

GUIDANCE ON EC DIRECTIVE 93/37/EEC, PUBLIC WORKS CONTRACTS, As Amended by EC Directive 97/52/eec : Guidance 07

Virtually every contract let by Government is subject to EC Legislation. This Directive was implemented into UK Law by the Public Works Contracts Regulations 1995.

Application

Article 1.

For the purpose of this Directive 'public works contracts' are contracts for pecuniary interest concluded in writing between a contractor and a contracting public authority as defined below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

(a) A 'work' means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfill an economic and technical function;

(b) 'public works concession' is a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment.

Procedures available:

'Open Procedures' are those national procedures whereby all interested contractors may submit tenders; 'Restricted Procedures' are those national procedures whereby only those contractors invited by the contracting authority may submit tenders; 'Negotiated Procedures' are those national procedures whereby contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them;

Article 2.

Member States are required to take the necessary measures to ensure that the contracting authorities comply or ensure compliance with the Directive where they subsidize directly by more than 50% a works contract awarded by an entity other than themselves.

Article 3.

1. Should contracting authorities conclude a public works concession contract, the advertising rules will apply to that contract when its value is not less than £3,611,395.

2. The contracting authority may:

- either require the concessionaire to award contracts representing a minimum of 30% of the total value of the work for which the concession contract is to be awarded, to third parties, at the same time providing the option for candidates to increase this percentage. This minimum percentage must be specified in the concession contract,

· or request the candidates for concession contracts to specify in their tenders the percentage, if any, of the total value of the work for which the concession contract is to be awarded which they intend to assign to third parties.

3. When the concessionaire is itself a contracting authority, it must comply with the provisions of the Directive in the case of works to be carried out by third parties.

Article 4.

This Directive does not apply to:

(a) contracts below the stated thresholds;

(b) works contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of the Member State's security so requires.

Article 5

1. This Directive does not apply to public contracts governed by different procedural rules and awarded:

(a) in pursuance of an international agreement, concluded in conformity with the Treaty, between a Member State and one or more non-member countries and covering works intended for the joint implementation or exploitation of a project by the signatory States;

(b) to undertakings in a Member State or a nonmember country in pursuance of an international agreement relating to the stationing of troops;

(c) pursuant to the particular procedure of an international organization.

Valuation

Article 6.

The Directive will apply to:

(a) Public Works Contracts whose estimated value net of value-added tax (VAT) is not less than the equivalent in ECUs of 5,000,000 Special Drawing Rights (SDRs);

(b) public works contracts referred to in Article 2 (1) whose estimated value net of VAT is not less than ECU 5,358,153.

Where a work is subdivided into several lots, each one the subject of a contract, the value of each lot must be taken into account for the purpose of calculating the amounts referred to above. Where the aggregate value of the lots is not less than the amount referred to, the provisions shall apply to all lots. Contracting authorities shall

be permitted to depart from this provision for lots whose estimated value net of VAT is less than £674,000, provided that the total estimated value of all the lots exempted does not, in consequence, exceed 20% of the total estimated value of all lots.

No work or contract may be split up with the intention of avoiding the application of the Directive.

When calculating the value, account must be taken not only of the amount of the public works contracts but also of the estimated value of the supplies needed to carry out the works.

Contracting authorities shall ensure that there is no discrimination between the various contractors.

Award Procedures

Article 7.

1. The contracting authorities may award their public works contracts by Negotiated Procedure, with prior publication of a contract notice and after having selected the candidates according to publicly known qualitative criteria, in the following cases:

(a) in the event of irregular tenders in response to an Open or Restricted Procedure or in the case of tenders which are unacceptable under national provisions insofar as the original terms of the contract are not substantially altered. The contracting authorities must not, in these cases, publish a contract notice where they include in such Negotiated Procedure all the enterprises satisfying the criteria of Articles 24 to 29 which, during the prior Open or Restricted Procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure;

(b) when the works involved are carried out purely for the purpose of research, experiment or development, and not to establish commercial viability or to recover research and development costs;

(c) in exceptional cases, when the nature of the works or the risks attaching thereto do not permit prior overall pricing.

2. The contracting authorities may award their public works contracts by Negotiated Procedure without prior publication of a contract notice, in the following cases:

(a) in the absence of tenders or of appropriate tenders in response to an Open or Restricted Procedure insofar as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission at its request;

(b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor;

(c) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseen by the contracting authorities in question, the time limit laid down for the Open, Restricted or Negotiated Procedures cannot be kept (Articles 11-

14). The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

(d) for additional works not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the carrying out of the work described therein, on condition that the award is made to the contractor carrying out such work:

- when such works cannot be technically or economically separated from the main contract without great inconvenience to the contracting authorities, or
- when such works, although separable from the execution of the original contract, are strictly necessary to its later stages.

