
SCOTTISH STATUTORY INSTRUMENTS

2016 No. 65

The Concession Contracts (Scotland) Regulations 2016

PART 3

**RULES ON THE PROCUREMENT FOR THE
AWARD OF CONCESSION CONTRACTS**

CHAPTER 6

GENERAL PRINCIPLES

Concession notice

33.—(1) A contracting entity wishing to award a concession contract, other than a concession contract for social and other specific services listed in Schedule 3, must make known their intention through the publication of a concession notice.

(2) Such a concession notice must contain—

- (a) the information set out in Annex V to the Concession Contracts Directive; and
- (b) any other information that the contracting entity considers useful;

and must be in the format of the standard forms set out in Commission Implementing Regulation 2015/1986⁽¹⁾.

(3) A contracting entity wishing to award a concession contract for social and other specific services listed in Schedule 3 must make known their intention of a planned concession contract award through the publication of a prior information notice.

(4) Such a prior information notice must contain the information set out in Annex VI to the Concession Contracts Directive and must be in the format of the standard forms set out in Commission Implementing Regulation 2015/1986.

(5) This regulation does not apply in any of the following cases—

- (a) if no applications, no suitable applications, no tenders or no suitable tenders have been submitted in response to a prior procurement for the award of a concession contract, provided that the initial conditions of the concession contract are not substantially altered and that a report is sent to the European Commission if it so requests;
- (b) if the works or services can be supplied only by a particular economic operator for any of the following reasons—
 - (i) the aim of the concession contract is the creation or acquisition of a unique work of art or artistic performance;
 - (ii) competition is absent for technical reasons;
 - (iii) the existence of an exclusive right;

⁽¹⁾ OJ L 222, 12.11.2015, p.1.

- (iv) the protection of intellectual property rights and exclusive rights other than exclusive rights as defined in regulation 2 (interpretation),
but only, in the case of sub-paragraphs (ii) to (iv), if 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 concession contract award.
- (6) For the purposes of paragraph (5)(a)—
 - (a) a tender must be considered not to be suitable if it is irrelevant to the concession contract, being manifestly incapable, without substantial changes, of meeting the contracting entity's needs and requirements as specified in the concession documents;
 - (b) an application must be considered not to be suitable if—
 - (i) the applicant concerned is to be or may be excluded under regulation 40 (exclusion grounds) or does not meet the selection criteria set out by the contracting entity in accordance with regulation 41(1) to (3) (selection of and qualitative assessment of candidates);
 - (ii) the application includes tenders which are considered not to be suitable as described in sub-paragraph (a).

Concession contract award notice

34.—(1) Not later than 48 days after the award of a concession contract, the contracting entity must send for publication a concession contract award notice in accordance with regulation 35 (form and manner of publication of notices).

(2) A concession contract award notice for social and other specific services listed in Schedule 3 may be grouped for publication on a quarterly basis, in which case the contracting entity must send the grouped notices for publication within 48 days of the end of each quarter.

(3) A concession contract award notice must contain the information set out in Annex VII to the Concession Contracts Directive, or in the case of a concession contract for social and other specific services listed in Schedule 3, the information set out in Annex VIII to that Directive.

Form and manner of publication of notices

35.—(1) A notice required by regulation 33 (concession notice), 34 (concession contract award notice) and 46(3) (modification of contracts) to be sent for publication in accordance with this regulation (and any corrigenda to a notice)—

- (a) must be sent by electronic means to the Publications Office of the European Union ("EU Publications Office") for publication; and
- (b) must be in the format of the standard forms set out in Commission Implementing Regulation 2015/1986(2).

(2) If the EU Publications Office has given the contracting entity 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.

(3) The notices referred to in regulations 33, 34 and 46(3) must not be published at national level before they are published by the EU Publications Office unless publication by that Office does not take place within 48 hours after it confirms receipt in accordance with Article 33(2) of the Concession Contracts Directive.

(4) Notices published at national level must not contain information other than that contained in the notices sent to the EU Publications Office but must indicate the date of sending of the notice to that Office.

