipt of initial tenders which shall not be less than 10 days from the date on which the invitation to tender was sent.

(12) A contracting authority may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(13) Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit an initial tender which shall be the basis for the subsequent negotiations.

(14) Subject to paragraph (16), a contracting authority must negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve its content.

(15) A contracting authority must not negotiate the minimum requirements or the award criteria referred to in paragraph (3).

(16) A contracting authority may award a contract on the basis of the initial tender without negotiation where the authority has indicated, in the contract notice or in the invitation to confirm interest, that the authority reserves the possibility of doing so.

(17) During the negotiations, a contracting authority must—

- (a) ensure equal treatment of all tenderers;
- (b) not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (c) inform in writing all tenderers whose tenders have not been eliminated of any changes to the technical specification or other procurement documents; and
- (d) following any such changes, provide sufficient time for all tenderers referred to in paragraph (c) to modify and re-submit amended tenders, as appropriate.

(18) In accordance with regulation 22 (confidentiality), a contracting authority must not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

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

(20) A contracting authority may conduct a competitive procedure with negotiation in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in—

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

(21) The contracting authority must indicate, in the contract notice, the invitation to confirm interest or in another procurement document, whether it will use the option described in paragraph (20).

(22) Where the contracting authority uses the option described in paragraph (20) it must ensure that in the final stage, the number of tenders remaining shall make for genuine competition in so far as there are enough tenders or qualified candidates.

(23) Where the contracting authority intends to conclude the negotiations, it must—

- (a) inform the remaining tenderers and set a common deadline to submit any new or revised tenders;
- (b) verify that the final tenders are in conformity with the minimum requirements and comply with regulation 57(1) (general principles);
- (c) assess the final tenders on the basis of the award criteria; and
- (d) award the contract in accordance with regulations 67 to 69.

Competitive Dialogue

31.—(1) In a competitive dialogue, a contracting authority must permit any economic operator to submit a request to participate in response to a contract notice within the time period set in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the contracting authority.

(3) The minimum time period for receipt of a request to participate shall be 30 days from the date on which the contract notice was sent for publication.

(4) A contracting authority may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(5) Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may participate in the dialogue.

(6) The contract must be awarded on the sole basis of the best price-quality ratio in accordance with regulation 67 (contract award criteria).

(7) A contracting authority must—

- (a) in the contract notice, set out its needs and requirements; and
- (b) in the contract notice, in a descriptive document or in both—
 - (i) define those needs and requirements;
 - (ii) set out and define the chosen award criteria; and
 - (iii) set out an indicative timeframe.

(8) A contracting authority—

- (a) must open, with the participants selected in accordance with the relevant provisions of regulations 57 to 66, a dialogue with the aim of identifying and defining the means best suited to satisfying its needs; and
- (b) may discuss all aspects of the procurement with the chosen participants during this dialogue.

(9) During the dialogue, a contracting authority—

- (a) must ensure equal treatment of all participants; and
- (b) must not provide information in a discriminatory manner which may give any participant an advantage over others.

(10) In accordance with regulation 22 (confidentiality), a contracting authority must not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or tenderer participating in the dialogue without its agreement.

(11) Any agreement referred to in paragraph (10) shall not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(12) A contracting authority may conduct a competitive dialogue in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage only by applying the award criteria specified in—

- (a) the contract notice; or
- (b) the descriptive document.

(13) The contracting authority must indicate, in the contract notice or the descriptive document, whether it will use the option described in paragraph (12).

(14) The contracting authority shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

(15) Where the contracting authority uses the option described in paragraph (12) it must ensure that in the final stage, the number of solutions remaining shall make for genuine competition in so far as there are enough solutions or qualified candidates.

(16) When the contracting authority has declared that the dialogue is concluded and informed the remaining participants, the authority must invite each remaining participant to submit their final tender on the basis of the solution or solutions presented and specified during the dialogue.

(17) The final tenders—

- (a) shall contain all the elements required and necessary for the performance of the project; and
- (b) may, subject to paragraph (18), be clarified, specified and optimised at the request of the contracting authority.

(18) Any clarification, specification, optimisation or additional information provided pursuant to a request referred to in paragraph (17)(b) must not involve changes to the essential aspects of the tender or the procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where such changes are likely to distort competition or cause discrimination.

(19) A contracting authority must assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document.

(20) At the request of the contracting authority, and subject to paragraph (21), negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 67 (contract award criteria) may be carried out to confirm financial commitments or other terms contained in the tender in order to finalise the terms of the contract.

(21) Any negotiation and finalisation of the terms of the contract referred to in paragraph (20) must not involve changes to the essential aspects of the tender or the procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where such changes are likely to distort competition or cause discrimination.

(22) A contracting authority may specify prizes or payments to the participants in the dialogue.

Innovation Partnership

32.—(1) A contracting authority may establish an innovation partnership with one partner or with several partners conducting separate research and development activities.

(2) The innovation partnership must aim at the development of innovative works, products or services and the subsequent purchase of the resulting works, supplies or services provided that they correspond to the performance levels and maximum costs agreed between the contracting authority and the partners.

(3) The estimated value of works, supplies or services must not be disproportionate in relation to the investment required for their development.

(4) The innovation partnership must 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.

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

(6) Based on those targets, the contracting authority may decide after each phase to—

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

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

(7) In the procurement of an innovation partnership, a contracting authority must permit any economic operator to submit a request to participate in response to a contract notice within the time period set in accordance with this regulation.

(8) A request by an economic operator referred to in paragraph (7) must be accompanied by the information for qualitative selection that is requested by the contracting authority

(9) In the procurement documents, the contracting authority must—

- (a) identify the subject matter of the procurement by providing the description of the authority's need for innovative works, products or services that cannot be met by purchasing works, products or services already available on the market;
- (b) indicate which elements of this description define the minimum requirements to be met by all tenders;
- (c) specify the award criteria; and
- (d) define the arrangements applicable to intellectual property rights.

(10) The information provided by the contracting authority in accordance with paragraph (9) must 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.

(11) The minimum time period for the receipt of requests to participate shall be 30 days from the date on which the contract notice is sent for publication.

(12) A contracting authority may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(13) In selecting candidates, a contracting authority must, in particular, apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

(14) Only those economic operators invited to do so by the contracting authority following its assessment of the requested information may participate in the procedure and submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions.

(15) A contracting authority must negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve its content.

(16) A contracting authority must not negotiate the minimum requirements or the award criteria referred to in paragraph (9).

