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## STATUTORY INSTRUMENTS

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# 2016 No. 273

## The Concession Contracts Regulations 2016

### PART 3

#### Rules on the award of concession contracts

##### CHAPTER 2

###### Procedural guarantees

###### **Technical and functional requirements**

36.—(1) Technical and functional requirements shall be set out in the concession documents and shall lay down the characteristics required of the works or services that are the subject-matter of the concession contract.

(2) 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.

(3) The characteristics may, for example, include quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, terminology, symbols, testing and test methods, marking and labelling, or user instructions.

(4) Unless justified by the subject-matter of the concession contract, technical and functional requirements shall 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) But such a reference is permitted, on an exceptional basis, where 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 authority or utility shall 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**

###### *Concession contract award*

###### *Concession contract award*

37.—(1) Concession contracts shall 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 authority or utility;
- (b) the tenderer complies with the conditions for participation set out in regulation 38(1) to (3); and
- (c) the tenderer is not excluded from participating in the concession contract award procedure in accordance with regulation 38(8) to (16), as read with regulation 38(21) to (25).

*Limitation of candidates or tenderers*

(2) The contracting authority or utility 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 shall be sufficient to ensure genuine competition.

- (4) The contracting authority or utility shall communicate the following to all participants—
- (a) the description of the envisaged organisation of the concession contract award 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 authority or utility shall advertise it to all economic operators.

(6) The contracting authority or utility shall provide for appropriate recording of the stages of the procedure using the means it considers appropriate, subject to regulation 28(1) and (2).

(7) The contracting authority or utility may hold negotiations with candidates and tenderers but the subject-matter of the concession contract, the award criteria and the minimum requirements shall not be changed during the course of any negotiations.

- (8) In this regulation—
- (a) “the award criteria” means the award criteria set out by the contracting authority or utility in accordance with regulation 41;
  - (b) “minimum requirements” means the conditions and characteristics (in particular any technical, physical, functional and legal conditions and characteristics) that any tender must meet or possess.

**Selection of and qualitative assessment of candidates**

**38.**—(1) Contracting authorities and utilities shall 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 shall be non-discriminatory and proportionate to the subject-matter of the concession contract.

(3) The conditions for participation shall 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.

*Reliance on the capacities of other entities*

(4) For the purpose of meeting the conditions for participation, an economic operator may, where 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) Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority or utility 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 authority or utility 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 within the meaning of regulation 26 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.

#### *Mandatory exclusion*

(8) Contracting authorities and utilities referred to in regulation 5(1)(a) shall exclude an economic operator from participation in a concession contract award procedure where they have established that that economic operator has been convicted of any of the following offences—

- (a) conspiracy within the meaning of section 1 or 1A of the Criminal Law Act 1977(1) or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983(2) 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(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);
- (c) the common law offence of bribery;
- (d) bribery within the meaning of sections 1, 2 or 6 of the Bribery Act 2010(6), or section 113 of the Representation of the People Act 1983(7);
- (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(8)—
  - (i) the common law offence of cheating the Revenue;
  - (ii) the common law offence of conspiracy to defraud;
  - (iii) fraud or theft within the meaning of the Theft Act 1968(9), the Theft Act (Northern Ireland) 1969(10), the Theft Act 1978(11) or the Theft (Northern Ireland) Order 1978(12);

(1) 1977 c.45; section 1 was amended by the Criminal Attempts Act 1981 (c.47), section 5(1), by the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40), Schedule 2, Part 2, and by the Trade Union and Labour Relations (Consolidation) Act 1992 (c.52), Schedule 1; section 1A was inserted by the Criminal Justice (Terrorism and Conspiracy) Act 1998, section 5(1), and was amended by the Coroners and Justice Act 2009 (c.25), section 72(1)(a).

(2) S.I. 1983/1120 (N.I.13); article 9 was amended by Part 2 of Schedules 1 and 2 to the Criminal Justice (Terrorism and Conspiracy) Act 1998, and article 9A was inserted by section 6(1) of that Act; there are other amendments but none is relevant.

(3) OJ No L 300, 11.11.2008, p42.