Electronic availability of concession documents

36.—(1) A contracting entity must, by means of the internet, offer unrestricted and full direct access free of charge to the concession documents from the date of the publication in the Official Journal of a concession notice or, where the concession notice does not include the invitation to submit tenders, from the date on which the invitation to submit tenders was sent.

(2) The text of the concession notice or of the invitation to submit tenders must specify the internet address at which the concession documents are accessible.

(3) Paragraph (4) applies if, in duly justified circumstances due to—

- (a) exceptional security reasons;
- (b) technical reasons; or
- (c) the particularly sensitive nature of commercial information requiring a very high level of protection,

unrestricted and full direct access free of charge to certain concession documents cannot be offered by means of the internet.

(4) In those circumstances a contracting entity must indicate in the notice or the invitation to submit a tender that the concession documents concerned will be transmitted by means other than the internet and the time limit for the receipt of tenders shall be prolonged.

(5) Provided that it has been requested in good time, a contracting entity must supply to all applicants or tenderers taking part in the procurement for the award of a concession contract additional information relating to the concession documents not later than 6 days before the deadline fixed for the receipt of tenders.

Conflict of Interest

37.—(1) A contracting entity must take appropriate measures to prevent, identify and remedy a conflict of interest arising in the conduct of the procurement for the award of a concession contract so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

(2) The measures in relation to a conflict of interest must not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate an identified conflict of interest.

(3) Without prejudice to the generality thereof, reference to “conflicts of interest” in paragraph (1) includes any situation where a relevant staff member has, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement for the award of a concession contract.

(4) In paragraph (3), “relevant staff member” means a contracting entity staff member or staff member of a procurement service provider acting on behalf of the contracting entity, who is involved in the conduct of the procurement for the award of concession contract or may influence the outcome of that procurement.

CHAPTER 7

PROCEDURAL GUARANTEES

Technical and functional requirements

38.—(1) The technical specifications and functional requirements must—

- (a) be set out in the concession contract procurement documents;
 - (b) lay down the characteristics required of any works or services that are the subject matter of the concession contract.
- (2) The characteristics referred to in paragraph (1)(b) may include—
- (a) quality levels;
 - (b) levels of environmental and climate performance;
 - (c) design for all requirements (including accessibility for disabled persons) and conformity assessment;
 - (d) performance, safety or dimensions;
 - (e) terminology;
 - (f) symbols;
 - (g) testing and test methods;
 - (h) marking and labelling; or
 - (i) user instructions.
- (3) Those characteristics may also refer to the specific process of production or provision of the requested works or services provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.
- (4) Subject to paragraph (5), unless justified by the subject-matter of the concession contract, technical and functional requirements must not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator or to trade marks, patents, types or a specific production with the effect of favouring or eliminating certain undertakings or certain products.
- (5) Reference of a kind referred to in paragraph (4) is permitted, on an exceptional basis, if a sufficiently precise and intelligible description of the subject-matter of the contract is not possible, in which case the reference shall be accompanied by the words “or equivalent”.
- (6) A contracting entity must not reject a tender on the grounds that the works and services tendered for do not comply with the technical and functional requirements to which it has referred, once the tenderer proves in its tender, by any appropriate means, that the solutions it has proposed satisfy in an equivalent manner the technical and functional requirements.

Procedural guarantees

- 39.**—(1) A concession contract must be awarded on the basis of the award criteria, provided that all of the following conditions are fulfilled—
- (a) the tender complies with any minimum requirements set by the contracting entity;
 - (b) the tenderer complies with the conditions for participation set out in regulation 41(1) to (3) (selection of and qualitative assessment of candidates); and
 - (c) the tenderer is not excluded from participating in the award procedure in accordance with regulation 40(1) to (9) (exclusion grounds), as read with regulation 40(14) to (18).
- (2) The contracting entity may limit the number of candidates or tenderers to an appropriate level, on condition that this is done in a transparent manner and on the basis of objective criteria.
- (3) The number of candidates or tenderers invited must be sufficient to ensure genuine competition.
- (4) The contracting entity must communicate the following to all participants—
- (a) the description of the envisaged organisation of the procedure and an indicative completion deadline; and

(b) any modification to that procedure or completion deadline.

