

Guidance on EC Directive 92/50/EEC: Guidance 11

Public Service Contracts, as amended by EC Directive 97/52/EC

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

The objective of the Service Directive is to require the co-ordination of the procurement procedures for the award of public service contracts. The Directive does not, however, prejudice the application, at national level, of rules concerning the conditions for the pursuit of an activity or a profession, provided that they are compatible with Community Law. In effect therefore, UK CCT Legislation will work in tandem with the Service Directive. The rules concerning service contracts as contained in the Utilities Directive of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors remain unaffected by this Directive. Also the Service Directive does not apply to small contracts below a set threshold, in order to avoid unnecessary formalities. These rules for the award of public service contracts are as close as possible to those concerning public supply contracts and public works contracts; this Guidance highlights the principal parts of the legislation.

Application <Top>

Articles 1-6

Under the Directive, public service contracts mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority. If a public contract is intended to cover both products within the meaning of Supply Directive 77/62/EEC (amended 88/295) and services within the meaning of this Service Directive, it shall fall within the scope of the highest value purchase area. In awarding public service contracts contracting authorities have to ensure that there is no discrimination between different service providers. This Directive applies to public service contracts awarded by contracting authorities in the field of defence, except for contracts that are sensitive to the national interest. It does not apply to services which are declared secret. The Directive also does not apply to public service contracts awarded to an entity which is itself a contracting authority on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

Valuation <Top>

Article 7

The Directive applies to all public service contracts the estimated value of which, net of VAT, is not less than £93,896 for GATT entities (primarily Central Government Departments including Health bodies) and £144,456 for all others. For the purposes of calculating the estimated value of the contract, the contracting authority must include the estimated total remuneration of the service provided and the selection of the

valuation method cannot be used with the intention of avoiding the application of the Directive, nor can any procurement requirements for a given amount of services be split up in order to avoid the application of the Directive.

Packaging <Top>

Where the services are 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 amount referred to above. Where the value of the lots is not less than this amount, the provisions of this Directive shall apply to all lots. Contracting authorities may waive application of the previous paragraph for any lot which has an estimated value net of VAT of less than £53,920, provided that the total value of such lots does not exceed 20% of the total value of all the lots.

Value Calculation <Top>

In the case of contracts which do not specify a total price, the basis for calculating the estimated contract value shall be;

in the case of fixed-term contracts, where their term is 48 months or less, the total contract value for its duration;

in the case of contracts of indefinite duration or with a term of more than 48 months, the monthly installment multiplied by 48.

In the case of regular contracts or of contracts which are to be renewed within a given time, the contract value may be established on the basis of:

either the actual aggregate cost of similar contracts for the same categories of services awarded over the previous fiscal year or 12 months, adjusted, where possible, for anticipated changes in quantity;

or value over the 12 months following the initial contract;

or the estimated aggregate cost during the 12 months following the first service performed or during the term of the contract, where this is greater than 12 months.

Article 8

Contracts which have as their object services listed in Annex 1a of the Directive shall be awarded in accordance with the provisions of the full Directive.

Article 9

Contracts which have as their object services listed in Annex 1b of the Directive shall be awarded in accordance with Articles 14 and 16 only.

Article 10

Contracts which have as their object services listed in both Annexes 1a and 1b shall be awarded in accordance with the provisions of the full Directive where the value of the services listed in Annex 1a is greater than the value of the services listed in Annex 1b. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16 only.

Negotiated Procedure <Top>

Article 11

Contracting authorities can award their public services contracts by Negotiated Procedure, with prior publication of a contract notice in the following cases:

in the event of irregular tenders in response to an Open or Restricted Procedure, or in the event of tenders which are unacceptable (see Article 11 (2) (b) in full for circumstances where this may be used);

in exceptional cases, when the nature of the service or the risks involved do not permit prior overall pricing;

when the nature of the services to be procured, in particular in the case of intellectual services, is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing Open or Restricted Procedures.

Contracting authorities may award their public service contracts by Negotiated Procedure without prior publication of a contract notice in the following cases:

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

when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider;

where the contract concerned follows a design contest and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates. In the latter case, all successful candidates shall be invited to participate in the negotiations;

in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the Open, Restricted or Negotiated Procedures referred to in Articles 17 to 20 cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

for additional services not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the performance of the service described therein, on condition that the award is made to the service provider carrying out such services:

when such additional services cannot be technically or economically separated from the main contract without great inconvenience to the contracting authorities; or

when such services, although separable from the performance of the original contract, are strictly necessary for its completion. However, the aggregate estimated value of contracts awarded for additional services may not exceed 50% of the amount of the main contract.

for new services consisting in the repetition of similar services entrusted to the service provider to which the same contracting authorities awarded an earlier contract, provided that such services conform to a basic project for which a first contract was awarded according to the Procedures (see Article 11 (3) (f) in full).

