



Procurement Act 2023

2023 CHAPTER 54

PART 3

AWARD OF PUBLIC CONTRACTS AND PROCEDURES

CHAPTER 2

COMPETITIVE AWARD

Exclusions and modifications

26 Excluding suppliers from a competitive award

- (1) In assessing tenders under section 19, a contracting authority must disregard any tender from a supplier that is an excluded supplier.
- (2) Before assessing which tender best satisfies the award criteria for the purposes of section 19, a contracting authority—
 - (a) must consider whether a supplier is an excludable supplier, and
 - (b) may disregard any tender from an excludable supplier.
- (3) If the supplier is an excluded or excludable supplier only by virtue of an associated person being an excluded or excludable supplier, the contracting authority must, before disregarding a tender—
 - (a) notify the supplier of its intention to disregard, and
 - (b) give the supplier reasonable opportunity to replace the associated person.
- (4) In this Act, “associated person” means a person that the supplier is relying on in order to satisfy the conditions of participation (see section 22(8)), but not a person who is to act as guarantor as described in section 22(9).

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27 Excluding suppliers from a competitive flexible procedure

- (1) Before permitting a supplier to participate in a competitive flexible procedure, a contracting authority must determine whether the supplier is—
 - (a) an excluded supplier, or
 - (b) an excludable supplier.
- (2) The contracting authority must exclude an excluded supplier from participating in, or progressing as part of, the competitive flexible procedure.
- (3) The contracting authority may exclude an excludable supplier from participating in, or progressing as part of, the competitive flexible procedure.
- (4) Before excluding a supplier that is an excluded supplier or excludable supplier only by virtue of an associated person, a contracting authority must—
 - (a) notify the supplier of its intention, and
 - (b) provide the supplier with reasonable opportunity to replace the associated person.
- (5) In this section, a reference to a supplier participating in a competitive flexible procedure is a reference to a supplier participating beyond the initial submission of tenders or requests to participate.

28 Excluding suppliers by reference to sub-contractors

- (1) A contracting authority must as part of a competitive tendering procedure—
 - (a) request information about whether a supplier intends to sub-contract the performance of all or part of the public contract, and
 - (b) seek to determine whether any intended sub-contractor is on the debarment list.
- (2) A contracting authority may, as part of a competitive tendering procedure, request information for the purpose of determining whether any intended sub-contractor is an excluded or excludable supplier.
- (3) If, after requesting information under subsection (1) or (2), a contracting authority considers that a supplier intends to sub-contract to a supplier that is an excluded supplier, the contracting authority must—
 - (a) treat the supplier as an excluded supplier for the purpose of assessing tenders under section 19, and
 - (b) exclude the supplier from participating in, or progressing as part of, the competitive tendering procedure.
- (4) If, after requesting information under subsection (1) or (2), a contracting authority considers that a supplier intends to sub-contract to a supplier that is an excludable supplier, the contracting authority—
 - (a) must treat the supplier as an excludable supplier for the purpose of assessing tenders under section 19, and
 - (b) may exclude the supplier from participating in, or progressing as part of, the competitive tendering procedure.
- (5) Before disregarding a tender or excluding a supplier under subsection (3) or (4), a contracting authority must—
 - (a) notify the supplier of its intention, and

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- (b) give the supplier reasonable opportunity to find an alternative supplier with which to sub-contract.
- (6) In this section, a reference to a supplier participating in a competitive tendering procedure is a reference to a supplier participating beyond the initial submission of tenders or requests to participate.
- (7) Subsections (3) and (4) do not apply if the intended sub-contractor is an associated person.

29 Excluding a supplier that is a threat to national security

- (1) This section applies if a relevant contracting authority intends to disregard a tender under section 26 or 28 or exclude a supplier under section 27 or 28 on the basis of the discretionary exclusion ground in paragraph 14 of Schedule 7 (threat to national security).
- (2) The contracting authority may not disregard the tender, exclude the supplier or notify the supplier of its intention unless—
 - (a) the authority has notified a Minister of the Crown of its intention, and
 - (b) the Minister of the Crown considers that—
 - (i) the supplier or an intended sub-contractor is an excludable supplier by reference to paragraph 14 of Schedule 7, and
 - (ii) the tender should be disregarded or supplier excluded.
- (3) The reference in subsection (2) to a contracting authority notifying a supplier of its intention is a reference to notification in accordance with section 26(3), 27(4) or 28(5).
- (4) In this section, a “relevant contracting authority” means a contracting authority other than—
 - (a) a Minister of the Crown or a government department,
 - (b) the Corporate Officer of the House of Commons, or
 - (c) the Corporate Officer of the House of Lords.

