



Procurement Act 2023

2023 CHAPTER 54

PART 3

AWARD OF PUBLIC CONTRACTS AND PROCEDURES

CHAPTER 2

COMPETITIVE AWARD

Awarding contracts by reference to dynamic markets

34 Competitive award by reference to dynamic markets

- (1) A competitive flexible procedure may provide for the following suppliers to be excluded from participating in, or progressing as part of, the procedure—
 - (a) suppliers that are not members of an appropriate dynamic market, or
 - (b) suppliers that are not members of an appropriate part of an appropriate dynamic market.
- (2) Subsection (3) applies in relation to the award of a public contract under section 19 if the competitive flexible procedure provides for suppliers to be excluded as set out in subsection (1).
- (3) In assessing tenders under section 19, a contracting authority must disregard any tender from a supplier that is not a member of—
 - (a) the appropriate dynamic market, or
 - (b) the appropriate part of the appropriate dynamic market.
- (4) A contracting authority must, before excluding suppliers or disregarding tenders under this section, consider any applications for membership of the market or part of the market from suppliers that have submitted a request to participate in the competitive flexible procedure, or submitted a tender as part of the competitive flexible procedure.

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- (5) Subsection (4) does not apply in relation to an application for membership if, due to exceptional circumstances arising from the complexity of the particular procurement, a contracting authority is unable to consider the application before—
- (a) the deadline for submitting a request to participate in the procedure, or
 - (b) where there has been no invitation to submit such requests, the deadline for submitting a first or only tender.
- (6) A dynamic market or part of a dynamic market is “appropriate” for the purposes of this section if its terms permit the award of the contract by the contracting authority.
- (7) This section does not apply in relation to the award of a concession contract, unless the concession contract is also a utilities contract.
- (8) In this Act—
- “dynamic market” means arrangements established under section 35(1);
- references to a contract being awarded by reference to suppliers’ membership of a dynamic market are references to a contract being awarded in reliance on this section;
- references to suppliers’ membership of a dynamic market are references to suppliers’ participation in arrangements established under section 35(1).

35 Dynamic markets: establishment

- (1) A contracting authority may establish arrangements for the purpose of a contracting authority awarding public contracts by reference to suppliers’ participation in the arrangements.
- (2) In this Act a “utilities dynamic market” means a dynamic market established only for the purpose of the award of utilities contracts by utilities.
- (3) If arrangements established by any person comply with the requirements of this Act that apply in relation to a utilities dynamic market established by a private utility—
- (a) the arrangements are to be treated for the purposes of this Act as a utilities dynamic market established by a private utility, and
 - (b) a utility may award public contracts that are utilities contracts by reference to suppliers’ membership of the market.
- (4) In this Act, “utility” means—
- (a) a public authority, or public undertaking, that carries out a utility activity;
 - (b) a private utility.
- (5) Documents establishing or modifying a dynamic market are not a contract for the purposes of this Act.

36 Dynamic markets: membership

- (1) A contracting authority may set conditions for membership of a dynamic market or part of a dynamic market only if it is satisfied that the conditions are a proportionate means of ensuring that members—
- (a) have the legal and financial capacity to perform contracts awarded by reference to membership of the market or the part of the market;
 - (b) have the technical ability to perform such contracts.

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- (2) A condition set under subsection (1)(a) may not—
 - (a) require the submission of audited annual accounts, except from suppliers who are, or were, required to have the accounts audited in accordance with Part 16 of the Companies Act 2006 or an overseas equivalent;
 - (b) require insurance relating to the performance of the contract to be in place before the award of the contract.
- (3) A condition set under subsection (1)(b) may relate to suppliers' qualifications, experience or technical ability, but may not—
 - (a) require suppliers to have been awarded a contract by a particular contracting authority,
 - (b) break the rules on technical specifications in section 56, or
 - (c) require particular qualifications without allowing for their equivalents.
- (4) When considering whether a condition is proportionate for the purposes of subsection (1) a contracting authority must have regard to the nature, complexity and cost of contracts to be awarded by reference to suppliers' membership of the market.
- (5) A condition for membership may require the provision of evidence that is verifiable by a person other than the supplier.
- (6) A contracting authority must—
 - (a) accept applications for membership of a dynamic market or part of a dynamic market at any time during the term of the market;
 - (b) consider such applications within a reasonable period;
 - (c) admit to the market or the part of the market, as soon as reasonably practicable, any supplier that—
 - (i) is not an excluded or excludable supplier, and
 - (ii) satisfies the conditions for membership;
 - (d) consider whether to admit to the market or the part of the market any supplier that—
 - (i) is an excludable supplier, and
 - (ii) satisfies the conditions for membership;
 - (e) inform a supplier of the outcome of their application, together with reasons for the decision, as soon as reasonably practicable.
- (7) A contracting authority may not—
 - (a) limit the number of suppliers that can be admitted to a dynamic market or part of a market, or
 - (b) modify the conditions for membership of a dynamic market or part of a market during the term of the market.