(17) During the negotiations, a contracting authority—

- (a) must ensure equal treatment of all tenderers;
- (b) must not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (c) must, in writing, inform all tenderers whose tenders have not been eliminated of any changes to the technical specifications or other procurement documents; and
- (d) must provide sufficient time following any such changes for all tenderers referred to in paragraph (c) to modify and re-submit amended tenders, as appropriate.

(18) In accordance with regulation 22 (confidentiality), a contracting authority must not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

(19) Any agreement referred to in paragraph (18) must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(20) A contracting authority may conduct negotiations during innovation partnership procedures in successive stages in order to reduce the number of tenders to be negotiated only by applying the award criteria specified in the contract notice or another procurement document.

(21) The contracting authority must indicate in the contract notice or in another procurement document, whether it will use the option described in paragraph (20).

(22) The contracts must be awarded on the sole basis of the best price-quality ratio in accordance with regulation 67 (contract award criteria).

(23) The contracting authority must 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.

(24) In the case of an innovation partnership with several partners, the contracting authority must not, in accordance with regulation 22 (confidentiality), 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.

(25) Any agreement referred to in paragraph (24) must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

Use of the negotiated procedure without prior publication

33.—(1) A contracting authority may award a public contract following negotiated procedure without prior publication of a contract notice or prior information notice in any of the following cases—

- (a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests;
 - (b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons—
 - (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
 - (ii) competition is absent for technical reasons;
 - (iii) the protection of exclusive rights, including intellectual property rights, but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement; or
 - (c) where (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for open procedure, restricted procedure or competitive procedure with negotiation cannot be complied with.
- (2) For the purposes of paragraph (1)(a)—
- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents; and
 - (b) a request to participate shall be considered not to be suitable where the economic operator concerned—
 - (i) has been or would be excluded under regulation 58 (exclusion grounds); or
 - (ii) does not meet the selection criteria.

(3) For the purposes of paragraph (1)(c), the circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority.

(4) A contracting authority may award a public supply contract following negotiated procedure without prior publication in any of the following cases—

- (a) where the products involved are manufactured purely for the purpose of research, experimentation, study or development, but a contract awarded in reliance upon this subparagraph shall not include quantity production to establish commercial viability or to recover research and development costs;
- (b) 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 authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- (c) for supplies quoted and purchased on a commodity market;
- (d) for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.

(5) For the purposes of paragraph (4)(b), the duration of such a contract, as well as that of recurrent contracts must not, save in exceptional circumstances, exceed 3 years.

(6) A contracting authority may award a public service contract following negotiated procedure without prior publication where the contract concerned—

- (a) follows a design contest organised in accordance with these Regulations; and
- (b) is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest.

(7) Where there is more than one winner of the design contest referred to in paragraph (6), all of them must be invited to participate in the negotiation.

(8) A contracting authority may award a public contract following negotiated procedure without prior publication where—

- (a) it is for new works, services or both, consisting of the repetition of similar works or services entrusted to the economic operator to which the contracting authority awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded following a procedure in accordance with regulation 27(1) and (2) (choice of procedures);
- (b) the basic project indicated the extent of possible additional works or services and the conditions under which they would be awarded;
- (c) the possible use of this procedure was disclosed in the procurement documents and the total estimated cost of subsequent works or services was taken into consideration by the contracting authority when applying regulation 5 (thresholds) in relation to the original contract; and
- (d) not more than 3 years has elapsed following the conclusion of the original contract.

SECTION 4

Techniques and Instruments for Electronic and Aggregated Procurement

Framework Agreements

34.—(1) A contracting authority may conclude a framework agreement, provided that the authority applies the procedures provided for in these Regulations.

(2) The term of a framework agreement must not exceed 4 years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

(3) A contract based on a framework agreement must be awarded in accordance with the procedures laid down in this regulation.

(4) The procedures referred to in paragraph (3) may be applied only between those contracting authorities clearly identified for that purpose in the call for competition or the invitation to confirm interest and those economic operators that are party to the framework agreement as concluded.

(5) A contract based on a framework agreement must under no circumstances entail substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph (6).

(6) Where a framework agreement is concluded with a single economic operator—

- (a) a contract based on that agreement must be awarded within the limits laid down in the framework agreement; and
- (b) for the award of such a contract, a contracting authority may consult in writing the economic operator which is party to the framework agreement, requesting it to supplement its tender as necessary.

(7) Where a framework agreement is concluded with more than one economic operator, that framework agreement must be performed in one of the following ways—

- (a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out—
 - (i) all the terms governing the provision of the works, supplies or services concerned; and
 - (ii) the objective conditions for determining which of the economic operators that are party to the framework agreement must perform those works, supplies or services (which conditions must be indicated in the procurement documents for the framework agreement);
- (b) where the framework agreement sets out all the terms governing the provision of the works, supplies or services concerned—
 - (i) partly without reopening competition in accordance with sub-paragraph (a); and
 - (ii) partly through reopening competition amongst the economic operators which are party to the framework agreement,

where this possibility has been stipulated by the contracting authority in the procurement documents for the framework agreement; or

- (c) where not all the terms governing the provision of the works, supplies or services are laid down in the framework agreement, through reopening competition amongst the economic operators which are parties to the framework agreement.

(8) For the purposes of paragraph (7)(b)—

- (a) the choice of whether specific works, supplies or services shall be acquired following reopening of competition or directly on the terms set out in the framework agreement must be made pursuant to objective criteria, which must be set out in the procurement documents for the framework agreement; and

(b) those procurement documents must also specify which terms may be subject to reopening of competition.

(9) The possibilities provided for in paragraph (7)(b) must also apply to any lot of a framework agreement for which all the terms governing the provision of the works, supplies or services concerned are set out in the framework agreement, regardless of whether all the terms governing the provision of the works, supplies or services concerned under other lots have been set out.

(10) The competition referred to in paragraph (7)(b) and (c) must be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms and, where appropriate, other terms referred to in the procurement documents for the framework agreement, in accordance with the following procedure—

- (a) for every contract to be awarded, a contracting authority must consult in writing the economic operators capable of performing the contract;
- (b) a contracting authority must fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
- (c) a contracting authority must require tenders to be submitted in writing and must not open the tenders until the stipulated time limit for reply has expired; and
- (d) a contracting authority must award each contract to the tenderer that has submitted the most economically advantageous tender on the basis of the award criteria set out in the procurement documents for the framework agreement.