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

Right to Know <Top>

Article 12

The contracting authority must, 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 his 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 first 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 service providers

Contracting authorities must 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 required.

Procedure <Top>

For each contract awarded, the contracting authorities must draw up a written report to include at least the following:

the name and address of the contracting authority, the subject and value of the contract;

the names of the candidates or tenderers admitted and the reasons for their selection;

the names of the candidates or tenderers rejected and the reasons for their rejection;

the name of the successful tenderer and the reasons why his tender was selected and, if known, the part of the contract which the successful tenderer intends to sub-contract to third parties;

for Negotiated Procedures, the circumstances referred to in Article 11 which justify the use of these procedures.

Common Rules in the Technical Field <Top>

Article 14

The technical specifications which are required to be met must be stated in the general documents or the contractual documents relating to each contract. Such technical specifications are to 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.

Unless it is justified by the subject of the contract, Member States must prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention products of a specific make or source or of a particular process and which therefore favour or eliminate certain service providers.

However, if such indication is accompanied by the words 'or equivalent' it shall be authorised in cases where the contracting authority is unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned.

Common Advertising Rules <Top>

Article 15

Contracting authorities must make known, as soon as possible after the beginning of their budgetary year, the intended total procurement in each of the service categories in Annex 1a (see page iv) which they envisage awarding during the subsequent 12 months where the total estimated value, taking account of the provisions of Article 7, is not less than $\text{€}750,000$ (£584,901). Contracting authorities who wish to award a public service contract by Open, Restricted or, under the conditions laid down in Article 11, Negotiated Procedure, shall make known their intention by means of a notice.

Contract Awards <Top>

Article 16

Contracting authorities who have awarded a public service contract or have held a design contest shall issue a notice of the results of the award procedure. Where the release of information on the contract award would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular enterprise, public or private, or might prejudice fair competition between service providers, such information need not be published.

Time Limits - Open Procedure <Top>

Article 18

In Open Procedures the time limit for the receipt of tenders shall be fixed by the contracting authorities at not less than 52 days from the date of dispatch of the notice.

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 as provided for in Article 15 (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 15 (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 III B (Open Procedure) as was available at the time of publication of the notice.

Also, provided that it has been requested in good time, additional information relating to the contract documents must be supplied by the contracting authorities not later than 6 days before the final date fixed for receipt of tenders. Where the contract documents, supporting documents or additional information are too bulky to be supplied within the time limits laid down or where the 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 limits laid down must be extended accordingly.

Time Limits - Restricted and Negotiated Procedures <Top>

Article 19

In Restricted Procedures and Negotiated Procedures within the meaning of Article 11 (advertised contracts), 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. The contracting authorities have to simultaneously and in writing invite the selected candidates to submit their tenders.

The letter of invitation must be accompanied by the contract documents and supporting documents and include at least the following information:

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 payment of any sum to be paid for such documents;

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;

a reference to the contract notice published;

an indication of any documents to be annexed, either to support the verifiable statements furnished by the candidate, or to supplement the information provided under the same conditions as those laid down in Articles 31 and 32;

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

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.

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 15 (1) drafted in accordance with the model in Annex III 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 on which the contract notice provided for in Article 15 (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 in Annex III C (Restricted Procedure) or, where applicable, Annex III D (Negotiated Procedure) as was available at the time of publication of the notice.

Requests to participate in procedures for the award of contracts may be made by letter, telegram, telex, facsimile or telephone. If by one of the last four, they must be confirmed by letter dispatched before the end of the period laid down. 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 6 days before the final date fixed for the receipt of tenders. Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the contract document, the time limit laid down must be extended accordingly.

Urgent Procedure <Top>

Article 20

In cases where urgency renders impracticable the time limits laid down in Article 19, the contracting authorities may fix the following time limits:

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;

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

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 4 days before the final date fixed for the receipt of tenders.

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

Article 23

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:

that each tender contains all the information necessary for its evaluation;

that the confidentiality of tenders is maintained pending their evaluation;

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;

that tenders are opened after the time limit for their submission has expired.

Variants <Top>

Article 24

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

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

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 even by reference to national technical specifications.

Sub-Contracting <Top>

Article 25

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

Legal Form for Group Bidders <Top>

Article 26

Tenders may be submitted by groups of service providers. These groups may not 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. Companies may be required to indicate in the tender or the request for participation, the names and relevant professional qualifications of the staff to be responsible for the performance of the service.

Invitations to Tender <Top>

Article 27

In Restricted and Negotiated Procedures the contracting authorities shall, on the basis of information given relating to the service provider's 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 29 to 35 those whom they will invite to submit a tender or to negotiate. Where the contracting authorities award a contract by Restricted Procedure, they may prescribe the range within which the number of service providers which they intend to invite will fall.

