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STATUTORY INSTRUMENTS

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**2016 No. 274**

**The Utilities Contracts Regulations 2016**

**PART 2**

**RULES APPLICABLE TO CONTRACTS**

**CHAPTER 3**

**Conduct of the procedure**

*SECTION 1*

*Preparation*

**Preliminary market consultations**

**58.**—(1) Before commencing a procurement procedure, utilities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.

(2) For this purpose, utilities may for example seek or accept 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**

**59.**—(1) Where a candidate or tenderer, or an undertaking related to a candidate or tenderer—

(a) has advised the utility, whether in the context of regulation 58 or not; or

(b) has otherwise been involved in the preparation of the procurement procedure,

the utility shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

(2) Such measures shall 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) The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to treat economic operators equally in accordance with regulation 36(1).

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

(5) The measures taken under this regulation shall be documented in accordance with regulation 99.

### **Technical specifications**

**60.**—(1) The technical specifications shall be set out in the procurement documents.

#### *Scope of the technical specifications*

(2) The technical specifications shall lay down the characteristics required of works, services or supplies.

(3) In these Regulations, “technical specification” means—

- (a) in the case of works contracts, the totality of the technical prescriptions contained in the procurement documents, defining the characteristics required of a material, product or a supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the utility;
- (b) in the case of service or supply contracts, a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures.

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

- (a) levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, and production processes and methods at any stage of the life cycle of the works;
- (b) rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the utility 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.

(5) For the purposes of paragraph (3), 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.

#### *Formulating the technical specifications*

(7) For all procurement which is intended for use by natural persons, whether the general public or staff of the utility, the technical specifications shall, 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 shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.

(9) Technical specifications shall afford equal access of economic operators to the procurement procedure and shall 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 shall be formulated in one of the following ways—

- (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 utilities to award the contract;
- (b) by reference to technical specifications and, in order of preference, to—
  - (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 shall be accompanied by the words “or equivalent”;
- (c) in terms of performance or functional requirements 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;
- (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) Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.

(12) But such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract in accordance with paragraph (10) is not possible, in which case the reference shall be accompanied by the words “or equivalent”.

#### *Applying the technical specifications*

(13) Where a utility uses the option of referring to the technical specifications referred to in paragraph (10)(b), it shall not reject a tender on the ground that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender, by any appropriate means, including the means of proof referred to in regulation 62, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

(14) Where a utility uses the option provided for in paragraph (10)(a) to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for works, supplies or services which comply with a national standard transposing a European standard,

a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where those address the performance or functional requirements which it has laid down.

(15) In its tender, the tenderer shall prove by any appropriate means including those referred to in regulation 62, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the utility.

(16) In this regulation—

“common technical specification” means a technical specification in the field of information and communication technology laid down in accordance with Articles 13 and 14 of Regulation (EU) 1025/2012 of the European Parliament and of the Council<sup>(1)</sup> as amended from time to time;

“European Technical Assessment” means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the respective European Assessment Document as defined in point 12 of Article 2 of Regulation (EU) No 305/2011 of the European Parliament and the Council<sup>(2)</sup> as amended from time to time;

“technical reference” means any deliverable produced by European standardisation bodies, other than European standards, according to procedures adapted to the development of market needs.

## Labels

**61.**—(1) Where utilities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, supplies or services 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 the characteristics of the works, supplies or services that are the subject-matter of the contract;
- (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- (c) the labels are 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 labels are accessible to all interested parties;
- (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 utilities do not require the works, supplies or services to meet all of the label requirements, they shall indicate which label requirements are required.

(3) Utilities requiring a specific label shall 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 utility, or an equivalent label, within the relevant time limits for reasons that are not attributable to that economic operator, the utility shall accept other appropriate means of proof, which may include a technical dossier of the manufacturer, provided that the economic operator

<sup>(1)</sup> OJ No L 316, 14.11.2012, p12.

<sup>(2)</sup> OJ No L 88, 4.4.2011,p5, last amended by [Directive 2014/68/EU](#) of the European Parliament and of the Council (OJ No L 189, 27.6.2014,p164).

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 utility.

(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, utilities shall not require the label as such 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, certification and other means of proof**

**62.**—(1) Utilities may require that economic operators 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 utilities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by the utilities.

(3) In paragraphs (1) and (2), a “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 the Council(3).