Dynamic Purchasing Systems

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

(2) The dynamic purchasing system must—

- (a) be operated as a completely electronic process; and
- (b) throughout the period of validity of the system, be open to any economic operator that satisfies the selection criteria.

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

(4) The characteristics referred to in paragraph (3) may include reference to either or both of—

- (a) the maximum allowable size of the subsequent specific contracts; and
- (b) a specific geographic area in which subsequent specific contracts will be performed.

(5) In order to procure under a dynamic purchasing system, a contracting authority must follow the restricted procedure, and accordingly the provisions of regulation 29 (restricted procedure) apply, subject to the following provisions of this regulation.

(6) A contracting authority must admit to a dynamic purchasing system all of the candidates satisfying the selection criteria and must not limit the number of candidates to be admitted whether under regulations 29(4) (restricted procedure) or 66 (reduction of the number of otherwise qualified candidates to be invited to participate) or otherwise.

(7) Where a contracting authority has divided the system into categories of works, supplies or services in accordance with paragraph (3), the authority must specify the applicable selection criteria for each category.

(8) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which—

- (a) the contract notice is sent; or
 - (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent.
- (9) 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.
- (10) The minimum time limit for receipt of tenders shall be 10 days from the date on which the invitation to tender is sent.
- (11) All communications in the context of a dynamic purchasing system must be made only by electronic means in accordance with regulation 23(1) to (7) and (11) to (20) (Rules applicable to communication).
- (12) For the purposes of awarding contracts under a dynamic purchasing system, a contracting authority must—
- (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 system operates, the electronic equipment used and the technical connection arrangements and specifications;
 - (c) indicate in the procurement documents any division into categories of works, supplies or services and the characteristics defining them; and
 - (d) throughout the period of validity of the system, offer unrestricted and full direct access to the procurement documents in accordance with regulation 54 (electronic availability of procurement documents).
- (13) A contracting authority must, throughout the period of validity of the dynamic purchasing system, give any economic operator the possibility of requesting to participate in the system under the conditions referred to in paragraphs (5) to (12).
- (14) A contracting authority must finalise evaluation of such requests in accordance with the selection criteria within 10 working days following their receipt.
- (15) The deadline referred to in paragraph (14) may be extended to a maximum of 15 working days in individual cases where justified, in particular, because of the need to examine additional documentation or otherwise to verify whether the selection criteria are met.
- (16) Despite paragraphs (14) and (15), as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, a contracting authority may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period.
- (17) Where a contracting authority intends to extend the evaluation period in accordance with paragraph (16), the authority must indicate in the procurement documents the length of the extended period that the authority intends to apply.
- (18) A contracting authority must inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.
- (19) A contracting authority must invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with regulation 55 (invitations to candidates).
- (20) Where the dynamic purchasing system has been divided into categories of works, supplies or services, a contracting authority must invite every relevant participant to submit a tender.

(21) In paragraph (20), “relevant participant” means an economic operator which has been admitted to the dynamic purchasing system in relation to the category corresponding to the specific procurement concerned.

(22) A contracting authority must award the contract to the tenderer that submitted the most economically advantageous tender on the basis of the award criteria set out in the contract notice for the dynamic purchasing system or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest.

(23) Those criteria may, where appropriate, be formulated more precisely in the invitation to tender.

(24) A contracting authority may, at any time throughout the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed ESPD within 5 working days from the date on which that request is transmitted.

(25) Regulation 60(8) to (11) (European Single Procurement Document: use, content and form of the ESPD) shall apply throughout the period of validity of the dynamic purchasing system.

(26) A contracting authority must indicate the period of validity of the dynamic purchasing system in the call for competition.

(27) A contracting authority must notify the Commission of any change to the period of validity using—

- (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 regulation 51 (contract award notice).

(28) No charges may be made to any economic operators which are interested in or are a party to the dynamic purchasing system.

Electronic Auctions

36.—(1) A contracting authority may use electronic auctions, in which economic operators present one or both of the following:—

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

(2) A contracting authority must 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.

(3) Electronic auctions must not be used for public works contracts or public service contracts, which have as their subject-matter intellectual activities (such as the design of works) which cannot be ranked using automatic evaluation methods.

(4) A contracting authority which decides to hold an electronic auction must state that fact in the contract notice or in the invitation to confirm interest.

(5) In open or restricted procedures or competitive procedures with negotiation when the content of the procurement documents, in particular the technical specifications, can be established with precision a contracting authority—

- (a) may decide that the award of a public contract shall be preceded by an electronic auction;
- (b) may hold an electronic auction—
 - (i) on the reopening of competition among the parties to a framework agreement as provided for in regulation 34(7)(b) or (c) (framework agreements); or

(ii) on the opening for competition of contracts to be awarded under a dynamic purchasing system.

(6) The electronic auction must be based on prices, on the new values of the features of the tenders indicated in the procurement documents or on both, where the contract is awarded on the basis of the best price-quality ratio.

(7) Where a contracting authority has decided to hold an electronic auction, the procurement documents must include at least the following—

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

(8) Before proceeding with an electronic auction, a contracting authority must make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them.

(9) A tender must be considered admissible where—

- (a) it has been submitted by a tenderer who has not been excluded pursuant to regulation 58 (exclusion grounds) and who meets the selection criteria; and
- (b) it is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.

(10) A tender must be considered to be irregular for the purposes of paragraph (9)(b) where—

- (a) it does not comply with the procurement documents;
- (b) it was received late;
- (c) there is evidence of collusion or corruption; or
- (d) it has been found by the contracting authority to be abnormally low.

(11) A tender must be considered to be unacceptable for the purposes of paragraph (9)(b) where—

- (a) it was submitted by a tenderer which does not have the required qualifications; or
- (b) the price tendered exceeds the contracting authority's budget as determined and documented prior to the commencement of the procurement procedure.

(12) A tender must be considered not to be suitable for the purpose of paragraph (9)(b) where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents.

(13) All tenderers that have submitted admissible tenders must be invited simultaneously to participate in the electronic auction using, as of the date and time specified in the invitation, the technical connection arrangements referred to in accordance with the instructions set out in the invitation.

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

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

(16) The invitation must be accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in regulation 67(9) (contract award criteria).

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

(18) The formula referred to in paragraph (17) must 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.

(19) For the purpose of paragraph (18), any ranges of weightings must be reduced beforehand to a specified value.

(20) Where variants are authorised in accordance with regulation 46 (variants), a separate formula must be provided for each variant.

