



A Guide to...

The EU Procurement Directive 2004/18/EC

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Chapter 1

Procedures for the Award of Public Supply, Works and Services Contracts

Background

- 001: In its Explanatory Memorandum to the Procurement Consolidated Directive 2004/18/EC, the European Commission set out the background to the proposals which the Council has now adopted in cooperation with the European Parliament.
- 002: The EU Directives coordinating procedures for the award of public contracts are intended to reinforce the European Treaty's provisions on the free movement of goods and freedom to provide services within the Internal Market. This legislation is intended not to replace national law but to ensure compliance in all Member States with the Treaty principles of equality of treatment, non-discrimination and transparency. The consolidation of the Directives is intended to meet requests by contracting authorities and economic operators (suppliers, contractors and service-providers) alike for their simplification, clarification and modernisation.
- This Directive is also based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental Treaty principles above.
- 003: The proposal followed on from a debate launched by the European Commission in 1996 with the publication of a Green Paper. The simplification is to make the current texts more easily comprehensible for users, so that contracts are awarded in complete conformity with the Treaty rules and principles governing this area and the companies involved are in a better position to know their rights. Modernisation is required to take account of new technologies and changes in the economic environment.
- 004: Current procedures also needed to be made more flexible in order to meet the needs of public purchasers and economic operators. Moreover, re-casting the Supplies, Works and Services Directives into a single consolidated Directive makes a single, clear and transparent text available to contracting authorities and economic operators.
- 005: These coordinating provisions should be interpreted in accordance with the principles and other rules of the Treaty. They are intended to take account as far as possible of current procedures and practices in each of the Member States. (They are also intended to account for the jurisprudence for the European Court of Justice in cases brought before it by the Commission or referred to it by national courts for a preliminary ruling on the interpretation of the existing law.)

Introduction

- 006: The new Consolidated Procurement Directive 2004/18/EC sets out a number of reminders, clarifications and justifications for change on matters of varying degrees of importance. Coupled with the recitals at the beginning of the Directive, the Explanatory Memorandum provides an insight to the Directive's substantive provisions and the national legislation which gives them effect. The following examples are set out in sequence and include some of the more important topics.

Services From Contracting Authorities with Exclusive Rights

- 007: This Directive does not apply to public service contracts awarded by a contracting authority to another contracting authority or to an

association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty. The exclusive right may give them the right to provide a service or be necessary for the provision of the service.

Open Competition

- 008: The principles of the EU Treaty are applicable to all public contracts, including those falling below the Directive's application threshold. As regards the principle of non-discrimination, the Commission takes the view that this implies an obligation of transparency and a requirement for an appropriate level of publicity. The proposed Directive will facilitate this by providing for the Official Journal to publish notices for contracts for which the directive does not require them.

BiP's Project contract notice creation service helps authorities to advertise their requirements to a wider audience without increasing the costs of so doing by linking to many publication channels, paper and electronic.

For further details visit: <http://project.bipsolutions.com/>

Number of Candidates

- 009: A contracting authority may limit the number of candidates in the restricted and negotiated procedures with publication of a contract notice, and in the competitive dialogue. Such a reduction of candidates should be performed on the basis of objective criteria indicated in the contract notice. These objective criteria do not necessarily imply weightings. For criteria relating to the personal situation of economic operators, a general reference in the contract notice to the situations set out in Article 45 may suffice.

In the competitive dialogue or negotiated procedures with publication of a contract notice, in view of the flexibility which may be required and the high level of costs associated with such methods of procurement, contracting authorities are entitled to make provision for the procedure to be conducted in successive stages to gradually reduce, on the basis of previously indicated contract award criteria, the number of tenders which they will go on to discuss or negotiate. This reduction should, insofar as the number of appropriate solutions or candidates allows, ensure that there is genuine competition.

Qualifications

- 010: The relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in a procurement procedure or a design contest.

Distortion of Competition by Public Sector Candidates

- 011: The Directive reminds contracting authorities that they are required to ensure that the participation of a public body as a Candidate in a procedure for the award of a public contract does not cause any distortion of competition in relation to other Candidates.