However, the aggregate amount of contracts awarded for additional works may not exceed 50% of the amount of the main contract;

(e) for new works consisting of the repetition of similar works entrusted to the undertaking to which the same contracting authorities awarded on earlier contract, provided that such works conform to a basic project for which a first contract was awarded according to the procedures referred to above.

As soon as the first project is put up for tender, notice must be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the contracting authorities when they apply the provision of Article 6. This procedure may only be adopted during the three years following the inclusion of the original contract.

3. In all other cases, the contracting authorities shall award their public works contracts by the Open Procedure or by the Restricted Procedure.

Rights to Information

Article 8.

1. The contracting authority shall, within 15 days of the date on which a written request is received, inform any eliminated candidate or tenderer of the reasons for rejection of this application or his tender, and , any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

However, contracting authorities may decide that certain information on the contract award, referred to in the preceding subparagraph, be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between contractors.

2. Contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract awards, including the reasons why they have decided not

to award a contract for which there has been an invitation to tender or to start the procedure again, and shall do so in writing if requested. They shall also inform the Office for Official Publications of the European Communities of such decisions.

Technical Specifications

Article 10.

1. The technical specifications must be given in the general or contractual documents relating to each contract.
2. Without prejudice to the legally binding national technical rules and insofar as these are compatible with Community law, the technical specifications must be defined by the contracting authorities by reference to national standards implementing European standards, or by reference to European technical approvals or by reference to common technical specifications.
3. In the absence of European standards or European technical approvals or common technical specifications, the technical specifications:
 - (a) must be defined by reference to the national technical specifications recognized as complying with the basic requirements listed in the Community directives on technical harmonization, in accordance with the procedures laid down in those directives, and in particular in accordance with the procedures laid down in Council Directive 89/106/EEC of 21 December, 1989 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products;
 - (b) may be defined by reference to national technical specifications relating to design and method of calculation and execution of works and use of materials;
 - (c) may be defined by reference to other documents.

In this case, it is appropriate to make reference in order of preference to:

- (i) national standards implementing international standards accepted by the country of the contracting authority;
- (ii) other national standards and national technical approvals of the country of the contracting authority;
- (iii) any other standard.

Common Advertising Rules

Article 11.

1. Contracting authorities must make known, by means of an indicative notice, the essential characteristics of the works contracts which they intend to award and the estimated value of which is not less than the threshold laid down.
2. Contracting authorities who wish to award a public works contract by Open, Restricted or Negotiated Procedure must make known their intention by means of a notice.
3. Contracting authorities who wish to award a works concession contract shall make known their intention by means of a notice.
4. Works concessionaries, other than a contracting authority, who wish to award works contracts to a third party must also make known their intention by means of a notice.

Time Limits

Article 12.

1. In Open Procedures the time limit for the receipt of tenders, fixed by the contracting authorities must be not less than 52 days from the date of dispatch of the notice.
2. The time limit for receipt of tenders laid down in paragraph 1 may be replaced by a period sufficiently long to permit responsive tendering, which, as a general rule, shall be not less than 36 days and in any case not less than 22 days, from the date on which the contract notice was dispatched, if the contracting authorities have sent the indicative notice provided for in Article 11 (1), drafted in accordance with the model in Annex IV A (Prior Information), to the Official Journal of the European Communities within a minimum of 52 days and a maximum of 12 months before the date of which the contract notice provided for in Article 11 (2) was dispatched to the Official Journal of the European Communities within a minimum of 52 days and a maximum of 12 months before the date on which the contract notice provided for in Article 11 (2) was dispatched to the Official Journal of the European Communities, provided that the indicative notice contained, in addition, at least as much of the information referred to in the model notice in Annex IV B (Open Procedure) as was available at the time of publication of the notice.
3. Provided requested in good time, the contract documents and supporting documents must be sent to the contractors by the contracting authorities or competent departments within six days of receiving their application.
4. Provided requested in good time, additional information relating to the contract documents shall be supplied by the contracting authorities not later than six days before the final date fixed for receipt of tenders.
5. Where the contract documents, supporting documents or additional information are too bulky to be supplied within the time limits stated or where tenders can only be made after a visit to the site or after on-the-spot inspection of the documents

supporting the contract documents, the time limits laid down in paragraphs 1 and 2 shall be extended accordingly.

Article 13.

1. In Restricted Procedures and Negotiated Procedures (Article 7), the time limit for receipt of requests to participate fixed by the contracting authorities must be not less than 37 days from the date of dispatch of the notice.

2. The contracting authorities must simultaneously and in writing invite the selected candidates to submit their tenders. The letter of invitation should be accompanied by the contract documents and supporting documents.