(4) Utilities shall accept appropriate means of proof other than those referred to in paragraphs (1) and (2), such as a technical dossier of the manufacturer, where the economic operator concerned had 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, provided that—

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

### **Communication of technical specifications**

**63.**—(1) On request from economic operators interested in obtaining a contract, utilities shall make available—

- (a) the technical specifications regularly referred to in their supply, works or service contracts;  
or
- (b) the technical specifications which they intend to apply to contracts for which the call for competition is a periodic indicative notice.

(2) Subject to paragraph (3), the technical specifications referred to in paragraph (1) shall be made available by electronic means of communication through unrestricted and full direct access free of charge.

(3) Technical specifications shall be transmitted by means other than electronic means where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered—

- (a) for one of the reasons set out in regulation 40(3), or
- (b) because the utilities intend to apply regulation 39(3).

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(3) OJ No. L 218, 13.8.2008, p30.

(4) Where the technical specifications are based on documents available by electronic means through unrestricted and full direct access free of charge to interested economic operators, the inclusion of a reference to those documents shall be sufficient.

### **Variants**

**64.**—(1) Utilities may authorise or require tenderers to submit variants which meet the minimum requirements specified by those utilities.

(2) Utilities shall indicate in the procurement documents whether or not they authorise or require variants.

(3) Utilities authorising or requiring variants shall indicate in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation, in particular whether variants may be submitted only where a tender, which is not a variant, has also been submitted.

(4) Utilities shall ensure that the chosen award criteria can be applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

(5) In procedures for awarding supply or service contracts, utilities that have authorised or required variants shall not reject a variant on the sole ground that it would, where successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

### **Division of contracts into lots**

**65.**—(1) Utilities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

(2) Utilities shall indicate—

- (a) in the contract notice;
- (b) in the invitation to confirm interest; or
- (c) where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate,

whether tenders may be submitted for one, for several or for all of the lots.

(3) Utilities 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—

- (a) the contract notice; or
- (b) the invitation to confirm interest, to tender or to negotiate.

(4) Utilities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend 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.

(5) Where more than one lot may be awarded to the same tenderer, utilities may award a contract combining several or all lots where they have specified in the—

- (a) contract notice; or
- (b) in the invitation to confirm interest, to tender or to negotiate,

that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.

### **Setting time limits**

66.—(1) When fixing the time limits for requests to participate and the receipt of tenders, utilities shall take particular 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 45 to 49.

(2) Where tenders can be made only after a visit to the site or after on-the-spot inspection of 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 45 to 49, shall be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.

(3) Utilities shall 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 in the following cases—

- (a) where, 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 receipt of tenders;
- (b) where significant changes are made to the procurement documents.

(4) The length of the extension shall be proportionate to the importance of the information or change.

(5) In the case of an accelerated open procedure, the period mentioned in paragraph (3)(a) shall be 4 days.

(6) Where additional information has either not been requested in good time or its importance with a view to preparing responsive tenders is insignificant, utilities are not required to extend the time limits.

## *SECTION 2*

### *Publication and transparency*

#### **Periodic indicative notices**

67.—(1) Utilities may make known their intentions of planned procurements through the publication of a periodic indicative notice.

(2) Such notices shall contain the information set out in part A, section I of Annex VI to the Utilities Contracts Directive.

(3) A utility wishing to publish a periodic indicative notice shall—

- (a) send it for publication in accordance with regulation 71; or
- (b) publish it on the utility's buyer profile in accordance with regulation 72.

(4) Where the periodic indicative notice is published by the utility on its buyer profile the utility shall send for publication, in accordance with regulation 71, a notice containing the information set out in Part B of Annex VI to the Utilities Contracts Directive.

(5) When a call for competition is made by means of a periodic indicative notice in respect of restricted procedures and negotiated procedures with prior call for competition and competitive dialogue, the notice shall meet all the following requirements—

- (a) it refers specifically to the supplies, works or services that will be the subject of the contract to be awarded;
- (b) it indicates that the contract will be awarded by restricted or negotiated procedure or competitive dialogue without further publication of a call for competition and invites interested economic operators to express their interest;

- (c) it contains, in addition to the information set out in section I of Part A of Annex VI to the Utilities Contracts Directive, the information set out section II of Part A;
  - (d) it has been sent for publication between 35 days and 12 months prior to the date on which the invitation to confirm interest is sent for the purposes of regulation 74(1) or (2).
- (6) Where paragraph (5) applies, paragraph (3)(b) shall not apply to the notice, but additional publication at national level under regulation 52, if any, may be made on a buyer profile.
- (7) The period covered by the periodic indicative notice shall be a maximum of 12 months from the date on which the notice is transmitted for publication.
- (8) In the case of contracts for social and other specific services, the periodic indicative notice referred to in regulation 91(1)(b) may cover a period which is longer than 12 months.