Environmental Protection

- 012: Under Article 6 of the EU Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development.

The Directive therefore clarifies how contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.

- 013: Nothing in the Directive is intended to prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.

Technical Dialogue

- 014: Before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of specifications, provided such advice does not have the effect of precluding competition.

Certification

- 015: The Directive states that in the United Kingdom and Ireland, a supplier may be requested to provide a certificate from respectively the Registrar of Companies or the Registrar of Friendly Societies stating that the supplier is certified as incorporated or registered or, if the supplier is not so certified, to provide 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.

Works and Service Contracts

- 016: A contract is considered to be a public works contract only if its principal purpose is the execution of the civil engineering and building activities listed in Annex 1 of the Directive, even if the contract also covers the provision of other services necessary for the execution of such activities. Public service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works. However, insofar as such works are incidental to the principal subject matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the contract as a public works contract.

Works Contract Award

- 017: In view of the diversity of public works contracts, contracting authorities can make provision for contracts for the design and execution of work to be awarded either separately or jointly. It is not the intention of the Directive to prescribe either joint or separate contract awards. The decision to award contracts separately or jointly must be determined by qualitative and economic criteria, which may be defined by national law.

Electronic Communication

- 018: In view of new developments in information and communications technology, and the simplifications these can bring in terms of publicising contracts and the efficiency and transparency of procurement processes, electronic means are put on a par with traditional means of communication and information exchange. As far as possible, the means and technology chosen should be compatible with the technologies used in other Member states.

Electronic Notifications

- 019: *The Directive provides for communication by electronic means, allowing shorter deadlines:*

- 7 days where contract notices are sent electronically
- A further 5 days where contract documents are made available on the web

Shorter deadlines also apply following publication of an adequate Prior Information Notice either in the OJEU or as part of the contracting authority's Buyer Profile published on the web.

Electronic Purchasing Techniques

- 020: New electronic purchasing techniques are continually being developed. Such techniques help to increase competition and

streamline public purchasing, particularly in terms of the savings in time and money which their use will allow. Contracting authorities may make use of electronic purchasing techniques, providing such use complies with the rules drawn up under this Directive and the principles of equal treatment, non-discrimination and transparency. To that extent, a tender submitted by a Candidate, in particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used, may take the form of that Candidate's electronic catalogue if the latter uses the means of communication chosen by the contracting authority in accordance with Article 42.

Central Purchasing Organisations

- 021: Certain centralised purchasing techniques have been developed in most Member States. Under these arrangements various contracting authorities are responsible for making acquisitions for resale to other contracting authorities or for awarding public contracts/framework agreements for other contracting authorities to use. In view of the large volumes purchased, these techniques help to increase competition and streamline public purchasing. Provisions are therefore included in the Directive for a Community definition of central purchasing bodies dedicated to contracting authorities.
- 022: A definition is also given of the conditions under which, in accordance with the principles of non-discrimination and equal treatment, contracting authorities purchasing works, supplies and/or services through a central purchasing body may be deemed to have complied with this Directive.
- 023: To take account of the different circumstances in Member States, each State may elect to choose whether contracting authorities may use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or the competitive dialogue procedure, as defined and regulated by this Directive.
- 024: In response to concerns expressed following the judgement of the European Court of Justice (ECJ) in the Teckal case (C-107/98), the Directive will provide that contracting authorities which purchase supplies, works or services from, or through, a central buying office will be deemed to have complied with the provisions of the Directive insofar as the central buying office has complied with them.
- 025: This will apply to purchases from the central buying office and to purchases under contracts or framework agreements awarded by the central buying office on behalf of one or more contracting authorities. The principal condition will be that the central buying office is itself a contracting authority.
- 026: *Definition:*
 "A central purchasing body is a contracting authority which:
 - acquires supplies and/or services intended for contracting authorities,
 - or
 - awards public contracts or concludes framework agreements for works, supplies or services intended for use by contracting authorities."