(21) Throughout each phase of an electronic auction the contracting authority must instantaneously communicate to all tenderers at least sufficient information to enable the tenderers to ascertain their relative rankings at any moment.

(22) A contracting authority may, where this has been previously indicated, communicate other information concerning other prices or values submitted.

(23) A contracting authority may also at any time announce the number of participants in the current phase of the auction.

(24) In no case, however, may a contracting authority disclose the identities of the tenderers during any phase of an electronic auction.

(25) A contracting authority must close an electronic auction—

(a) at the previously indicated date and time;

(b) when the authority receives no more new prices or new values which meet the requirements concerning minimum differences specified in accordance with paragraph (7) (e), provided that the authority has previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction; or

(c) when all of the previously indicated number of phases in the auction have been completed.

(26) Where the contracting authority intends to close an electronic auction in accordance with paragraph (25)(c), whether or not in combination with any arrangements laid down in paragraph (25) (b), the authority must indicate in the invitation to participate in the auction the timetable for each phase of the auction.

(27) After closing an electronic auction, a contracting authority must award the contract in accordance with regulation 67 (contract award criteria) on the basis of the results of the electronic auction.

Electronic catalogues

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

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

(3) Electronic catalogues must 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 authority.

(4) Electronic catalogues must also comply with the requirements for electronic communication tools set out in regulation 23 (rules applicable to communication) as well as with any additional requirements set by the contracting authority in accordance with that regulation.

(5) Where the presentation of tenders in the form of electronic catalogues is accepted or required, a contracting authority must—

- (a) state that to be the case in the contract notice, or in the invitation to confirm interest where a prior information notice is used as a means of calling for competition; and
- (b) indicate in the procurement documents all the necessary information pursuant to regulation 23(16) to (20) (rules applicable to communication) concerning the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

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

(7) Where a contracting authority requires updated catalogues in accordance with paragraph (6), the authority must—

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

(8) Where a contracting authority reopens competition for a specific contract in accordance with paragraph (7)(b), the authority must—

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

(9) A contracting authority must allow an adequate period of time between the notification referred to in paragraph (8)(a) and the collection of information.

(10) Before awarding the contract, a contracting authority must present the collected information to the tenderer concerned and give the tenderer the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.

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

(12) A contracting authority may also award a contract based on a dynamic purchasing system in accordance with paragraphs (7)(b) and (8) to (10) 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 authority.

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

Centralised purchasing activities and central purchasing bodies

38.—(1) A contracting authority may acquire supplies, services or both from a central purchasing body offering the centralised purchasing activity referred to in paragraph (9)(a).

(2) A contracting authority may acquire works, supplies or services by using—

- (a) a contract awarded by a central purchasing body;
- (b) a dynamic purchasing system operated by a central purchasing body; or
- (c) to the extent set out in regulation 34(4) (framework agreements), a framework agreement concluded by a central purchasing body offering the centralised purchasing activity.

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

(4) Subject to paragraph (5), where a contracting authority makes an acquisition in accordance with paragraphs (1) or (2), the contracting authority fulfils its obligations under these Regulations in relation to such acquisition.

(5) A contracting authority referred to in paragraph (4) is responsible for fulfilling the obligations imposed by these Regulations in respect of any part of the procedure that the authority conducts itself, such as—

- (a) awarding a contract under a dynamic purchasing system which is operated by a central purchasing body;
- (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body; or
- (c) determining, pursuant to regulation 34(7)(a) or (b) (framework agreements), which of the economic operators, that are party to a framework agreement that has been concluded by a central purchasing body, shall perform a given task under such framework agreement.

(6) All procurement procedures conducted by a central purchasing body must be performed using electronic means of communication, in accordance with the requirements set out in regulation 23 (rules applicable to communication).

(7) A contracting authority may, without applying the procedures provided for in these Regulations, award a public service contract for the provision of centralised purchasing activities to a central purchasing body.

(8) A public service contract referred to in paragraph (7) may also include the provision of ancillary purchasing activities.

Occasional joint procurement

39.—(1) Two or more contracting authorities may agree to perform certain specific procurements jointly.

(2) Contracting authorities shall be jointly responsible for fulfilling their obligations under these Regulations where—

- (a) the conduct of a procurement procedure in its entirety is carried out jointly in the name of and on behalf of all the contracting authorities concerned; or
- (b) one contracting authority manages the procedure, acting on its own behalf and on behalf of the other contracting authorities concerned.

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

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

Procurement involving contracting authorities from different member States

40.—(1) Without prejudice to regulation 13 (exclusions: public contracts between entities within the public sector), a contracting authority may act jointly with a contracting authority from another member State in the award of a public contract by using one of the means provided for in this regulation.

(2) A contracting authority must not use the means provided for in this regulation for the purpose of avoiding the application of mandatory public law provisions in the applicable law of the jurisdiction to which the authority is subject, where those provisions are in conformity with EU law.

(3) A contracting authority may use centralised purchasing activities offered by a central purchasing body located in another member State.

(4) A contracting authority may only use the provision of centralised purchasing activities by a central purchasing body located in another member State where they are conducted in accordance with the national provisions of the member State where the central purchasing body is located.

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

- (a) the award of a contract under a dynamic purchasing system;
- (b) the conduct of a reopening of competition under a framework agreement; and
- (c) the determination, for the purpose of points (a) and (b) of Article 33(4) of the Directive (to which effect is given in these Regulations by regulation 34(7)(a) and (b)) (framework agreements), of which of the economic operators which are party to the framework agreement shall perform a given task.

(6) In the circumstances set out in paragraph (7), several contracting authorities from different member States may—

- (a) jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system; and
- (b) to the extent that they may do so in accordance with Article 33(2) of the Directive (to which effect is given in these Regulations by regulation 34(3) to (5) (framework agreements)), award contracts based on the framework agreement or award public contracts under the dynamic purchasing system.

(7) The circumstances referred to in paragraph (6) are that—

- (a) unless the necessary elements have been regulated by an international agreement concluded between the member States concerned, the participating contracting authorities have concluded an agreement that determines—
 - (i) the responsibilities of the parties and the relevant applicable national provisions; and
 - (ii) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts; and
- (b) the allocation of responsibilities and the applicable national law have been referred to in the procurement documents.

(8) When determining responsibilities and the applicable national law as referred to in paragraph (7)(a)(i), the participating contracting authorities may allocate specific responsibilities among them and determine the applicable provisions of the national laws of any of their respective member States.