### **Notices on the existence of a qualification system**

**68.**—(1) Where utilities choose to set up a qualification system in accordance with regulation 77, the system shall be the subject of a notice which shall include the information set out in Annex X to the Utilities Contracts Directive, indicating the purpose of the qualification system and how to have access to the rules concerning its operation.

(2) Utilities shall indicate the period of validity of the qualification system in the notice on the existence of the system.

(3) Utilities shall notify the EU Publications Office of any change in the period of validity, using the following standard forms—

- (a) where the period of validity is changed without terminating the system, the form for notices on the existence of qualification systems;
- (b) where the system is terminated, a contract award notice referred to in regulation 70.

### **Contract notices**

**69.** Contract notices shall contain the information set out in the relevant part of Annex XI to the Utilities Contracts Directive and shall be sent for publication in accordance with regulation 71.

### **Contract award notices**

**70.**—(1) Not later than 30 days after the award of a contract or the conclusion of a framework agreement, following the decision to award or conclude it, utilities shall send for publication a contract award notice on the results of the procurement procedure.

(2) Such notices shall contain the information set out in Annex XII to the Utilities Contracts Directive and shall be sent for publication in accordance with regulation 71.

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

(4) In the case of framework agreements, utilities shall not be bound to send a notice of the results of the procurement procedure for each contract based on such an agreement.

(5) In the case of dynamic purchasing systems, utilities shall either—

- (a) send a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system; or
- (b) group such notices on a quarterly basis, in which case they shall send the grouped notices within 30 days of the end of each quarter.



(6) Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release—

- (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.

(7) In the case of contracts for research and development services, the information concerning the nature and quantity of the services may be limited to:—

- (a) the indication “R & D services” where the contract has been awarded by a negotiated procedure without a call for competition in accordance regulation 50(1)(b);
- (b) information as least as detailed as was indicated in the notice that was used as a means of calling for competition.

### **Form and manner of sending notices for publication at EU level**

**71.**—(1) The notices required by regulations 67 to 70, 88, 91 and 95 to be sent for publication in accordance with this regulation shall be sent by electronic means to the EU Publications Office for publication.

(2) Utilities shall 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 utility 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) Utilities may send notices in respect of works, supply or service contracts to the EU Publications Office for publication even where they are not required by these Regulations to do so, provided that the notices are sent by electronic means.

(5) The notices referred to in paragraphs (1) and (4), shall be in the format of the relevant standard forms set out in Commission Implementing Regulation (EU) 2015/1986(4) as amended from time to time.

### **Publication at national level**

#### *Publication on buyer profiles*

#### *Publication on buyer profiles*

**72.**—(1) In addition to the publication of the notices referred to in regulations 67 to 70, 91 and 95 by the EU Publications Office, utilities may publish the information contained in them on the internet on a buyer profile.

(2) A buyer profile may also include (in addition to the periodic indicative notices referred to in regulation 67(3)(b))—

- (a) information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled; and
- (b) any useful general information, such as a contact point, a telephone and a facsimile number, a postal address and an e-mail address.

#### *Timing and content of publication at national level*

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(4) OJ No L 296, 12.11.2015, p1.

(3) The notices referred to in regulations 67 to 70, 91 and 95, and the information contained in them shall not be published at national level before they are published by the EU Publications Office.

(4) But publication may in any event take place at the national level where utilities have 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 71(5) of the Utilities Contracts Directive.

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

(6) Where a periodic indicative notice is to be published on a buyer profile for the purposes of regulation 67(3)(b)—

- (a) the periodic indicative notice may not be so published before the notice referred to in regulation 67(4) is sent to the EU Publications Office; and
- (b) the periodic indicative notice shall indicate the date of that sending.

### **Electronic availability of procurement documents**

**73.**—(1) Utilities shall, by means of the internet, offer unrestricted and full direct access free of charge to the procurement documents from the date of publication in the Official Journal of a notice in accordance with regulation 71 or the date on which an invitation to confirm interest is sent.