Financial Thresholds

- 027: Multiplying the number of thresholds for applying the coordinating provisions complicates matters for contracting authorities. Therefore, given the context of monetary union, such thresholds are now established in euros, in such a way as to simplify the application of such provisions, while at the same time ensuring compliance with the thresholds provided for by the Government Procurement Agreement which are expressed in Special Drawing Rights. In this context, provisions are also made for periodic reviews of the thresholds expressed in euros in order to adjust them, where necessary, in line with possible variations in the value of the euro in relation to the Special Drawing Right.

Public Service Contracts

- 028: As regards public service contracts, full application of this Directive is limited, for a transitional period, to contracts where its provisions will permit the full potential for increased cross-frontier trade to be

realised. Contracts for other services need to be monitored during this transitional period before a decision is taken on the full application of this Directive.

Service Categories

029: The field of services is best delineated, for the purpose of applying the procedural rules of the Directive and for monitoring purposes, by subdividing it into categories corresponding to particular headings of a common classification and by bringing them together in two Annexes, IIA and IIB, according to the regime to which they are subject. (Annex IIA services are subject to all the rules of the directive, Annex IIB services are subject to the rules on technical specifications and contract award notices.) As regards services in Annex IIB, the relevant provisions of this Directive are, without prejudice to the application of Community rules, specific to the services in question.

Public Utility Contracts

030: Public contracts which are awarded by the contracting authorities operating in the water, energy, transport and postal services sectors for the purpose of relevant activities are covered by the Consolidated Utilities Directive. However, contracts awarded by contracting authorities in the context of their (public) service activities for maritime, coastal or river transport all fall within the scope of the Public Sector Directive.

Telecommunications

031: In view of the situation of effective market competition in the telecommunications sector following the implementation of the Community rules aiming to liberalise that sector, public contracts in that area are excluded from the scope of this Directive insofar as they are intended primarily to allow the contracting authorities to exercise certain activities in the telecommunications sector. Those activities are defined in accordance with the definitions used in Articles 1, 2 and 8 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, such that this Directive does not apply to contracts which have been excluded from the scope of Directive 93/38/EEC pursuant to Article 8 thereof (or following its consolidation).

State Security

032: Provisions are made for cases in which it is impossible to apply the measures for coordinating procedures on grounds relating to state security or secrecy, or because specific rules on the awarding of contracts which derive from international agreements, relating to the stationing of troops, or which are specific to international organisations are applicable.

Technology Contracts

033: Pursuant to Article 163 of the Treaty, the encouragement of research and technological development is a means of strengthening the scientific and technological basis of Community industry, and the opening-up of public service contracts contributes to this end. However, the Directive does not cover the co-financing of research and development programmes research and development contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority, are not therefore covered by this Directive.

Immovable Property

034: In the context of services, contracts for the acquisition or rental of immovable property or rights to such property have particular characteristics which make the application of public procurement rules inappropriate.

Broadcasting

035: The awarding of public contracts for certain audio-visual services in the field of broadcasting allows for aspects of cultural or social significance to be taken into account which render application of procurement rules inappropriate. For these reasons, an exception is

therefore made for public service contracts for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of a programme and contracts concerning broadcasting times. However, this exclusion does not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes.

Arbitration Services

036: Arbitration and conciliation services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules.

Financial Services

037: The financial services covered by the Directive do not include instruments of monetary policy, exchange rates, public debt, reserve management or other policies involving transactions in securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital. Accordingly, contracts for financial services relating to the issue, purchase, sale or transfer of securities or other financial instruments are not covered. Central bank services are also excluded. (The Directive does, however, apply to other financial services including banking and insurance services.)

Technical Specifications

038: The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and requirements and, where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements must be considered by contracting authorities.

039: To demonstrate equivalence, Candidates should be permitted to use any form of evidence. Contracting authorities must be able to provide a reason for any decision that equivalence does not exist in a given case.

