

Guidance on EC Directive 93/38/EEC (Water, Energy, Transport and Communication) as amended by EC Directive 98/4/EC : Guidance 14

Guidance on EC Directive 93/38/EEC (Water, Energy, Transport and Communication) as amended by EC Directive 98/4/EC

Virtually every contract let by Government is subject to EC Legislation. This Directive was implemented into the UK law by the Utilities Supply and Works Regulations 1995.

Article 1

The provision of services is covered by this Directive only in so far as it is based on contracts; whereas the provision of services on other bases, such as law, regulations or administrative provisions or employment contracts, is not covered. This Directive should not apply to procurement contracts which are declared secret or may affect basic State security interests or are concluded according to other rules set up by existing international agreements or international organisations. Contracts with a designated single source of supply may, under certain conditions, be fully or partly exempted from this Directive.

Framework Agreements

'Framework agreement' means an agreement between one of the contracting entities defined in Article 2 and one or more suppliers, contractors or service providers, the purpose of which is to establish the terms, in particular with regard to the prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period.

Procedures

'Open, Restricted and Negotiated Procedures' means the award procedures applied by contracting entities whereby:

- a) in the case of Open Procedures, all interested suppliers, contractors or service providers may submit tenders;
- b) in the case of the Restricted Procedures, only candidates invited by the contracting entity may submit tenders;
- c) in the case of Negotiated Procedures, the contracting entity consults suppliers, contractors or service providers of its choice and negotiates the terms of the contract with one or more of them.

Applications

Article 2

This Directive applies to contracting entities which:

- a) are public authorities or public undertakings and exercise one of the activities referred to below;
- b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to below or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

Relevant activities for the purposes of this Directive are:

- a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:
 - i) drinking water; or
 - ii) electricity; or
 - iii) gas or heat; or the supply of drinking water, electricity, gas or heat to such networks;
- b) the exploitation of a geographical area for the purpose of:
 - i) exploring for or extracting oil, gas, coal or other solid fuels; or
 - ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;
- c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolleybus, bus or cable; As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;
- d) the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

Article 4

When awarding supply, works or services contracts, or organising design contests, the contracting entities must apply procedures which are adapted to the provisions of this Directive. Contracting entities must ensure that there is no discrimination between different suppliers, contractors or service providers. In the context of provision of technical specifications to interested suppliers, contractors or service providers, of qualification and selection and of award of contracts, contracting entities may impose requirements with a view to protecting the confidential nature of information which they make available.

Article 5

Contracting entities may regard a framework agreement as a contract within the meaning of Article 1 and award it in accordance with this Directive. Where contracting entities have awarded a framework agreement in accordance with this Directive, they may negotiate a contract without prior call for competition. Where a framework agreement has not been awarded in accordance with this Directive, contracting entities must issue a call for competition. Contracting entities must not misuse framework agreements in order to hinder, limit or distort competition.

Article 6

This Directive does not apply to contracts or design contests which the contracting entities award or organise for purposes other than the pursuit of their activities as described in Article 2.

However, this Directive applies to contracts or design contests awarded or organised by the entities which exercise an activity referred to in Article 2(2)(a)(i) and which:

- a) are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water intended for the supply of drinking water represents more than 20% of the total volume of water made available by these projects or irrigation or drainage installations; or
- b) are connected with the disposal or treatment of sewage.

Article 7

This Directive does not apply to contracts awarded for purposes of resale or hire to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the contracting entity.

Article 8

This Directive does not apply to contracts which contracting entities exercising an activity described in Article 2(2)(d) award or purchases intended exclusively to enable them to provide one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions.

Article 9

This Directive does not apply to:

- a) contracts which the contracting entities award for the purchase of water;
- b) contracts which the contracting entities award for the supply of energy or of fuels for the production of energy.

Article 10

This Directive does not apply to contracts when they are declared to be secret by Member States, when their execution 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 security interests of that State so requires.

Article 11

This Directive shall not apply to service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the EEC Treaty.

Article 12

This Directive does not apply to contracts governed by different procedural rules and awarded pursuant to an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering supplies, works, services or design contests intended for the joint implementation of exploitation of a project by the signatory States.