(5) To the extent that any modification referred to in paragraph (4)(b) concerns elements disclosed in the concession notice, the contracting entity must advertise it to all economic operators.

(6) The contracting entity must provide for appropriate recording of the stages of the procedure using the means it considers appropriate, subject to regulation 31(1) and (2) (confidentiality).

(7) The contracting entity may hold negotiations with candidates and tenderers but the subject-matter of the concession contract, the award criteria and the minimum requirements must not change during the course of any negotiation.

(8) In this regulation—

(a) “the award criteria” means the award criteria set out by the contracting entity in accordance with regulation 44 (concession contract award criteria);

(b) “minimum requirements” mean the conditions and characteristics (in particular any technical, physical, functional and legal conditions and characteristics) that any tender must meet or possess.

Exclusion grounds

40.—(1) A contracting authority or utility referred to in regulation 5(1)(a) (meaning of “utility”) must exclude an economic operator from participation in a procurement for the award of a concession contract if the contracting authority or utility establishes that an 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 if that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA(3) or an offence under sections 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010(4);

(b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889(5) or section 1 of the Prevention of Corruption Act 1906(6), where the offence relates to active corruption as defined in Article 3 of the Council Act of 26th May 1997(7) and Article 3(1) of Council Joint Action 98/742/JHA(8);

(c) bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003(9), if the offence relates to active bribery or corruption;

(d) bribery within the meaning of sections 1 or 6 of the Bribery Act 2010(10);

(e) if 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(11)—

(i) the offence of cheating the Revenue;

(ii) the common law offence of fraud;

(iii) the common law offence of theft or fraud;

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

(4) 2010 asp 13.

(5) 1889 c.69. This Act was repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(6) 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).

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

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

(9) 2003 asp 7. Sections 68 and 69 were repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(10) 2010 c.23.

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

- (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(12), or section 993 of the Companies Act 2006(13);
- (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(14) or section 72 of the Value Added Tax Act 1994(15);
- (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993(16);
- (vii) the common law offence of uttering; or
- (viii) the common law offence of attempting to pervert the course of justice;
- (f) any offence listed in—
 - (i) section 41 of the Counter-Terrorism Act 2008(17); 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(18);
- (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(19);
- (i) any offence under Part 1 of the Human Trafficking and Exploitation (Scotland) Act 2015(20) 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(21);
- (k) any other offence within the meaning of Article 38(4) of the Concessions Contracts Directive as defined by the national law of any EEA state.

(2) This regulation applies if the person convicted 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 the economic operator.

(3) A contracting authority or utility referred to in regulation 5(1)(a) (meaning of “utility”) must exclude an economic operator from participation in a procurement if—

- (a) subject to paragraphs (6) to (8), the contracting authority or utility referred to in regulation 5(1)(a) 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 or utility referred to in regulation 5(1)(a) is aware that the economic operator has committed an act prohibited under the Employment Relations

(12) 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).

(13) 2006 c.46.

(14) 1979 c.2. There are amendments to this Act which are not relevant to these Regulations.

(15) 1994 c.23. Section 72 was amended by section 17 of the Finance Act 2004 (c.40). There are other amendments to this Act which are not relevant to these Regulations.

(16) 1993 c.36. There are amendments to this Act which are not relevant to these Regulations.

(17) 2008 c.28.

(18) 2002 c.29.

(19) 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 11, paragraph 17(2).

(20) 2015 asp 12.

(21) 1994 c.37; sections 49, 50 and 51 were repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraphs 1 and 25(1) and (2)(a), and by Schedule 12.

Act 1999 (Blacklists) Regulations 2010(22) 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 entity may exclude an economic operator from participation in the procurement for the award of a concession contract if the contracting authority or utility 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 utility other than one referred to in regulation 5(1)(a) may exclude an economic operator from participation in the procurement for an award of a concession contract if it is aware that the economic operator has been convicted of any offence in paragraph (1) or committed a prohibited act referred to in paragraph (3)(b).

(6) A contracting entity may not exclude an economic operator pursuant to paragraphs (3)(a) or (4) if—

- (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.