Environmental Requirements

040: Contracting authorities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics and/or specific environmental effects of product groups or services. They can, but are not obliged to, use appropriate specifications that are defined in eco-labels, such as the European Eco-label, multinational eco-labels or any other eco-label providing the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and providing the eco-label is accessible and available to all interested parties.

Additional Information

041: Additional information concerning contracts must, as is customary in Member States, be given in the contract documents for each contract or else in an equivalent document.

Complex Projects

042: Contracting authorities which carry out exceptionally complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions. This situation may arise in particular with the implementation of important integrated transport infrastructure projects, large computer networks or projects involving complex and structure financing, the financial and legal make-up of which cannot be defined in advance.

043: To the extent that use of open or restricted procedures does not allow the award of such contracts, a flexible procedure is provided which preserves not only competition between economic operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate. However, this procedure must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful Candidate, or by involving any Candidate other than the one selected as the most economically advantageous.

SMEs

044: To encourage the involvement of small and medium size undertakings in the public procurement market, the directive includes provisions on subcontracting, which allow contracting authorities to ask about subcontracting intentions without affecting the contractual relationship between the economic operator and its subcontractors.

Contract Conditions

045: Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment.

046: For instance, mention may be made, amongst other things, of the requirements applicable during performance of the contract, to the recruiting of long-term jobseekers or to the implementation of training measures for the unemployed or young persons, or to complying in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruiting more handicapped persons than are required under national legislation.

Health and Safety

047: The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of welfare and safety at work apply during performance of public contract providing that such rules, and their application, comply with Community law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

Advertising

048: To ensure the development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community. The information contained in these notices must enable economic operators in the Community to determine whether the proposed contracts are of interest to them. For this purpose, it is appropriate to give them adequate information on the object of the contract and the conditions attached thereto.

049: Improved visibility should therefore be ensured for public notices by means of appropriate instruments, such as standard contract notice forms and the Common Procurement Vocabulary (CPV) provided for in regulation of the European Parliament and of the Council as the reference nomenclature for public contracts. In restricted procedures, advertisement is, more particularly, intended to enable contractors of Member States to express their interest in contracts by seeking from the contracting authorities invitations to tender under the required conditions.

Electronic Signatures

050: Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') should, in the context of this Directive, apply to the transmission of information by electronic means.

051: The public procurement procedures and the rules applicable to service contests require a level of security and confidentiality higher than that required by these Directives. Accordingly, the devices for the electronic receipt of offers, requests to participate and plans and projects should comply with specific additional requirements. To this end, use of electronic signatures, in particular advanced electronic signatures, should, as far as possible, be encouraged. Moreover, the existence of voluntary accreditation schemes could constitute a favourable framework for enhancing the level of certification service provision for these devices.

Minimum Timescales

052: The use of electronic means leads to savings in time. As a result, provision is made in the Directive for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Community Level.

Criminality

053: The award of public contracts to economic operators who have participated in a criminal organisation, or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities, or of money laundering, should be avoided. Where appropriate, the contracting authorities should ask candidates or Candidates to supply relevant documents and, where they have doubts concerning the personal situation of a candidate or Candidate, they may seek the cooperation of the competent authorities of the Member State concerned.

054: The exclusion of such economic operators should take place as soon as the contracting authority has knowledge of a judgment concerning such offences rendered in accordance with national law that has the force of res judicata. If national law contains provisions to this effect, non-compliance with environmental legislation or on unlawful agreements in public contracts which has been the subject of a definitive judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

Environmental Management

055: In appropriate cases, in which the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a public contract, the application of such measures or schemes may be required. Environmental management schemes, whether or not they are registered under Community instruments such as Regulation (EC) No 761/2001 (EMAS), can demonstrate that the economic operator has the technical capability to perform the contract. Moreover, a description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence.

Official Lists

056: The Directive allows Member States to establish official lists of contractors, suppliers or service providers or a system of certification by public or private bodies, and makes provision for the effects of such registration or such certification to be recognised in a contract award procedure in another Member State.