Article 13

This Directive does not apply to service contracts which:

- a) a contracting entity awards to an affiliated undertaking;
- b) are awarded by a joint venture formed by a number of contracting entities for the purpose of carrying out a relevant activity within the meaning of Article 2 to one of those contracting entities or to an undertaking which is affiliated with one of these contracting entities, provided that at least 80% of the average turnover of that undertaking with respect to services arising within the Community for the preceding

three years derives from the provision of such services to undertakings with which it is affiliated.

Where more than one undertaking affiliated with the contracting entity provides the same service or similar services, the total turnover deriving from the provision of services by those undertakings shall be taken into account.

The contracting entities shall notify to the Commission, at its request, the following information regarding the application of the provisions:

- o the names of the undertakings concerned;
- o the nature and value of the service contracts involved;
- o such proof as may be deemed necessary by the Commission that the relationship between the undertaking to which the contracts are awarded and the contracting entity is in conformity with requirements of this Article.

Valuations

Article 14

This Directive shall apply to:

a) contracts awarded by contracting entities carrying out activities referred to in Annex (X) (1), provided that the estimated value, net of value added tax (VAT), is not less than:

- i) \geq 600,000 (£404,000) in the case of supply and service contracts;
- ii) \geq 5,000,000 (£3,370,000) in the case of works contracts;

b) contracts awarded by contracting entities carrying out activities referred to in Annexes I, II, VII, VIII and IX (2), provided that the estimated value, net of VAT, is not less than:

i) the equivalent in \geq of 400,000 Special Drawing Rights (SDR) (£288,912) for supply contracts and for the service contracts listed in Annex XVI A, except for the R&D services mentioned in Category 8 and Category 5 telecommunications services, the CPC reference numbers of which are 7524, 7525 and 7526;

ii) \geq 400,000 SDR (£288,912) in the case of service contracts other than those mentioned in (i);

iii) the equivalent in \geq of 5,000,000 SDR (£3,611,395) for works contracts;

c) contracts awarded by contracting entities carrying out activities referred to in Annexes III, IV, V and VI (3), provided that the estimated value, net of VAT, is not less than:

i) \geq 400,000 (£269,600) in the case of supply and service contracts;

ii) \geq 5,000,000 (£3,370,000) in the case of works contracts.

1) Annex X: contracting entities in the telecommunications sector.

2) Annex I: entities in the sectors covering the production, transport or distribution of drinking water.

Annex II: entities in the sectors covering the production, transport and distribution of electricity.

Annex VII: entities in the field of urban railway, tramway, trolleybus or bus services.

Annex VIII: entities in the field of airport facilities.

Annex IX: entities in the field of maritime or inland port or other terminal facilities.

3) Annex III: entities in the sectors covering the transport or distribution of gas or heat.

Annex IV: entities in the sectors covering the exploration for and extraction of oil or gas.

Annex V: entities in the sectors covering the exploration for and extraction of coal or other solid fuels.

Annex VI: entities in the field of railway services.

Criteria

Article 15

Supply and works contracts and contracts which have as their object services listed in Annex Ia of the Service Directive shall be awarded in accordance with the provisions stipulated for technical specification, award procedures and qualification procedures.

Article 16

Contracts which have as their as their object services listed in Annex Ib of the Service Directive shall be awarded in accordance with technical specification and award notice requirements only.

Partial Applications

Article 17

Contracts which have as their object services listed in both Annexes Ia and Ib of the Service Directive shall be awarded in accordance with the provisions of Article 15 where the value to the services listed in Annex Ia is greater than the value of the services listed in Annex Ib. Where this is not the case, they shall be awarded in accordance with Article 16.

Technical Specifications and Standards.

Article 18

Contracting entities must include the technical specifications in the general documents or the contract documents relating to each contract. The technical specifications must be defined by reference to European specifications, where these exist. In the absence of European specifications, the technical specifications should as far as possible be defined by reference to other standards having currency within the Community. This article is without prejudice to compulsory technical rules in so far as these are compatible with Community Law.

Access to Technical Specifications

Article 19

Contracting entities must make available on request to suppliers, contractors or service providers interested in obtaining a contract the technical specifications regularly referred to in their supply, works or services contracts or the technical specifications which they intend to apply to contracts covered by periodic information notices within the meaning of Article 22. Where such technical specifications are based on documents available, a reference to those documents shall be sufficient.

Calls for Competition

Article 20

Contracting entities may choose any of the procedures described, provided that, subject to paragraph 2, a call for competition has been made in accordance with Article 21 except for calls for competition.

