



STATUTORY INSTRUMENTS.

**S.I. No. 62 of 2012**



EUROPEAN UNION (AWARD OF CONTRACTS RELATING TO  
DEFENCE AND SECURITY) REGULATIONS 2012

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ARRANGEMENT OF REGULATIONS

*PART 1*

PRELIMINARY PROVISIONS

1. Citation and commencement
2. Object of these Regulations
3. Interpretation and contracting authority or contracting entity

*PART 2*

SCOPE OF THESE REGULATIONS

4. Threshold amounts for defence and security contracts
5. Mixed Contracts
6. Methods for calculating the estimated value of contracts and framework agreements
7. Contracts and framework agreements awarded by central purchasing bodies
8. Regulations not to apply to contracts awarded in accordance with international rules
9. Specific exclusions from these Regulations
10. Special arrangements for contracts involving sheltered workshops and sheltered employment programs

*PART 3*

PRINCIPLES AND RULES FOR AWARD OF CONTRACTS

11. Principles for awarding contracts
12. Rules relating to acceptance and rejection of economic operators

*PART 4*

ARRANGEMENTS FOR PUBLIC SERVICE CONTRACTS

13. Service contracts specified in Schedule 1
14. Service contracts specified in Schedule 2

15. Mixed contracts including services specified in Schedules 1 and 2

*PART 5*

SPECIFIC RULES GOVERNING SPECIFICATIONS AND CONTRACT DOCUMENTS

16. Technical specifications
17. Tenderers may submit variants in certain cases
18. Conditions for performance of contracts
19. Subcontracting
20. Security of Information
21. Security of Supply
22. Obligations relating to taxes, environmental protection, employment protection provisions and working conditions

*PART 6*

PROCEDURES FOR AWARD OF CONTRACTS

23. Restricted and negotiated procedures to be used
24. Negotiated procedure with publication of contract notice
25. Competitive dialogue procedure
26. What happens after a competitive dialogue ends
27. When contract may be awarded by negotiated procedure without prior publication of contract notice
28. Contracting party may enter into framework agreements
29. Framework agreement entered into with a single economic operator
30. Framework agreement entered into with several economic operators

*PART 7*

RULES ON ADVERTISING AND TRANSPARENCY

CHAPTER 1

*Publication of notices*

31. Prior information notices
32. Publication of notices: contracts involving restricted procedure or negotiated procedure or competitive dialogue

33. Contracting authority to send notice of the result of award procedure on entering into contract or framework agreement
34. Contracting authority may withhold certain information from publication
35. Publication of notices for the purposes of these Regulations

## CHAPTER 2

### *Deadlines*

36. Deadlines for receipt of tenders and requests to participate

## CHAPTER 3

### *Information content and means of transmission*

37. Invitations to submit a tender or to participate in dialogue or negotiation
38. How candidates and tenderers are to be informed

## CHAPTER 4

### *Communications*

39. Rules applicable to communication of information relating to contracts

## CHAPTER 5

### *Reports*

40. Content of reports

## PART 8

### HOW THE AWARD PROCEDURE IS TO BE CONDUCTED

## CHAPTER 1

### *General provisions*

41. Procedure for verifying the suitability of participants, for choosing participants and for awarding contracts

## CHAPTER 2

### *Criteria for qualitative selection*

42. Exclusion of certain persons from being considered for awards of contracts
43. Suitability to pursue the professional activity
44. Economic and financial standing

45. Contracting authority to assess technical and professional ability of economic operators
46. Evidence to be furnished in relation to a works contract
47. Evidence to be furnished in relation to a supplies contract
48. Evidence to be furnished in relation to a services contract
49. Economic operator may be required to produce certificate of payment of outstanding social security contributions and taxes
50. Official lists of registered economic operators and certification of economic operators
51. Economic operator may rely on capacities of other economic operators
52. Quality assurance standards
53. Environmental management standards
54. Additional documentation and information

### CHAPTER 3

#### *Awarding contracts*

55. Criteria for the award of a contract
56. Conditions under which contracting authority may hold an electronic auction
57. Procedure for closing an electronic auction
58. Contracting authority may reject abnormally low tenders

### *PART 9*

## RULES APPLICABLE TO SUBCONTRACTING

### CHAPTER 1

59. Scope
60. Principles
61. Thresholds and rules on advertising
62. Criteria for qualitative selection of subcontractors

CHAPTER 2

*Subcontracts awarded by successful tenderers which are contracting authorities/entities*

63. Subcontracts awarded by successful tenderers which are contracting authorities

*PART 10*

RULES TO BE APPLIED TO REVIEWS

64. Interpretation
65. Scope and availability of review procedures
66. Persons to whom review procedures are available
67. Standstill Period
68. Notices to unsuccessful tenderers and candidates
69. Time limits for applications to Court
70. Application to Court
71. Powers of Court
72. Rules of court and hearing otherwise than in public
73. Declaration by Court that a contract is ineffective
74. Effect of declaration that a contract is ineffective
75. Alternative Penalties
76. Non-exclusion of other remedies

*PART 11*

STATISTICAL OBLIGATIONS, EXECUTIVE POWERS AND FINAL PROVISIONS

77. Statistical obligations
78. Contents of statistical reports
79. Notice by Minister for Public Expenditure and Reform of revision of thresholds
80. Amendment of Utility Undertakings Regulations
81. Amendment of Public Authorities' Contracts Regulations
82. Transitional provisions

SCHEDULE 1

LIST OF SERVICES

SCHEDULE 2

LIST OF SERVICES

SCHEDULE 3

DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

SCHEDULE 4

REQUIREMENTS RELATING TO DEVICES FOR ELECTRONIC  
RECEIPT OF TENDERS, REQUESTS FOR PARTICIPATION AND  
PLANS AND PROJECTS IN CONTESTS

SCHEDULE 5

INFORMATION TO BE INCLUDED IN NOTICES

SCHEDULE 6

FEATURES CONCERNING PUBLICATION

EUROPEAN UNION (AWARD OF CONTRACTS RELATING TO  
DEFENCE AND SECURITY) REGULATIONS 2012

I, ALAN SHATTER, Minister for Defence, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972), and for the purpose of giving effect to Directive 2009/81/EC<sup>1</sup> of the European Parliament and of the Council, 13 July 2009 amending Directives 2004/17/EC<sup>2</sup> and 2004/18/EC<sup>3</sup> hereby make the following regulations:

## PART 1

## PRELIMINARY PROVISIONS

*Citation and Commencement*

1. (1) These Regulations may be cited as the European Union (Award of Contracts relating to Defence and Security) Regulations 2012.

(2) These Regulations come into operation on 30 March 2012.

*Object of these Regulations*

2. The object of these Regulations is to give effect to Directive 2009/81/EC<sup>1</sup> of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC<sup>2</sup> and 2004/18/EC<sup>3</sup>.

*Interpretation and contracting authority or contracting entity*

3. (1) In these Regulations—

“contracting authority” means the State, a local authority or a public authority, or an association comprising one or more local authorities or public authorities, or local authorities and public authorities;

“contracting entity” means—

(a) a contracting authority, or

(b) a public undertaking, or,

(c) a private sector entity engaged in a prescribed activity under a special or exclusive right granted by the relevant competent authority of a Member State;

<sup>1</sup>O.J. L216 20.8.2009 p. 76

<sup>2</sup>O.J. L134 30.4.2004 p. 1

<sup>3</sup>O.J.L134 30.4.2004 P. 114

*Notice of the making of this Statutory Instrument was published in  
“Iris Oifigiúil” of 2nd March, 2012.*



“Defence and Security Contracts Directive” means Directive 2009/81/EC<sup>1</sup> of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC<sup>2</sup> and 2004/18/EC<sup>3</sup>;

“European Union” has the same meaning as it has in the European Communities Act 1972;

“Member State” means a state that is a member of the European Union or a state that is a part to the agreement on the European Economic Area signed at Oporto on 2 May 1992, as adjusted by the protocol done at Brussels on 17 March 1993;

“Minister” means the Minister for Defence;

“public authority” means any body that—

- (a) is established by or under a law of the State for a public purpose, and
- (b) does not have an industrial or commercial character, and
- (c) is—
  - (i) financed wholly or partly by the State, or a local authority or another public authority, or
  - (ii) managed or supervised by the State, or by a local authority or another public authority, or
  - (iii) governed by a board, more than half of whose members are appointed by the State, or by a local authority or another public authority;

“Public Authorities’ Contracts Regulations” means the European Communities (Award of Public Authorities’ Contracts) Regulations 2006 (S.I. No. 329 of 2006);

“public undertaking” means an undertaking over which a contracting entity may exercise directly or indirectly, a dominant influence because of—

- (a) its ownership of the undertaking, or
- (b) its financial participation in the undertaking, or,
- (c) the rules that govern the undertaking;

“statute” means—

- (a) an Act of the Oireachtas, or

- (b) a statute that was in force in Saorstát Éireann immediately before the date of the coming into operation of the Constitution and that continues to be of full force and effect by virtue of Article 50 of the Constitution;

“Utility Undertakings Regulations” means the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 (S.I. No. 50 of 2007).

(2) In these Regulations (other than in paragraph (1)) every reference to contracting authority means, as the context requires, a reference to a contracting authority (within the meaning given to it by paragraph (1)) or contracting entity.

(3) A word or expression which is used in these Regulations and which is also used in the Defence and Security Contracts Directive, has unless the context otherwise requires, the same meaning in these Regulations as it has in that Directive.

## PART 2

### SCOPE OF THESE REGULATIONS

#### *Threshold amounts for defence and security contracts*

4. These Regulations apply to the following contracts awarded in the fields of defence and security for—

- (a) the supply of military equipment, including any parts, components or subassemblies thereof,
- (b) the supply of sensitive equipment, including any parts, components or subassemblies thereof,
- (c) works, supplies and services directly related to the equipment referred to in paragraph (a) or (b) for any and all elements of its life cycle, or
- (d) works and services for specifically military purposes or sensitive works and sensitive services,

which have a value excluding value-added tax estimated to be no less than the following thresholds:

- (i) €412,000 for supply and service contracts;
- (ii) €5,150,000 for works contracts.

#### *Mixed Contracts*

5. (1) Subject to paragraph (3), a contract for works, supplies or services to which these Regulations apply and for works, supplies or services to which the Public Authorities’ Contracts Regulations or Utility Undertakings Regulations apply shall be awarded by a contracting authority in accordance with these Regulations, provided that the award of a single contract is justified for objective reasons.

(2) Subject to paragraph (3), these Regulations shall not apply to the award of a contract which is for works, supplies or services to which these Regulations would otherwise apply, where the contract is also for works supplies or services to which neither these Regulations nor the Award of Public Authorities' Contracts Regulations or Utility Undertakings Regulations apply provided that the award of a single contract is justified for objective reasons.

(3) The decision to award a single contract shall not be taken by a contracting authority in order that these Regulations or the Award of Public Authorities' Contracts Regulations or Utility Undertakings Regulations do not apply to the contract.

*Methods for calculating the estimated value of contracts and framework agreements*

6. (1) A contracting authority shall estimate the total amount payable (net of value added tax) in respect of a contract that it proposes to award. In calculating the estimated total amount, it shall include any form of option and any renewals under the contract.

(2) The estimate shall be valid—

(a) when the contract notice is sent to the Office for Publications Office of the European Union for publication, or

(b) if such a notice is not required, when the contracting authority begins the contract awarding procedure.

(3) A contracting authority shall take into account any prizes or payments that it gives to candidates or tenderers when calculating the estimated value of a contract.

(4) A contracting authority shall not subdivide a works project, or a proposed purchase of a specified quantity of supplies or specified services, so as to prevent the project or purchase from coming within the scope of these Regulations.

(5) In calculating the estimated value of a works contract, a contracting authority shall take account of both the cost of the works and the total estimated value of the supply of products necessary for carrying out the works.

(6) If a proposed work or purchase of a service could result in contracts being awarded at the same time in the form of separate lots, the contracting authority shall take account of the total estimated value of all the lots.

(7) Subject to paragraph (8), these Regulations apply to the awarding of each lot referred to in paragraph (6) or (9) if the aggregate value of all of the lots is equal to or exceeds the threshold specified in Regulation 4.

(8) A contracting authority may decide that these Regulations should not apply in respect of lots referred to in paragraph (6) or (9) if the estimated value of which (net of value added tax) is less than €80,000 for supplying a service or

€1,000,000 for works so long as the aggregate value of those lots does not exceed 20 per cent of the aggregate value of all of the lots.

(9) If a contracting authority proposes to acquire supplies of a similar kind and the acquisition could result in contracts being awarded at the same time in the form of separate lots, the authority shall take account of the total estimated value of all the lots when applying Regulation 4.

(10) If a supply contract relates to the leasing, hire, rental or hire purchase of a product for a fixed term, the value to be taken as a basis for calculating the estimated contract value is as follows:

- (a) if that term is less than or equal to 12 months, the total estimated value for the term of the contract;
- (b) if the term of the contract is greater than 12 months, the total value of the contract, including its estimated residual value.

(11) If a supply contract relates to the leasing, hire, rental or hire purchase of a product that is for a term that is not fixed or that cannot be defined, the value to be taken as a basis for calculating the estimated contract value is the monthly value multiplied by 48.

(12) If a supply contract, or a service contract, is of a recurring nature, or is likely to be renewed within a specified period, the contracting authority shall determine the estimated contract value on the basis of one of the following criteria:

- (a) the total actual value of the successive contracts of the same kind awarded during the preceding 12 months or financial year, adjusted (so far as possible) to take account of the changes in quantity or value that are likely to occur during the 12 months following the initial contract;
- (b) the total estimated value of the successive contracts awarded during the period of 12 months following the first supply of products or a service under the contract, or if the financial year of the authority is longer than 12 months, during that financial year.

(13) A contracting authority may not choose a method for calculating the estimated value of a contract in order to exclude the contract from the scope of these Regulations.

(14) When a contract to supply a service specifies a total price, the contracting authority concerned shall use the following as a basis for calculating the estimated value of the contract:

- (a) if the contract is to provide insurance, the premium and other forms of remuneration payable for the service;

- (b) if the contract is for the supply of a design, the fee, commission or other form of remuneration payable for the service.

(15) If a contract to supply a service is for a fixed term but does not specify or provide for a total price, the contracting authority concerned shall use the following as a basis for calculating the estimated value of the contract:

- (a) if the contract is for a fixed term of 48 months or less, the total value of the contract for the full term;
- (b) if the contract is for a fixed term of longer than 48 months or no term is fixed, the monthly value of the contract multiplied by 48.

(16) If a contracting authority enters into a framework agreement the authority shall take into account the maximum estimated value (free of value added tax) of all contracts that it envisages for the total period during which it expects the agreement or system to remain in operation.

*Contracts and framework agreements awarded by central purchasing bodies*

7. (1) A contracting authority may enter into a contract or framework agreement for works, products or a service with or through a central purchasing body.

(2) A contracting authority that enters into a contract or framework agreement for works, products or a service through a central purchasing body is taken to have complied with these Regulations to the extent that—

- (a) the central purchasing body has complied with these Regulations, or
- (b) when the central purchasing body is not a contracting authority, in relation to a contract or framework agreement, the contract award rules that the body applies are in accordance with these Regulations and the review procedures that it applies correspond with review procedures in Part 10.

*Regulations not to apply to contracts awarded in accordance with international rules*

8. These Regulations do not apply to a contract the award of which is governed by special procedural rules—

- (a) pursuant to an international agreement or arrangement involving one or more Member States and one or more third countries,
- (b) pursuant to a concluded international agreement or arrangement relating to the stationing of armed forces and concerning the undertakings of a Member State or a third country, or
- (c) of an international organisation purchasing for its purposes, or to contracts which shall be awarded by a Member State in accordance with those rules.

*Specific exclusions from these Regulations*

9. These Regulations do not apply to the following kinds of contracts:

- (a) a contract for which the provisions of these Regulations would oblige the Government to supply information the disclosure of which they consider contrary to the essential interests of the security of the State;
- (b) a contract for the purposes of intelligence activities;
- (c) a contract or framework agreement for supplying a service involving a research and development programme being conducted by or on behalf of the Government and at least one other Member State in relation to a new product or development of that product, at the conclusion of which the Minister shall furnish details to the Commission, as relevant, regarding research and development expenditure by the Government, cost-sharing by the Government, and intended share of purchases by the Government;
- (d) a contract awarded in a country other than a Member State, including for civil purchases, carried out when forces are deployed outside the territory of the European Union where operational needs require them to be concluded with economic operators located in the area of operation;
- (e) a service contract for the acquisition or rental, under whatever financial arrangements, of land, existing buildings or other immovable property, or concerning rights in respect thereof;
- (f) a contract awarded by the Government to the government of any state outside the State relating to—
  - (i) the supply of military equipment or sensitive equipment,
  - (ii) works and services directly linked to other equipment, or
  - (iii) works and services specifically for military purposes, or sensitive works and sensitive services;
- (g) a contract for arbitration and conciliation services;
- (h) other than a contract for insurance services, a contract for financial services;
- (i) a contract of employment;
- (j) a contract for supplying a service involving research and development, other than such a service in relation to which the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly paid for by the contracting authority.

*Special arrangements for contracts involving sheltered workshops and sheltered employment programs*

10. (1) A contracting authority may—
- (a) reserve the right to participate in the award of a contract to sheltered workshops, or
  - (b) provide for such a contract to be performed only by participants in a sheltered employment program,

if a majority of the employees involved are disabled persons who, because of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

(2) A contracting authority that reserves a contract under this Regulation shall specify the reservation in the relevant contract notice.