In this case the range shall be indicated in the contract notice. The range shall be determined in the light of the nature of the service to be provided. The range must number at least 5 service providers and may be up to 20. In any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition. Where the contracting authorities award a contract by Negotiated Procedure as referred to in Article 11, the number of candidates admitted to negotiate may not be less than 3, provided that there is a sufficient number of suitable candidates.

Exclusions <Top>

Article 29

Any service provider may be excluded from participation in a contract who:

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 similar position arising from national laws and regulations;

is the subject of 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 and regulations;

has been convicted of an offence concerning his professional conduct by a judgment which has the force of res judicata;

has been guilty of grave professional misconduct proven by any means which the contracting authority can justify;

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;

has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country of the contracting authority;

is guilty of serious misrepresentation in supplying or failing to supply the information that may be required under this Chapter. Where the contracting authority requires proof it shall accept as sufficient evidence a declaration on oath made by the person concerned before a judicial or administrative authority, or via a certificate issued by a competent authority.

Professional Certification <Top>

Article 30

In so far as candidates for a public contract or tenderers have to possess a particular authorisation or be members of a particular organisation in their home country in order to be able to perform the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

In the United Kingdom, the service provider may be requested to provide a certificate from the Register of Companies or the Registrar of Friendly Societies or, if he is not so certified, 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 under a given business name.

Financial and Economic Standing <Top>

Article 31

Proof of the service provider's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

appropriate statements from banks or evidence of relevant professional risk indemnity insurance;

the presentation of the service provider's balance sheets or extracts therefrom, where publication of the balance sheets is required under company law in the country in which the service provider is established;

a statement of the undertaking's overall turnover and its turnover in respect of the services to which the contract relates for the previous 3 financial years.

The contracting authorities shall specify in the contract notice or in the invitation to tender which reference or references they have chosen and which other references are to be produced.

If, for any valid reason, the service provider is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.

Evaluation <Top>

Article 32

The ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

Evidence of the service provider's technical capability may be furnished by one or more of the following:

the service provider'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 providing the services;

a list of the principal services provided in the past 3 years, with the sums, dates and recipients, public or private, of the services provided:

where provided to contracting authorities, evidence to be in the form of certificates issued or countersigned by the competent authority;

where provided to private purchasers, delivery to be certified by the purchaser or, failing this, simply declared by the service provider to have been effected.

an indication of the technicians or technical bodies involved, whether or not belonging directly to the service provider, especially those responsible for quality control;

a statement of the service provider's average annual manpower and the number of managerial staff for the last 3 years;

a statement of the tool, plant or technical equipment available to the service provider for carrying out the services;

a description of the service provider's measures for ensuring quality and his study and research facilities;

where the services to be provided are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the country in which the service provider is established, subject to the body's agreement, on the technical capacities of the service provider and, if necessary, on his study and research facilities and quality control measures;

an indication of the proportion of the contract which the service provider may intend to sub-contract.

The contracting authority must specify, in the notice or in the invitation to tender, which references it wishes to receive.

Quality <Top>

Article 33

Where contracting authorities require the production of certificates for attesting quality assurance standards, they shall refer to quality assurance systems based on the

relevant EN 29000 European standard series. They shall also accept other evidence of equivalent quality assurance measures from service providers who have no access to such certificates, or no possibility of obtaining them within the relevant time limits.

Supplementary Information <Top>

Article 34

Within the limits of Articles 29 to 32, contracting authorities may invite the service providers to supplement the certificates and documents submitted or to clarify them.

Award Criteria <Top>

Article 36

Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of the contracts may be:

where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or

the lowest price only.

Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.

Low Tender <Top>

Article 37

If, for a given contract, tenders appear to be abnormally low in relation to the service to be provided, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituted elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the method by which the service is provided, or the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer for the provision of the service, or the originality of the service proposed by the tenderer.

If the document relating to the contract provides for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low.

Services within the meaning of Article 8 <Top>

Annex 1a

Maintenance and repair services.

Land transport services, including armoured car services, and courier services, except transport of mail.

Air transport services of passengers and freight, except transport of mail.

Transport of mail by land and by air.

Telecommunications services.

Financial services:

Insurance services.

Banking and investment services.

Computer and related services.

R&D services.

Accounting, auditing and bookkeeping services.

Market research and public opinion polling services.

Management consultant services and related services.

Architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services.

Advertising services.

Building-cleaning services and property management services.

Publishing and printing services on a fee or contract basis.

Sewage and refuse disposal services; sanitation and similar services.

Services within the meaning of Article 9

Annex 1b

Hotel and restaurant services.

Rail transport services.

Water transport services.

Supporting and auxiliary transport services.

Legal services.

Personnel placement and supply services.

Investigation and security services, except armoured car services.

Education and vocational education services.

Health and social services.

Recreational, cultural and sporting services.

Other services.

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