(9) A participating contracting authority fulfils its obligations under these Regulations when it purchases works, supplies or services from a contracting authority which is responsible for the procurement procedure.

(10) Contracting authorities from different member States may set up a joint entity for the purpose of paragraph (1), subject to compliance with paragraph (11).

(11) The participating contracting authorities must, before undertaking any given procurement, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules of—

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

(12) The agreement referred to in paragraph (11) 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 contract or one or more individual contract awards.

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

(14) In this regulation—

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

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

SECTION 5

Conduct of the Procedure

Preliminary market consultation

41.—(1) Before commencing a procurement, a contracting authority may conduct market consultation with a view to preparing the procurement and informing economic operators of the authority’s procurement plans and requirements.

(2) For this purpose, a contracting authority may act as it considers appropriate, including seeking or accepting advice from independent experts or authorities or from market participants.

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

Prior involvement of candidates or tenderers

42.—(1) A contracting authority must take appropriate measures to ensure that competition is not distorted by the participation of a candidate or tenderer where that candidate or tenderer, or an undertaking related to that candidate or tenderer—

- (a) has advised the contracting authority, whether in the context of regulation 41 (preliminary market consultation) or not; or
- (b) has otherwise been involved in the preparation of the procurement.

(2) Such measures must include—

- (a) the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure; and
- (b) the fixing of adequate time limits for the receipt of tenders.

(3) A candidate or tenderer in a situation referred to in paragraph (1) may only be excluded from the procedure for the purpose of paragraph (1) where there are no other means to ensure compliance with the duty referred to in regulation 19(1) (principles of procurement).

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

(5) The measures taken must be documented in the report referred to in regulation 83(1) (reporting and documentation requirements).

Technical specifications

43.—(1) The technical specifications must—

- (a) be set out in the procurement documents; and
- (b) lay down the characteristics required of any works, supply or service.

(2) In the case of a public works contract, technical specifications define any characteristics required of a material, product or supply so that it fulfils the use for which it is intended by the contracting authority.

(3) The characteristics referred to in paragraph (2) may include—

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

(4) In the case of a public supply or public service contract, the required characteristics may include—

- (a) quality levels;
- (b) environmental and climate performance levels;
- (c) design for all requirements (including accessibility for disabled persons) and conformity assessment;
- (d) performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold;
- (e) terminology;
- (f) symbols;
- (g) testing and test methods;

- (h) packaging, marking and labelling;
- (i) user instructions;
- (j) production processes and methods at any stage of the life cycle of the supply or service; and
- (k) conformity assessment procedures.

(5) In the case of any public contract, the required characteristics may also refer to—

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

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

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

(7) Where the subject of the procurement is intended for use by natural persons, whether the general public or staff of the contracting authority, the technical specifications must, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.

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

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

(10) Without prejudice to mandatory national technical rules, to the extent that they are compatible with EU law, the technical specifications must be formulated—

- (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 the contracting authority to award the contract;
- (b) by reference to any of the following technical specifications in the following order of precedence—
 - (i) national standards transposing European standards;
 - (ii) European Technical Assessments;
 - (iii) common technical specifications;
 - (iv) international standards;
 - (v) other technical reference systems established by the European standardisation bodies; or
 - (vi) when none of the above exist, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies,

but each reference must be accompanied by the words ‘or equivalent’;

- (c) in terms of performance or functional requirements as referred to in sub-paragraph (a), with reference to the technical specifications referred to in sub-paragraph (b) as a means of presuming conformity with such performance or functional requirements; or

(d) by reference to the technical specifications referred to in sub-paragraph (b) for certain characteristics, and by reference to the performance or functional requirements referred to in sub-paragraph (a) for other characteristics.

(11) Subject to paragraph (12), technical specifications must not, with the effect of favouring or eliminating certain undertakings or certain products, refer to—

- (a) a specific make or source;
- (b) a particular process which characterises the products or services provided by a specific economic operator; or
- (c) trade marks, patents, types, or a specific origin or production.

(12) Reference of a kind referred to in paragraph (11) is permitted in any of the following circumstances—

- (a) where justified by the subject-matter of the contract;
- (b) on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph (10) is not possible, in which case the reference must be accompanied by the words “or equivalent”.

(13) Where a contracting authority formulates technical specifications in terms of performance or functional requirements in accordance with paragraph (10)(a), it must not reject a tender for works, supplies or services which complies with a technical specification of a kind mentioned in paragraph (10)(b)(i) to (v), where those specifications address the performance or functional requirements which it has laid down.

(14) Where a contracting authority formulates technical specifications in accordance with paragraph (10)(b), it must not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, where the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 45 (test reports, certificates and other means of proof), that the solution proposed satisfies in an equivalent manner the requirements defined by the technical specifications.

(15) In its tender, the tenderer must prove by any appropriate means, including those referred to in regulation 45 (test reports, certificates and other means of proof), that the works, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

Labels

44.—(1) Where a contracting authority intends to purchase works, supplies or services with specific environmental, social or other characteristics the authority may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies 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 characteristics of the works, supplies or services;
- (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- (c) the label is established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;
- (d) the label is accessible to all interested parties; and
- (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

(2) Where a contracting authority does not require the works, supplies or services to meet all of the label requirements, the authority must indicate which label requirements are required.

(3) A contracting authority requiring a specific label must accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

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

(5) Where a label fulfils the conditions mentioned in paragraph (1)(b), (c), (d) and (e) but also sets out requirements not linked to the subject-matter of the contract, a contracting authority must not require the label but may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts of it, that are linked to the subject-matter of the contract and are appropriate to define characteristics of that subject-matter.

Test reports, certificates and other means of proof

45.—(1) A contracting authority may require an economic operator to provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

(2) Where a contracting authority requires the submission of certificates drawn up by a specific conformity assessment body, certificates from other equivalent conformity assessment bodies must also be accepted by the contracting authority.

(3) In paragraphs (1) and (2), “conformity assessment body” means a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93⁽¹⁾.

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

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

Variants

46.—(1) A contracting authority may authorise or require tenderers to submit variants.

(2) A contracting authority must indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest, whether or not it authorises or requires variants.

(3) A contracting authority authorising or requiring variants must state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for

(1) OJ No L 218, 13.8.2008, p.30.

their presentation, in particular whether variants may be submitted only where the economic operator also submits a tender which is not a variant.

(4) A contracting authority must not take into consideration a variant which—

- (a) has not been authorised or required;
- (b) is not linked to the subject matter of the contract; or
- (c) does not meet the minimum requirements laid down by the contracting authority.