### PART 3

#### PRINCIPLES AND RULES FOR AWARD OF CONTRACTS

*Principles for awarding contracts*

11. In awarding a contract, a contracting authority shall—
- (a) treat all economic operators equally and without discrimination, and
  - (b) act in a transparent way.

*Rules relating to acceptance and rejection of economic operators*

12. (1) If a candidate or tenderer for a service contract is, under the law of the Member State in which the candidate or tenderer is established, entitled to supply a particular service, a contracting authority shall not reject the candidate or tenderer only on the ground that, under the law of the State the candidate or tenderer is required to be either a natural person or a body corporate.

(2) However, in the case of a service or works contract or a supply contract that also provides for the supply of a service or for siting or installation operations, the contracting authority may require tenderers that are not natural persons to indicate in their tenders or their requests to participate the names and relevant professional qualifications of the staff who would be responsible for performing the contract.

(3) A group of economic operators may submit a tender or present itself as a candidate.

(4) A contracting authority may not require a group of economic operators to assume a particular legal form as a condition of being allowed to submit to the authority a tender or a request to participate in a tender. However, if the contracting authority awards a contract to such a group, it may require the group to assume such a form, but only if it is of the opinion that the imposition of the requirement is necessary for the satisfactory performance of the contract.

## PART 4

## ARRANGEMENTS FOR PUBLIC SERVICE CONTRACTS

*Service contracts specified in Schedule 1*

13. A contracting authority that proposes to award a contract whose object is the supply of a service specified in Schedule 1 shall ensure that Parts 3 to 10 are complied with in respect of the award.

*Service contracts specified in Schedule 2*

14. A contract to supply a service specified in Schedule 2 is subject only to Regulations 16 and 33.

*Mixed contracts including services specified in Schedules 1 and 2*

15. (1) A contracting authority shall not award a contract to supply a service specified in both Schedules 1 and 2 otherwise than in accordance with Parts 3 to 10 if the value of the service specified in Schedule 1 is greater than the value of the service specified in Schedule 2.

(2) In the case of a contract to supply any other kind of service, the contracting authority shall ensure that the contract is awarded in accordance with Regulations 16 and 33.

## PART 5

## SPECIFIC RULES GOVERNING SPECIFICATIONS AND CONTRACT DOCUMENTS

*Technical specifications*

16. (1) A contracting authority shall set out the relevant technical specifications in the appropriate documents such as the contract notice, or the documents inviting expressions of interest or the submission of tenders.

(2) The contracting authority shall ensure that the technical specifications for a contract provide tenderers with equal access to the award process and do not hinder competition among potential tenderers.

(3) Subject to paragraphs (4) to (11), the contracting authority shall formulate the technical specifications for a contract in one of the following ways:

- (a) by reference to technical specifications (within the meaning given to that term by Schedule 3) and (in order of preference)—
  - (i) to a national standard giving effect to a relevant European standard, or
  - (ii) to a European technical approval, or
  - (iii) to a common civil technical specification, or
  - (iv) to a national standard giving effect to an international standard, or



- (v) to other relevant international civil standards, or
  - (vi) to some other relevant technical reference system established by a European standardisation body, or
  - (vii) civil technical specifications stemming from industry and widely recognised by it, or
  - (viii) the national ‘defence standards’ as defined in Schedule 3;
- (b) in terms of performance or functional requirements (which may include environmental characteristics);
  - (c) in terms of performance or functional requirements (as referred to in subparagraph (b)) with reference to specifications of the kind referred to in subparagraph (a) as a means of presuming conformity with those requirements;
  - (d) by reference to specifications of the kind referred to in subparagraph (a) for certain characteristics and by reference to the performance or functional requirements of the kind referred to in subparagraph (b) for other characteristics.

(4) If there is no standard, approval, specifications or system of the kind referred to in subparagraph (3)(a)(vi), the technical specifications may be formulated by reference to a national standard or national technical approval, or national technical specifications, relating to the design, calculation and carrying out of the works, or the use of the products, concerned.

(5) Each reference to technical specifications in paragraph (3)(a) and (4) shall be read as if it is accompanied by the words “or equivalent”.

(6) If environmental characteristics are involved, the contracting authority shall ensure that those characteristics are specified with sufficient precision to allow tenderers to determine the subject matter of the contract and to allow the contract to be awarded. That contracting authority may formulate the technical specifications for a contract by reference to the specifications referred to in paragraph (3).

(7) This Regulation does not affect the operation of mandatory national technical rules, including those related to product safety or the technical requirements to be met by the State under international standardisation agreements in order to guarantee the interoperability required by those agreements to the extent that they are compatible with the law of the European Communities or the European Union.

(8) A contracting authority that chooses the option referred to in paragraph (3)(a) or (4) may not reject a tender on the ground that the products or service

for which tenders have been invited do not comply with the technical specifications to which the authority has referred provided the tenderer has, by appropriate means, satisfied that authority that the solutions that the tenderer proposes in the tender meet in an equivalent manner the requirements of the technical specifications.

(9) If, in accordance with paragraph (3), a contracting authority has formulated the technical specifications for a contract in terms of performance or functional requirements that it has prescribed, the authority may not reject a tender that complies with—

- (a) a national standard that transposes a European standard, or
- (b) a European technical approval, or
- (c) an international standard, or
- (d) a common technical specification, or
- (e) a technical reference system established by a European standardisation body,

if those specifications address those performance or functional requirements.

(10) In submitting a tender for a contract in respect of which the contracting authority has formulated the technical specifications for a contract in terms of performance or functional requirements that it has prescribed as referred to in paragraph (3)(b), the tenderer shall, by appropriate means, including a technical dossier from the manufacturer or test report from a recognised body, satisfy that authority that the works, products or services concerned comply with the requisite standard, system, approval or specification and so meet those performance or functional requirements.

(11) A contracting authority that prescribes environmental characteristics in terms of performance or functional requirements as referred to in paragraph (3)(b) may use the detailed specifications, or (if necessary) a part of those specifications, as defined by a European or multi-national eco-label, or any other kind of eco-label, but only if—

- (a) those specifications are appropriate to define the characteristics of the products or service to be supplied under the contract, and
- (b) the requirements for the label are drawn up on the basis of scientific information, and
- (c) the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and
- (d) the specifications are accessible to all interested parties.

(12) A contracting authority may specify that a product bearing the eco-label is presumed to comply with the technical specifications prescribed by the contract or an associated document. However, the authority shall accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

(13) A contracting authority shall accept a certificate issued by a recognised body established in a Member State other than the State.

(14) Unless the contracting authority concludes that the subject matter of the contract justifies otherwise, it shall ensure that technical specifications do not refer to—

- (a) a specific make or source, or
- (b) a particular process, or
- (c) a specific trade mark, patent, or type, or
- (d) a specific origin or production,

if to do so would have the effect of favouring or eliminating a particular undertaking or product. However, a contracting authority may include such a reference in an exceptional case, but only if a sufficiently precise and intelligible description of the subject matter of the contract (as provided by this Regulation) is not possible. Each reference to technical specifications under this paragraph shall be read as if it is accompanied by the words “or equivalent”.

(15) In this Regulation—

- (a) “appropriate means” includes (but is not limited to) a technical dossier prepared by or on the instructions of the manufacturer (if any) or a test report prepared by a recognised body, and
- (b) “recognised body” means a test and calibration laboratory or certification and inspection body that complies with the relevant European standards.

*Tenderers may submit variants in certain cases*

17. (1) If a contract is to be awarded on the basis of the most economically advantageous tender, the contracting authority may authorise tenderers for the contract to submit variants.

(2) The contracting authority shall specify in the relevant contract notice whether or not variants are authorised and a tenderer may submit a variant only if the contract notice specifically authorises variants.

(3) A contracting authority that authorises variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

(4) In awarding a contract, a contracting authority may take into consideration only variants that satisfy the minimum requirements specified in the relevant contract documents.

(5) A contracting authority that has authorised variants in relation to the award of a supply or service contract may not reject a variant submitted by a tenderer only because the variant would, if successful, result in the award of a service contract instead of a supply contract or a supply contract instead of a service contract.

*Conditions for performance of contracts*

18. (1) A contracting authority may prescribe special conditions relating to the performance of a contract that is to be awarded by the authority, provided the conditions—

(a) are compatible with the law of the European Communities or the European Union, and

(b) are specified in the relevant contract notice or contract specifications.

(2) Conditions referred to in paragraph (1), may relate to environmental or social matters or, in accordance with Regulations 19 to 21 respectively, may deal with—

(i) subcontracting,

(ii) security of classified information,

(iii) security of supply.

*Subcontracting*

19. (1) The successful tenderer shall be free to select its subcontractors for all subcontracts to which the requirements in paragraphs (4) to (13) do not apply, and in particular shall be required not to discriminate against potential subcontractors on grounds of nationality.

(2) The contracting authority may ask the tenderer to indicate either of the following matters:

(a) in its tender, any share of the contract it may intend to subcontract to third parties and any proposed subcontractor, as well as the subject-matter of the subcontracts for which they are proposed;

(b) any change occurring at the level of subcontractors during the execution of the contract.

(3) The contracting authority may apply the requirements of Part 9 to all or certain subcontracts which the successful tenderer intends to award to third parties.

(4) The contracting authority may ask the successful tenderer to subcontract a share of the contract to third parties.

(5) Where a contracting authority imposes a subcontracting requirement under paragraph (4), it shall express the share of the contract to be so subcontracted as a minimal percentage in the form of a range of values, comprising a minimum and maximum percentage.

(6) The maximum percentage in the range of values referred to in paragraph (5) may not exceed 30% of the value of the contract and such a range shall be proportionate to the object and value of the contract and the nature of the industry sector involved, including the level of competition in that market and the relevant technical capabilities of the industrial base.

(7) For the purposes of paragraphs (5) and (6), any percentage of subcontracting falling within the range of values indicated by the contracting authority shall be considered to fulfil the subcontracting requirement.

(8) Nothing in this Regulation shall prevent a tenderer from proposing to subcontract a share of the total value which is above the range required by the contracting authority.

(9) The contracting authority shall ask tenderers to specify in their tender which part or parts of their offer they intend to subcontract to fulfil the requirement referred to in paragraphs (5) and (6).

(10) The contracting authority may also ask tenderers—

(a) to specify which part or parts of their offer they intend to subcontract beyond the percentages referred to in paragraphs (5) and (6),

and

(b) the subcontractors they have already identified.

(11) The successful tenderer shall award subcontracts corresponding to the percentage which the contracting authority requires it to subcontract in accordance with Part 9.

(12) (a) Where a contracting authority rejects the subcontractors selected by the tenderer at the stage of the award procedure of the main contract or by the successful tenderer during the performance of the contract, such rejection shall be based on criteria applied for the selection of the tenderers for the main contract.

(b) If the contracting authority rejects a subcontractor, it shall furnish a notice in writing to the tenderer or the successful tenderer, giving reasons why it considers that the subcontractor does not meet the criteria.

(13) Requirements referred to in paragraphs (2) to (12) shall be indicated in the contract notices.

(14) Paragraphs (1) to (12) shall be without prejudice to the question of the principal economic operator's liability.

#### *Security of Information*

20. (1) When contracts involve, require or contain classified information, the contracting authority shall specify in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents) the measures and requirements necessary to ensure the security of such information at the requisite level.

(2) For the purposes of paragraph (1), the contracting authority may require that the tender contain, *inter alia*, the following particulars:

- (a) a commitment from the tenderer and the subcontractors already identified to appropriately safeguard the confidentiality of all classified information in their possession or coming to their notice throughout the duration of the contract and after termination or conclusion of the contract, as required by or under a relevant statute or administrative provision;
- (b) a commitment from the tenderer to obtain the commitment referred to in subparagraph (a) from other subcontractors to which it will subcontract during the execution of the contract;
- (c) sufficient information on subcontractors already identified to enable the contracting authority or entity to determine that each of them possesses the capabilities required to appropriately safeguard the confidentiality of the classified information to which they have access or which they are required to produce when carrying out their subcontracting activities;
- (d) a commitment from the tenderer to provide the information required under subparagraph (c) on any new subcontractor before awarding a subcontract.

#### *Security of Supply*

21. (1) The contracting authority shall specify in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents) its security of supply requirements.

(2) The contracting authority may require that the tender contain, *inter alia*, the following particulars:

- (a) certification or documentation demonstrating to the satisfaction of the contracting authority that the tenderer will be able to honour its obligations regarding the export, transfer and transit of goods associated with the contract, including any supporting documentation received from any Member State concerned;

- (b) the indication of any restriction on the contracting authority regarding disclosure, transfer or use of the products and services or any result of those products and services, which would result from export control or security arrangements;
- (c) certification or documentation demonstrating that the organisation and location of the tenderer's supply chain will allow it to comply with the requirements of the contracting authority concerning security of supply set out in the contract documents, and a commitment to ensure that possible changes in its supply chain during the execution of the contract will not affect adversely compliance with these requirements;
- (d) a commitment from the tenderer to establish, or, as the case may be, maintain the capacity required to meet additional needs required by the contracting authority as a result of a crisis, according to terms and conditions to be agreed;
- (e) any supporting documentation received from the tenderer's national authorities regarding the fulfilment of additional needs required by the contracting authority as a result of a crisis;
- (f) a commitment from the tenderer to carry out the maintenance, modernisation or adaptation of the supplies covered by the contract;
- (g) a commitment from the tenderer to inform the contracting authority in due time of any change in its organisation, supply chain or industrial strategy that may affect its obligations to that contracting authority;
- (h) a commitment from the tenderer to provide the contracting authority, according to terms and conditions to be agreed, with all specific means necessary for the production of spare parts, components, assemblies and special testing equipment, including technical drawings, licenses and instructions for use, in the event that it is no longer able to provide these supplies.

(3) A contracting authority shall not require a tenderer to obtain a commitment from a Member State that would prejudice that Member State's freedom to apply, in accordance with relevant international law or the law of the European Communities or of the European Union, its national export, transfer or transit licensing criteria in the circumstances prevailing at the time of such a licensing decision.

*Obligations relating to taxes, environmental protection, employment protection provisions and working conditions*

22. (1) A contracting authority that proposes to award a contract that will involve carrying out works or supplying a service shall specify in the contract documents the persons from whom a candidate or tenderer may obtain information about the obligations that will, during the performance of the contract, apply in relation to taxation, environmental protection, employment protection

and working conditions. This paragraph does not affect the operation of Regulation 58 regarding the examination of abnormally low tenders.

- (2) The contracting authority—
  - (a) shall require the candidates or tenderers concerned to state that, in preparing their tenders for the contract, they have taken account of the obligations relating to employment protection and working conditions that are in force in the place where the works are to be carried out or the service is to be supplied, and
  - (b) shall disregard the tender of any candidate or tenderer that fails to comply with that requirement.

## PART 6

### PROCEDURES FOR AWARD OF CONTRACTS

#### *Restricted and negotiated procedures to be used*

23. (1) Except as provided by paragraphs (2) and (3), a contracting authority may award a contract by means of a restricted procedure or a negotiated procedure with publication of a contract notice.

(2) In the circumstances set out in Regulations 25 and 26, a contracting authority may award a contract by means of a competitive dialogue.

(3) In the circumstances set out in Regulation 27, a contracting authority may award a contract by means of a negotiated procedure without the need for publication of a contract notice.

#### *Negotiated procedure with publication of contract notice*

24. (1) In negotiated procedures with publication of a contract notice, a contracting authority shall negotiate with the tenderer the tenders submitted by them in order—

- (a) to adapt those tenders to the requirements that were specified in the contract notice, the contract documents and additional documents (if any), and
  - (b) in order to seek out the best tender in accordance with Regulation 55
- (2) During the negotiations, a contracting authority—
- (a) shall treat all tenderers equally and without discrimination, and
  - (b) shall not provide information in a manner that would give some tenderers an advantage over others.

(3) In order to reduce the number of tenders to be negotiated, a contracting authority may provide for a negotiated procedure to be conducted in successive stages, and that reduction shall be achieved on the basis of the published award criteria.



(4) A contracting authority shall indicate in the contract notice or the contract documents whether the option referred to in paragraph (3) has been availed of.

*Competitive dialogue procedure*

25. (1) A contracting authority may award a contract by means of a competitive dialogue in accordance with this Regulation if it considers—

- (a) that the contract is particularly complex, and
- (b) that the use of a restricted procedure or negotiated procedure would not allow the contract to be awarded.

(2) A contracting authority can regard a contract as being particularly complex for the purposes of paragraph (1) if—

- (a) it is not objectively able to define, in accordance with Regulation 16(3)(b), (c) or (d) the technical means capable of satisfying its needs or objectives, or
- (b) it is not objectively able to specify the legal or financial make-up, or both the legal and financial make-up, of a project.

(3) If a contracting authority decides to award a contract by means of a competitive dialogue, it shall do the following:

- (a) define its requirements in a contract notice or in a separate document accompanying the notice;
- (b) publish the notice and any such document;
- (c) award the contract to the tenderer that makes the most economically advantageous tender.

(4) The contracting authority shall open a dialogue with the candidates selected in accordance with Regulations 36, 37 and 38. The aim of the dialogue shall be to identify and define the means best suited to satisfying the requirements of the contracting authority.

(5) During the dialogue, the contracting authority may discuss all aspects of the contract with the chosen candidates, but in doing shall treat all candidates equally and without discrimination. In particular, the contracting authority shall not provide information in a discriminatory manner that may result in some candidates having an advantage over others.