It must include at least the following information:

(a) where appropriate, the address of the service from which the contract documents and supporting documents can be requested and the final date for making such a request; also the amount and terms of any sum to be paid for such documents;

(b) the final date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be drawn up;

(c) a reference to the contract notice published;

(d) an indication of any documents to be annexed, either to support the verifiable statements furnished by the candidate, or to supplement the information provided;

(e) the criteria for the award of the contract if these are not given in the notice.

3. In Restricted Procedures, the time limit for receipt of tenders fixed by the contracting authorities may not be less than 40 days from the date of dispatch of the written invitation.

4. The time limit for receipt of tenders laid down in paragraph 3 may be reduced to 26 days if the contracting authorities have sent the indicative notice provided for in Article 11 (1) drafted in accordance with the model in Annex IVa (Prior Information) to the Official Journal of the European Communities within a minimum of 52 days and a maximum of 12 months before the date on which the contract notice provided for in Article 11 (2) was dispatched to the Official Journal of the European Communities, provided that the indicative notice contained, in addition, at least as much of the information referred to in the model notice in Annex IV C (Restricted Procedure), or, where applicable, Annex IV D (Negotiated Procedure) as was available at the time of publication of the notice.

5. Requests to participate in procedures for the award of contracts may be made by letter, by telegram, telex, telefax or by telephone. If by one of the last four, they must be confirmed by letter dispatched before the end of the period laid down.

6. Provided it has been requested in good time, additional information relating to the contract documents must be supplied by the contracting authorities not later than six days before the final date fixed for the receipt of tenders.

7. Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the contract documents, the time limit laid down must be extended accordingly.

Urgency

Article 14.

1. In cases where urgency renders impracticable the time limits laid down in Article 13, the contracting authorities may fix the following time limits:

(a) a time limit for receipt of requests to participate which shall be not less than 15 days from the date of dispatch of the notice;

(b) a time limit for the receipt of tenders which shall be not less than 10 days from the date of the invitation to tender.

2. Provided it has been requested in good time, additional information relating to the contract documents must be supplied by the contracting authorities not later than four days before the final date fixed for the receipt of tenders.

3. Requests for participation in contracts and invitations to tender must be made by the most rapid means of communications possible. When requests to participate are made by telegram, telex, telefax or telephone, they must be confirmed by letter dispatched before the expiry of the time limit referred to in paragraph 1.

Concession Contract

Article 15.

Contracting authorities who wish to award a works concession contract are required to fix a time limit for receipt of candidatures for the concession, which shall be not less than 52 days from the date of dispatch of the notice.

Article 16.

In works contracts awarded by a works concessionaire other than a contracting authority, the time limit for the receipt of requests to participate, fixed by the concessionaire, must be not less than 37 days from the date of dispatch of the notice, and the time limit for the receipt of tenders not less than 40 days from the date of dispatch of the notice or the invitation to tender.

Article 18.

Contracts are required to be awarded on the basis of the criteria stated in the directive, taking into account Article 19, after the suitability of the contractors not excluded

under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29.

Tenders shall be submitted in writing, directly or by mail. Member States may authorise the submission of tenders by any other means making it possible to ensure:

- (a) that each tender contains all the information necessary for its evaluation,
- (b) that the confidentiality of tenders is maintained pending their evaluation,
- (c) that, where necessary, for reasons of legal proof, such tenders are confirmed as soon as possible in writing or by dispatch of a certified copy,
- (d) that tenders are opened after the time limit for their submission has expired.

Variants

Article 19.

Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the contracting authorities.

The contracting authorities should state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. They must indicate in the tender notice if variants are not permitted.

Contracting authorities may not reject the submission of a variant on the sole grounds that it has been drawn up with technical specifications defined by reference to national standards transposing European standards, to European technical approvals or to common technical specifications, or national technical specifications.

Article 20.

The contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties.

This indication shall be without prejudice to the question of the principal contractor's liability.

Group Bids

Article 21.

Tenders may be submitted by groups of contractors. These groups cannot be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.

Tenders Invited

Article 22.

1. In Restricted and Negotiated Procedures the contracting authorities must, on the basis of information given relating to the contractor's personal position as well as to the information and formalities necessary for the evaluation of the minimum conditions of an economic and technical nature to be fulfilled by him, select from among the candidates with the qualifications required by Articles 24 to 29 those whom they will invite to submit a tender or to negotiate.

2. Where the contracting authorities award a contract by Restricted Procedure, they may prescribe the range within which the number of undertakings which they intend to invite will fall. In this case the range must be indicated in the contract notice. The range must number at least 5 undertakings and may be up to 20.

In any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition.

3. Where the contracting authorities award a contract by Negotiated Procedure as referred to in Article 7(2), the number of candidates admitted to negotiate may not be less than three provided that there is a sufficient number of suitable candidates.