(5) A contracting authority must ensure that the award criteria can be applied to variants meeting those minimum requirements as well as to tenders which are not variants.

(6) In a procedure for awarding a public supply contract or public service contract, a contracting authority that has authorised or required variants must not reject a variant on the sole ground that it would, where successful, lead to either a public service contract rather than a public supply contract or a public supply contract rather than a public service contract.

Division of contracts into lots

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

(2) Where a contracting authority decides not to award a contract in the form of separate lots the authority must indicate the main reasons for its decision in the procurement documents or in the report referred to in regulation 83(1) (reporting and documentation requirements).

(3) Where a contracting authority decides to award a contract in the form of separate lots it must indicate, in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots.

(4) A contracting authority 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.

(5) A contracting authority must indicate in the procurement documents the objective and non-discriminatory criteria or rules it intends 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.

(6) Where more than one lot may be awarded to the same tenderer, a contracting authority may award contracts combining several or all lots where the authority—

- (a) has specified in the contract notice or in the invitation to confirm interest that it reserves the possibility of doing so; and
- (b) indicated the lots or groups of lots that may be combined.

Setting time limits

48.—(1) When fixing the time limits for the receipt of tenders and requests to participate, a contracting authority must take account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in regulations 28 to 32.

(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 regulations 28 to 32, must be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.

(3) A contracting authority must 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, where—

- (a) for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest 6 days before the time limit fixed for the receipt of tenders; or
 - (b) significant changes are made to the procurement documents.
- (4) In the case of an accelerated procedure, the period mentioned in paragraph (3)(a) shall be 4 days.
- (5) The length of the extension given pursuant to paragraph (3) must be proportionate to the importance of the information or change.
- (6) A contracting authority is not required to extend the time limit where—
- (a) additional information has not been requested in good time; or
 - (b) the additional information requested is of insignificant importance with a view to preparing responsive tenders.

Prior information notices

49.—(1) A contracting authority may make known its intentions of planned procurements through the publication of a prior information notice.

(2) A prior information notice must contain the information set out in section I of Part B of Annex V to the Directive.

(3) A contracting authority wishing to publish a prior information notice must—

- (a) send it for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level); or
- (b) publish it on the contracting authority's buyer profile in accordance with regulation 53 (publication at national level).

(4) Where the prior information notice is published by the contracting authority on its buyer profile, the contracting authority must send for publication, in accordance with regulation 52 (form and manner of sending notices for publication at EU level), a notice of the publication on its buyer profile.

(5) The notice of publication referred to in paragraph (4) must contain the information set out in Part A of Annex V to the Directive.

(6) Where a sub-central contracting authority uses a prior information notice as a call for competition pursuant to regulation 27(8) (choice of procedures), the notice must—

- (a) refer specifically to the works, supplies or services that will be the subject of the contract to be awarded;
- (b) indicate that the contract will be awarded by restricted procedure or competitive procedure with negotiation without further publication of a call for competition and invite interested economic operators to express their interest;
- (c) contain, in addition to the information set out in section I of Part B of Annex V to the Directive, the information set out in section II of that Part; and
- (d) have been sent for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level) between 35 days and 12 months prior to the date on which an invitation is sent for the purposes of regulation 55(2) (invitations to candidates).

(7) In addition to sending a prior information notice used for the purpose mentioned in paragraph (6) for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level), a contracting authority may publish such a notice on its buyer profile in accordance with regulation 53 (publication at national level).

(8) Subject to paragraph (9), the period covered by a prior information notice must be a maximum of 12 months from the date on which the notice is sent for publication.

(9) In the case of a public contract for social and other specific services, a prior information notice referred to in regulation 75(1)(b) (publication of notices) may cover a period which is longer than 12 months.

Contract notices

50. A contract notice must contain the information set out in Part C of Annex V to the Directive and must be sent for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level).

Contract award notices

51.—(1) Not later than 30 days after the award of a contract or conclusion of a framework agreement, a contracting authority must send for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level) a contract award notice on the results of the procurement procedure.

(2) A contract award notice must contain the information set out in Part D of Annex V to the Directive.

(3) Where the call for competition for the contract concerned has been made in the form of a prior information notice and the contracting authority has decided that it will not award further contracts during the period covered by the prior information notice, the contract award notice must contain a specific indication to that effect.

(4) Paragraph (1) does not apply where the contract awarded is a contract based on a framework agreement.

(5) In the case of the award of a contract based upon a dynamic purchasing system, a contracting authority must either—

- (a) send for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level) a contract award notice within 30 days after the award of each such contract; or
- (b) group notices referred to in sub-paragraph (a) on a quarterly basis, in which case the authority must send for publication the grouped notices within 30 days of the end of each quarter.

(6) A contracting authority may withhold from publication information on the contract award or the conclusion of the framework agreement where the release of the information—

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

Form and manner of sending notices for publication at EU level

52.—(1) The notices required by regulations 49, 50, 51, 72, 75 and 78 to be sent for publication in accordance with this regulation must—

- (a) be sent by electronic means to the EU Publications Office for publication; and
- (b) where the Commission has published standard forms for such notices, be set out using such forms.

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

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

(4) A contracting authority may send notices in respect of public contracts to the EU Publications Office for publication even where the authority is not required to do so by these Regulations, provided such notices are sent by electronic means.

Publication at national level

53.—(1) In addition to the publication of the notices referred to in regulations 49, 50, 51, 75 and 78 by the EU Publications Office, a contracting authority may publish the information contained in such notices on the internet on a buyer profile.

(2) A buyer profile may also include—

- (a) prior information notices which are published on it pursuant to regulation 49(3)(b) (prior information notices);
- (b) information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled; and
- (c) any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address.

(3) The notices referred to in regulations 49, 50, 51 and 78, and the information contained in them, must not be published at national level before the notices are published by the EU Publications Office.

(4) Notwithstanding paragraph (3), publication may take place at national level where a contracting authority has not been notified of the publication by the EU Publications Office within 48 hours after confirmation of the receipt of the notice in accordance with Article 51(5) of the Directive.

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

(6) Where a prior information notice is to be published on a buyer profile for the purposes of regulation 49(3) (prior information notices) —

- (a) the prior information notice may not be so published before the contracting authority sends to the EU Publications Office the notice referred to in regulation 49(4) (prior information notices); and
- (b) the prior information notice must indicate the date of that sending.