(4) 1889 c.69; this Act was repealed by the Bribery Act 2010 (c.23), Schedule 2.

(5) 1906 c.34; this Act was repealed by the Bribery Act 2010, Schedule 2.

(6) 2010 c.23.

(7) 1983 c.2; section 113 was amended by the Greater London Authority Act 1999 (c.29), Schedule 3, paragraph 30(2).

(8) OJ No C 316, 27.11.1995, p48.

(9) 1968 c.60.

(10) 1969 c.16 (N.I.).

(11) 1978 c.31.

(12) S.I. 1978/1407 (N.I.23).

- (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(13), article 451 of the Companies (Northern Ireland) Order 1986(14) or section 993 of the Companies Act 2006(15);
- (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(16) or section 72 of the Value Added Tax Act 1994(17);
- (vi) an offence in connection with taxation in the EU within the meaning of section 71 of the Criminal Justice Act 1993(18);
- (vii) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968(19) or section 19 of the Theft Act (Northern Ireland) 1969(20);
- (viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006(21); or
- (ix) the possession of articles for use in frauds within the meaning of section 6 of the Fraud Act 2006, or the making, adapting, supplying or offering to supply articles for use in frauds within the meaning of section 7 of that Act;
- (f) any offence listed—
  - (i) in section 41 of the Counter Terrorism Act 2008(22); or
  - (ii) in Schedule 2 to that Act where the court has determined that there is a terrorist connection;
- (g) any offence under sections 44 to 46 of the Serious Crime Act 2007(23) which relates to an offence covered by sub-paragraph (f);
- (h) money laundering within the meaning of sections 340(11) and 415 of the Proceeds of Crime Act 2002(24);
- (i) 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(25) or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996(26);
- (j) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004(27);

(13) 1985 c.6; section 458 was modified by S.I. 2001/1090 and repealed by the Companies Act 2006 (c.46), Schedule 16.

(14) S.I. 1986/1032 (N.I.6), amended by S.R. (NI) 2004/307 (and other instruments that were not relevant) and revoked by the Companies Act 2006 (c.46), Schedule 16.

(15) 2006 c.46; section 993 is applied (with modifications) by S.I. 2009/1804, regulation 47, and by S.I. 2009/2436, regulation 3 and Schedule 1.

(16) 1979 c.2; section 170 was amended by the Forgery and Counterfeiting Act 1981 (c.45), section 23(3); by the Police and Criminal Evidence Act 1984 (c.60), section 114(1); by the Finance Act 1988 (c.39), section 12; by the Finance (No 2) Act 1992 (c.48), Schedule 2; by the Criminal Justice Act 2003 (c.44), section 293; by the Criminal Justice and Immigration Act 2008 (c.4), Schedule 17; by the Anti-social Behaviour, Crime and Policing Act 2014 (c.12), section 111; and by S.I. 1996/2686 and 2015/664; S.I. 2004/702 (N.I.3) and S.I. 2005/1966 (N.I.16).

(17) 1994 c.23; section 72 was amended by the Finance Act 2007 (c.11), Schedule 22; by the Finance Act 2003 (c.14), section 17 and by S.I. 2015/664.

(18) 1993 c.36, amended by S.I. 2011/1043.

(19) 1968 c.60; section 20 was amended by the Fraud Act 2006 (c.35), Schedules 1 and 3.

(20) 1969 c.16 (N.I.); section 19 was amended by the Fraud Act 2006 (c.35), Schedules 1 and 3.

(21) 2006 c.35.

(22) 2008 c.28.

(23) 2007 c.27.

(24) 2002 c.29; sections 340(11) and 415 were modified by the Serious Crime Act 2007 (c.27), section 63(1) and Schedule 6, paragraph 44; section 415 was amended by the Serious Organised Crime and Police Act 2005 (c.15), section 107(4).

(25) 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) and Schedule 12.

(26) S.I. 1996/1299 (N.I.9); articles 45, 46 and 47 were repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraph 31(2).