(2) But where the means of calling for competition is a notice on the existence of a qualification system, the access referred to in paragraph (1) shall be offered as soon as possible and at the latest when the invitation to tender or to negotiate is sent.

(3) The text of the notice or of the invitation shall specify the internet address at which the procurement documents are accessible.

(4) Where unrestricted and full direct access free of charge to certain procurement documents cannot be offered by means of the internet for one of the reasons set out in regulation 40(3), utilities may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by means other than the internet in accordance with paragraphs (7) and (8).

(5) Where unrestricted and full direct access free of charge to certain procurement documents cannot be offered by means of the internet because utilities intend to apply regulation 39(3), utilities shall indicate in—

- (a) the notice;
- (b) the invitation to confirm interest; or
- (c) where the means of calling for competition is a notice on the existence of a qualification system, the procurement documents,

which measures aimed at protecting the confidential nature of the information they require and how access can be obtained to the documents concerned.

(6) In the cases referred to in paragraphs (4) and (5), the time limit for the submission of tenders shall be prolonged by 5 days, except—

- (a) in the cases of duly substantiated urgency referred to in regulation 45(5), and
- (b) where the time limit is set by mutual agreements in accordance with regulations 46(5) or 47(5).

(7) Provided that it has been requested in good time, utilities shall supply to all tenderers taking part in the procurement procedure additional information relating to the specifications and any supporting documents no later than 6 days before the time limit fixed for the receipt of tenders.

(8) In the case of an accelerated open procedure, the period mentioned in paragraph (7) shall be 4 days.

### **Invitations to candidates**

**74.**—(1) In restricted procedures, competitive dialogue procedures, innovation partnerships and negotiated procedures with prior call for competition, utilities shall simultaneously and in writing invite the selected candidates to submit their tenders, to take part in the dialogue or to negotiate.

(2) Where a periodic indicative notice is used as a call for competition in accordance with regulation 44(4)(a), utilities shall simultaneously and in writing invite the economic operators which have expressed their interest to confirm their continuing interest.

(3) The invitations required by paragraphs (1) and (2) shall—

- (a) include a reference to the electronic address at which the procurement documents have been made directly available by electronic means, and
- (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 73(4) or (5) and have not been made otherwise available.

(4) The invitations required by paragraph (1) shall also contain at least the following information—

- (a) the final date for receipt of tenders, the address to which they are to be sent and the language or languages in which they are to be drawn up;
- (b) 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;
- (c) a reference to any published call for competition;
- (d) an indication of any documents to be attached;
- (e) the criteria for the award of the contract, where they are not indicated in the notice on the existence of a qualification system used as a means of calling for competition;
- (f) the relative weighting of the contract award criteria or, where appropriate, the order of importance of such criteria, if this information is not given in the contract notice, the notice on the existence of a qualification system or the specifications.

(5) But in the case of contracts awarded through a competitive dialogue or an innovation partnership, the information referred to in paragraph (4)(a) shall not appear in the invitation to negotiate but it shall appear in the invitation to submit a tender.

(6) The invitations required by paragraph (2) shall also contain at least the following information—

- (a) nature and quantity, including all options concerning complementary contracts and, where possible, the estimated time available for exercising those 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) type of procedure, namely restricted procedure or negotiated procedure or competitive dialogue;
- (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 utility;

- (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 those; and
- (h) the contract award criteria and their weighting or, where appropriate, the order of importance of such criteria, where this information is not given in the indicative notice or the specifications or in the invitation to tender or to negotiate.

### **Informing applicants for qualification, candidates and tenderers**

75.—(1) Utilities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of a contract, or admittance to a dynamic purchasing system, including 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.

(2) On request from the candidate or tenderer concerned, a utility shall, 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 60(14) and (15), the reasons for its decision of non-equivalence or their 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;
- (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

(3) Utilities 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, public or private; or
- (c) might prejudice fair competition between economic operators.

### *Qualification systems*

(4) Utilities which establish and operate a system of qualification shall inform applicants of their decision as to qualification within a period of 6 months.

(5) If the decision will take longer than 4 months from the presentation of an application, the utility shall inform the applicant, within 2 months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.

(6) Applicants whose qualification is refused shall be informed of the refusal decision and the reasons for that decision as soon as possible and no more than 15 days later than the date of the refusal decision.