(7) A contracting entity 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.

(8) A contracting entity may also disregard the prohibition imposed by paragraph (3)(a) if an exclusion would be clearly disproportionate, in particular—

- (a) if only minor amounts of taxes or social security contributions are unpaid; or
- (b) if 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 (6) before expiration of the deadline for requesting participation or the deadline for submitting its tender.

(9) A contracting entity may exclude an economic operator from participation in a procurement for the award of a concession contract if—

- (a) the contracting entity can demonstrate by any appropriate means a violation by the economic operator of applicable obligations referred to in the fields of environmental, social and labour law established by European Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Schedule 4 to these Regulations;
- (b) the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, if its assets are being administered by a liquidator or by the court, if it is in an arrangement with creditors, if its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations to which the economic operator may be subject;
- (c) the contracting entity can demonstrate by any appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
- (d) the contracting entity 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 within the meaning of regulation 37 (conflict of interest) cannot be effectively remedied by other less intrusive measures;
 - (f) the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior concession contract or a prior contract with a contracting authority or a utility as defined under these Regulations or under the Public Contracts (Scotland) Regulations 2015 or the Utilities Contracts (Scotland) Regulations 2016 which led to early termination of that prior contract, damages or other comparable sanctions;
 - (g) if the economic operator—
 - (i) 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 set out by the contracting entity in accordance with regulation 41 (1) to (3) (selection of and qualitative assessment of candidates); or
 - (ii) the economic operator has withheld such information or is unable to submit the supporting documents required;
 - (h) the economic operator—
 - (i) has or has sought to unduly influence the decision-making process of the contracting entity;
 - (ii) has or has sought to obtain confidential information that may confer upon it undue advantages in the procurement for the award of a concession contract; or
 - (iii) has negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award;
 - (i) in the case of a concession contract in the fields of defence and security as referred to in the Defence and Security Regulations, if the economic operator has been found, on the basis of any means of evidence, including protected data sources, not to possess the reliability necessary to exclude risks to the security of the United Kingdom.
- (10) A contracting authority and utility referred to in regulation 5(1)(a) (meaning of “utility”)—
- (a) must exclude an economic operator if it becomes aware, at any time during the procurement for the award of a concession contract, 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);
 - (b) may exclude an economic operator if it becomes aware, at any time during a procurement for the award of a concession contract, that the economic operator is, in view of acts committed or omitted either before or during the procurement, in one of the situations referred to in paragraphs (4) and (9).
- (11) A utility other than one referred to in regulation 5(1)(a) (meaning of “utility”) may exclude an economic operator if it becomes aware, at any time during a procurement for the award of a concession contract, that the economic operator is, in view of acts committed or omitted either before or during the procurement, in one of the situations referred to in paragraphs (1) to (4) and (9).
- (12) In the cases referred to in paragraph (1) and subject to paragraph (7), the period during which the economic operator must be excluded is 5 years from the date of the conviction by final judgement.
- (13) In the cases referred to in paragraphs (3)(b) and (9) and subject to paragraph (15), the period during which the economic operator may be excluded is 3 years from the date of the relevant event.
- (14) Any economic operator that is in one of the situations referred to in paragraph (1), (3)(b) or (9) 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.

(15) If the contracting entity is satisfied that the evidence proves that the measures are sufficient for the purpose referred to in paragraph (14), the contracting entity must not exclude the economic operator from the procurement of the award of a concession contract.

(16) For that purpose, 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.

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

(18) If the contracting entity considers that the measures are insufficient, the contracting entity must give the economic operator a statement of the reasons for that decision.

Selection of and qualitative assessment of candidates

41.—(1) A contracting entity must verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of candidates or tenderers on the basis of self-declarations or references submitted as proof in accordance with the requirements specified in the concession notice.

(2) Those requirements must be non-discriminatory and proportionate to the subject-matter of the concession contract.

(3) The conditions for participation must be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession contract, taking into account the subject-matter of the concession contract and the purpose of ensuring genuine competition.

(4) For the purpose of meeting the conditions for participation, an economic operator may, if appropriate and for a particular concession contract, rely on the capacities of other entities, regardless of the legal nature of its links with them, subject to the following provisions of this regulation.