(6) If a candidate that is participating in the dialogue has (whether orally or in writing) proposed a solution, or provided confidential information, to the contracting authority, that authority shall not, without the candidate's consent, disclose the solution or information to the other candidates.

(7) A contracting authority that uses the competitive dialogue procedure to award a contract may opt to provide for the competitive dialogue to be conducted in successive stages in order to reduce the number of solutions to be discussed during the dialogue. The contracting authority shall specify in the relevant contract notice or descriptive document that recourse may be had to that option and, if the contracting authority decides to exercise that option, it shall apply the award criteria set out in that notice or document.

(8) A contracting authority that uses the competitive dialogue procedure shall continue the dialogue until it finds the solution or solutions (if necessary after comparing them) that will satisfy its requirements.

*What happens after a competitive dialogue ends*

26. (1) As soon as practicable after a competitive dialogue has ended, a contracting authority shall declare the dialogue to be ended and inform the candidates accordingly. The authority shall then ask the candidates to submit final tenders on the basis of the solution or solutions that were presented during the dialogue.

(2) A candidate that submits a tender following a competitive dialogue shall include in the tender all of the elements required for the performance of the proposed contract.

(3) If the contracting authority so requires, a candidate that has submitted a tender following a competitive dialogue shall clarify the tender or provide additional information. Such a requirement shall not—

- (a) involve changes to the fundamentals of the tender or the call for tender, or
- (b) distort competition or have a discriminatory effect.

(4) As soon as practicable after the deadline for the receipt of tenders following a competitive dialogue, the contracting authority shall—

- (a) assess the tenders received on the basis of the award criteria specified in the relevant contract notice or descriptive document, and
- (b) select from those tenders the most economically advantageous tender in accordance with Regulation 55.

(5) If asked to do so by the contracting authority, the candidate identified as having submitted the most economically advantageous tender shall clarify aspects of the tender or confirm commitments contained in the tender, but only in so far as the clarification will not have the effect of—

- (a) significantly modifying the tender or the call for tenders, or
- (b) risking distorting competition or causing discrimination.

(6) Subject to paragraph (7) a contracting authority may specify that payments may be made to participants in respect of expenses incurred by them in participating in the competitive dialogue procedure.

(7) The power conferred by paragraph (6) may be exercised only in a manner consistent with any direction or guideline notified by or with the authority of the Minister.

*When contract may be awarded by negotiated procedure without prior publication of contract notice*

27. (1) A contracting authority may award a works contract, a supply contract or a service contract by a negotiated procedure without prior publication of a contract notice in the following cases:

- (a) when no tenders or no suitable tenders, or no applications, have been submitted in response to a restricted procedure or a negotiated procedure with prior publication of a contract notice or a competitive dialogue but only if—
  - (i) the initial conditions of contract have not been substantially altered, and
  - (ii) on being requested to do so by the European Commission, the contracting authority provides it with a written report specifying the circumstances necessitating the use of the procedure;
- (b) when tenders have been submitted in response to a restricted procedure or a negotiated procedure with prior publication of a contract notice or a competitive dialogue are irregular or are unacceptable because they do not comply with the rules of tendering prepared in accordance with Regulations 12,17, 19 to 22 and 31 to 40, but only if—
  - (i) the initial conditions of contract have not been substantially altered, and
  - (ii) the contracting authority shall include in the negotiated procedure all, and only, tenderers selected in accordance with the relevant provisions of Regulations 42 to 54 who had during the restricted procedure or competitive dialogue submitted tenders in accordance with its requirements in a contract notice or in a separate document accompanying the notice;
- (c) when, because of extreme urgency resulting from a crisis, the deadline for the restricted or negotiated procedure with publication of a contract notice, including the shortening of time-limits provided for in Regulation 36 (9) or (10) cannot be met, and may include circumstances where Regulation 21(2)(d) applies;
- (d) when, for reasons of extreme urgency attributable to an event that the contracting authority could not foresee, the deadline for the restricted

or negotiated procedure with publication of a contract notice, including the shortening of time-limits provided for in Regulation 36 (9) or (10) cannot be met, other than if the event is caused by the contracting authority;

- (e) when, for technical reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator.

(2) A contracting authority may award a service contract or a supply contract by a negotiated procedure without prior publication of a contract notice in the following cases:

- (a) for services provided which are purely for the purpose of research or development, other than those provided for in Regulation 9;

- (b) for products manufactured which are purely for the purpose of research and development, other than quantity production to establish commercial viability or recover research and development costs.

(3) A contracting authority may award a supply contract by a negotiated procedure without prior publication of a contract notice in the following cases:

- (a) when additional deliveries by the original supplier are intended—

- (i) as a partial replacement for normal supplies or installations, or

- (ii) as the extension of existing supplies or installations in circumstances where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics that would result in incompatibility or disproportionate technical difficulties in operation and maintenance;

- (b) when the supplies are quoted and purchased on a commodity market;

- (c) when the supplies are purchased on particularly advantageous terms—

- (i) from a supplier whose business activities are being wound up, or

- (ii) from the receiver or liquidator of a supplier who has been adjudicated bankrupt, or in respect of whom a winding up order under the Companies Acts has been made, or who has entered into an arrangement with creditors.

(4) The duration of a contract for additional deliveries of products referred to in paragraph (3)(a), or a recurrent contract, shall not exceed 5 years other than if exceptional circumstances exist such as the expected service life of delivered supplies or the technical difficulties which a change of supplier may cause.

(5) A contracting authority may award a works or service contract by a negotiated procedure without prior publication of a contract notice in the following cases:

- (a) when additional works or services that were not included in the project when considered initially, or were not included in the original contract, have, through unforeseen circumstances, become necessary in order to carry out the works or services specified in the contract, but only if the award is made to the contractor who is carrying out the original works or services, and—
  - (i) the additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authority, or
  - (ii) the additional works or services, although separable from the performance of the original contract, are strictly necessary for its completion;
- (b) when new works or services that repeat similar works or services are entrusted to the economic operator to whom the contracting authority awarded an original contract by means of the restricted procedure, the negotiated procedure with publication of a contract notice or a competitive dialogue, provided that the works or services conform to a basic project for which the original contract was awarded.

(6) The aggregate value of contracts awarded for additional works or services referred to in paragraph (5) (a) may not exceed 50 per cent of the amount of the original contract.

(7) In applying paragraph (5)(b)—

- (a) when a contracting authority offers the first project for tender it shall disclose the possible use of the negotiated procedure without prior publication of a contract notice for additional works and services and in so doing the contracting authority shall take into account the estimated cost of subsequent works or services when it applies Regulation 4, and
- (b) a contracting authority may use the negotiated procedure without prior publication of a contract notice only during the 5 years following the date on which the original contract was entered into, other than if exceptional circumstances exist such as the expected service life of any delivered items, installations or systems, or the technical difficulties which the change of a supplier may cause.

(8) A contracting authority may award a works or service contract by a negotiated procedure without prior publication of a contract notice related to the provision of air and maritime transport services for armed or security forces deployed or about to be deployed outside of the State in circumstances where paragraph (9) applies.

(9) The circumstances referred to in paragraph (8) are that the contracting authority has to procure works or services from economic operators and can only guarantee the validity of the tenders of such operators for a period that is so short that the time-limit for the restricted procedure or the negotiated procedure with publication of a contract notice, including the shortening of time-limits provided for in Regulation 36(9) or (10) cannot be met.

*Contracting party may enter into framework agreements*

28. (1) A contracting authority may enter into a framework agreement as provided by this Regulation.

(2) In entering into a framework agreement, a contracting authority shall follow the rules of procedure prescribed by these Regulations for all phases up to the award of contracts based on the agreement. The parties to the framework agreement are to be determined by applying the award criteria set in accordance with Regulation 55.

(3) A contracting authority that proposes to award a contract by means of a framework agreement shall award the contract in accordance with the procedures specified in Regulations 29 and 30. Those procedures are applicable only between the contracting authority and the economic operators that were originally parties to the agreement.

(4) In awarding a contract on the basis of a framework agreement, the parties may not make substantial amendments to the terms specified in the agreement, in particular in the case referred to in Regulation 29.

(5) The duration of a framework agreement may not exceed 7 years save in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which the change of a supplier may cause. In such exceptional circumstances, the contracting authority shall provide an appropriate justification for those circumstances in a notice referred to in Regulation 33.

(6) A contracting authority may not use framework agreements in such a way as to prevent, restrict or distort competition.

*Framework agreement entered into with a single economic operator*

29. (1) A contracting authority may award a contract on the basis of a framework agreement with a single economic operator within the limits of the terms specified in the agreement.

(2) In deciding whether to award such a contract to a single economic operator, the contracting authority may in writing request the operator to supplement its tender to such extent as it requires. The contracting authority may decide not to award the contract on the grounds that the operator has failed to comply with such a request to that authority's satisfaction.

*Framework agreement entered into with several economic operators*

30. (1) A contracting authority may enter into a framework agreement with several economic operators, but in that case the number of economic operators shall be not less than 3, unless there is—

- (a) an insufficient number of economic operators to satisfy the relevant selection criteria, or
- (b) an insufficient number of admissible tenders that satisfy the relevant award criteria.

(2) A contracting authority may award a contract based on a framework agreement entered into with several economic operators either—

- (a) by applying the terms specified in the agreement without reopening competition, or
- (b) if not all the terms are specified in the agreement, when the parties are again in competition on the basis of the same terms (which may, if necessary, be more precisely formulated), and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the appropriate procedure.

(3) For the purposes of paragraph (2)(b), the appropriate procedure is as follows:

- (a) for each contract to be awarded, the contracting authority shall consult in writing the economic operators that appear to the contracting authority to be capable of performing the contract;
- (b) the contracting authority shall fix a time limit that is sufficiently long to allow tenders for the contract to be submitted and, in particular, shall take into account factors such as the complexity of the subject matter of the contract and the time needed to submit tenders;
- (c) economic operators shall submit their tenders in writing;
- (d) the contracting authority shall keep the content of the tenders confidential until the deadline for receiving tenders has expired;
- (e) the contracting authority shall award the contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

## PART 7

## RULES ON ADVERTISING AND TRANSPARENCY

## CHAPTER 1

*Publication of notices**Prior information notices*

31. (1) A contracting authority that intends to award contracts or to enter into framework agreements may, by means of a prior information notice published by the European Commission or by themselves, in accordance with Paragraph 1(2) of Schedule 6 on its buyer profile—

- (a) in relation to a contract or framework agreement for the supply of products, make known the estimated total value of those contracts or framework agreements by product area which it is intended to award during the 12 months following the relevant date and the product area shall be established by reference to the relevant CPV nomenclature,
- (b) in relation to a contract or framework agreement for the supply of a service, make known the estimated total value of those contracts or framework agreements in each of the categories of service which it intends to award during the 12 months following the relevant date, and
- (c) in relation to a contract or framework agreement for carrying out works, make known the essential characteristics of those contracts or framework agreements which it intends to award.

(2) In the case of a notice referred to in subparagraph (a), (b) or (c) of paragraph (1) the contracting authority shall send the notice to the European Commission as soon as possible after the decision to approve the planning of the relevant contract or framework agreement is made.

(3) As soon as practicable after a contracting authority has published a prior information notice on its buyer profile, it shall notify the European Commission of the publication by electronic means and the form and notification shall be in accordance with Paragraph 3 of Schedule 6.

(4) Publication of a prior information notice in accordance with this Regulation entitles the contracting authority concerned to reduce, in accordance with Regulation 36(3) the deadlines for the receipt of tenders.

(5) In this Regulation, “relevant date”, in relation to a prior information notice, means the date on which the notice is sent to the Office for Publications Office of the European Union for publication or the date on which it is published in the authority’s buyer profile, whichever first occurs.



*Publication of notices: contracts involving restricted procedure, negotiated procedure or competitive dialogue*

32. A contracting authority that proposes to award a contract or enter into a framework agreement by means of—

- (a) the restricted procedure,
- (b) a competitive dialogue, or
- (c) the negotiated procedure with the prior publication of a contract notice,

shall make its intention known by means of a contract notice.

*Contracting authority to send notice of the result of award procedure on entering into contract or framework agreement*

33. (1) A contracting authority that has entered into a contract or a framework agreement shall send a notice of the result of the award procedure to the Office for Publications Office of the European Union within 48 days after the date on which the contract was awarded or the framework agreement was entered into.

(2) A contracting authority that enters into a framework agreement in accordance with Regulation 28 is not required to send a notice of the result of the award procedure for each contract based on the agreement.

*Contracting authority may withhold certain information from publication*

34. A contracting authority may withhold from publication certain information relating to entry into a contract or framework agreement if, in its opinion, release of the information—

- (a) would impede law enforcement or otherwise be contrary to the public interest, in particular defence or security interests, or
- (b) would harm the legitimate commercial interests of economic operators, public or private, or
- (c) could reasonably be expected to prejudice fair competition between economic operators.

*Publication of notices for the purposes of these Regulations*

35. (1) A contracting authority shall ensure that every notice that it sends to the Office for Publications Office of the European Union for publication—

- (a) includes the information specified in Schedule 5 and, when appropriate, any other information that the authority considers relevant, and
- (b) accords with the format of standard forms adopted by the European Commission in accordance with the procedure referred to in Article 67 of the Defence and Security Contracts Directive.

(2) If, in complying with a requirement of these Regulations, a contracting authority sends by electronic means a notice to the Office for Publications Office of the European Union for publication, it shall ensure that the notice complies with the format and procedures for transmission specified in Paragraph 3 of Schedule 6.

(3) A contracting authority that has recourse to an accelerated procedure under Regulation 36 shall send the relevant notice either by telefax or by electronic means and ensure that the notice complies with the format and procedures for transmission specified in Paragraph 3 of Schedule 6.

(4) When sending to the Office for Publications Office of the European Union a notice for publication required by these Regulations, a contracting authority shall comply with the technical requirements for publication specified in Paragraphs 1(1) and (2) of Schedule 6.

(5) A contracting authority shall not send a contract notice for publication unless the full text of the notice is in an official language of the European Community chosen by the contracting authority.

(6) A contracting authority shall not publish a contract notice, or any of its contents, before a copy of the notice has been sent to the Office for Publications Office of the European Union.

(7) When issuing a notice within the State for the purposes of these Regulations or the Defence and Security Contracts Directive, a contracting authority shall ensure that the notice specifies only—

- (a) information contained in the copy of the notice that was sent to the European Commission or was published on its buyer profile, and
- (b) the date on which that copy was so sent or published.

(8) A contracting authority shall publish a prior information notice on its buyer profile only if—

- (a) notice of its publication has been sent to the Office for Publications Office of the European Union in the same format as that in which it is proposed to be published, and
- (b) it specifies the date on which it was sent to that Office.

(9) A contracting authority shall ensure that the content of a notice does not exceed 650 words if it is not sent by electronic means in the format and procedures for transmission specified in Paragraph 3 of Schedule 6.

(10) A contracting authority shall ensure that it is able to provide proof of the dates on which copies of notices were sent to the Office for Publications Office of the European Union for publication. A confirmation of the publication given by a person purporting to be employed in that Office, mentioning the date of publication is proof of publication.

(11) A contracting authority may send to the Office for Publications Office of the European Union for publication in the Official Journal of the European Union a copy of a notice relating to a contract for which publication is not mandatory under these Regulations.

(12) While the European Commission publishes a summary of the important elements of a notice referred to in this Regulation in the other official languages of the European Community, the version of the notice published in the chosen language shall be the sole authentic text.

## CHAPTER 2

### *Deadlines*

#### *Deadlines for receipt of tenders and requests to participate*

36. (1) When fixing the deadline for the receipt of requests to participate and tenders in an award of a contract, a contracting authority shall take particular account of the complexity of the contract and the time needed for drawing up tenders but nothing in this paragraph affects the minimum time limits prescribed by this Regulation.

(2) In the case of a restricted procedure, a negotiated procedure with the prior publication of a contract notice and use of competitive dialogue, a contracting authority shall—

- (a) fix a deadline for receipt of requests to participate that is no less than 37 days from the date on which the contract notice is sent for publication, and
- (b) in the case of a restricted procedure, fix a deadline for the receipt of tenders that is no less than 40 days from the date on which the invitation is sent.

(3) A contracting authority that has published a prior information notice may reduce the deadline for the receipt of tenders fixed in accordance with paragraph (2)(b), to 36 days, but in any event to not less than 22 days.

(4) For the purposes of paragraph (3) a deadline is to be calculated from the date on which the invitation to tender is sent.

(5) The reduction referred to in subparagraph (3) is permitted only if—

- (a) the relevant prior information notice has included all the information required for the contract notice specified in Schedule 5, in so far as that information was available when the prior information notice was published, and
- (b) that prior information notice was sent for publication not less than 52 days and not more than 12 months before the date of publication of the contract notice.

(6) If, in awarding a contract by means of a restricted procedure, a negotiated procedure with publication of a contract notice, or a competitive dialogue, a contracting authority has sent to the Office for Publications Office of the European Union by electronic means a notice in accordance with the format and procedures for transmission specified in Paragraph 3 of Schedule 6, the authority may reduce by not more than 7 days the deadline—

- (a) for the receipt of tenders referred to in paragraph (3), and
- (b) for the receipt of requests to participate referred to in paragraph (2)(a).

(7) A contracting authority may reduce by not more than 5 days the deadlines referred to in paragraph (2)(b) or may add by not more than 5 days to the reduction referred to in paragraph (6) if the authority—

- (a) offers, from the date on which the relevant notice is published in accordance with Schedule 6, unrestricted and full direct access by electronic means to the contract documents and to any supplementary documents, and
- (b) specifies in that notice an internet address at which those documents can be accessed.