30 Excluding suppliers for improper behaviour

- (1) Subsection (2) applies if a contracting authority determines that—
 - (a) a supplier has acted improperly in relation to the award of a public contract,
 - (b) in consequence, the supplier is put at an unfair advantage in relation to the award, and
 - (c) the unfair advantage cannot be avoided other than by excluding the supplier.
- (2) The contracting authority must in relation to the award—
 - (a) treat the supplier as an excluded supplier for the purpose of assessing tenders under section 19, and
 - (b) exclude the supplier from participating in, or progressing as part of, any competitive tendering procedure.
- (3) Before making a determination of the kind described in subsection (1), a contracting authority must give the supplier reasonable opportunity to—
 - (a) make representations, and
 - (b) provide relevant evidence.

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- (4) In subsection (1), the reference to a supplier acting improperly is reference to a supplier—
 - (a) failing to provide information requested by the contracting authority,
 - (b) providing information that is incomplete, inaccurate or misleading,
 - (c) accessing confidential information, or
 - (d) unduly influencing the contracting authority’s decision-making.
- (5) Subsection (6) applies if—
 - (a) a contracting authority has, in relation to the award of a public contract, requested—
 - (i) information about a supplier’s connected persons or associated persons for the purpose of determining whether the supplier is an excluded or excludable supplier, or
 - (ii) other information under section 28(2) (excluding suppliers by reference to sub-contractors), and
 - (b) the supplier has—
 - (i) failed to provide the information requested, or
 - (ii) provided information that is incomplete, inaccurate or misleading.
- (6) The contracting authority must in relation to the award—
 - (a) treat the supplier as an excluded supplier for the purpose of assessing tenders under section 19, and
 - (b) exclude the supplier from participating in, or progressing as part of, any competitive tendering procedure.

31 Modifying a section 19 procurement

- (1) A contracting authority may modify the terms of a covered procurement before the following deadlines have passed—
 - (a) in the case of an open procedure, the deadline for submitting tenders;
 - (b) in the case of a competitive flexible procedure—
 - (i) the deadline for submitting a request to participate in the procedure, or
 - (ii) where there has been no invitation to submit such requests, the deadline for submitting a first or only tender.
- (2) In the case of a competitive flexible procedure, a contracting authority may also modify the terms of a covered procurement before the deadline for submitting a tender for assessment under section 19 (award following competitive tendering procedure) has passed if—
 - (a) the modification is not substantial, or
 - (b) the procurement relates to the award of a light touch contract.
- (3) A modification is “substantial” if—
 - (a) it would permit suppliers that are not participating suppliers to submit a tender, or
 - (b) the contracting authority considers that, had the modification been reflected in the tender notice or associated tender documents before a deadline referred to in subsection (1)(b) passed—
 - (i) one or more participating suppliers would not be a participating supplier, or

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- (ii) one or more suppliers that are not participating suppliers would be a participating supplier.
- (4) Whenever a contracting authority modifies the terms of a covered procurement, the authority must consider revising applicable tender deadlines and other time limits in accordance with section 54 (time limits).
- (5) If a contracting authority modifies the terms of a covered procurement under subsection (1), the authority must revise and republish or provide again the tender notice and any associated tender documents affected by the modifications or time limit revisions.
- (6) If a contracting authority modifies the terms of a covered procurement under subsection (2), the authority must notify each participating supplier.
- (7) In this section—
 - “terms of a covered procurement” means anything set out in a tender notice or associated tender documents, including any requirements of a competitive tendering procedure, conditions of participation or award criteria;
 - “participating supplier” means a supplier that—
 - (a) has submitted a request to participate in, or a tender as part of, the competitive tendering procedure, and
 - (b) has not been excluded in accordance with the procedure or under this Act.
- (8) See section 43 for provision about switching to direct award.