Electronic availability of procurement documents

54.—(1) A contracting authority must offer on the internet unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice in accordance with regulation 52 (form and manner of sending notices for publication at EU level) or the date on which an invitation to confirm interest was sent.

(2) The text of the notice or the invitation to confirm interest must specify the internet address at which the procurement documents are accessible.

(3) 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 regulation 23(3) (rules applicable to communication), a contracting authority may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by means other than electronic means in accordance with the periods mentioned in paragraphs (6) and (7).

(4) Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered because a contracting authority intends to apply regulation 22(3) (confidentiality), the authority must indicate in the notice or the invitation to confirm interest which measures, aimed at protecting the confidential nature of the information, the authority requires and how access can be obtained to the documents concerned.

(5) Where paragraph (3) or (4) applies, the time limit for the submission of tenders must be extended by 5 days, except in a case of duly substantiated urgency referred to in regulation 28(5) (open procedure), regulation 29(11) (restricted procedure), or regulation 30(11) (competitive procedure with negotiation).

(6) Provided that it has been requested in good time, a contracting authority must, not later than 6 days before the time limit fixed for the receipt of tenders, supply to all tenderers taking part in the procurement procedure additional information relating to the specifications and any supporting documents.

(7) In the case of an accelerated procedure, the period mentioned in paragraph (6) shall be not later than 4 days before the time limit fixed for the receipt of tenders.

Invitations to candidates

55.—(1) In a restricted procedure, a competitive dialogue procedure, an innovation partnership and a competitive procedure with negotiation, an invitation by a contracting authority to selected candidates or to participants to submit a tender must be issued simultaneously and in writing.

(2) In a competitive dialogue procedure or an innovation partnership, an invitation by a contracting authority to selected candidates to participate must be issued simultaneously and in writing.

(3) Where the call for competition is made by means of a prior information notice, as referred to in regulation 27(8)(choice of procedure), the contracting authority must, simultaneously and in writing, invite all economic operators which have expressed their interest following the publication of the prior information notice, to confirm their interest in writing.

(4) The invitations required by paragraphs (1) to (3) must—

- (a) include a reference to the electronic address at which the procurement documents have been made directly available by electronic means; or
- (b) be accompanied by the procurement documents, where those documents have not been the subject of unrestricted and full direct access, free of charge, for the reasons referred to in regulation 54(3) or (4) (electronic availability of procurement documents) and have not already been made otherwise available.

(5) The invitations required by paragraphs (1) and (2) must also contain at least the following information—

- (a) a reference to the call for competition published;
- (b) where tenders are to be submitted, the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language in which the tenders must be drawn up;
- (c) in the case of competitive dialogue, the date and the address set for the start of consultation and the language or languages to be used;
- (d) a reference to any documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with regulations 60 (European Single Procurement Document: use, content and form of ESPD) and 61 (means of proof) and, where appropriate, 63 (quality assurance standards and environmental management standards) or to supplement the information referred to in those regulations, and under the conditions laid down in regulations 60, 61 and 63; and

- (e) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance of such criteria, where they are not given in the contract notice, in the invitation to confirm interest, in the technical specifications or the descriptive document.
- (6) An invitation to confirm interest referred to in paragraph (3) must also contain at least the following information—
 - (a) the nature and quantity, including all options concerning complementary contracts and, where possible, the estimated time available for exercising such options for renewable contracts, the nature and quantity and, where possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;
 - (b) the type of procedure, namely restricted procedure or competitive procedure with negotiation;
 - (c) where applicable, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;
 - (d) where electronic access cannot be offered, the address and closing date for the submission of requests for procurement documents and the language or languages in which they are to be drawn up;
 - (e) the address of the contracting authority which is to award the contract;
 - (f) economic and technical conditions, financial guarantees and information required from economic operators;
 - (g) the form of the contract which is the subject of the invitation to tender, namely purchase, lease, hire or hire-purchase, or any combination of these; and
 - (h) the contract award criteria and their relative weighting or, where appropriate, the descending order of importance of such criteria, where this information is not given in the prior information notice or the technical specifications or in the invitation to tender or to negotiate.

Informing candidates and tenderers

56.—(1) A contracting authority must as soon as possible after reaching a decision concerning the award of a contract, the conclusion of a framework agreement or admittance to a dynamic purchasing system, inform each candidate and tenderer of the decision reached.

(2) Information provided in accordance with paragraph (1) must, where applicable, include the grounds for any decision—

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

(3) On request from the candidate or tenderer concerned, the contracting authority must as soon as possible, and in any event within 15 days from receipt of a written request, inform—

- (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;
- (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in regulation 43(13) and (14) (technical specifications), the reasons for its decision of non-equivalence or its 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; and
 - (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.
- (4) A contracting authority may decide to withhold certain information referred to in paragraphs (2) and (3), where the release of such information—
- (a) would impede law enforcement or otherwise be contrary to the public interest;
 - (b) would prejudice the commercial interests of any person; or
 - (c) might prejudice fair competition between economic operators.

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⁽²⁾ or an offence under sections 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010⁽³⁾;
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889⁽⁴⁾ or section 1 of the Prevention of Corruption Act 1906⁽⁵⁾, where the offence relates to active corruption as defined in Article 3 of the Council Act of 26th May 1997⁽⁶⁾ and Article 3(1) of Council Joint Action 98/742/JHA⁽⁷⁾;
- (c) bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003⁽⁸⁾, where the offence relates to active bribery or corruption;
- (d) bribery within the meaning of sections 1 or 6 of the Bribery Act 2010⁽⁹⁾;
- (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⁽¹⁰⁾—
 - (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⁽¹¹⁾, or section 993 of the Companies Act 2006⁽¹²⁾;
 - (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979⁽¹³⁾ or section 72 of the Value Added Tax Act 1994⁽¹⁴⁾;
 - (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993⁽¹⁵⁾;
 - (vii) the common law offence of uttering; or

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

(3) 2010 asp 13.

(4) 1889 c.69. This Act was repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(5) 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).

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

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

(8) 2003 asp 7. Sections 68 and 69 were repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(9) 2010 c.23.

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

(11) 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).

(12) 2006 c.46.

(13) 1979 c.2. There are amendments to this Act which are not relevant to these Regulations.

(14) 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.

(15) 1993 c.36. There are amendments to this Act which are not relevant to these Regulations.

- (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⁽¹⁶⁾; 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⁽¹⁷⁾;
 - (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⁽¹⁸⁾;
 - (i) any offence under Part 1 of the Human Trafficking and Exploitation (Scotland) Act 2015⁽¹⁹⁾ 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⁽²⁰⁾;
 - (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⁽²¹⁾ 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—
- (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.