(8) If—

- (a) for any reason the specifications and the supporting documents or additional information, although requested in good time, are not supplied before the deadline for the receipt of tenders referred to in Regulation 37, or
- (b) tenders can be made only after a visit to a site where the contract is to be performed or after an on-the-spot inspection of documents supporting the contract documents,

the contracting authority shall extend the deadline so that all of the economic operators concerned may become aware of all of the information needed to prepare tenders.

(9) If, in awarding a contract by means of a restricted procedure or a negotiated procedure following publication of a contract notice, urgency makes it impracticable for a contracting authority to comply with the deadlines prescribed by this Regulation, the authority may fix another deadline for the receipt of requests to participate, but, if it does so, the deadline shall—

- (a) except as provided by subparagraph (b), be not less than 15 days from the date on which the copy of the notice inviting requests to participate was sent to the Office for Publications Office of the European Union for publication, or

- (b) if the notice was sent to that Office by electronic means in accordance with the format and procedure specified in paragraph 3 of Schedule 6, be not less than 10 days from that date.

(10) If, when awarding a contract by means of a restricted procedure, urgency makes it impracticable for a contracting authority to comply with the deadlines prescribed by this Regulation, the authority may fix another deadline for the receipt of tenders, but that deadline shall be not less than 10 days from the date on which the authority invites tenders.

## CHAPTER 3

### *Information content and means of transmission*

#### *Invitations to submit a tender or to participate in dialogue or negotiation*

37. (1) When awarding a contract by means of a restricted procedure, a negotiated procedure with publication of a contract notice or a competitive dialogue procedure, a contracting authority shall simultaneously and in writing invite the selected candidates—

- (a) to submit their tenders, or
- (b) to negotiate, or
- (c) in the case of a competitive dialogue, to participate in the dialogue,

as provided by this Regulation.

(2) The invitation shall—

- (a) include a copy of the relevant specifications or descriptive document and of each of the supporting documents (if any), or
- (b) if documents referred to in subparagraph (a) are made directly available by electronic means in accordance with Regulation 36(7), specify how access to the documents can be obtained.

(3) If a person other than the contracting authority responsible for the award procedure is in possession of the contract document, the descriptive document or any supporting document, the invitation shall specify—

- (a) the address from which the document may be obtained, and
- (b) if appropriate—
  - (i) the closing date for requesting the document, and
  - (ii) the fee (if any) payable for obtaining the document from the person and any payment procedure.

(4) As soon as practicable after receiving a request for such a document from an economic operator, the person having possession of the document shall send it to the economic operator.

(5) On receiving a request for additional information about the contract document, the descriptive document or any supporting document within a reasonable time before the deadline for the receipt of tenders, the person concerned shall provide the additional information to the economic operator concerned—

(a) not less than 6 days, or

(b) when a restricted or an accelerated procedure is used, not less than 4 days,

before the deadline fixed for receipt of tenders.

(6) The invitation shall, as a minimum, also contain the following:

(a) a reference to the publication of the contract notice;

(b) subject to paragraph (6), the deadline for the receipt of the tenders, the address to which the tenders shall be sent and the language or languages in which the tenders shall be prepared;

(c) in the case of competitive dialogue, the date and the address specified for the start of consultation and the language or languages used;

(d) a reference to any possible accompanying documents to be submitted, either to support verifiable statements by the candidate in accordance with Regulation 41, or to supplement the information referred to in that Regulation, and under the conditions prescribed by Regulations 43 and 44;

(e) if not specified in the contract notice, specifications or descriptive document, the relative weighting of criteria for the award of the contract or, if appropriate, the descending order of importance for such criteria.

(7) When awarding a contract in accordance with the competitive dialogue procedure, a contracting authority shall ensure that the information referred to in paragraph (5)(b) appears in the invitation to submit a tender and not in the invitation to participate in the dialogue.

*How candidates and tenderers are to be informed*

38. (1) As soon as practicable after reaching a decision about entering into a contract or a framework agreement, a contracting authority shall inform candidates and tenderers of the decision by the most rapid means of communication possible (such as by electronic mail or by telefax). If the authority notifies its decision by electronic mail or telefax, it shall confirm the decision in writing if a candidate or tenderer so requests.

(2) If a contracting authority decides—

- (a) not to enter into a framework agreement or a contract for which there has been a call for competition, or
- (b) to restart the procedure,

the authority shall include in the decision the grounds on which it is based.

(3) As soon as possible, and in any event no later than 15 days after the date on which a contracting authority receives a request to do so, the authority shall inform—

- (a) a candidate whose application is rejected of the reasons for the rejection, or
- (b) a tenderer whose tender is rejected of the reasons for the rejection (including, in a case referred to in Regulation 16(9) or (10)), the reasons for the decision of the authority (of non-equivalence or that the works, supplies or service do not meet the authority's performance or functional requirements), or
- (c) a tenderer whose tender is rejected of the reasons for the rejection (including, in a case referred to in Regulation 20 or 21), the reasons for the decision of the authority on non-conformity with the requirements of security of information and security of supply,
- (d) a tenderer that has made an admissible tender that has been rejected 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.

(4) However, a contracting authority may decide not to disclose information referred to in paragraph (3) relating to entry into a contract or framework agreement if the release of the information—

- (a) would impede law enforcement, or otherwise be contrary to the public interest and in particular the public interest in defence or security matters, or
- (b) would prejudice the legitimate commercial interests of economic operators (whether public or private), or
- (c) might prejudice fair competition among them.

(5) A contracting authority shall not enter into a contract with a successful tenderer unless at least 14 days have elapsed since the date on which tenderers were informed of the contract award decision in accordance with paragraph (1).

(6) A contracting authority may reduce the 14-day period referred to in paragraph (5) to 7 days if an accelerated procedure has been used. However, if

within this 7-day period, the authority is notified in writing of the intention of a tenderer to seek a review of the contract award decision, it shall not enter a contract until at least 10 days have elapsed since tenderers were informed of the contract award decision in accordance with paragraph (1).

## CHAPTER 4

### *Communications*

#### *Rules applicable to communication of information relating to contracts*

39. (1) A contracting authority may give or send any information, notice or other communication for a purpose connected with entry into a contract, or require candidates or tenderers to submit information or tenders, by such of the following means as it chooses:

- (a) by post or personal delivery;
- (b) subject to paragraphs (5) and (6), by electronic means;
- (c) subject to paragraph (7), by telephone or facsimile machine;
- (d) by a combination of any 2 or more of those means.

(2) A contracting authority shall choose a means of communication that is generally available to economic operators so as to enable them to gain access to the authority's tendering procedure.

(3) A contracting authority shall communicate and store information in connection with awarding contracts in a way that maintains the integrity of data and the confidentiality of tenders and preserves requests to participate.

(4) A contracting authority shall ensure that the content of tenders remains unopened and confidential until the deadline for the receipt of tenders or requests to participate has expired.

(5) The equipment used for communicating by electronic means shall be—

- (a) non-discriminatory, and
- (b) generally available, and
- (c) compatible with information and communication equipment that is currently in general use.

(6) The following provisions apply to equipment used for sending and receiving tenders, and for receiving requests to participate, by electronic means:

- (a) information regarding the specifications necessary for the electronic submission of tenders and requests to participate (including encryption) shall be made available to candidates and tenderers;



- (b) equipment used for electronically receiving tenders and requests to participate shall comply with Schedule 4;
  - (c) tenderers or candidates shall undertake to submit, before the deadline for submission of tenders or requests to participate, all documents referred to in Regulations 42 to 52 that do not exist in electronic form.
- (7) The following provisions apply to the sending of requests to participate in a procedure for the award of a contract by a contracting authority:
- (a) a person who makes such a request by telephone shall confirm the request in writing before the deadline set for receiving requests;
  - (b) a person who sends such a request by fax shall confirm the request by post or by electronic means, but only if required to do so by the authority for the purpose of authenticating the request;
  - (c) the authority shall specify these provisions in the contract notice, together with the deadline for sending confirmation by post or electronic means.

## CHAPTER 4

### *Reports*

#### *Content of reports*

40. (1) A contracting authority shall prepare a written report for every contract or framework agreement that it enters into showing that the selection procedure was undertaken in a transparent and non discriminatory manner and the report shall, as a minimum, include the following particulars:

- (a) the name and address of the authority, the subject matter and the value of the contract or framework agreement;
- (b) the award procedure used;
- (c) in the case of competitive dialogue procedure, the circumstances that justify the use of the procedure;
- (d) in the case of negotiated procedure without prior publication of a contract notice—
  - (i) the circumstances referred to in Regulation 27 that justify the use of the procedure,
  - (ii) if appropriate, the circumstances that justify exceeding time limits referred to in paragraph (4) or (7)(b) of Regulation 27, and
  - (iii) if appropriate, the circumstances that justify exceeding the 50 per cent limit referred to in Regulation 27(6);

- (e) if appropriate, the reasons for the framework agreement lasting more than 7 years;
  - (f) the name of the candidate chosen and the reasons why they were chosen;
  - (g) the name of the candidate excluded and the reasons for their rejection;
  - (h) the reasons for the rejection of a tender;
  - (i) the name of the successful tenderer and the reasons why its tender was selected and, if known, the share of the contract or framework agreement which the successful tenderer intends or will be required to subcontract to third parties;
  - (j) if appropriate, the reasons why the contracting authority has decided not to award a contract or enter into a framework agreement.
- (2) If the European Commission so requests, the contracting authority shall send to it a copy of the report, or such parts of the report as it specifies.
- (3) A contracting authority shall keep a proper record of the progress of a contract award procedure conducted by electronic means.

## PART 8

### HOW THE AWARD PROCEDURE IS TO BE CONDUCTED

#### CHAPTER 1

##### *General provisions*

##### *Procedure for verifying the suitability of participants, for choosing participants and for awarding contracts*

41. (1) A contracting authority shall award a contract on the basis of the criteria prescribed by Regulations 55 and 59 after having checked the suitability of the economic operators (other than those excluded under Regulation 42 or 43) in accordance with—
- (a) the criteria of economic and financial standing referred to in Regulation 44, and
  - (b) the criteria of professional and technical knowledge or ability referred to in Regulations 45 to 48, and
  - (c) if appropriate, the non-discriminatory rules and criteria referred to in paragraphs (3) to (7).
- (2) In awarding a contract on the basis of those criteria, a contracting authority shall take into account Regulation 17.

- (3) A contracting authority can require candidates and tenderers to meet minimum capacity levels in accordance with Regulations 44 to 48.
- (4) A contracting authority—
- (a) shall ensure that the extent of the information referred to in Regulations 44 to 48 and the minimum levels of ability required for a specific contract are related to, and are proportionate to, the subject matter of the contract, and
  - (b) shall specify those minimum levels in the contract notice.
- (5) A contracting authority that uses a restricted procedure, negotiated procedure with publication of a contract notice or a competitive dialogue procedure may limit the number of suitable candidates that it will invite to tender, or with which it will conduct a dialogue, and in such a case, the contracting authority shall specify in the contract notice—
- (a) the objective and non-discriminatory criteria or rules that it proposes to apply, and
  - (b) the minimum number and, if that authority considers it appropriate to do so, the maximum number of candidates that it proposes to invite.
- (6) Where a contracting authority limits the number under paragraph (5) it shall—
- (a) invite no fewer than 3 candidates, and
  - (b) invite a number of candidates at least equal to the minimum number that the authority has set in advance provided that a sufficient number of suitable candidates is available.
- (7) If the number of candidates satisfying the selection criteria and the minimum stated levels of ability required is less than the minimum number referred to in paragraph (6) the contracting authority may continue the procedure by inviting those candidates that have the capabilities required to perform the contract.
- (8) Where the contracting authority forms the opinion that the number of suitable candidates is too low to ensure genuine competition it may suspend the procedure and republish the initial contract notice under Regulations 32 and 35 and shall fix a new deadline for the submission of requests to participate.
- (9) Where the contracting authority suspends and republishes under paragraph (8), the authority shall invite candidates selected upon the first publication and those selected upon the second publication shall be invited in accordance with Regulation 37.

(10) Paragraphs (8) and (9) shall operate without prejudice to the ability of the contracting authority to cancel the ongoing procurement procedure and launch a new procedure.

(11) The contracting authority shall not invite—

- (a) other economic operators that have not made requests to participate in the tendering process, or
- (b) candidates that do not have the requisite capabilities.

(12) A contracting authority that decides to reduce the number of solutions to be discussed under Regulation 24(3) or tenders to be negotiated under Regulation 25(7) shall do so by applying the award criteria specified in the contract notice or contract documents, but in any case shall ensure that the number of solutions arrived at is consistent with genuine competition (assuming enough solutions or suitable candidates are available).

## CHAPTER 2

### *Criteria for qualitative selection*

#### *Exclusion of certain persons from being considered for awards of contracts*

42. (1) In considering whether or not to award a contract, a contracting authority shall exclude from consideration any person who, to the knowledge of the authority, has been convicted of an offence involving—

- (a) participation in a prescribed criminal organisation, or
- (b) corruption, or
- (c) fraud, or
- (d) terrorist offences or offences linked to terrorist activities, or
- (e) money laundering.

(2) In order to give effect to paragraph (1), the contracting authority—

- (a) shall, whenever appropriate, ask a candidate or tenderer to supply the documents referred to in paragraph (6), and
- (b) may, if it has doubts concerning the personal situation of the candidate or tenderer, also seek information that it considers relevant from an appropriate competent administrative or judicial authority.

(3) If the information referred to in paragraph (2)(b) concerns a candidate or tenderer established in another Member State, the contracting authority may request the co-operation of the competent authority of that other State. Such a request may extend to any agent of the person and, in the case of a body (whether incorporated or unincorporated), extend to any person who is concerned in the direction or management of the body.

- (4) In considering whether to award a contract, a contracting authority may exclude from consideration any person—
- (a) who is subject to a bankruptcy or insolvency procedure or process of a kind specified in paragraph (5), or
  - (b) who has been found guilty of professional misconduct by a competent authority that is authorised by law to hear and determine allegations of professional misconduct against persons that include the operator, such as infringement of a statute regarding export of defence or security equipment, or
  - (c) who has committed grave professional misconduct provable by means that the authority can supply, such as breach of obligations regarding security of information or security of supply during a previous contract, or
  - (d) has been found to be not as reliable as is required to exclude risks to the security of the State, or
  - (e) who has not fulfilled an obligation to pay—
    - (i) any contribution or levy in respect of social insurance under the Social Welfare Acts where the person ordinarily resides in the State, or
    - (ii) any contribution or levy corresponding to a contribution or levy referred to in clause (i) as required by a law of the country or territory—
      - (I) where the person ordinarily resides or carries on business, or
      - (II) where the authority is established, or
  - (f) who has not fulfilled an obligation to pay any tax or levy imposed by or under statute where the person ordinarily resides in the State or any tax or levy imposed by or under a law of the country or territory—
    - (i) where the person ordinarily resides or carries on business, or
    - (ii) where the authority is established, or
  - (g) who has provided a statement or information to the authority or another contracting authority knowing it to be false or misleading, or has failed to provide to the authority or another such authority a statement or information that is reasonably required by the authority for the purpose of awarding the contract concerned.
- (5) A person is subject to a bankruptcy or insolvency procedure or process for the purpose of paragraph (4) if—

- (a) the person is bankrupt or the subject of a bankruptcy petition, or
- (b) the person, being a body corporate, is being wound up or the subject of proceedings for compulsory winding up, or
- (c) the person's affairs are being administered by a court, or the person is the subject of proceedings in which it is sought to have the person's affairs so administered, or
- (d) the person has entered into an arrangement with creditors, or
- (e) the person has suspended business activities, or
- (f) the person is, in the opinion of the contracting authority concerned, in any situation analogous to any of those mentioned in subparagraphs (a) to (e) under a law of the State, another Member State or a third country relating to bankruptcy or insolvency.

(6) A contracting authority shall accept as sufficient evidence that a person is not liable to be excluded under paragraph (1) or under subparagraph (a), (b), (e) or (f) of paragraph (4)—

- (a) a copy of the relevant judicial record, or
- (b) in the absence of such a copy, a certificate issued by a competent judicial or administrative authority in the country or territory where the person ordinarily resides or carries on business, or the authority is established,

showing that the particular paragraph or subparagraph does not apply to the person.

(7) Without limiting paragraph (6), a contracting authority shall accept as sufficient evidence that a person is not liable to be excluded under subparagraph (e) or (f) of paragraph (4) a certificate issued by the Collector General of the Office of the Irish Revenue Commissioners showing that the relevant subparagraph does not apply to the person.

(8) If a question arises as to whether paragraph (1), or subparagraph (a) or (b) of paragraph (4), applies to a person and either—

- (a) the relevant judicial or administrative or competent authority in the country or territory in question does not issue documents of the kind referred to in paragraph (6), or (7), or
- (b) although it issues documents of that kind, they do not cover the case in question,

the contracting authority concerned shall accept instead a declaration made by the person on oath or, in the case of a Member State where there is no provision

for making a declaration on oath, a solemn declaration made by the person before a person authorised for the purpose under a law of that Member State.

(9) The following are authorised authorities for the purposes of paragraph (8):

- (a) a competent judicial or administrative authority of the country or territory where the person ordinarily resides or carries on business or where the contracting authority is established;
- (b) a notary or a competent professional or trade body located in that country or territory.

