

Guidance on EC Directive 93/36/EEC: Guidance 12

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 Supply Contracts Regulations 1995.

The application of the threshold set out for supply contracts from Public Bodies subject to the EC and GATT Agreement (primarily Central Government Departments), is £93,896 and for non-GATT bodies (primarily Local Government Bodies), the figure is £144,456. Supply contracts of less than these levels may be exempted from the competition process as provided under this Directive.

Application

Article 1

For the purpose of this Directive: 'public supply contracts' are contracts for pecuniary interest concluded in writing involving the purchase, lease and rental or hire purchase, with or without option to buy, of products between a supplier and a public authority. The delivery of such products may in addition include siting and installation operations.

Procedures Available

'Open Procedures' - All interested suppliers may submit tenders; 'Restricted Procedures' - Only those suppliers invited by the contracting authorities may submit tenders; 'Negotiated Procedures' - Contracting authorities may consult suppliers of their choice and negotiate the terms of the contract with one or more of them.

Article 2

This Directive does not apply to:

contracts valued at under the above-stated thresholds;

supply 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 States concerned or when the protection of the basic interests of the Member State's security so requires.

Article 3

Without prejudice to Articles 2, 4 and 5(1), the Directive applies to all products to which Article 1 relates, including those covered by contracts awarded by contracting authorities in the field of defence, except as stated in

Article 4

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

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 supplies intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts set up by Decision 71/306/EEC;

to undertakings in a Member State or a non-member country in pursuance of an international agreement relating to the stationing of troops;

pursuant to the particular Procedure of an international organisation.

Valuation

Article 5

The Directive applies to public supply contracts provided that the estimated value net of VAT is not less than £144,456 (unless covered by GATT - when the figure is £93,896).

In the case of contracts for the lease, rental or hire-purchase of products, the basis for calculating the estimated contract value shall be:

in the case of fixed-term contracts, where the term is 12 months or less the total contract value for its duration, or, where the term exceeds 12 months, its total value including the estimated residual value;

in the case of contracts for an indefinite period or in cases where there is doubt as to the duration of the contracts the monthly value multiplied by 48.

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

either the actual aggregate value of similar contracts concluded 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 value during the 12 months following the first delivery or during the term of the contract, where this is greater than 12 months.

The selection of the valuation method must not be used with the intention of avoiding the application of this Directive.

If a proposed procurement of supplies of the same type may lead to contracts being awarded at the same time in separate parts, the estimated value of the total sum of these parts must be taken as the basis for the application of Article 5, paragraph 1.

In the case where a proposed procurement specifies option clauses, the basis for calculating the estimated contract value shall be the highest possible total of the purchase, lease, rental, or hire-purchase permissible, inclusive of the option clauses.

No procurement requirement for a given quantity of supplies may be split up with the intention of avoiding the application of this Directive.

Award Procedure

Article 6

In awarding public supply contracts the contracting authorities must apply the Procedures defined in Article 1 (a), (b) and (c) in the cases set out below:

The contracting authorities may award their supply contracts by Negotiated Procedure in the case of irregular tenders in response to an Open or Restricted Procedure or in the case of tenders which are unacceptable under national provisions that are in accordance with provisions, in so far as the original terms for the contract are not substantially altered. The contracting authorities in these cases must publish a tender notice unless they include in such Negotiated Procedures all the enterprises satisfying the criteria of Articles 20 to 24 which, during the prior Open or Restricted Procedure, have submitted tenders in accordance with the formal requirements of the tendering Procedure.

The contracting authorities may award their supply contracts by Negotiated Procedure without prior publication of a tender notice, in the following cases:

in the absence of tenders or 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;

when the products involved are manufactured purely for the purpose of research, experiment, study or development. This provision does not extend to quantity production to establish commercial viability or to recover research and development costs;

when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the products supplied may be manufactured or delivered only by a particular supplier;

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 laid down for the Open, Restricted or Negotiated Procedures cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities;

for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. The length of such contracts as well as that of recurrent contracts may, as a general rule, not exceed three years.