(7) The reasons shall be based on the criteria for qualification referred to in regulation 77(4).

(8) Utilities which establish and operate a system of qualification may bring the qualification of an economic operator to an end only for reasons based on the criteria for qualification referred to in regulation 77(3) to (6).

(9) Any intention to bring the qualification to an end shall be notified in writing to the economic operator at least 15 days before the date on which the qualification is due to end, together with the reason or reasons justifying the proposed action.

### SECTION 3

#### *Choice of participants and award of contracts*

#### **General principles**

**76.**—(1) For the purpose of selecting participants in their procurement procedures, the following rules shall apply—

- (a) utilities which have provided rules and criteria for the exclusion of tenderers or candidates in accordance with regulations 78(1) or 80(1), shall exclude economic operators identified in accordance with such rules and fulfilling such criteria;
- (b) utilities shall select tenderers and candidates in accordance with the objective rules and criteria mentioned in regulations 78 and 80;
- (c) utilities shall, where appropriate and in accordance with regulation 78(3) and (4), reduce the number of candidates selected in accordance with paragraphs (a) and (b) in:—
  - (i) restricted procedures;
  - (ii) negotiated procedures with a call for competition;
  - (iii) competitive dialogues; and
  - (iv) innovation partnerships.

(2) When a call for competition is made by means of a notice on the existence of a qualification system and for the purpose of selecting participants in procurement procedures for the specific contracts which are the subject of the call for competition, utilities shall—

- (a) qualify economic operators in accordance with regulation 77;
- (b) apply to such qualified economic operators those provisions of paragraph (1) that are relevant to restricted or negotiated procedures, to competitive dialogues or to innovation partnerships.

(3) When selecting participants for a restricted or negotiated procedure, a competitive dialogue or an innovation partnership, in reaching their decision as to qualification or when the criteria and rules are being updated, utilities shall not—

- (a) impose administrative, technical or financial conditions on certain economic operators which would not be imposed on others;
- (b) require tests or evidence which would duplicate objective evidence already available.

(4) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, utilities may request the economic operators 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.

(5) Utilities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in regulations 82 and 84, taking into account regulation 64.

(6) Utilities may decide not to award a contract to the tenderer submitting the best tender where they have 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 XIV to the Utilities Contracts Directive as amended from time to time.

(7) In open procedures, utilities may decide to examine tenders before verifying the suitability of tenderers, provided that the relevant provisions of this regulation and regulations 77 to 84 are observed.

#### SUB-SECTION 1 Qualification and qualitative selection

##### **Qualification systems**

77.—(1) Utilities may establish and operate a system of qualification of economic operators.

(2) Utilities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

(3) The system under paragraph (1) may involve different qualification stages.

(4) Utilities shall establish objective rules and criteria for—

(a) the exclusion and selection of economic operators requesting qualification; and

(b) the operation of the qualification system, covering matters such as—

(i) inscription in the system;

(ii) periodic updating of the qualifications, if any; and

(iii) the duration of the system.

(5) Where the rules and criteria referred to in paragraph (4) include technical specifications, regulations 60 to 62 shall apply.

(6) The rules and criteria referred to in paragraph (4)—

(a) shall be made available to economic operators upon request;

(b) may be updated as required and if so, shall be communicated to interested economic operators

(7) Where a utility considers that the qualification system of certain other utilities or other bodies meets its requirements, it shall communicate the names of those utilities and bodies to interested economic operators.

(8) A written record of qualified economic operators shall be kept and may be divided into categories according to type of contract for which the qualification is valid.

(9) When a call for competition is made by means of a notice on the existence of a qualification system, specific contracts for the works, supplies or services covered by the qualification system shall be awarded by restricted or negotiated procedure or by a competitive dialogue or innovation partnership, in which all tenderers and participants are selected among the candidates already qualified in accordance with such a system.

(10) Any charges that are billed in connection with requests for qualification or with updating or conserving an already obtained qualification in accordance with the system shall be proportionate to the generated costs.

##### **Criteria for qualitative selection**

78.—(1) Utilities may establish objective rules and criteria for the exclusion and selection of tenderers or candidates.

(2) Those rules and criteria shall be available to interested economic operators.

(3) Where utilities need to ensure an appropriate balance between the particular characteristics of the procurement procedure and the resources required to conduct it, they may, in restricted and negotiated procedures, in competitive dialogues or in innovation partnerships, establish objective rules and criteria that reflect that need and enable utilities to reduce the number of candidates that will be invited to tender or to negotiate.