*Suitability to pursue the professional activity*

43. (1) Where a candidate that wishes to participate in a contract—

- (a) is established in the State or in another Member State, and
- (b) is required to be enrolled on a professional or trade register in order to pursue its professional activity in the State or, as the case may be the Member State of origin or establishment of the candidate,

the candidate shall, if requested to do so by the contracting authority concerned, provide—

- (i) evidence to the satisfaction of that authority that it is enrolled on one of the professional or trade registers, or
- (ii) a declaration on oath or a certificate,

as described in the relevant Part of Annex VII to the Defence and Security Contracts Directive.

(2) For the purposes of paragraph (1), the relevant Part of Annex VII to the Defence and Security Contracts Directive is—

- (a) in the case of a works contract, Part A, and
- (b) in the case of a supply contract, Part B, and
- (c) in the case of a service contract, Part C.

(3) If, in relation to the award of a service contract, candidates or tenderers are required to be holders of a particular qualification in order to be able to carry on the kind of activity to which the contract relates in the country or territory where their principal place of business is located, those candidates or tenderers shall, if required to do so by the contracting authority, provide evidence that they hold such a licence or authority or that they are members of that organisation.

(4) In paragraph (3), “qualification” includes—

- (a) a licence or other form of authorisation, and
- (b) membership of a specified organisation.

(5) This Regulation is without prejudice to the law of the European Communities or the European Union relating to freedom of establishment and freedom to provide services.

*Economic and financial standing*

44. (1) A contracting authority may accept as proof of an economic operator's economic and financial standing one or more of the following references:

- (a) an appropriate statement from a bank or, where appropriate, evidence that the operator has professional risk indemnity insurance;
- (b) the presentation of a financial statement relating to the business of the operator, or a copy of such a statement, but only if the statement is required to be published under a law of the country in which the operator is established or carries on business;
- (c) a statement showing—
  - (i) the operator's overall turnover, and
  - (ii) if appropriate, the turnover in the kind of business covered by the proposed contract,

for a specified period normally not exceeding the preceding 3 years.

(2) An economic operator may, if appropriate and in relation to a particular contract, rely on the services of other persons, regardless of the legal nature of the links that the operator has with them. In such a case, the operator shall satisfy the contracting authority that the operator will have available the resources necessary to perform the contract (for example, by producing an undertaking by those other persons that they have available the necessary resources).

(3) Under the same conditions, a group of economic operators may rely on the capacities of participants within the group.

(4) A contracting authority shall specify, in the relevant contract notice—

- (a) which reference or references mentioned in paragraph (1) they have chosen, and
- (b) which other references shall be provided.

(5) An economic operator that, for any valid reason, is unable to provide the references requested by a contracting authority may prove its economic and financial standing by any other document acceptable to the authority.



*Contracting authority to assess technical and professional ability of economic operators*

45. In considering whether to award a contract, a contracting authority shall, so far as relevant, assess the technical and professional abilities of the economic operators in accordance with—

- (a) Regulation 46, if the contract is to carry out works, or
- (b) Regulation 47, if the contract is to supply products, or
- (c) Regulation 48, if the contract is to supply a service.

*Evidence to be furnished in relation to a works contract*

46. (1) In relation to a works contract, an economic operator may, as a general rule, provide evidence of the operator's technical ability by producing to the relevant contracting authority one or more of the following references:

- (a) a list of the works that the operator has carried out over the immediately preceding 5 years, accompanied by certificates or other evidence that the operator has completed the relevant works satisfactorily;
- (b) a list of the technical persons—
  - (i) who are or have been responsible for controlling the quality of, or are or have been otherwise involved in, works carried out by the operator, or
  - (ii) whose services the operator can call on in order to assist the operator in carrying out works;
- (c) a description of—
  - (i) the technical facilities and measures used by the operator for ensuring quality,
  - (ii) the study and research facilities of the operator, and
  - (iii) rules of the operator regarding intellectual property;
- (d) a report of an examination carried out by the contracting authority, or if applicable, by a competent official body located in the country or territory in which the economic operator is established concerning—
  - (i) the production capacity of the supplier or technical capacity of the operator, and
  - (ii) when appropriate, the means of study and research that are available to the operator and the quality control measures that it shall operate;

- (e) in the case of a works contract which also relates to siting and installation operations or services, the educational and professional qualifications of persons employed to manage works carried out by the operator, its managerial staff, and persons who carry out works as subcontractors of the operator;
  - (f) when appropriate, a specification of the environmental management measures (if any) that the operator shall be able to apply when performing the contract;
  - (g) a statement specifying—
    - (i) the average number of persons employed by the operator in carrying out works contracts, and
    - (ii) the number of persons employed by the operator in managerial positions,  
  
during the immediately preceding 3 years;
  - (h) in the case of contracts involving, relating to, or containing information which has been classified as sensitive information, evidence of the ability to process, store and transmit that information in a manner that protects the confidentiality and security of information.
- (2) (a) The certificates or evidence referred to in paragraph (1)(a) shall specify—
- (i) the value, date and site of the works, and
  - (ii) whether the works were carried out in accordance with the rules of the relevant trade and were properly completed.
- (b) Whenever appropriate to do so, the persons responsible for issuing certificates referred to in paragraph (1)(a) or other evidence shall submit them directly to the contracting authority concerned.
- (3) For the purposes of paragraph (1)(b), a person can be regarded as being or having been involved in works carried out by an operator even though the person is not an employee of the operator.
- (4) For the purposes of paragraph (1)(h)—
- (a) the evidence which the contracting authority shall consider shall comply with any security clearances which are required—
    - (i) by or under statute, or
    - (ii) under any other rules regarding security clearances that may apply in the State,

notwithstanding that the contracting authority may also conduct and take into account further investigations of its own if it considers that this is necessary,

- (b) the contracting authority may, where appropriate, grant candidates which do not yet hold security clearance additional time to obtain such clearance and in such a case the authority shall indicate in the contract notice that this may occur and the additional time that may be granted,
- (c) the contracting authority may ask the body responsible for the national security of a Member State, or the body designated for that purpose by the Member State, to check in relation to candidates—
  - (i) the conformity of the premises and facilities that may be used,
  - (ii) the industrial and administrative procedures that will be followed,
  - (iii) the methods for managing information, or
  - (iv) information relating to employees of the candidate who will carry out a contract.

(5) In awarding a works contract, a contracting authority may evaluate the capacity of an economic operator to carry out the works by reference to the operator's skills, efficiency, experience and reliability.

(6) The contracting authority shall specify in the contact notice or in the invitation to tender for the works contract which references referred to in paragraph (1) it wishes to receive.

*Evidence to be furnished in relation to a supply contract*

47. (1) In relation to a supply contract, an economic operator may, as a general rule, provide evidence of the operator's technical ability by producing to the relevant contracting authority one or more of the following references:

- (a) a list of the principal contracts to supply products effected during the immediately preceding 5 years, together with particulars of—
  - (i) the amounts of consideration given, and
  - (ii) the dates on which, or the periods over which, the contracts were performed, and
  - (iii) the persons, and whether public or private bodies, to whom the products were supplied;
- (b) a list of the technical persons who are or have been responsible for controlling the quality of, or are or have been otherwise involved in, the supply of products by the operator;
- (c) a description of—

- (i) the technical facilities and measures used by the operator for ensuring the quality of products supplied by the operator,
  - (ii) the study and research facilities of the operator, and
  - (iii) rules of the operator regarding intellectual property;
- (d) a report of an examination carried out by the contracting authority, or if applicable, by a competent official body located in the country or territory in which the economic operator is established concerning—
- (i) the production capacity of the supplier or technical capacity of the operator, and
  - (ii) when appropriate, the means of study and research that are available to the operator and the quality control measures that it shall operate;
- (e) in the case of a supply contract which also relates to siting and installation operations or services, the educational and professional qualifications of persons employed to manage works carried out by the operator, its managerial staff, and persons who carry out works as subcontractors of the operator;
- (f) a statement specifying the tools, plant and other technical equipment that would be available to the operator for carrying out the contract together with an indication of the location, if that location is outside of the territory of the European Union, which the economic operator has at its disposal to perform the contract or cope with any additional needs required by the contracting authority as a result of a crisis or carry out the maintenance, modernisation or adaptation of supplies to which the contract relates;
- (g) samples, descriptions or photographs of the products proposed to be supplied, the authenticity of which shall be certified if the contracting authority so requests;
- (h) certificates prepared by an official quality control institute or agency of recognised competence attesting the conformity of the products, clearly identified by reference to specifications or standards;
- (i) in the case of a supply contract involving, relating to or containing information which has been classified as sensitive information, evidence of the ability to process, store and transmit that information in a manner that protects the confidentiality and security of information.
- (2) In relation to the information referred to in paragraph (1)(a), an economic operator shall provide evidence of the supply of products—
- (a) if the recipient of the products was a contracting authority, in the form of a certificate issued or countersigned by the authority, or

(b) if the recipient was a private purchaser, by a certificate given by the purchaser or, in the absence of such certificate, by a declaration made by the economic operator.

(3) For the purposes of paragraph (1)(b), a person can be regarded as being or having been involved in the supply or manufacture of products by an operator even though the person is not an employee of the operator.

(4) For the purposes of paragraph (1)(i)—

(a) the evidence which the contracting authority shall consider shall comply with any security clearances which are required:

(i) by or under statute, or

(ii) under any other rules regarding security clearances that may apply in the State,

notwithstanding that the contracting authority may also conduct and take into account further investigations of its own if it considers that this is necessary,

(b) the contracting authority may, where appropriate, grant candidates which do not yet hold security clearance additional time to obtain such clearance and in such a case the authority shall indicate in the contract notice that this may occur and the additional time that may be granted,

(c) the contracting authority may ask the body responsible for the National Security of a Member State, or the body designated for that purpose by the Member State, to check the following in relation to candidates:

(i) the conformity of the premises and facilities that may be used;

(ii) the industrial and administrative procedures that will be followed;

(iii) the methods for managing information;

(iv) where applicable, information related to employees of the candidate who will carry out a contract.

(5) In awarding a supply contract, a contracting authority may evaluate the capacity of an economic operator to supply products by reference to the operator's skills, efficiency, experience and reliability.

(6) The contracting authority shall specify, in the contract notice or in the invitation to tender for the supply contract, which references under paragraph (1) it wishes to receive.

*Evidence to be furnished in relation to a service contract*

48. (1) In relation to a service contract, an economic operator shall, as a general rule, provide evidence of the operator's technical ability by producing to the relevant contracting authority one or more of the following references:

- (a) a list of the principal services supplied during the immediately preceding 5 years, together with particulars of—
  - (i) the amounts of consideration given, and
  - (ii) the dates on which, or the periods over which, the contracts were performed, and
  - (iii) the persons, and whether public or private bodies, to whom the services were supplied;
- (b) a list of the technical persons who are or have been responsible for controlling the quality of, or are or have been otherwise involved in, the supply of services by the operator;
- (c) a description of—
  - (i) the technical facilities and measures used by the operator for ensuring the quality of services supplied by the operator,
  - (ii) the study and research facilities of the operator, and
  - (iii) rules of the operator regarding intellectual property;
- (d) a report of an examination carried out by the contracting authority, or if applicable, by a competent official body located in the country or territory in which the economic operator is established concerning—
  - (i) the production capacity of the supplier or technical capacity of the operator, and
  - (ii) when appropriate, the means of study and research that are available to the operator and the quality control measures that it shall operate;
- (e) in the case of a service contract which also relates to siting and installation operations or services, the educational and professional qualifications of persons employed to manage works carried out by the operator, its managerial staff, and persons who carry out works as subcontractors of the operator;
- (f) when appropriate, a statement of the environmental management measures (if any) that the operator shall be able to apply when performing the service contract;
- (g) a statement specifying—

- (i) the average number of persons employed by the operator in carrying out works contracts, and
- (ii) the number of persons employed by the operator in managerial positions,

during the immediately preceding 3 years;

- (h) a statement specifying the tools, plant and other technical equipment that would be available to the operator for carrying out the contract together with an indication of the location, if that location is outside of the territory of the European Union, which the economic operator has at its disposal to perform the contract or cope with any additional needs required by the contracting authority as a result of a crisis or carry out the maintenance, modernisation or adaptation of supplies to which the contract relates;
  - (i) in the case of a service contract involving, relating to or containing information which has been classified as sensitive information, evidence of the ability to process, store and transmit that information in a manner that protects the confidentiality and security of information.

(2) In relation to the information referred to in paragraph (1)(a), an economic operator shall provide evidence of the supply of services—

- (a) if the recipient of the services was a contracting authority, in the form of a certificate issued or countersigned by the authority, or
- (b) if the recipient was a private purchaser, by a certificate given by the purchaser or, in the absence of such certificate, by a declaration made by the economic operator.

(3) For the purposes of paragraph (1)(b), a person can be regarded as being or having been involved in the supply or manufacture of products by an operator even though the person is not an employee of the operator.

(4) For the purposes of paragraph (1)(i)—

- (a) the evidence which the contracting authority shall consider shall comply with any security clearances which are required:
  - (i) by or under statute, or
  - (ii) under any other rules regarding security clearances that may apply in the State,

notwithstanding that the contracting authority may also conduct and take into account further investigations of its own if it considers that this is necessary,

- (b) the contracting authority may, where appropriate, grant candidates which do not yet hold security clearance additional time to obtain such clearance and in such a case the authority shall indicate in the contract notice that this may occur and the additional time that may be granted,
  - (c) the contracting authority may ask the body responsible for the national security of a Member State, or the body designated for that purpose by the Member State, to check the following in relation to candidates:
    - (i) the conformity of the premises and facilities that may be used;
    - (ii) the industrial and administrative procedures that will be followed;
    - (iii) the methods for managing information;
    - (iv) where applicable, information related to employees of the candidate who will carry out a contract.
- (5) In awarding a contract to supply a service, a contracting authority may evaluate the capacity of an economic operator to supply the service by reference to the operator's skills, efficiency, experience and reliability.
- (6) The contracting authority shall specify, in the contract notice or in the invitation to tender for the supply contract, which references under paragraph (1) it wishes to receive.

*Economic operator may be required to produce certificate of payment of outstanding social security contributions and taxes*

49. (1) When deciding whether or not to award a contract to a particular approved or certified economic operator, a contracting authority is entitled to require the operator to produce to the authority an additional certificate certifying that the operator has no outstanding obligations to pay—
- (a) any contribution or levy in respect of social insurance under the Social Welfare Acts where the economic operator ordinarily resides in the State, or
  - (b) any contribution or levy corresponding to a contribution or levy referred to in subparagraph (a) as required by the law of the country or territory—
    - (i) where the economic operator ordinarily resides or carries on business, or
    - (ii) where the economic operator is established, or
  - (c) any tax or levy imposed by or under statute where the economic operator ordinarily resides in the State or any tax or levy imposed by or under a law of the country or territory—



- (i) where the economic operator ordinarily resides or carries on business, or
- (ii) where the economic operator is established.

(2) An economic operator that fails, within such period as is specified by the contracting authority (or within such extended period as that authority allows) to comply with a requirement made in accordance with paragraph (1), is taken to have withdrawn its tender or to have withdrawn from participating in the restricted or negotiated procedure or competitive dialogue concerned.

*Official lists of registered economic operators and certification of economic operators*

50. (1) If an economic operator registered on an official list kept under a law of another Member State proposes to tender for a contract to be awarded by a contracting authority established in the State, the operator may submit to the authority either the certificate of registration or a certificate issued by a competent certifying body of that other Member State certifying that the operator's name appears on the list.

(2) However, the fact that an economic operator is registered on an official list, or holds a certificate certifying that the operator's name appears on such a list, does not create a presumption that the operator is suitable for the purposes of carrying out the relevant works, or supplying the relevant products or service, under a contract, except as regards the operation of Regulations 42, 43 and 44, and—

- (a) Regulation 46 in the case of a works contract, or
- (b) Regulation 47 in the case of a supply contract, or
- (c) Regulation 48 in the case of a service contract.

(3) A contracting authority is not, without justification, entitled to question information that can be deduced from registration on an official list or certification.

(4) Paragraphs (2) and (3) apply to an economic operator registered on an official list kept in another Member State only if the operator is established in that other Member State.

(5) If an economic operator is registered on an official list kept in another Member State, or holds a certificate issued by a competent certifying body established in that other State, a contracting authority is not entitled to require further proof or statements other than those that it can ask an economic operator established in the State to provide. The authority may not in any case require the operator to provide proof and statements other than those provided for under Regulations 42 to 49, 51 and 52 and, where appropriate, Regulation 53.

(6) A contracting authority established in the State cannot require an economic operator established in another Member State in which an official list is

kept to become registered on that list or to obtain a certificate from a competent certifying body of that other Member State.

(7) A contracting authority established in the State shall recognise certificates issued by certifying bodies established in other Member States and shall also accept other equivalent means of proof.

(8) Certifying bodies referred to in paragraph (7) shall comply with European certification standards.

*Economic operator may rely on capacities of other economic operators*

51. (1) When it is appropriate to do so in relation to a particular contract, an economic operator may rely on the capacities of other persons or groups of economic operators, irrespective of the links that it has with them.

(2) A group of economic operators may also rely on the capacities of members of the group or of other persons or groups.

(3) In making use of the capacities of other persons, the operator or group shall satisfy the contracting authority concerned that it will have at its disposal the resources necessary to perform the contract, for example, by producing an undertaking from those persons that they are willing and able to place the necessary resources at the disposal of the operator or group.

(4) In awarding a contract for supplies requiring siting or installation work, a contracting authority may evaluate the capacity of an economic operator to carry out the works by reference to the operator's skills, efficiency, experience and reliability.

(5) If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, the operator may prove its technical or professional ability by any other document which the contracting authority considers appropriate.