(5) If an economic operator wants to rely on the capacities of other entities, it must prove to the contracting entity that it will have at its disposal, throughout the period of the concession contract, the necessary resources; for example, by producing a commitment by those entities to that effect.

(6) With regard to financial standing, the contracting entity may require that the economic operator and those entities on which it relies are jointly liable for the execution of the contract.

(7) A group of economic operators referred to in regulation 29 (economic operators) may rely on the capacities of participants in the group or of other entities, and paragraphs (4) to (6) apply in relation to such a group in the same way that they apply in relation to an economic operator.

Time limits for receipt of applications and tenders for the concession contract

42.—(1) When fixing the time limit for the receipt of applications or tenders, a contracting entity must take account of the complexity of the concession contract and the time required for drawing up a tender or application, without prejudice to the minimum time limits set out in this regulation.

(2) If an application or tender can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession documents, the time limit for the receipt of an application for the concession contract or for the receipt of a tender must be fixed so that any economic operator concerned is aware of all the information needed to produce an application or tender and in any event must be longer than the minimum time limits set out in paragraphs (3) and (4).

(3) The minimum time limit for the receipt of applications (whether or not including tenders for the concession contract) must be 30 days from the date on which the concession notice was sent for publication in accordance with regulation 35 (form and manner of publication of notices).

(4) If the procurement takes place in successive stages the minimum time limit for the receipt of initial tenders must be 22 days from the date on which the invitation to tender is sent.

(5) The time limits for receipt of tenders may be reduced by 5 days if the contracting entity allows the submission of tenders by electronic means in accordance with regulation 32 (rules applicable to communication).

Informing candidates and tenderers

43.—(1) A contracting entity must as soon as possible after reaching a decision concerning the award of a concession contract inform each candidate and tenderer of the decision reached, including—

- (a) the name of the successful tenderer; and
- (b) the grounds for any decision—
 - (i) to reject its application or tender;
 - (ii) not to award a contract for which there has been publication of a concession notice; or
 - (iii) to recommence the procurement.

(2) On request from the party concerned, the contracting entity must as quickly as possible, and in any event within 15 days from receipt of a request in writing, inform any tenderers that have submitted an admissible tender of the characteristics and relative advantages of the tender selected.

(3) The contracting entity may decide to withhold certain information referred to in this regulation if the release of such information—

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

Concession contract award criteria

44.—(1) A contracting entity must award a concession contract on the basis of objective criteria which comply with the principles set out in regulation 28 (principle of equal treatment, non-discrimination and transparency) and which ensure that a tender is assessed in conditions of effective competition so as to identify an overall economic advantage for the contracting entity (“the award criteria”).

(2) The award criteria—

- (a) must be linked to the subject-matter of the concession contract;
- (b) must not confer an unrestricted freedom of choice on the contracting entity; and
- (c) may include environmental criteria, social criteria or criteria related to innovation.

(3) The award criteria must be accompanied by requirements which allow the information provided by the tenderers to be effectively verified.

(4) The contracting entity must verify whether a tender properly meets the award criteria.

(5) The contracting entity must list the award criteria in descending order of importance.

(6) If the contracting entity receives a tender which proposes an innovative solution with an exceptional level of functional performance which could not have been foreseen by a diligent

contracting entity, the contracting entity may, exceptionally, modify the ranking order of the award criteria to take into account that innovative solution.

(7) If paragraph (6) applies, the contracting entity must—

- (a) inform all tenderers about the modification of the order of importance and issue a new invitation to submit tenders within the minimum time limit referred to in regulation 42(4) (time limits for receipt of applications and tenders);
- (b) if the award criteria was published either in the concession notice or at the same time, publish a new concession notice including the minimum time limit referred to in regulation 42(3).

(8) The contracting entity must ensure that a modification of the ranking order referred to in paragraph (6) does not result in discrimination.

(9) In this regulation, “innovation” means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations, including with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy⁽²³⁾ for smart, sustainable and inclusive growth.

(23) European Commission COM(2010) 2020 3.3.2010.