(4) Utilities shall take account of the need to ensure adequate competition when selecting the number of candidates.

### **Reliance on the capacities of other entities**

**79.**—(1) Where the objective rules and criteria for the exclusion and selection of—

- (a) economic operators requesting qualification in a qualification system; or
- (b) candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships,

include requirements relating to the economic and financial capacity of the economic operator, or its technical and professional abilities, the economic operator may, where necessary, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them, subject to the following provisions of this regulation.

(2) With regard to criteria relating to the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff or to relevant professional experience, economic operators may however only rely on 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 on the capacities of other entities, it shall prove to the utility that the necessary resources will be available to it, for example by producing a commitment by those entities to that effect.

(4) For the purposes of paragraph (3), an economic operator requesting qualification in a qualification system shall prove that the necessary resources will be available to it throughout the period of validity of the qualification system.

(5) Where, in accordance with regulation 80, utilities have referred to exclusion or selection criteria provided for under the Public Contracts Regulations, utilities shall verify, in accordance with regulation 80(4), whether the other entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria or whether there are grounds for exclusion, to which the utilities have referred, under regulation 57 of the Public Contracts Regulations and,

- (a) the utility shall require that the economic operator replaces an entity in respect of which there are compulsory grounds for exclusion to which the utility has referred; and
- (b) the utility may require that the economic operator replaces an entity in respect of which there are non-compulsory grounds for exclusion to which the utility has referred.

(6) Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the utility may require that the economic operator and those entities be jointly liable for the execution of the contract.

(7) A group of economic operators within the meaning of regulation 37(3) may rely on 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, service contracts and siting or installation operations in the context of a supply contract, utilities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators within the meaning of regulation 37(3), by a participant in that group.

## **Use of exclusion grounds and selection criteria provided for under the Public Contracts Regulations**

**80.**—(1) The objective rules and criteria for the exclusion and selection of—

- (a) economic operators requesting qualification in a qualification system; and
- (b) candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships,

may include the exclusion grounds listed in regulation 57 of the Public Contracts Regulations on the terms and conditions set out in those Regulations.

(2) Where the utility is a contracting authority, the criteria and rules referred to in paragraph (1) shall include the exclusion grounds listed in regulation 57(1) to (5) of the Public Contracts Regulations on the terms and conditions set out in that regulation.

(3) The criteria and rules referred to in paragraph (1) may include the selection criteria set out in regulation 58 of the Public Contracts Regulations on the terms and conditions set out in that regulation, notably as regards the limits to requirements concerning yearly turnovers, as provided for under regulation 58(9) of those Regulations.

(4) For the purposes of applying paragraphs (1), (2) and (3)—

- (a) regulations 59 to 61 of the Public Contracts Regulations apply.
- (b) regulations 57 to 61 and 65 of the Public Contracts Regulations shall have effect as though a reference to a contracting authority in those regulations were a reference to a utility;
- (c) references to regulations 56(2), 24 and 41 in regulation 57(8) of the Public Contracts Regulations shall have effect as though such references are to, respectively, regulations 76(6), 42 and 59 in these Regulations;
- (d) references to regulations 62 and 63 in regulations 59 and 60 of the Public Contracts Regulations shall have effect as though such references are to, respectively, regulations 81 and 79 in these Regulations;
- (e) in regulation 59(9) of the Public Contracts Regulations, the words “where such contracts are concluded in accordance with regulations 33(7) or 8(a)” shall be replaced with “with a single economic operator or where such contracts are concluded without reopening competition in accordance with regulations 51 of the Utilities Contracts Regulations 2016.”;
- (f) in regulation 58(9) of the Public Contracts Regulations, the words “in the report referred to in regulation 84(1).” shall be replaced with “in the information and documentation referred to in regulation 99 of the Utilities Contracts Regulations 2016.”.

## **Quality assurance standards and environmental management standards**

**81.**—(1) Utilities shall, where they require 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) Utilities shall recognise equivalent certificates from bodies established in other member States.

(3) Utilities shall 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 utilities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, they shall refer to—

- (a) the Eco-Management and Audit Scheme of the EU,
- (b) other environmental management systems as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council<sup>(5)</sup>, or
- (c) other environmental management standards based on the relevant European or international standards by accredited bodies,

and shall recognise equivalent certificates from bodies established in other member States.