Contracting entities may use a procedure without prior call for competition in the following cases:

- a) in the absence of tenders or suitable tenders in response to a procedure with a prior call for competition, provided that the original contract conditions have not been substantially changed;
- b) where a contract is purely for the purpose of research, experiment, study or development and not for the purpose of ensuring profit or of recovering research and development costs and in so far as the award of such a contract does not prejudice the competitive award of subsequent contracts which have in particular these purposes;
- c) when, for technical or artistic reasons or for reasons connected with protection of exclusive rights, the contracts may be executed only by a particular supplier, contractor or service provider;
- d) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time limits laid down for Open and Restricted Procedures cannot be adhered to;
- e) in the case of supply contracts 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 entity to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- f) for additional works or services not included in the project initially awarded or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the execution of the contract, on condition that the award is made to the contractor or service provider executing the original contract:
 - o when such additional works or services cannot be technically or economically separated from the main contract without great inconvenience to the contracting entities,
 - o or when such additional works or services, although separable from the execution of the original contract, are strictly necessary to its later stages;
- g) in the case of works contracts, for new works consisting of the repetition of similar works entrusted to the contractor to which the same contracting entities awarded an earlier contract, provided that such works conform to a basic project for which a first contract was awarded after a call for competition. 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 entities when they apply the provisions of Article 14;
- h) for supplies quoted and purchased on a commodity market;
- i) for contracts to be awarded on the basis of a framework agreement, provided that the condition referred to in Article 5 is fulfilled;
- j) for bargain purchases, where it is possible to procure supplies taking advantage of a particularly advantageous opportunity available for a very short space of time at a price considerably lower than normal market prices;
- k) for purchases of goods under particularly advantageous conditions from either a supplier definitively winding up his business activities or the receivers or liquidators of a bankruptcy, an arrangement with creditors or a similar procedure under national laws or regulations;
- l) when the service contract concerned is part of the follow-up to a design contest organised in conformity with the provisions of this Directive and must, in accordance with the relevant rules, be awarded to the winner or to one of the winners of that

contest. In the latter case, all the winners must be invited to participate in the negotiations.

Competition Procedure

Article 21

In the case of supplies, works or service contracts, the call for competition may be made:

- a) by means of a contract notice;
- b) by means of a periodic indicative notice;
- c) by means of a notice of the existence of a qualification system.

Periodic Indicative Notices

When a call for competition is made by means of a periodic indicative notice:

- a) the notice must refer specifically to the supplies, works or services which will be the subject of the contract to be awarded;
- b) the notice must indicate that the contract will be awarded by Restricted or Negotiated Procedure without further publication of a notice of a call for competition and invite interested undertakings to express their interest in writing;
- c) contracting entities shall subsequently invite all candidates to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of tenderers or participants in negotiations. The information must include at least the following:
 - i) the nature and quantity, including any options for further procurement and, if possible, an estimate of the timing when such options may be exercised; in the case of recurring contracts the nature and quantity and, if possible, an estimate of the timing of the subsequent calls for competition for the works, supplies or services to be procured;
 - ii) whether the procedure is restricted or negotiated;
 - iii) any date for starting or completing the delivery of supplies or for performing works or services;
 - iv) the address and final date for submitting an application to be invited to tender, as well as the language or languages in which it must be submitted;
 - v) the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents;
 - vi) any economic and technical requirements, financial guarantees and information required from suppliers, undertakings or providers of services;
 - vii) the amount and terms of payment of any sum payable for the documentation relating to the procurement procedure; and
 - viii) whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods.

Qualification Systems

When a call for competition is made by means of a notice on the existence of a qualification system, tenderers in a Restricted Procedure or participants in a Negotiated Procedure shall be selected from the qualified candidates in accordance with such a system

Design Contests

Article 22

In the case of design contests, the call for competition shall be made by means of a notice drawn up in accordance with a set format.

Contracting entities shall make known, at least once a year, by means of a periodic indicative notice:

a) in the case of supply contracts, the total of the contracts for each product area of which the estimated value is equal to or greater than $\approx 750,000$ (£505,500), and which they intend to award over the following twelve months;

b) in the case of works contracts, the essential characteristics of the works contracts which the contracting entities intend to award, the estimated value of which is not less than:

o the threshold laid down in Article 14(1)(a)(ii) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annex X;

o the threshold laid down in Article 14(1)(b)(iii) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annexes I, II, VII, VIII and IX; or

o the threshold laid down in Article 14(1)(c)(ii) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annexes III, IV, V and VI.

c) in the case of service contracts, the estimated total value of the service contracts in each of the categories of services which they intend to award over the following 12 months, where such estimated total value is equal to or greater than $\approx 750,000$ (£505,000).