In all other cases, the contracting authorities must award their supply contracts by the Open Procedure or by the Restricted Procedure.

Rights to Information

Article 7

The contracting authority shall, within 15 days of the date on which the 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 preceding subparagraph, shall 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 suppliers.

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 of Official Publications of the European Communities of such decisions.

For each contract awarded the contracting authorities must draw up a written report which shall 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 for his tender having been selected and, if known, any share of the contract the successful tenderer may intend to sub-contract to a third party;

for Negotiated Procedures, the circumstances referred to in Article 6 which justify the use of these Procedures.

Technical Specifications

Article 8

The technical specifications must be given in the general or contractual documents relating to each contract.

Without prejudice to the legally binding national technical rules, in so far as these are compatible with Community law, the technical specifications mentioned shall 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.

In the absence of European standards, European technical approvals or common technical specifications, the technical specifications:

shall be defined by reference to the national technical specifications recognised as complying with the basic requirements listed in the Community Directives on technical harmonisation, in accordance with the Procedures laid down in those Directives, and in particular in accordance with the Procedures laid down in Directive 89/106/EEC;

may be defined by reference to national technical specifications relating to design and method of calculation and execution of works and use of materials;

may be defined by reference to other documents. In this case, it is appropriate to make reference in order of preference to: shall be defined by reference to the national technical specifications recognised as complying with the basic requirements listed in the Community Directives on technical harmonisation, in accordance with the Procedures laid down in those Directives, and in particular in accordance with the Procedures laid down in Directive 89/106/EEC;

national standards implementing international standards accepted by the country of the contracting authority;

other national standards and national technical approvals of the country of the contracting authority;

any other standard.

Unless such specifications are justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention goods of specific make or source or of a particular process and which therefore favour or eliminate certain suppliers or products. In particular, the indication of trade marks, patents, or types of a specific origin or production shall be prohibited. However, if such indication is accompanied by the words 'or equivalent' it shall be authorised in cases where the contracting authorities are unable to give a description of the subject of the contract using specifications which are sufficiently precise and fully intelligible to all parties concerned.

Article 9

The contracting authorities are required to make known, as soon as possible after the beginning of their budgetary year, by means of an indicative notice, the total procurement by product area which they envisage awarding during the subsequent 12 months where the total estimated value is equal to or greater than £584,901.

Time Limits - Open Procedure

Article 10

In Open Procedures, the time limit for the receipt of tenders, fixed by the contracting authorities, shall not be 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 provided for in Article 9 (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 on which the contract notice provided for in Article 9 (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.

Provided requested in good time, the contract documents and supporting documents must be sent to the suppliers by the contracting authorities or competent departments within six days of receiving their application.

Provided requested in good time, additional information relating to the contract documents will 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 in paragraph 2 or 3 or 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 in paragraph 1 must be extended accordingly.

Restricted and Negotiated Procedures

Article 11

In Restricted Procedures and Negotiated Procedures as described in Article 6 (2), the time limit for receipt of requests to participate fixed by the contracting authorities shall not be less than 37 days from the date of dispatch of the notice.

The contracting authorities must 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. These to 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 conditions as those laid down in Article 22 and 23;

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 9 (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 on which the contract provided for in Article 9 (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 IV C (Restricted Procedure), or, where applicable, Annex IV 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, 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.

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 for 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 documents, the time limit laid down in paragraph 3 above shall be extended accordingly.

Urgency

Article 12

In cases where urgency renders impracticable the time limits laid down in Article 11, the contracting authorities may fix the following time limits:

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

a time limit for the receipt of tenders which shall not be 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 less than four 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, telefax or telephone, they must be confirmed by letter dispatched before the expiry of the relevant time limit.

Article 15

The contracting authorities must respect fully the confidential nature of any information furnished by the suppliers.

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

Article 16

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 must 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 by reference to national technical specifications.

Contracting authorities which have admitted variants pursuant to paragraph 1 may not reject a variant on the sole grounds that it would lead, if successful, to a service contract rather than a public supply contract within the meaning of this Directive.