⁽¹⁶⁾ 2008 c.28

⁽¹⁷⁾ 2002 c.29.

⁽¹⁸⁾ 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.

⁽¹⁹⁾ 2015 asp 12.

⁽²⁰⁾ 1994 c.37; sections 49, 50 and 51 were repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 12.

⁽²¹⁾ S.I. 2010/493.

(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(22);
- (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 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—

(22) 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).

- (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 only—
 - (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.
- SECTION 6

Contract Performance

Conditions for performance of contracts

- 70.**—(1) A contracting authority may lay down special conditions relating to the performance of a contract, provided that they are—
- (a) linked to the subject-matter of the contract within the meaning of regulation 67(6) (contract award criteria); and
 - (b) indicated in the call for competition or in the procurement documents.
- (2) Such conditions may include economic, innovation-related, environmental, social or employment-related considerations.

Subcontracting

- 71.**—(1) In the procurement documents, the contracting authority may ask the tenderer to indicate in its tender any share of the contract that the tenderer may intend to subcontract to third parties and information about any proposed subcontractors including their name and contact details.
- (2) Paragraph (1) is without prejudice to the liability of the main contractor under the contract.
- (3) Where paragraph (4) applies, the contracting authority must require the main contractor to notify it, at the latest when the performance of the contract commences, of the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at the time.
- (4) This paragraph applies in the case of—
- (a) a public works contract;
 - (b) a public services contract including services to be provided at a facility under the direct oversight of the contracting authority.
- (5) The contracting authority must require the main contractor to notify the authority of—
- (a) any changes to that information during the course of the contract; and

- (b) the name, contact details and legal representatives for any new subcontractors which the contractor subsequently involves in such works or services.
- (6) Paragraphs (3) and (5) do not apply to subcontractors who provide only supplies.
- (7) Where necessary for the purposes of paragraph (9), the required information must be accompanied by ESPDs in respect of the subcontractors.
- (8) A contracting authority may require a contractor to provide information of the kind referred to in paragraphs (3) and (5) in respect of any one or more of the following—
 - (a) supply contracts or services contracts (other than those concerning services to be provided at the facilities under the direct oversight of the contracting authority);
 - (b) suppliers involved in works or services contracts;
 - (c) subcontractors of the main contractor's subcontractors and other contractors further down the subcontracting chain.
- (9) A contracting authority may, 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), verify whether there are grounds for exclusion of subcontractors under regulation 58 (exclusion grounds).
- (10) The contracting authority must require the economic operator to replace a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion.
- (11) The contracting authority may require the economic operator to replace a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

Modification of contracts during their term

- 72.—**(1) A contract and framework agreement may be modified without a new procurement procedure—
- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses—
 - (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used; and
 - (ii) do not provide for modifications or options that would alter the overall nature of the contract or framework agreement;
 - (b) to provide for additional works, supplies or services by the original contractor 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, services or installations procured under the initial procurement; and
 - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority,
 provided that any increase in price does not exceed 50% of the initial contract value;
 - (c) where all of the following conditions are fulfilled—
 - (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;
 - (ii) the modification does not alter the overall nature of the contract or framework;

- (iii) any increase in price does not exceed 50 % of the initial contract value or framework agreement;
 - (d) where a new contractor replaces one to which the contracting authority had initially awarded the contract or framework as a consequence of—
 - (i) an unequivocal review clause or option in conformity with sub-paragraph (a); or
 - (ii) complete or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, by another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract or framework and is not aimed at circumventing the application of this Part;
 - (e) where the modifications, irrespective of their value, are not substantial (as defined in paragraph (8)); or
 - (f) where paragraph (5) applies.
- (2) Where several successive modifications are made—
- (a) the limitations imposed by the proviso at the end of paragraph (1)(b) and in paragraph (1)(c)(iii) shall apply to the value of each modification; and
 - (b) such successive modifications must not be aimed at circumventing these Regulations.
- (3) A contracting authority which has modified a contract or framework in either of the cases described in paragraph (1)(b) and (c) must send a notice to that effect for publication in accordance with regulation 52 (form and manner of sending notices for publication on EU level).
- (4) Such a notice must contain the information set out in Part G of Annex V to the Directive.
- (5) This paragraph applies where the value of the modification is below both of the following values—
- (a) the relevant threshold mentioned in regulation 5 (thresholds); and
 - (b) 10 % of the initial contract value for service and supply contracts or frameworks and 15% of the initial contract value for works contracts or frameworks,
- provided that the modification does not alter the overall nature of the contract or framework agreement.
- (6) For the purposes of paragraph (5), where several successive modifications are made, the value must be the net cumulative value of the successive modifications.
- (7) For the purpose of the calculation of—
- (a) the price mentioned in paragraph (1)(b) and (c); and
 - (b) the values mentioned in paragraph (5)(b),
- the updated figure shall be the reference figure when the contract or framework includes an indexation clause.
- (8) A modification of a contract or a framework agreement during its term must be considered substantial for the purpose of paragraph (1)(e) where—
- (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
 - (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—
 - (i) allowed for the admission of candidates other than those initially selected;
 - (ii) allowed for the acceptance of a tender other than that originally accepted; or
 - (iii) attracted additional participants in the procurement procedure;

- (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
 - (d) the modification extends the scope of the contract or framework agreement considerably;
or
 - (e) a new contractor replaces one to which the contracting authority had initially awarded the contract or framework in cases other than those provided for in paragraph (1)(d).
- (9) A new procurement procedure in accordance with these Regulations is required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation.

Termination of contracts

73.—(1) A contracting authority must ensure that every public contract or framework which the authority awards contains provisions enabling the authority to terminate the contract or framework where—

- (a) the contract or framework has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72(9) (modification of contracts during their term);
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 58(1) (exclusion grounds), including as a result of the application of regulation 58(2), and should therefore have been excluded from the procurement procedure; or
- (c) the contract or framework should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of the TFEU.

(2) Those provisions may address the basis on which the power is to be exercisable in those circumstances, for example by providing for notice of termination to be given and by addressing consequential matters that will or might arise from the termination.

(3) To the extent that a public contract or framework does not contain provisions enabling the contracting authority to terminate the contract or framework on any of the grounds mentioned in paragraph (1), a power for the contracting authority to do so on giving notice to the contractor shall be an implied term of that contract or framework.