Where the notice is issued as a means of calling for competition, it must have been published not more than 12 months prior to the date on which the invitation is sent. Contracting entities may, in particular, publish periodic indicative notices relating to major projects which form part of the requirements previously published, without repeating information previously included in a periodic indicative notice, provided that it is clearly stated that such notices are additional notices.

Article 23

a) This Article shall apply to design contests organised as part of a procedure leading to the award of a service contract whose estimated value net of VAT for which is not less than:

o the threshold laid down in Article 14(1)(a)(i) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annex X;

o the threshold laid down in Article 14(1)(b)(i) or (ii) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annexes I, II, VII, VIII and IX; or

o the threshold laid down in Article 14(1)(c)(i) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annexes III, IV, V and VI.

b) This Article shall apply to all design competitions where the total amount of competition prizes and payments to participants is not less than:

o the threshold laid down in Article 14(1)(a)(i) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annex X;

o the threshold laid down in Article 14(1)(b)(i) or (ii) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annexes I, II, VII, VIII, and IX; or

o the threshold laid down in Article 14(1)(c)(i) as regards contracts intended to be awarded by entities carrying out an activity referred to in Annexes III, IV, V, and VI.

Article 25

Contracting entities which have awarded a contract or organised a design contest must communicate within two months of the award of the contract the results of the award procedure. The contracting entities must be able to supply proof of the date of dispatch of all notices to the EC. The notices must be published in full in their original language in the Official Journal of the European Communities.

Time Limits

Article 26

In Open Procedures the time limit for the receipt of tenders shall be fixed by contracting entities at not less than 52 days from the date of dispatch of the notice. This time limit may be replaced by one which is sufficiently long to allow those concerned to submit valid tenders and which, as a general rule, shall not be 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 entities have sent the Official Journal of the European Communities a periodic indicative notice in accordance with Article 22(1), provided that this notice contains the information required in Parts II and III of Annex XIV, insofar as that information is available at the time of publication of the notice referred to in Article 22(1).

This periodic indicative notice must furthermore have been 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 21(1)(a) is dispatched to the Official Journal of the European Communities.

In Restricted Procedures and in Negotiated Procedures with a prior call for competition, the following shall apply:

- a) the time limit for receipt of requests to participate, in response to a notice published in accordance with Article 21(1)(a) or in response to an invitation from a contracting entity in accordance with Article 21(2)(c), shall, as a general rule, be at least 37 days from the date of dispatch of the notice or invitation and shall in any case not be less than the time limit for publication laid down in Article 25(3), plus 10 days;
- b) the time limit for receipt of tenders may be fixed by mutual agreement between the contracting entity and the selected candidates, provided that all tenderers are given equal time to prepare and submit tenders;
- c) where it is not possible to reach agreement on the time limit for the receipt of tenders, the contracting entity shall fix a time limit which shall, as a general rule, be at least

24 days and shall in any case not be less than 10 days from the date of the invitation to tender; the time allowed shall be sufficiently long to take account in particular of the factors mentioned in Article 28(3).

Sub-Contracting

Article 27

In the contract documents, the contracting entity may ask the tenderer to indicate in his tender any share of the contract which he may intend to sub-contract to third parties. This indication will be without prejudice to the question of the principal contractor's responsibility.

Additional Information

Article 28

Provided that they have been requested in good time, the contract documents and supporting documents must be sent to the suppliers, contractors or service providers by the contracting entities as a general rule within six days of receipt of the application. Provided that it has been requested in good time, additional information relating to the contract documents shall be supplied by the contracting entities not later than six days before the final date fixed for receipt of tenders. Where tenders require the examination of voluminous documentation such as lengthy technical specifications, a visit to the site or an on-the-spot inspection of the documents supporting the contract documents, this shall be taken into account when the appropriate time limits are fixed.

Employment Regulations

Article 29

The contracting entity may state in the contract documents, or be obliged by a Member State so to do, 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 or services are to be executed or performed and which shall be applicable to the works carried out or the services performed on site during the performance of the contract.