(27) 2004 c.19; section 4 was amended by the Human Tissue Act 2004 (c.30), Schedule 6, paragraph 7, by the UK Borders Act 2007 (c.30), section 31(1), by the Borders, Citizenship and Immigration Act 2009 (c.11), section 54, by the Protection of Freedoms Act 2012 (c.9), section 110, and by the Criminal Justice Act (Northern Ireland) 2013 (c.7 (N.I.)), section 7(2) to

- (k) an offence under section 59A of the Sexual Offences Act 2003(28);
- (l) an offence under section 71 of the Coroners and Justice Act 2009(29);
- (m) an offence under section 2 or 4 of the Modern Slavery Act 2015(30);
- (n) 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(31); or
- (o) any other offence within the meaning of Article 38(4) of the Concessions Directive—
  - (i) as defined by the law of any jurisdiction outside England and Wales and Northern Ireland, or
  - (ii) created, after the day on which these Regulations were made, in the law of England and Wales or Northern Ireland.

(9) The obligation to exclude an economic operator also applies where the person convicted is a member of the administrative, management or supervisory body of that economic operator, or has powers of representation, decision or control in the economic operator.

*Mandatory and discretionary exclusions for non-payment of taxes etc.*

(10) A contracting authority or a utility referred to in regulation 5(1)(a) shall exclude an economic operator from participation in a concession contract award procedure where—

- (a) it is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions; and
- (b) the breach 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 the economic operator is established or with those of any of the jurisdictions of the United Kingdom.

(11) A contracting authority or a utility referred to in regulation 5(1)(a) may exclude an economic operator from participation in a concession contract award procedure where it 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.

(12) Paragraphs (10) and (11) cease to apply when 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.

*Exceptions to mandatory exclusion*

(13) A contracting authority or utility may disregard any of the prohibitions imposed by paragraphs (8) to (10), on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

(14) A contracting authority or utility may also disregard the prohibition imposed by paragraph (10) 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

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(5) and Schedule 4, Part 2, and extended to the Isle of Man with modifications by S.I. 2008/680, article 18 and Schedule 8. Section 4 was repealed, in relation to England and Wales, by the Modern Slavery Act 2015 (c.30), Schedule 5, paragraph 6.

(28) 2003 c.42; section 59A was inserted by the Protection of Freedoms Act 2012 (c.9), section 109(2) and repealed by the Modern Slavery Act 2015, Schedule 5, paragraph 5.

(29) 2009 c.25; section 71 was repealed by the Modern Slavery Act 2015, Schedule 5, paragraph 8.

(30) 2015 c.30.

(31) 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.

time that it did not have the possibility of fulfilling its obligations in a manner described in paragraph (12) before expiration of the deadline for submitting its application.

#### *Discretionary exclusion*

(15) A utility other than one referred to in regulation 5(1)(a) may exclude an economic operator from participation in a concession contract award procedure where it is aware that that economic operator has been convicted of any offence in paragraph (8).

(16) A contracting authority or utility may exclude from participation in a concession contract award procedure any economic operator in any of the following situations—

- (a) where it can demonstrate by any appropriate means a violation of 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 Concessions Directive as amended from time to time;
- (b) where 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 the laws and regulations of any State;
- (c) where the contracting authority or utility can demonstrate by any appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
- (d) where a conflict of interest within the meaning of regulation 35 cannot be effectively remedied by any other, less intrusive, measures;
- (e) where the contracting authority or utility has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- (f) where 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 Regulations 2015(32) or the Utilities Contracts Regulations 2016(33) which led to early termination of that prior contract, damages or other comparable sanctions;
- (g) where 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 authority or utility in accordance with paragraphs (1) to (3); or
  - (ii) has withheld such information or is unable to submit the required documents supporting such information;
- (h) where the economic operator has—
  - (i) undertaken to—
    - (aa) unduly influence the decision-making process of the contracting authority or utility, or
    - (bb) obtain confidential information that may confer upon it undue advantages in the concession contract award procedure; or

(32) S.I. 2015/102, as amended by S.I. 2016/275.

(33) S.I. 2016/274.

- (ii) 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 Directive 2009/81/EC of the European Parliament and of the Council(34), where 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.