*Quality assurance standards*

52. When requiring the production of certificates issued by independent bodies attesting to the extent to which an economic operator has complied with certain quality management systems, a contracting authority shall—

- (a) refer to quality management systems based on the relevant European standards series certified by independent accredited bodies conforming to the European standards series for accreditation and certification, and
- (b) recognise equivalent certificates issued by independent accredited bodies established in other Member States, and
- (c) accept evidence of equivalent quality management systems provided by other economic operators.

*Environmental management standards*

53. When requiring the production of certificates issued by independent bodies attesting to the extent to which an economic operator has complied with environmental management standards as provided by Regulation 46(1)(f) or 48(1)(f), a contracting authority shall—

- (a) refer to the Community Eco-Management and Audit Scheme (EMAS), or to environmental management standards based on the relevant European or international standards certified by bodies conforming to the law of the European Communities or of the European Union or the relevant European or international standards concerning certification, and
- (b) recognise certificates of competency issued by recognised bodies established in other Member States, and
- (c) accept evidence of equivalent environmental management measures provided by other economic operators.

*Additional documentation and information*

54. (1) A contracting authority may require an economic operator to supplement or clarify, within a period or before a date specified in the request, the certificates and documents that it has submitted in accordance with the requirements of this Chapter.

(2) An economic operator that fails, within such period as is specified by the contracting authority (or within such extended period as that authority allows), to comply with a requirement made in accordance with paragraph (1) is taken to have withdrawn its tender or to have withdrawn from participating in the restricted or negotiated procedure or competitive dialogue concerned.

## CHAPTER 3

*Awarding contracts**Criteria for the award of a contract*

55. (1) A contracting authority shall, in awarding a contract on the basis of the tender that is most economically advantageous to it, adopt criteria linked to the subject matter of the contract.

(2) Except as provided by paragraph (1), a contracting authority shall award a contract on the basis of the lowest price.

(3) For the purpose of paragraph (1), the criteria may include (but are not limited to) the following matters:

- (a) quality;
- (b) price;
- (c) technical merit;

- (d) functional characteristics;
  - (e) environmental characteristics;
  - (f) running costs;
  - (g) life cycle costs;
  - (h) cost-effectiveness;
  - (i) after-sales service and technical assistance;
  - (j) delivery date and delivery period or period of completion;
  - (k) security of supply;
  - (l) interoperability;
  - (m) operational characteristics.
- (4) (a) The contracting authority shall specify in the relevant contract notice, contract documents, descriptive documents or supporting documents, the relative weighting that it gives to each of the criteria chosen to determine the most economically advantageous tender.
- (b) The weighting referred to in paragraph (a) can be expressed by providing for a range within an appropriate maximum spread.
- (5) If weighting is not possible for reasons that the contracting authority can demonstrate, that authority shall specify in the relevant contract notice, contract documents, descriptive documents or supporting documents, the criteria in descending order of importance.
- (6) Nothing in this Regulation affects any law of the State relating to remuneration for a service supplied under contract of employment or for services.
- Conditions under which contracting authority may hold an electronic auction*
56. (1) A contracting authority may award a contract by means of an electronic auction, but only in accordance with this Regulation and Regulation 57.
- (2) A contracting authority shall not—
- (a) have improper recourse to electronic auctions, or
  - (b) use an electronic auction in such a way as to prevent, restrict or distort competition or to change the subject matter of the contract, as put up for tender in the published contract notice and defined in the contract specifications.
- (3) In awarding a contract by means of a restricted procedure, or negotiated procedure with publication of a contract notice, a contracting authority may

decide that the award should be preceded by an electronic auction, but only if the contract specifications can be established with precision.

(4) Provided the contract specifications can be established with precision, a contracting authority may also hold an electronic auction on the reopening of competition among the parties to a framework agreement as provided for in Regulation 30(2)(b).

(5) An electronic auction shall—

(a) if the contract is awarded to the most economically advantageous tender, be based on price and the new values of the features of the tenders indicated in the contract documents, or on both price and those new values, or

(b) if the contract is to be awarded to the tenderer of the lowest price, be based solely on price.

(6) (a) On deciding to hold an electronic auction, a contracting authority shall state that fact in the relevant contract notice, together with details of the auction.

(b) The details referred to in subparagraph (a) shall include (but are not limited to) the following:

(i) the weightings of award criteria to be used in the auction (so long as the criteria can be expressed in figures or percentages);

(ii) any limits imposed on the values that can be submitted (in so far as they result from the specifications relating to the subject matter of the contract);

(iii) the information that the authority will make available to tenderers in the course of the auction and, if appropriate, when the information will be made available to them;

(iv) all information relevant to the auction process;

(v) the conditions under which tenderers will be able to bid and, in particular, the minimum amounts by which tenderers shall reduce their bids in the tendering process;

(vi) all relevant information concerning the electronic equipment to be used and the arrangements and technical specifications for communicating while the auction is in progress.

(7) Before proceeding with an electronic auction, a contracting authority shall make a full initial evaluation of the candidates or tenders in accordance with the specified criteria and any weighting fixed for those criteria.

(8) In holding an electronic auction, a contracting authority shall—

- (a) simultaneously by electronic means, invite all tenderers that have submitted admissible tenders to the authority to submit new prices or new values, or both new prices and new values, and
- (b) include in the invitation all relevant information concerning individual electronic connection to the electronic equipment being used, and
- (c) state the date and time of the start of the auction.

(9) A contracting authority may hold an electronic auction in a number of successive phases, but may not begin the auction earlier than 2 business days after the date on which invitations were sent.

(10) In awarding a contract on the basis of the most economically advantageous tender, a contracting authority shall ensure—

- (a) that the invitation is accompanied by the outcome of a full evaluation of the relevant tenderer, carried out in accordance with the weighting provided for in Regulation 55(4), and
- (b) that the invitation specifies the mathematical formula to be used in the electronic auction to determine automatic re-rankings of tenderers on the basis of the new prices or new values (or both) submitted by them, and
- (c) that that formula incorporates the weighting of all the criteria that have been fixed to determine the most economically advantageous tender (as specified in the relevant contract notice or specifications for that purpose).

(11) Before beginning an electronic auction, a contracting authority concerned shall ensure that any weightings expressed as being within a range are specified as precise figures.

(12) When holding an electronic auction, a contracting authority shall, throughout each phase of the auction, instantaneously communicate to each tenderer sufficient information to enable the tenderer to discover what its relative ranking is at any particular time. The authority may also—

- (a) communicate other information concerning other prices or values submitted, so long as it is stated in the contract documents, and
- (b) at any time announce the number of tenderers that are participating in that phase of the auction.

(13) The contracting authority shall not disclose the identities of the tenderers at any time during the course of the auction.

*Procedure for closing an electronic auction*

57. (1) A contracting authority shall close an electronic auction in one or more of the following ways:

- (a) by specifying in the invitation to participate in the auction the date and time of the closure;
- (b) when it is no longer receiving any further new offers or prices that comply with the rules regulating the circumstances in which tendered amounts can be reduced during the tender process;
- (c) when the number of phases in the auction (as specified in the invitation to participate in the auction) has been completed.

(2) A contracting authority shall not close an electronic auction under paragraph (1)(b) unless it has specified in the invitation to participate in the auction the period that it will allow to elapse, after receiving the last submission, before it closes the auction.

(3) A contracting authority shall not close an electronic auction under paragraph (1)(c), unless it has specified in the invitation to participate in the auction the timetable for each phase of the auction.

(4) After closing an electronic auction, a contracting authority shall award the contract in accordance with the criteria referred to in Regulation 55 and on the basis of the result of the auction.

*Contracting authority may reject abnormally low tenders*

58. (1) If a tender for the award of a contract to carry out works, or to supply products or a service, appears to the contracting authority concerned to be abnormally low, that authority shall, by notice in writing and before rejecting the tender, request the tenderer to provide written details of such of the constituent elements of the tender as are specified in the notice. Those details may relate to (but are not limited to) any of the following:

- (a) the economics of the construction method to be used to carry out the work, the manufacturing process to be used to produce the products or the means to be used to supply the service;
- (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer to carry out the work, or to supply the products or service, or both;
- (c) the originality of the work to be carried out, or the products or service to be supplied, by the tenderer;
- (d) the extent to which the provisions for employment protection and working conditions applicable to the place where the work is to be carried out, or where the products or service are or is to be supplied, are being complied with;
- (e) whether there is a possibility that the tenderer may receive aid from the State or another Member State.

(2) The contracting authority shall, as far as practicable, verify the constituent elements—

- (a) by consulting the tenderer, and
- (b) by taking account of the evidence that the tenderer provides about those elements.

(3) The contracting authority may reject a tender on being satisfied that the only reason for the tender being abnormally low is that the tenderer has received aid from the State or other Member States, but only after—

- (a) that authority has consulted the tenderer about the matter, and
- (b) the tenderer has failed, by a deadline specified by that authority, to satisfy it that the aid was granted lawfully.

(4) A contracting authority that rejects a tender in accordance with paragraph (3) shall, by notice in writing, inform the European Commission of the rejection and the reason for it.

## PART 9

### RULES APPLICABLE TO SUBCONTRACTING

#### CHAPTER 1

##### *Scope*

59. (1) Where Regulation 19(3) and (4) applies in relation to a contract, a successful tenderer who is not a contracting authority shall award subcontracts to third parties in accordance with this Part.

(2) For the purposes of paragraph (1), a group of undertakings which has been formed to obtain a contract, or undertakings related to them, shall not be considered to be third parties.

(3) The tenderer shall include an exhaustive list of undertakings referred to in paragraph (2) in the tender and that list shall be updated following any change in the relationship between the undertakings.

##### *Principles*

60. In awarding a subcontract, a successful tenderer shall act transparently and treat all potential subcontractors in an equal and non-discriminatory way.

##### *Thresholds and rules on advertising*

61. (1) When a successful tenderer which is not a contracting authority awards a subcontract which has a value, excluding VAT estimated not to be lower than the thresholds laid down in Regulation 4, it shall make known its intention by the way of a notice.



(2) A subcontract notice shall contain the information specified in Schedule 5 and any other information deemed useful by the successful tenderer, if necessary with the approval of the contracting authority.

(3) Subcontract notices shall be published in accordance with paragraph (2) to (8) of Regulation 35.

(4) A subcontract notice shall not be required when a subcontract meets the conditions of Regulation 27.

(5) A successful tenderer may publish, in accordance with Regulation 35, subcontract notices for which advertising is not required.

(6) A successful tenderer may fulfil the subcontracting requirement set out in Regulation 19(3) or (4) by awarding a subcontract on the basis of a framework agreement concluded in accordance with Regulations 60 and 62 and paragraphs (1) to (5).

(7) A subcontract based on a framework agreement referred to in paragraph (6)—

(a) shall be awarded within the limits of the terms laid down in the framework agreement,

(b) may only be awarded to economic operators that were originally party to the framework agreement.

(8) When awarding a subcontract based on a framework agreement referred to in paragraph (6), the parties shall in all circumstances propose terms consistent with those of the framework agreement.

(9) The term of a framework agreement referred to in paragraph (6) may not exceed seven years, except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause.

(10) A framework agreement referred to in paragraph (6) may not be used improperly or in such a way as to prevent, restrict or distort competition.

(11) In awarding a subcontract which has a value, excluding VAT estimated to be less than the thresholds laid down in Regulation 4, a successful tenderer shall apply the principles of the Treaty on European Union regarding transparency and competition.

(12) Regulation 6 shall apply to the calculation of the estimated value of a subcontract.

*Criteria for qualitative selection of subcontractors*

62. (1) In the subcontract notice, the successful tenderer shall indicate—

- (a) the criteria for qualitative selection required by the contracting authority, and
- (b) any other criteria it will apply for the qualitative selection of subcontractors.

(2) All of the criteria referred to in subsection (1) shall be objective, non-discriminatory and consistent with the criteria applied by the contracting authority for the selection of the tenderer for the main contract.

(3) The capabilities required of the subcontractor shall be directly related to the subject of the subcontract, and the levels of ability required shall be commensurate with it.

(4) A successful tenderer shall not be required to subcontract if the successful tenderer proves to the satisfaction of the contracting authority that none of the subcontractors participating in the competition or their proposed bids meet the criteria indicated in the subcontract notice and thereby would prevent the successful tenderer from fulfilling the requirements set out in the main contract.

## CHAPTER 2

### *Subcontracts awarded by successful tenderers which are contracting authorities*

63. Where a contracting authority is a successful tenderer that authority shall, in awarding a subcontract, comply with the provisions of Parts 1 to 7 that relate to the award of a contract.

## PART 10

### RULES TO BE APPLIED TO REVIEWS

#### Rules to be Applied to Reviews

##### *Interpretation*

64. In this Part—

“Court” means the High Court;

“eligible person” shall be construed in accordance with Regulation 66;

“reviewable contract” shall be construed in accordance with Regulation 65;

“standstill period” shall be construed in accordance with Regulation 67;

##### *Scope and availability of review procedures*

65. This Part applies to a decision taken after the coming into operation of these Regulations by a contracting authority in relation to the award of a contract to which these Regulations apply regardless of when the contract award procedure commenced and which in this Part shall be referred to as a “reviewable contract”.

*Persons to whom review procedures are available*

66. For the purposes of this Part, a person is an eligible person in relation to a reviewable contract if the person—

- (a) has, or has had, an interest in obtaining the reviewable contract, and
- (b) alleges that he or she has been harmed, or is at risk of being harmed, by an infringement, in relation to that reviewable contract, of the law of the European Communities or the European Union in the field of public procurement, or of a law of the State giving effect to that law.

*Standstill period*

67. (1) A contracting authority shall not conclude a reviewable contract to which a standstill period applies under this Part within the standstill period for the contract.

(2) There is no standstill period for—

- (a) a contract where the Defence and Security Contracts Directive or these Regulations do not require prior publication of a contract notice in the Official Journal,
- (b) a contract where the only tenderer concerned is the one who is awarded the contract and there are no other candidates concerned, or
- (c) a contract entered into or awarded on the basis of a framework agreement in accordance with Regulation 28, 29 or 30.

(3) The standstill period for a contract begins on the day after the day on which each tenderer and candidate concerned is sent a notice, in accordance with paragraphs (2) and (3) of Regulation 68 of the outcome of his or her tender or application.

(4) The duration of the standstill period shall be at least—

- (a) if the notice under Regulation 68 is sent by fax or electronic means, 14 calendar days, or
- (b) if the notice is sent by any other means, 16 calendar days.

*Notices to unsuccessful tenderers and candidates*

68. (1) The notice referred to in Regulation 67 (3), or a notice to an unsuccessful tenderer for a contract based on a framework agreement shall be as set out in this Regulation.

(2) Such a notice—

- (a) shall inform the candidates and tenderers concerned of the decision reached concerning the award of the contract or the conclusion of a framework agreement including the grounds for any decision not to

award a contract or conclude a framework agreement for which there has been a call for competition,

(b) shall state the exact standstill period applicable to the contract, and

(c) for each unsuccessful tenderer or candidate, shall include—

(i) in the case of an unsuccessful candidate, a summary of the reasons for the rejection of his or her application,

(ii) in the case of an unsuccessful tenderer, a summary of the reasons for the rejection of his or her tender.

(3) In the case of a tenderer who has submitted an admissible tender (that is, a tender that qualifies for evaluation under the rules of the relevant tender process), the summary required by paragraph (2)(c)(ii) shall comprise—

(a) the characteristics and relative advantages of the tender selected,

(b) the name of the successful tenderer, or, in the case of a framework agreement, the names of the parties to it, and

(c) in the cases referred to in paragraphs (9) to (11) of Regulation 16, the reasons for the contracting authority's decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements.

(4) In the case of an unsuccessful candidate, the information to be provided under paragraph (2)(c)(i) may be provided by setting out—

(a) the score obtained by the candidate concerned, and

(b) the score achieved by the lowest-scoring candidate who was considered to meet the pre-qualification requirements, in respect of each criterion assessed by the contracting authority.

(5) In the case of an unsuccessful tenderer, the information to be provided under paragraph (2)(c)(ii) and subparagraphs (a) and (b) of paragraph (3) may be provided by setting out—

(a) the score obtained by the unsuccessful tenderer concerned, and

(b) the score obtained by the successful tenderer in respect of each criterion assessed by the contracting authority.

(6) In the case of a framework agreement to which more than one tenderer has been admitted, the information to be provided to each unsuccessful tenderer under paragraph (2)(c)(ii) may be provided by setting out—

(a) the scores obtained by the tenderer concerned in respect of each criterion assessed by the contracting authority, and

- (b) the scores obtained in respect of each criterion assessed by the contracting authority by the lowest scoring tenderer who was admitted to the framework.

(7) However, a contracting authority may decide to withhold any information referred to in paragraph (2)(c) regarding the award of a contract or the conclusion of a framework agreement if the release of such information—

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

*Time limits for applications to Court*

69. (1) Subject to any order of the Court made under a rule referred to in Regulation 72(2), an application to the Court shall be made within the relevant period determined in accordance with this Regulation.

(2) An application referred to in subparagraph (a) or (b) of Regulation 70 (1) shall be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application.

(3) An application for a declaration that a contract is ineffective shall be made within 30 calendar days (commencing on the appropriate date determined in accordance with paragraph (4) or (5), as the case requires), in the following cases:

- (a) where the contracting authority published a contract award notice in accordance with Regulations 33 and 35 and, in the case of a contract awarded without prior publication of a contract notice in the Official Journal of the European Union, on condition that the contract award notice sets out the justification of the contracting authority's decision not to publish a contract notice;
- (b) where the contracting authority notified each tenderer or candidate concerned of the outcome of his or her tender or application, and that notice contained a summary of the relevant reasons that complied with Regulation 68(2);
- (c) the case of a contract based on a framework agreement where the contracting authority has given notice in accordance with Regulation 68(2).