A contracting entity which supplies the information referred to in paragraph 1 shall 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 or the service is to be carried out or performed. This shall be without prejudice to the application of Article 34 concerning the examination of abnormally low tenders.

Qualification Lists

Article 30

Contracting entities which so wish may establish and operate a system of qualification of suppliers, contractors or service providers.

Entities establishing or operating a qualification system shall ensure that suppliers, contractors and service providers may apply for qualification at any time.

Selection of Candidates

Article 31

Contracting entities which select candidates to tender in Restricted Procedures or to participate in Negotiated Procedures must do so according to objective criteria and rules which they lay down and which they shall make available to interested suppliers, contractors or service providers. The criteria may be based on the objective of the contracting entity to reduce the number of candidates to a level which is justified by the need to balance the particular characteristics of the contract award procedure and the resources required to complete it. The number of candidates selected must, however, take account of the need to ensure adequate competition.

Common Standards

Article 32

Should contracting entities require the production of certificates drawn up by independent bodies for attesting conformity of the service provider to certain quality assurance standards, they shall refer to quality assurance systems based on the relevant EN 29000 European standards series certified by bodies conforming to the EN 45000 European standards series. Entities must recognise equivalent certificates from bodies established in other Member States. 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.

Group Bids

Article 33

Groupings of suppliers, contractors or service providers must be permitted to tender or negotiate. The conversion of such groupings into a specific legal form cannot be required in order to submit a tender or to negotiate, but the grouping selected may be required to convert itself once it has been awarded the contract, where such conversion is necessary for the proper performance of the contract. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to carry out the relevant service activity can not be rejected on the sole ground that under the law of the Member State in which the contract is awarded they would have been required to be either a natural or a legal person.

However, legal persons 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.

Award Criteria

Article 34

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

- a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or
- b) the lowest price only.

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

Article 35

Article 34(1) shall not apply where a Member State bases the award of contracts on other criteria, within the framework of rules in force at the time of adoption of this Directive, which are intended to give preference to certain tenderers, provided that the rules invoked are compatible with the Treaty.

Article 41

Contracting entities shall keep appropriate information on each contract which shall be sufficient to permit them at a later date to justify decisions taken in connection with:

- a) the qualification and selection of contractors, suppliers or service providers and award of contracts;
- b) recourse to derogations from the use of European specifications in accordance with Article 18(6);
- c) use of procedures without prior call for competition in accordance with Article 20(2);
- d) non-application of Titles II, III and IV in accordance with the derogations provided for in Title I.

The information shall be kept for at least four years from the date of award of the contract so that the contracting entity will be able, during that period, to supply the necessary information to the Commission if the latter so requests.

Entities carrying out one of the of the activities mentioned in Annexes I, II, VII, VIII and IX shall, promptly after 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 entities may decide that certain information on the contract award, referred to in the first subparagraph of this paragraph, 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 interest of particular enterprises, public or private, including those of the enterprise to which the contract has been awarded, or might prejudice fair competition between suppliers, contractors or service providers.

With respect to the activities to which Annexes I, II, VII, VIII, and IX refer, Member States shall, in accordance with the arrangements to be laid down under the procedure provided for in Article 40 (4) to (8), ensure that, by 31 October of every year, the Commission receives a statistical report on the contracts awarded. This report shall contain the information necessary to verify the proper application of the Agreement. The information required under this paragraph shall not include information concerning contracts for the services listed in Category 8 of Annex XVI A, telecommunications services listed in Category 5, the CPC reference numbers of which are 7524, 7525 and 7526, or the services listed in Annex XVIIb.

Variants

Article 42a

For the purposes of the award of contracts by the contracting entities, Member States shall apply in their relations conditions as favourable as those which they grant to third countries in implementation of the Agreement. The Member States shall to this end consult each other within the Advisory Committee for Public Contracts on the measures to be taken pursuant to the Agreement.

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

contracting entities. Contracting entities shall state in the contract documents the minimum specifications to be respected by the variants and specific requirements for their presentation. Where variants are not permitted, they shall so indicate in the contract documents. Contracting entities may not reject the presentation of a variant on the sole ground that it was drawn up on the basis of technical specifications defined with reference to European specifications or to national technical specifications recognised as complying with the essential requirements within the meaning of Directive 89/106/EEC.

Low Tender

If, for a given contract, tenders appear abnormally low in relation to the provision of services, the contracting entity shall, before it may reject those tenderers, 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. It may set a reasonable period within which to reply.

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.