(5) Where an economic operator had demonstrably no access to the 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 utility shall 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.

SUB-SECTION 2 Award of the Contract

### **Contract award criteria**

**82.**—(1) Utilities shall base the award of contracts on the most economically advantageous tender assessed from the point of view of the utility.

(2) That tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 83, and may include the best price-quality ratio, which shall be assessed on the basis of criteria linked to the subject-matter of the contract in question, such as any one or more of the following—

- (a) qualitative aspects,
- (b) environmental aspects, and
- (c) social aspects.

(3) Such criteria may comprise, for example:—

- (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, commitments with regard to parts and security of supply.

(4) 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.

(5) Award criteria shall 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

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(5) OJ No L 342, 22.12.2009, p1, amended by Council Regulation 517/2013 (OJ No L 158, 10.6.2013, p1).

(b) a specific process for another stage of their life-cycle, even where such factors do not form part of their material substance.

(6) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the utility.

(7) Award criteria shall—

(a) ensure the possibility of effective competition; and

(b) 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, utilities shall verify effectively the accuracy of the information and proof provided by the tenderers.

#### *Weighting*

(9) The utility shall specify in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

(10) Those weightings may be expressed by providing for a range with an appropriate maximum spread.

(11) Where weighting is not possible for objective reasons, the utility shall indicate the criteria in descending order of importance.

#### **Life-cycle costing**

**83.**—(1) Life-cycle costing shall, 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 utility 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;

(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 shall 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 shall 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 utilities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents—

(a) the data to be provided by the tenderers; and

(b) the method which the utility 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 shall be applied for the assessment of life-cycle costs.

(6) A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XV to the Utilities Contracts Directive as amended from time to time.

### **Abnormally low tenders**

**84.**—(1) Utilities shall require economic operators to explain the price or costs proposed in the tender where tenders appear 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 supply of the products or services or for the execution of the work;
- (c) the originality of the work, supplies or services proposed by the tenderer;
- (d) compliance with the applicable obligations referred to in regulation 76(6);
- (e) compliance with obligations referred to in regulation 87;
- (f) the possibility of the tenderer obtaining State aid.

(3) The utility shall assess the information provided by consulting the tenderer.

(4) The utility may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).

(5) The utility shall reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 76(6).

(6) Where the utility 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 latter is unable to prove, within a sufficient time limit fixed by the utility, that the aid in question was compatible with the internal market within the meaning of Article 107 of TFEU.

(7) Where the utility rejects a tender in the circumstances referred to in paragraph (6), it shall inform the Commission.

## *SECTION 4*

### *Tenders comprising products originating in third countries and relations with those countries*

#### **Tenders comprising products originating in third countries**

**85.**—(1) This regulation applies to tenders covering products originating in third countries with which the EU has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for EU undertakings to the markets of those third countries.

(2) For the purposes of this regulation—

- (a) the origin of products shall be determined in accordance with [Council Regulation \(EEC\) No 2913/92](#) of 12 October 1992 establishing the Community Customs Code<sup>(6)</sup> as amended from time to time;
- (b) software used in telecommunications network equipment shall be regarded as products; and
- (c) those third countries to which the benefits of the Utilities Contracts Directive has been extended by a Decision of the Council of the EU, shall not be taken into account by utilities for determining the proportion, referred to in paragraph (3), of products originating in third countries.

(3) Utilities may reject any tender submitted for the award of a supply contract where the proportion of the products originating in third countries exceeds 50% of the total value of the products constituting the tender.

(4) Where two or more tenders are equivalent in the light of the contract award criteria defined in regulation 82, utilities shall give preference to those tenders which may not be rejected in accordance with paragraph (3).

(5) However, a tender shall not be preferred to another where acceptance would oblige the utility to acquire equipment having technical characteristics different from those of existing equipment, resulting in—

- (i) incompatibility;
- (ii) technical difficulties in operation and maintenance; or
- (iii) disproportionate costs.

(6) For the purposes of paragraph (4), tenders shall be considered equivalent if the price difference between those tenders does not exceed 3%.

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<sup>(6)</sup> OJ No L 302, 19.10.1992, p1, last amended by Regulation (EU) of the European Parliament and of the Council No 952/2013 of 9 October 2013 (OJ No L 269, 10.10.2013, p1).