(4) In the case mentioned in paragraph (3)(a), the period begins on the day after the notice is published in the Official Journal of the European Union.

(5) In the cases mentioned in subparagraphs (b) and (c) of paragraph (3), the period begins on the day after the contracting authority gives the notice referred to in the relevant subparagraph.

(6) In any other case an application for a declaration that a contract is ineffective shall be made within 6 months after the conclusion of the relevant contract.

#### *Application to Court*

70. (1) An eligible person may apply to the Court—

- (a) for interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the eligible person's interests, including measures to suspend or to ensure the suspension of the procedure for the award of the contract concerned or the implementation of any decision taken by the contracting authority, or
- (b) for review of the contracting authority's or entity's decision to award the contract to a particular tenderer or candidate.

(2) If a person applies to the Court under paragraph (1), the contracting authority shall not conclude the contract until—

- (a) the Court has determined the matter, or
- (b) the Court gives leave to lift any suspension of a procedure, or
- (c) the proceedings are discontinued or otherwise disposed of.

(3) A person who is an eligible person in relation to a reviewable contract that has been concluded may apply to the Court for a declaration that the contract is ineffective.

(4) A person intending to make an application to the Court in accordance with this Regulation shall first notify the contracting authority in writing of—

- (a) the alleged infringement,
- (b) his or her intention to make an application to the Court, and
- (c) the matters that in his or her opinion constitute the infringement.

(5) A person who has applied to the Court under paragraph (1), (2) or (3) shall give the contracting authority concerned notice of the application by serving a copy of the originating motion on the authority as soon as reasonably practicable.

(6) Nothing in this Regulation prevents an eligible person from applying to the Court for any other remedy that may be available in the particular circumstances.

*Powers of Court*

## 71. (1) The Court—

- (a) may set aside, vary or affirm a decision to which these Regulations apply,
- (b) may declare a reviewable contract ineffective, and
- (c) may impose alternative penalties on a contracting authority, and
- (d) may make any necessary consequential order.

(2) The Court may make interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of a decision of the contracting authority.

(3) The Court may set aside any discriminatory technical, economic or financial specification in an invitation to tender, contract document or other document relating to a contract award procedure.

(4) When considering whether to make an interim or interlocutory order, the Court may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to make such an order when its negative consequences could exceed its benefits.

(5) The Court may by order suspend the operation of a decision or a contract.

(6) The Court may award damages as compensation for loss resulting from a decision that is an infringement of the law of the European Communities or the European Union, or of a law of the State giving effect to such law.

*Rules of court and hearing otherwise than in public*

72. (1) The rules of court may provide for a preliminary procedure to decide whether an applicant under Regulation 70 is an eligible person in relation to a particular reviewable contract.

(2) The rules of court may provide for the Court to grant leave, if the Court considers that there is good reason to do so, to make an application under Regulation 70 after the latest time permitted by Regulation 69(2).

(3) If the Court considers that there is good reason to do so in order to guarantee, in accordance with these Regulations and the Defence and Security Contracts Directive, an adequate level of confidentiality of classified information or other information, the Court may hear any application under this Part otherwise than in public.

*Declaration by Court that a contract is ineffective*

73. (1) For the purposes of this Regulation—

(a) a Regulation 67(1) infringement is an infringement where—

- (i) the relevant contract is one to which a standstill period applies, and
- (ii) the contracting authority has concluded the contract during the standstill period, and

(b) a Regulation 70(2) infringement is an infringement where—

- (i) a tenderer or candidate has applied to the Court in accordance with Regulation 70 for review of a contract award decision in relation to a reviewable contract, and
- (ii) the contracting authority has concluded the contract before the Court has made its decision.

(2) Subject to paragraphs (3), (4), (5) and (6) the Court shall declare a reviewable contract ineffective in the following cases:

(a) the case where the contracting authority has concluded the contract without first publishing a contract notice in the Official Journal of the European Union and concluding the contract without publishing such a notice is not permitted by these Regulations;

(b) the case of a Regulation 67(1) infringement or a Regulation 70(2) infringement where the infringement—

- (i) has deprived the tenderer or candidate applying for review of the possibility of pursuing pre-contractual remedies, and
- (ii) was combined with an infringement of this Regulation, that has affected the chances of the tenderer applying for a review, to obtain the contract;

(c) a case referred to in subparagraph (c) of Regulation 66(2) where—

- (i) there has been an infringement of Regulation 30, and
- (ii) the value of the contract concerned equals or exceeds the relevant value threshold set out for the time being in Regulation 4.

(3) Paragraph (2)(a) does not apply where—

(a) the contracting authority considered that the award of a contract without prior publication of a contract notice in the Official Journal was permitted by these Regulations;



- (b) the contracting authority published, in the Official Journal of the European Union, a notice complying with paragraph (8) stating that it intended to conclude the contract, and
- (c) the contract was not concluded before the end of the period of 14 calendar days beginning on the day after the day of publication of that notice.

(4) Paragraph (2)(c) does not apply where—

- (a) the contracting authority considered that the award of the contract was in accordance with Regulation 30,
- (b) the contracting authority sent a notice of the contract award decision, together with a summary of reasons complying with Regulation 68(2)(c) and, if applicable, Regulation 68(3), to the tenderers concerned, and
- (c) the contract was not concluded before the end of the period of—
  - (i) 14 days beginning on the day following the day on which notice of the contract award decision is sent to the tenderers concerned if fax or electronic means are used, or
  - (ii) 16 days beginning on the day following the day on which notice of the contract award decision is sent to the tenderers concerned if another means of communication is used.

(5) Despite paragraph (2), the Court may decline to declare a contract ineffective if it finds, after having examined all aspects of the matter that it considers relevant, that overriding reasons relating to a general interest, particularly a general interest in connection with defence or security matters, require that the effects of the contract should be maintained.

(6) Notwithstanding paragraph (2), the Court shall decline to declare a contract ineffective where it is satisfied that the consequences of such a declaration would seriously endanger the existence of a wider defence or security programme which is essential for the security interests of a Member State.

- (7) (a) Economic interests in the effectiveness of the contract may only be considered as overriding reasons relating to a general interest, including a general interest in connection with defence or security matters, if ineffectiveness would lead to disproportionate consequences.
- (b) For the purposes of this Regulation, economic interests directly linked to the contract are not overriding reasons relating to a general interest.
- (c) For the purposes of paragraph (b) “Economic interests directly linked to the contract” includes (but is not limited to)—

- (i) the costs resulting from the delay in the execution of the contract,
- (ii) the costs resulting from the launching of a new procurement procedure,
- (iii) the costs resulting from the change of the economic operator performing the contract, and
- (iv) the costs of legal obligations resulting from the ineffectiveness.

(8) In the case of a Regulation 67(1) infringement or a Regulation 70(2) infringement, (being, in each case, an infringement not covered by paragraph (2)(b)), the Court may, after having assessed all aspects that it considers relevant, declare the relevant contract ineffective.

(9) A notice referred to in paragraph (3)(b)—

(a) shall be in the form set out in Commission Regulation 1150/2009<sup>4</sup>,

(b) shall include—

- (i) the name and contact details of the contracting authority,
- (ii) a description of the object of the contract,
- (iii) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union, and
- (iv) the name and contact details of the economic operator in favour of whom a contract award decision has been taken, and

(c) may include any other information that the contracting authority considers useful.

(10) The Court may make any order necessary in the interests of justice to ensure that proper payment is made for any work done, or goods or services provided, in good faith in reliance on a contract that has been declared ineffective.

*Effect of declaration that a contract is ineffective*

74. (1) If the Court declares a contract ineffective, any contractual obligations not already performed are cancelled and contractual obligations already performed are not affected.

(2) Paragraph (1) shall not prevent the exercise of any power under which an order or decision of the Court may be stayed, but, if a declaration of ineffectiveness is stayed, then, at the end of the period during which the declaration is stayed, the contract shall be taken to have been ineffective from the making of the declaration.

<sup>4</sup>O.J. L313, 28.1.2009 p 3-35

*Alternative penalties*

75. (1) The Court shall impose an alternative penalty if—

- (a) under paragraph (5) or (6) of Regulation 73, it declines to declare a contract ineffective, or
- (b) in the case of an alleged infringement referred to in Regulation 73(8), it finds that the infringement occurred but declines to declare the contract ineffective.

(2) The alternative penalty shall be either or both of the following:

- (a) the imposition on the contracting authority of a civil financial penalty of up to 10 per cent of the value of the contract;
- (b) the termination, or shortening of the duration, of the contract.

(3) The Court may take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and any extent to which the contract remains in force and for that purpose, the Court needs to be satisfied of the relevant facts only on the balance of probabilities.

(4) A civil financial penalty payable pursuant to an order under paragraph (2)(a) shall be paid into the Central Fund.

(5) If the Court orders the payment of a civil financial penalty under paragraph (2)(a), the amount of the penalty may be recovered as a debt in any court of competent jurisdiction. For the purposes of such recovery, the order of the Court is conclusive that the amount of the penalty is due and payable by the contracting authority ordered to pay it.

(6) The award of damages is not an appropriate alternative penalty for the purposes of this Regulation.

*Non-exclusion of other remedies*

76. Nothing in this Part affects any power of the Court to grant any other remedy in relation to a contract.

## PART 11

## STATISTICAL OBLIGATIONS, EXECUTIVE POWERS AND FINAL PROVISIONS

*Statistical obligations*

77. Not later than 31 October in each year, the Minister for Public Expenditure and Reform shall send to the European Commission an annual statistical report, prepared in accordance with Regulation 78. The report shall deal separately with works contracts, supply contracts and service contracts awarded by contracting authorities during the immediately preceding financial year of the State.

*Contents of statistical reports*

78. (1) In the annual statistical report, the Minister for Public Expenditure and Reform shall specify the number and value of contracts that a contracting authority has awarded.

(2) As far as practicable and so far as relevant, the Minister for Public Expenditure and Reform shall segregate the data referred to in paragraph (1) by reference to—

- (a) the contract award procedures that contracting authorities have used, and
- (b) for each of those procedures, supplies, services and works identified by category of the CPV nomenclature, and
- (c) the nationality of the economic operator or group of economic operators to which the contract was awarded.

(3) In the case of contracts that have been entered into by means of the negotiated procedure without publication of a contract notice, the Minister for Public Expenditure and Reform shall segregate the data referred to paragraph (1) according to the circumstances referred to in Regulation 27.

(4) The Minister for Public Expenditure and Reform—

- (a) shall specify in the annual statistical report any other statistical information that is required under the Government Procurement Agreement, and
- (b) may include in that report such other information as the Minister for Public Expenditure and Reform considers appropriate, so long as it is not inconsistent with these Regulations or the information specified in accordance with subparagraph (a).

(5) The information required to be included in a report referred to in this Regulation is the information determined by the Advisory Committee in accordance with Articles 3, 7 and 8 of Decision 1999/468/EC.<sup>5</sup>

*Notification by Minister for Public Expenditure and Reform of revision of thresholds*

79. As soon as practicable after the European Commission has published revised thresholds and their corresponding values in the national currencies in the Official Journal of the European Union in accordance with Article 68 of the Defence and Security Contracts Directive, the Minister for Public Expenditure and Reform shall by notice in writing, inform contracting authorities of the revised thresholds and values set out in the provisions of these Regulations that correspond to the relevant provisions of that Directive.

<sup>5</sup>OJ.L 184, 17/07/1999 P. 0023 – 0026

*Amendment of Utility Undertakings Regulations*

80. The Utility Undertakings Regulations are amended by the insertion, after Regulation 18 thereof, of the following Regulation:

“Contracts relating to Defence and Security

18A These Regulations do not apply to—

- (a) contracts to which the European Union (Award of Contracts relating to Defence and Security) Regulations 2012 apply, and
- (b) contracts to which the European Union (Award of Contracts relating to Defence and Security) Regulations 2012 do not, under Regulation 4, 8 or 9 of those Regulations, apply.”.

*Amendment of Public Authorities’ Contracts Regulations*

81. Regulation 22 of the Award of Public Authorities’ Contracts Regulations is amended by inserting the following paragraph after paragraph (2):

“(3) These Regulations apply to public contracts awarded in the fields of defence and security other than—

- (a) contracts to which the European Union (Award of Contracts relating to Defence and Security) Regulations 2012 apply, and
- (b) contracts to which the European Union (Award of Contracts relating to Defence and Security) Regulations 2012 do not, under Regulation 4, 8 or 9 of those Regulations, apply.”.

*Transitional provisions*

82. (1) Nothing in these Regulations affects any contract award procedure commenced before 30 March 2012.

(2) Nothing in these Regulations affects the award of a specific contract based on a framework agreement where the framework agreement was concluded—

- (a) before 30 March 2012, or
- (b) on or after 30 March 2012 following a contract award procedure commenced before that date.

(3) Nothing in these Regulations affects the award of a specific contract under a dynamic purchasing system where the system was established—

- (a) before 30 March 2012, or
- (b) on or after 30 March 2012 following a contract award procedure commenced before that date.

(4) For the purposes of paragraphs (1), (2) and (3), a contract award procedure has been commenced before 30 March 2012 if, before that date—

- (a) a contract notice has been sent to the Official Journal in accordance with the Award of Public Authorities' Contracts Regulations or the Utility Undertakings Regulations, where applicable, in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed public contract, contract, framework agreement or dynamic purchasing system,
- (b) the contracting authority has had published any form of advertisement seeking offers or expressions of interest in respect of a proposed public contract, contract, framework agreement or dynamic purchasing system, or
- (c) the contracting authority has contacted any economic operator in order to—
  - (i) seek expressions of interest or offers in respect of a proposed public contract, contract, framework agreement or dynamic purchasing system, or
  - (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed public contract, contract, framework agreement or dynamic purchasing system.

(5) In this regulation—

“contract notice” has the same meaning as it has in the Award of Public Authorities' Contracts Regulations;

“dynamic purchasing system” has the same meaning as in the Award of Public Authorities' Contracts Regulations;

“framework agreement” has the same meaning as it has in the Award of Public Authorities' Contracts Regulations;

“public contract” has the same meaning as it has in the Award of Public Authorities' Contracts Regulations;

“contract” has the same meaning as it has in the Utility Undertakings Regulations.

## SCHEDULE 1

Regulation 13

## SERVICES REFERRED TO IN REGULATION 13

| Category 1 | Subject  | CPV Reference No  |
|------------|--|---|
| 1          | Maintenance and repair Services  | 50000000-5, from 50100000-6 to 50884000-5 (except from 50310000-1 to 50324200-4 and 50116510-9, 50190000-3, 50229000-6, 50243000-0) and from 51000000-9 to 51900000-1 |
| 2          | Foreign military-aid-related services  | 75211300-1  |
| 3          | Defence services, military defence services and civil defence services   | 75220000-4, 75221000-1, 75222000-8  |
| 4          | Investigation and security services  | From 79700000-1 to 79720000-7   |
| 5          | Land transport services  | 60000000-8, from 60100000-9 to 60183000-4 (except 60160000-7, 60161000-4), and from 64120000-3 to 64121200-2  |
| 6          | Air transport services of passengers and freight, except transport of mail   | 60400000-2, from 60410000-5 to 60424120-3 (except 60411000-2, 60421000-5), from 60440000-4 to 60445000-9 and 60500000-3   |
| 7          | Transport of mail by land and by air   | 60160000-7, 60161000-4, 60411000-2, 60421000-5  |
| 8          | Rail Transport services  | From 60200000-0 to 60220000-6   |
| 9          | Water Transport services   | From 60600000-4 to 60653000-0, and from 63727000-1 to 63727200-3  |
| 10         | Supporting and auxiliary transport services  | From 63100000-0 to 63111000-0, from 63120000-6 to 63121100-4, 63122000-0, 63512000-1 and from 63520000-0 to 6370000-6   |
| 11         | Telecommunication services   | From 64200000-8 to 64228200-2, 72318000-7, and from 72700000-7 to 72720000-3  |
| 12         | Financial services: Insurance services   | From 66500000-5 to 66720000-3   |
| 13         | Computer and related services  | From 50310000-1 to 50324200-4, from 72000000-5 to 72920000-5 (except 72318000-7 and from 72700000-7 to 72720000-3), 79342410-4, 9342410-4                             |
| 14         | Research and development services (1) and evaluation services  | From 73000000-2 to 73436000-7   |
| 15         | Accounting, auditing and bookkeeping services  | From 79210000-9 to 79212500-8   |
| 16         | Management consulting services (2) and related services  | From 73200000-4 to 73220000-0, from 79400000-8 to 79421200-3 and 79342000-3, 79342100-4, 79342300-6, 79342320-2, 79342321-9, 79910000-6, 79991000-7 and 98362000-8    |
| 17         | Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services | From 71000000-8 to 71900000-7 (except 71550000-8) and 79994000-8  |

| Category 1 | Subject  | CPV Reference No  |
|------------|--|---|
| 18         | Building-cleaning services and property management services            | From 70300000-4 to 70340000-6 and from 90900000-6 to 90924000-0   |
| 19         | Sewage and refuse disposal services; sanitation and similar services   | From 90400000-1 to 90743200-9 (except 90712200-3), from 90910000-9 to 90920000-2 and 50190000-3, 50229000-6, 50243000-0 |
| 20         | Training and simulation services in the fields of defence and security | 80330000-6, 80600000-0, 80610000-3, 80620000-6, 80630000-9, 80640000-2, 80650000-5, 80660000-8                          |

(1) Except research and development service referred to in Article 13(j)

(2) Except arbitration and conciliation services.