Sub-Contracting

Article 17

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

Group Bids

Article 18

Tenders may be submitted by groups of suppliers. 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, to the extent that this change is necessary for the satisfactory performance of the contract.

Tenders Invited

Article 19

In Restricted and Negotiated Procedures the contracting authorities must, on the basis of information given relating to the supplier'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 20 - 24, 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 suppliers 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 goods to be supplied. The range must number at least 5 suppliers 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 6 (2), the number of candidates admitted to negotiate may not be less than three provided that there is a sufficient number of suitable candidates.

Selection Process

Article 20

Any supplier may be excluded from participation in the 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 analogous situation arising from a similar Procedure under 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 authorities 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 in which he is established or those of the country of the contracting authority;

if guilty of serious misrepresentation in supply in the information required under this Chapter.

Where the contracting authority requires of the supplier [sic] proof that none of the cases quoted in (a), (b), (c), (e) or (f) of paragraph 1 applies to him, it shall accept as sufficient evidence:

o 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 [sic] showing that these requirements have been met;

or for points (e) or (f), a certificate issued by the competent authority in the Member State concerned.

Where the country in question does not issue the documents or certificates referred to in paragraph 2 or where these do not cover all the cases quoted in (a), (b) and (c) of paragraph 1, these may be replaced by a declaration on oath or, in Member States where there is no provision for declaration on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin in the country whence that person comes [sic].

Member States shall designate the authorities and bodies competent to issue the documents, certificates or declarations referred to in paragraphs 2 and 3.

Professional Legislation

Article 21

Any supplier wishing to take part in a public supply contract may be requested to prove his enrolment, as prescribed in his country of establishment, in one of the professional or trade registers or to provide a declaration on oath or certificate. In the UK and Ireland, the supplier may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies, that he is certified as incorporated or registered 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 and under a specific trading name.

Financial Standing

Article 22

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

appropriate statements from bankers;

the presentation of the supplier'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 supplier is established;

a statement of the supplier's overall turnover and its turnover in respect of the products to which the contract relates for the three previous financial years.

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

If, for any valid reason, the supplier 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.

Technical Capacity

Article 23

Evidence of the supplier's technical capacity may be furnished by one or more of the following means according to the nature, quantity and purpose of the products to be supplied:

a list of the principal deliveries effected in the past three years, with the sums, dates and recipients, public or private, involved:

o where effected to public authorities, evidence to be in the form of certificates issued or countersigned by the competent authority;

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

a description of the supplier's technical facilities, its measures for ensuring quality and its study and research facilities;

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

samples, description and/or photographs of the products to be supplied, the authenticity of which must be certified if the contracting authority so requests;

samples, description and/or photographs of the products to be supplied, the authenticity of which must be certified if the contracting authority so requests;

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

Article 24

The contracting authority may invite the suppliers to supplement the certificates and documents submitted or to clarify them.

Use of Lists

Article 25

Member States who have official lists of recognised suppliers must adapt them to the provisions of the Directives.

Suppliers registered in the official lists may, for each contract, submit to the contracting authority a certificate of 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 that list.

Certificated registration in official lists of suppliers by the competent bodies shall, for the contracting authorities of other Member States, constitute a presumption of suitability corresponding to the supplier's classification only as regards Article 20 (1) (a) to (d) and (g), Article 21, Article 22 (1) (b) (e) and

Article 23 (1) (a). Information which can be deduced from registration in official lists may not be questioned.

For the registration of suppliers of other Member States in an official list, no further proof or statements can be required other than those requested of national suppliers and, in any event, only those provided for under Articles 20 to 23.

Award Criteria

Article 26

The criteria on which the contracting authority shall base the award of contracts shall be:

either the lowest price only;

or, when the award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance.

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

Low Tenders

Article 27

If, for a given contract, tenders appear to be abnormally low in relation to the goods to be supplied, 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 constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations relating to the economics of the manufacturing process, or to the technical solutions chosen, or to the exceptionally favourable conditions available to the tenderer for the supply of the goods, or to the originality of the suppliers [sic] proposed by the tenderer.

If the documents relating to the contract provide 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.

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.