#### *Exclusion during procedure*

(17) Contracting authorities and utilities referred to in regulation 5(1)(a) shall exclude an economic operator where they become aware, at any time during a concession contract award 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 (8) to (10).

(18) Contracting authorities and utilities may exclude an economic operator where they become aware, at any time during a concession contract award 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 (11), (15) or (16).

#### *Duration of exclusion*

(19) In the cases referred to in paragraphs (8) and (9) the period during which the economic operator shall (subject to paragraphs (13) and (22)) be excluded is 5 years from the date of the conviction.

(20) In the cases referred to in paragraphs (15) and (16), the period during which the economic operator may (subject to paragraph (22)) be excluded is 3 years from the date of the relevant event.

#### *Self-cleaning*

(21) Any economic operator that is in one of the situations referred to in paragraphs (8), (15) or (16) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of the relevant ground for exclusion.

(22) If the contracting authority or utility considers such evidence to be sufficient, the economic operator concerned shall not be excluded from the concession contract award procedure.

(23) For that purpose, the economic operator shall 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.

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

(25) Where the contracting authority or utility considers such measures to be insufficient, it shall give the economic operator a statement of the reasons for that decision.

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(34) OJ No L 216, 20.8.2009, p76, last amended by Commission Regulation (EU) 2015/2340 (OJ No L 330, 16.12.2015, p14).

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

**39.**—(1) When fixing the time limits for the receipt of applications or of tenders, contracting authorities and utilities shall take account, in particular, of the complexity of the concession contract and the time required for drawing up tenders or applications, without prejudice to the minimum time limits set out in this regulation.

(2) Where applications or tenders 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 limits for the receipt of applications for the concession contract or for the receipt of tenders shall be fixed so that all economic operators concerned may be aware of all the information needed to produce applications or tenders and, in any event, shall 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) shall be 30 days from the date on which the concession notice was sent for publication in accordance with regulation 33.

(4) Where the concession contract award procedure takes place in successive stages the minimum time limit for the receipt of initial tenders shall be 22 days from the date on which the invitation to tender is sent.

(5) The time limit for receipt of tenders may be reduced by 5 days where the contracting authority or utility allows the submission of tenders by electronic means in accordance with regulation 29.

## Informing candidates and tenderers

**40.**—(1) The contracting authority or utility shall as soon as possible inform each candidate and tenderer of decisions reached concerning the award of a concession contract, 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 procedure.

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

(3) The contracting authority or utility may decide to withhold certain information referred to in paragraphs (1) and (2) where 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.

## Award criteria

**41.**—(1) Concession contracts shall be awarded on the basis of objective criteria which comply with the principles set out in regulation 8 and which ensure that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the contracting authority or utility (“the award criteria”).

(2) The award criteria—

- (a) shall be linked to the subject-matter of the concession contract;

- (b) shall not confer an unrestricted freedom of choice on the contracting authority or utility; and
- (c) may include criteria such as one or more of the following—
  - (i) environmental criteria,
  - (ii) social criteria, or
  - (iii) criteria related to innovation.

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

(4) The contracting authority or utility shall verify whether tenders properly meet the award criteria.

(5) The contracting authority or utility shall list the award criteria in descending order of importance.

(6) Where the contracting authority or utility 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 authority or utility, the contracting authority or utility may, exceptionally, modify the ranking order of the award criteria to take into account that innovative solution.

(7) Where paragraph (6) applies the contracting authority or utility shall—

- (a) inform all tenderers about the modification of the order of importance and issue a new invitation to submit tenders, respecting the minimum time limit referred to in regulation 39(4) for the receipt of tenders;
- (b) where the award criteria have been published in, or at the same time as, the concession notice, publish a new concession notice, respecting the minimum time limit referred to in regulation 39(3) for the receipt of applications.

(8) The contracting authority or utility shall 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 for smart, sustainable and inclusive growth(35).

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(35) The Europe 2020 strategy can be found on the European Commission website at <http://ec.europa.eu> 2020 or can be obtained from the Crown Commercial Service, Rosebery Court, St Andrews Business Park, Norwich, NR7 0HS.