## SCHEDULE 2

Regulation 14

## SERVICES REFERRED TO IN REGULATION 14

| Category 1 | Subject  | CPV Reference No  |
|------------|--|---|
| 21         | Hotel and restaurant services                          | From 55100000-1 to 55524000-9 and from 98340000-8 to 98341100-6   |
| 22         | Supporting and auxiliary transport services            | From 63000000-9 to 63734000-3 (except 63711200-8, 63712700-0, 63712710-3), from 63727000-1 to 63727200-3 and 98361000-1 |
| 23         | Legal services   | From 79100000-5 to 79140000-7   |
| 24         | Personnel placement and supply services <sup>(1)</sup> | From 79600000-0 to 79635000-4 (except 79611000-0, 79632000-3, 79633000-0) and from 98500000-8 to 98514000-9             |
| 25         | Health and social services                             | 79611000-0 and from 85000000-9 to 85323000-9 (except 85321000-5, 85322000-2)  |
| 26         | Other services   |   |

<sup>(1)</sup> Except employment contracts

## DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of these Regulations—

“common technical specification” means a technical specification prescribed in accordance with a procedure that is recognised by the Member States and has been published in the Official Journal of the European Union;

“defence standard” means a technical specification the observance of which is not compulsory and which is approved by a standardisation body specialising in the production of technical specifications for repeated or continuous application in the field of defence;

“European technical approval” means a favourable technical assessment of the fitness for use of a product for a particular purpose, based on the fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use;

“prescribed standard” means a technical specification approved by a recognised standardising body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:

- (a) international standard, which is a standard adapted by an international standards organisation and made available to the general public;
- (b) European standard, which is a standard adopted by a European standards organisation and made available to the general public;
- (c) national standard, which is a standard adopted by a national standards organisation and made available to the general public;

“technical reference” means any product produced by European standardisation bodies (other than official standards) according to procedures adopted for the development of market needs;

“technical specification”, when used in relation to a public works contract, means the totality of the technical prescriptions contained (in particular) in the tender documents, defining the characteristics required of a material, product or supply, that permits the material, product or supply to be described in a manner so that it can be used for the purpose for which it is intended by the relevant contracting authority. Those characteristics include—

- (a) levels of environmental 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 and production processes and methods, and

- (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 that the contracting authority is able to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts that they involve;

“technical specification”, when used in relation to a public supply or service contract, means a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental 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 and conformity assessment procedures.

(1) European technical approvals are issued by an approval body designated for this purpose by the Member State concerned. In relation to the State, the Minister for Public Expenditure and Reform is responsible for designating approved bodies.

## SCHEDULE 4

REQUIREMENTS RELATING TO DEVICES FOR ELECTRONIC  
RECEIPT OF TENDERS, REQUESTS FOR PARTICIPATION AND  
PLANS AND PROJECTS IN CONTESTS

1. Devices for the electronic receipt of tenders and requests for participation shall ensure, through technical means and appropriate procedures—

- (a) that electronic signatures relating to tenders and requests to comply with the Electronic Commerce Act 2000, and
- (b) that the exact time and date of the receipt of requests to participate and tenders can be determined precisely, and
- (c) that, as far as reasonably practicable, no one can gain access to data sent electronically in accordance with these Regulations before the deadline for submitting data to the contracting authority concerned, and
- (d) that, if a person does gain unauthorised access to any such data, there is a reasonable probability that that access will be detected, and
- (e) that only authorised persons are able to set or change the dates for opening data that is received, and
- (f) that, during the different stages of the contract award procedure or of the contest, access to the data submitted by tenderers can be gained only through simultaneous action by authorised persons, and
- (g) that authorised persons may allow access to data sent by tenderers only after the deadline for the close of tenders, and
- (h) that data received and opened in accordance with the requirements set out in this Schedule remain accessible only to persons authorised to have access to the data.

2. In paragraph 1, “authorised persons” means persons authorised by the contracting authority concerned.

## SCHEDULE 5

Regulation 35

INFORMATION THAT SHALL BE INCLUDED IN CONTRACT  
NOTICES**Notice of publication of prior information notice on a buyer profile.**

1. The following is the information that shall be included in a notice of publication of a prior information notice published on a contracting authority's buyer profile:

- (a) the name of the contracting authority;
- (b) the country in which the contracting authority is established;
- (c) the Internet address of the buyer profile (URL);
- (d) the relevant CPV nomenclature reference numbers.

**Information to be included in prior information notice.**

2. (1) The following is the information that shall be included in a prior information notice:

- (a) the name, address, fax number and email address of the contracting authority, and, if different, of the service from which additional information may be obtained;
- (b) in the case of a contract to carry out works or to supply a service, particulars of the sources (such as the internet site of the relevant Government department) from which information can be obtained concerning the general regulatory framework for taxes, environmental protection, employment protection and working conditions applicable in the place where the contract is to be performed.

(2) Whenever appropriate, the notice shall indicate whether the contract is restricted to sheltered workshops, or whether its performance is restricted to the framework of a protected job program.

(3) In the case of a works contract, the notice shall specify—

- (a) the nature and extent of the works and the place of performance, and
- (b) if the work is to be subdivided into several lots, the essential characteristics of those lots by reference to the work and, if available, an estimate of the range of the cost of the proposed works, and
- (c) CPV nomenclature reference number or numbers.

(4) In the case of a supply contract, the notice shall specify the nature and quantity or value of the products to be supplied and CPV nomenclature reference number or numbers.

(5) In the case of a service contract, the notice shall specify the total value of the proposed purchases in each of the service categories, and the CPV nomenclature reference number or numbers.

(6) The notice shall also specify an estimated date for initiating the award procedures in respect of the contract or contracts concerned (and, in the case of a service contract, by category).

(7) Whenever appropriate, the notice shall indicate whether a framework agreement is involved.

(8) The notice shall also contain such other information as is appropriate in the circumstances.

(9) The notice shall also specify the date on which it was sent, or on which the notice of publication of the prior information notice was published on the buyer profile.

**Contract notices for restricted procedure, negotiated procedures with publication of a contract notice and competitive dialogue procedure.**

3. (1) If a contract is to be awarded by means of the restricted procedure, negotiated procedure with publication of a contract notice or the competitive dialogue procedure, the contract notice shall specify the name and address and the telephone and fax numbers, and the email address (if any) of the contracting authority.

(2) When appropriate, the notice shall specify whether the relevant contract is restricted to sheltered workshops or whether the performance of the contract is restricted to the framework of protected job programs.

(3) The notice shall also specify the award procedure that is chosen. When appropriate, the reasons for use of an accelerated procedure (in restricted and negotiated procedures) shall be specified.

(4) When appropriate, the notice shall specify whether a framework agreement is involved.

(5) If the contracting authority decides that the award of a contract is to be preceded by an electronic auction the notice shall indicate that the award of the contract is to be preceded by such an auction.

**General requirements for contract notices.**

4. (1) The contract notice shall specify the form of the contract.

(2) The contract notice shall specify the place where the works are to be carried out, the products are to be delivered or the service is to be performed.

(3) In the case of a works contract, the contract notice shall—

- (a) specify the nature and extent of the works and general nature of the work, and
  - (b) in particular, indicate the options (if any) concerning supplementary works, and, if known, the provisional timetable for recourse to those options as well as the number of possible renewals (if any), and
  - (c) if the work or the contract is subdivided into several lots, specify the sizes of the different lots, together with all relevant CPV nomenclature reference numbers, and
  - (d) specify relevant information concerning the purpose of the work or the contract when the work or contract also involves the preparation of one or more projects, and
  - (e) if a framework agreement has been entered into, indicate—
    - (i) the planned duration of the agreement, and
    - (ii) the estimated total value of the works for the duration of the agreement, and
    - (iii) as far as possible, the value and the frequency of the contracts to be awarded.
- (4) In the case of a supply contract, the contract notice shall—
- (a) specify the nature of the products to be supplied, indicating in particular whether tenders are requested with a view to purchase, lease rental, hire or hire purchase or a combination of them, and the relevant CPV nomenclature reference number or numbers, and
  - (b) specify the quantity of products to be supplied, indicating in particular the options (if any) concerning supplementary purchases and, if known, the provisional timetable for recourse to those options as well as the number of renewals (if any) and the relevant CPV nomenclature reference number or numbers, and
  - (c) if regular or renewable contracts may be awarded during a specified period, indicate (if known) the timetable for subsequent contracts for purchase of supplies that the contracting authority intends to purchase, and
  - (d) if a framework agreement has been entered into, indicate—
    - (i) the planned duration of the agreement,
    - (ii) the estimated total value of the supplies for the entire duration of the framework agreement, and
    - (iii) as far as possible, the value and the frequency of the contracts to be awarded.

- (5) In the case of a service contract, the contract notice shall—
- (a) specify the category and description of the service to be supplied and the relevant CPV nomenclature reference number or numbers, and
  - (b) specify the quantity of services to be supplied and, in particular, the options (if any) concerning supplementary purchases and (if known) the provisional timetable for recourse to those options, as well as the number of renewals (if any), and
  - (c) if renewable contracts may be awarded over a specified period, indicate the estimated time frame (if known) for subsequent contracts for services that the contracting authority intends to purchase, and
  - (d) if a framework agreement has been entered into, indicate—
    - (i) the planned duration of the framework agreement, and
    - (ii) the estimated total value of the services for the entire duration of the agreement, and
    - (iii) as far as possible, the value and the frequency of the contracts to be awarded, and
  - (e) indicate whether the provision of the service is reserved to a particular profession by any law, regulation or administrative provision, and
  - (f) if, in a case where the provision of the service is so reserved, the service is to be provided by a body, indicate the names and professional qualifications of the staff who are to be responsible for providing the service.
- (6) If the contracts are divided into lots, the contract notice shall indicate whether there is any the possibility for an economic operator of tendering for one lot, or for several or all of the lots.
- (7) The contract notice shall indicate whether variants will be admitted or are prohibited.
- (8) Where appropriate the contract notice shall indicate the percentage of the contract's global value which is required to be subcontracted to third parties through a tendering procedure under Regulation 19(3).
- (9) Where applicable, the contract notice shall specify—
- (a) any selection criteria regarding the personal situation of subcontractors that may lead to their exclusion, and the information (if any) that they are required to provide in order to prove that they do not fall within the cases justifying exclusion, and
  - (b) any selection criteria and information concerning the subcontractor's reputation, character and professional standing, information and any



necessary formalities for assessment of the minimum technical standards required of the subcontractor, and

- (c) the minimum level of standards that may be required to be considered for the contract.

(10) The contract notice shall specify—

- (a) the time limit for completion of work, supplies or services as the case may be, and
- (b) where possible the time-limit by which works will begin or by which delivery of supplies or services will begin.

(11) If the performance of a contract is subject to particular conditions, the contract notice shall specify those conditions.

(12) The contract notice shall specify—

- (a) the deadline for receipt of requests to participate,
- (b) the address to which those documents shall be sent, and
- (c) the language or languages in which those documents shall be written.

(13) When appropriate, the contract notice shall specify any deposit and guarantees that shall be provided.

(14) The contract notice shall specify the main terms concerning financing and payment under the proposed contract or references to the texts in which those terms are contained.

7. (1) Where the contract will or could be awarded to a group of economic operators and the contract requires the group to be in a particular legal form, the contract notice shall specify the form that the group is required to take.

(2) The contract notice shall specify—

- (a) any selection criteria regarding the personal situation of economic operators that may lead to their exclusion, and the information (if any) that they are required to provide in order to prove that they do not fall within the cases justifying exclusion, and
- (b) any selection criteria and information concerning the economic operators' reputation, character and professional standing, information and any necessary formalities for assessment of the minimum technical standards required of the economic operator, and
- (c) the minimum level of standards that may be required to be considered for the contract.

(3) If a framework agreement involves a group of economic operators, the contract notice shall specify—

- (a) the number of members of the group and, where appropriate, the proposed maximum number of economic operators that will be members of it, and
- (b) the duration of the agreement and, if the agreement is to be for more than 7 years, the reasons for the agreement being for more than that period.

**Special provisions for contract notices relating to contracts to be awarded by means of competitive dialogue or negotiated procedure.**

8. (1) If a contract is to be awarded by means of a competitive dialogue or the negotiated procedure with the prior publication of a contract notice, the contract notice shall indicate (if appropriate) that the contracting authority will have recourse to a staged procedure in order to gradually reduce the number of solutions to be discussed or tenders to be negotiated.

(2) If a contract is to be awarded by means of a negotiated procedure and the contracting authority has selected economic operators to participate in the negotiations, the contract notice shall specify the names and addresses of those operators.

**Special provisions for contract notices relating to contracts to be awarded by means of restricted procedure, negotiated procedure or competitive dialogue.**

9. If a contract is to be awarded by means of the restricted procedure, a negotiated procedure or a competitive dialogue, and the contracting authority is to have recourse to the option of reducing the number of candidates to be invited to submit tenders, to engage in dialogue or to negotiate, the contract notice shall specify—

- (a) the minimum number and (if appropriate) the proposed maximum number of candidates that will be allowed to participate in the process, and
- (b) the objective criteria to be used to choose that number of candidates.

**Special provisions for contract notices relating to contracts to be awarded on basis of Regulation 55 criteria.**

10. If a contract is to be awarded on the basis of criteria referred to in Regulation 55 (“lowest price” or “most economically advantageous tender”), the contract notice shall specify the criteria representing the most economically advantageous tender as well as their weighting, unless they appear in the specifications or, in the case of a competitive dialogue, in the descriptive document.

11. Where appropriate the contract notice shall specify the date or dates of publication of the prior information notice in accordance with Schedule 6, or contain a statement that no such publication was made.

12. The contract notice shall also specify the date on which the notice is sent for publication to the Publications Office of the European Union.

**Contract award notices.**

13. The following is the information that a contracting authority shall include in a contract award notice notifying the award of a contract:

- (a) the name and address of that authority;
- (b) the kind of award procedure chosen;
- (c) in the case of negotiated procedure without prior publication of a contract notice, the justification for the use of the procedure;
- (d) in the case of a public works contract, the nature and extent of the contract and the general characteristics of the work to be carried out;
- (e) in the case of a public supply contract—
  - (i) the nature and quantity of products to be supplied, where appropriate, under the contract, and
  - (ii) the relevant nomenclature reference number;
- (f) in the case of a public service contract—
  - (i) the category and description of the service, and
  - (ii) the relevant nomenclature reference number, and
  - (iii) the quantity of services purchased;
- (g) the date on which the contract was awarded;
- (h) the criteria for the award of the contract;
- (i) the number of tenders received;
- (j) the name and address of the economic operator to whom the contract was awarded;
- (k) the price or range (minimum and maximum) of prices to be paid under the contract;
- (l) the value of the tender or tenders retained, or the highest tender and lowest tender taken into consideration for the award of the contract;

- (m) if part of the works to be carried out, or part of the products or service to be supplied, under the contract is to be subcontracted, the value and proportion of the contract that are likely to be subcontracted;
- (n) the date of publication of the tender notice in accordance with the technical specifications for publication in Schedule 6;
- (o) the date on which the contract award notice is sent for publication in the Official Journal of the European Union;

## SCHEDULE 6

Regulations 31, 36

## FEATURES CONCERNING PUBLICATION

**Publication of notices by contracting authorities or entities.**

1. (1) The following matters—
  - (a) a notice referred to in Regulation 32 or 61,
  - (b) prior information notice referred to in Regulation 31 published on a buyer profile referred to in subparagraph (2), or
  - (c) notice of publication of a matter referred to in clause (a) or (b),

sent by a contracting authority, or as the case may be successful tenderer to the Publications Office of the European Union shall comply with Regulation 35.

(2) Where a prior information notice is published on a buyer profile under Regulation 31, the notice referred to in Regulation 32 or 61 shall be published by the Office for Publications Office or the European Union or by the contracting authorities or entities.

(3) Contracting authorities or entities may publish the prior information notice on the internet on a buyer profile in accordance with Paragraph 2.

(4) The Office for Publications Office of the European Union shall give the contracting authority the confirmation of publication under Regulation 32(12).

**Publication of supplementary information.**

2. In addition to a prior information notice under Regulation 31, a buyer profile published by a contracting authority may include information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address.

**Form and procedures for sending notices electronically.**

3. The form and procedure for sending notices electronically shall be in accordance with the information accessible for the time being at <http://simap.europa.eu>, or at any other Internet address furnished by the Office for Publications Office of the European Union for that purpose.



GIVEN under my Official Seal,  
28 February 2012.

ALAN SHATTER,  
Minister for Defence.

## EXPLANATORY NOTE

*(This note is not part of the Instrument and does not purport to be a legal interpretation).*

These Regulations implement the provisions of EU Directive 2009/81/EC to provide a legal framework for dealing with the award of contracts in the field of defence and security. In addition this Regulation also amends the provisions of the European Communities (Award of Contract by Utility Undertakings) Regulations 2007 (S.I. No. 50 of 2007) and the European Communities (Award of Public Authorities Contracts) Regulations 2006 (S.I. No. 329 of 2006) to provide for contracts awarded in the fields of defence and security covered by this Regulation.

BAILE ÁTHA CLIATH  
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Le ceannach díreach ón  
OIFIG DHÍOLTA FOILSEACHÁN RIALTAIS,  
TEACH SUN ALLIANCE, SRÁID THEACH LAIGHEAN, BAILE ÁTHA CLIATH 2,  
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