4. Each Member State must ensure that contracting authorities issue invitations without discriminations to those nationals of other Member States who satisfy the necessary requirements and under the same conditions as to its own nationals.

Article 23.

1. The contracting authority may state in the contract documents, or be obliged by a Member State to do so, the authority or authorities from which a tenderer may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions which are in force in the Member State, region or locality in which the works are to be executed and which shall be applicable to the works carried out on site during the performance of the contract.

2. The contracting authority which supplies the information referred to in paragraph 1 should request the tenderers or those participating in the contract procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the work is to be carried out. This to be without prejudice to the application concerning the examination of abnormally low tenders.

Selection Criteria

Article 24.

Any contractor may be excluded from participation in the contract who:

- (a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;
- (b) is the subject to proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulation;
- (c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*;
- (d) has been guilty of grave professional misconduct proved by any means which the contracting authorities can justify;
- (e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
- (f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or those of the country of the contracting authority;
- (g) is guilty of serious misrepresentation in supplying the information required under this Chapter.

Where the contracting authority requires of the contractor proof that none of the cases quoted in (a), (b), (c), (e) or (f) applies to him, it shall accept as sufficient evidence:

- for points (a), (b) or (c), the production of an extract from the 'judicial record' or, failing, this, of an equivalent document issued by a competent judicial or administrative authority in the country of origin in the country whence that person comes showing that these requirements have been met;
- for points (e) or (f), a certificate issued by the competent authority in the Member State concerned.

Where the country concerned does not issue such documents or certificates, they may be replaced [by] a declaration on oath or, in Member States where there is not provision for declarations on oath, by a solemn declaration made by the person concerned before a judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes. Member States shall designate the authorities and bodies competent to issue these documents.

Professional Standing

Article 25.

Any contractor wishing to take part in a public works contract may be requested to prove his enrolment in the professional or trade register under the conditions laid down by the laws of the Member State in which he is established. In the UK and Ireland, the contractor may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies or, if this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name.

Financial Standing

Article 26.

1. Evidence of the contractor's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from bankers;

(b) the presentation of the firm's balance sheets or extracts from the balance sheets, where publication of the balance sheet is required under the law of the country in which the contractor is established;

(c) a statement of the firm's overall turnover and the turnover on construction works for the three previous financial years.

2. The contracting authorities shall specify in the notice or in the invitation to tender which reference or references they have chosen and what references other than those mentioned under paragraph 1(a), (b), or (c) are to be produced.

3. If, for any valid reason, the contractor is unable to supply the reference requested by the contracting authorities, he may prove his economic and financial standing by any other document which the contracting authorities consider appropriate.

Technical Capacity

Article 27.

1. Evidence of the contractor's technical capability may be furnished by:

(a) the contractor's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for carrying out the works;

(b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates should indicate the value, date and site of the works and specify whether they were carried out according to the rules of the trade and properly completed;

(c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work;

(d) a statement of the firm's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the technicians or technical bodies which the contract can call upon for carrying out the work, whether or not they belong to the firm.

2. The contracting authorities are required to specify in the invitation to tender which of these references are to be produced.

Article 28.

Within the limits of Articles 24 to 27, the contracting authority may request the contractor to supplement the certificates and documents submitted or to clarify them.

Official Lists

Article 29.

1. Member States who have official lists of recognized contractors must adapt them to the provisions of Article 24(a) to (d) and (g) and of Article 25, 26 and 27.

2. Contractors registered in the official lists may, for each contract, submit to the contracting authority a certificate or registration issued by the competent authority. This certificate shall state the reference which enabled them to be registered in the list and the classification given in this list.

3. Certified registration in the official lists by the competent bodies shall, for the contracting authorities of other Member States, constitute a presumption of suitability for works corresponding to the contractor's classification only as regards Articles 24(a) to (d) and (g), 25, 26(b) and (c) and 27(b) and (d).

Information which can be deduced from registration in official lists may not be questioned. However, with regard to the payment of social security contributions, an additional certificate may be required of any registered contractor whenever a contract is offered.

The contracting authorities of other Member States shall apply the above provisions only in favour of contractors who are established in the country holding the official list.

4. For the registration of contractors of other Member States in an official list, no further proofs and statements may be required other than those requested of nationals and, in any event, only those provided for under Article 24 to 27.

5. Member States holding an official list shall communicate to other Member States the address of the body to which requests for registration may be made.

Award Criteria

Article 30.

1. The criteria on which the contracting authorities shall base the award of contracts shall be:

(a) either the lowest price only;

(b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the case referred to in paragraph 1(b), the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance.

All information in this guidance is checked and believed to be correct, but cannot be so guaranteed and the publishers shall not be liable for any loss suffered directly or indirectly as a result of its use.