37 Dynamic markets: removing members from the market

- (1) A contracting authority must remove a supplier from a dynamic market if the authority considers that the supplier is an excluded supplier under section 57(1)(b) (debarment by reference to mandatory exclusion ground).
- (2) A contracting authority may remove a supplier from a dynamic market if—
 - (a) the authority considers that the supplier—
 - (i) is an excluded supplier under section 57(1)(a),

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- (ii) does not satisfy the conditions for membership, or
 - (iii) has, since becoming a member, become an excludable supplier, or
 - (b) the authority discovers that, on becoming a member, the supplier was an excludable supplier.
- (3) The reference to a supplier becoming an excludable supplier includes a reference to a supplier becoming an excludable supplier by virtue of a discretionary exclusion ground that—
 - (a) did not apply before the supplier became a member, or
 - (b) applied before the supplier became a member by reference to different circumstances.
- (4) Before removing a supplier from a dynamic market, a contracting authority must inform the supplier of its decision to do so, together with reasons for the decision.

38 Dynamic markets: fees

- (1) Documents establishing a dynamic market other than a utilities dynamic market may provide for the charging of fees to suppliers that are awarded a contract by reference to their membership of the market.
- (2) Fees charged by virtue of subsection (1) must be set as a fixed percentage to be applied to the estimated value of the awarded contract.
- (3) Documents establishing a utilities dynamic market may provide for the charging of fees to suppliers in connection with obtaining and maintaining membership of the market.

39 Dynamic market notices

- (1) A notice under this section is called a “dynamic market notice”.
- (2) Before establishing a dynamic market, a contracting authority must publish a notice setting out—
 - (a) that the authority intends to establish a dynamic market, and
 - (b) any other information specified in regulations under section 95.
- (3) As soon as reasonably practicable after establishing a dynamic market, the contracting authority must publish a notice setting out—
 - (a) that the dynamic market has been established, and
 - (b) any other information specified in regulations under section 95.
- (4) As soon as reasonably practicable after modifying a dynamic market, the contracting authority must publish a notice setting out—
 - (a) the modifications made to the market, and
 - (b) any other information specified in regulations under section 95.
- (5) As soon as reasonably practicable after a dynamic market ceases to operate, the contracting authority that established the market must publish a notice setting out—
 - (a) that the dynamic market has ceased to operate, and
 - (b) any other information specified in regulations under section 95.
- (6) Subsection (5) does not apply to private utilities.

40 Qualifying utilities dynamic market notices: no duty to publish a tender notice

- (1) The duty to publish a tender notice in section 21(1) does not apply in relation to the award of a contract by reference to suppliers' membership of—
 - (a) a utilities dynamic market established by reference to a qualifying utilities dynamic market notice, or
 - (b) a part of such a market.
- (2) A contracting authority must instead provide a tender notice to members of the market, or part of the market, for the purposes set out in section 21(1).
- (3) A contracting authority may also provide a tender notice to suppliers that have applied for membership of the market, or part of the market, but have yet to be accepted or rejected.
- (4) The reference in section 21(5) to a tender notice or associated tender documents includes a reference to a qualifying utilities dynamic market notice.
- (5) Section 34(4) (duty to consider applications for membership) does not apply in relation to the award of a contract by reference to suppliers' membership of—
 - (a) a utilities dynamic market established by reference to a qualifying utilities dynamic market notice, or
 - (b) a part of such a market.
- (6) In this section, “a qualifying utilities dynamic market notice” means a dynamic market notice under section 39(2) (dynamic market notices) that—
 - (a) relates to the establishment of a utilities dynamic market, and
 - (b) sets out—
 - (i) that only members of the market will be notified of a future intention to award a contract by reference to suppliers' membership of the market, and
 - (ii) any other information specified in regulations under section 95.
- (7) In this Act, a reference to publication of a tender notice includes a reference to provision of a tender notice under subsection (2) or (3).