057: As regards official lists of approved economic operators, it is important to take into account Court of Justice case law in cases where an economic operator belonging to a group claims the economic, financial or technical capabilities of other companies in the group in

support of its application for registration. In this case, it is for the economic operator to prove that those resources will actually be available to it throughout the period of validity of the registration. For the purposes of that registration, a Member State may therefore determine the level of requirements to be met and in particular, for example where the operator lays claim to the financial standing of another company in the group, it may require that that company be held liable, if necessary jointly and severally.

For information on BiP's compliant Supplier Information Database service Select, visit: www.bipselect.com

Sheltered Workshops

058: Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be executed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

Concessions

059: The Directive does not apply to the award of service concession contracts as defined. The Directive does require the advertisement of public works concession contracts and of works contracts to be awarded to third parties by works concessionaires.

Negotiated Procedure With A Call For Competition

060: In response to calls for greater flexibility, particularly in relation to complex contracts the present provision, allowing use of the negotiated procedure where prior overall pricing is not possible, will be extended to supplies as well as works and services; the present provision on inability to specify with sufficient precision for an open or restricted procedure will be amended to refer specifically to services involving the design of works but will not be extended to supplies contracts; and there is to be a new and separate procedure called "competitive dialogue".

061: Accompanying provisions will require equal treatment, particularly in the provision of information. They will also provide for the procedure to be conducted in stages to reduce the number of tenders by applying the award criteria.

Negotiated Procedure Without A Call For Competition

062: *The exemption from the requirement for a call for competition is to be extended to:*

- Supplies quoted and purchased on a commodities market
- Supplies on particularly advantageous terms, such as in insolvency

Rules Applicable To Means Of Communication

063: All communication and information exchange referred may be performed by post, by fax, by permitted electronic means, by telephone in certain cases, or by a combination of those means, at the choice of the contracting authority.

064: The means chosen must be generally available and thus not restrict economic operators' access to the tendering procedure.

065: Communication and the exchange and storage of information must be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved, and that the contracting authorities examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

066: The tools to be used for communicating by electronic means as well as their technical characteristics must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use.

067: *The following rules are applicable to devices for the electronic receipt of tenders and requests to participate:*

a) Information regarding the specifications necessary for the electronic submission of tenders and requests to participate, including encryption, must be available to interested parties. Moreover, the devices for the electronic receipt of tenders and requests to participate must confirm to the following requirements.

Devices for the electronic receipt of tenders, requests for participation and plans and projects in contests must at least guarantee, through technical means and appropriate procedures, that:

a) Electronic signatures relating to tenders, requests to participate and the forwarding of plans and projects comply with national provisions adopted pursuant to Directive 1999/93/EC.

b) The exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects can be determined precisely.

c) It may be reasonably ensured that, before the time limits laid down, no one can have access to data transmitted under these requirements.

d) If that access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable.

e) Only authorised persons may set or change the dates for opening data received.

f) During the different stages of the contract award procedure or of the contest access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons.

g) Simultaneous action by authorised persons must give access to data transmitted only after the prescribed date.

h) Data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves therewith.

b) Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification service provision for these devices.

c) Tenderers or Candidates must undertake to submit, before expiry of the time limit laid down for submission of tenders or requests to participate, the necessary documents, certificates, attestations and declarations if they do not exist in electronic format.

Consolidated Directive Timescales

068: **Principle of sufficiency**

The time-limits for tenders and requests to participate must take account of the complexity of the contract and the time needed to prepare tenders. They must allow for site visits, late or bulky documents and must exceed the following minima where necessary.

Open Procedure

Must allow at least 52* days for tenders from despatch of notice by post/fax (i.e. GPA 40 + EU 12) but following a full and current Prior Information Notice (PIN) or equivalent buyer profile, may reduce to 36 days in general, or at least 22 days.

* May allow 7 days less if notice despatched electronically.

* May allow 5 days less if contract documents are made available on the internet.

(The 7-day and 5-day reductions can be combined.)

Contract documents must be provided within 6 days of request to participate (RTP), if RTP timely.

Additional information must be provided not later than 6 days before deadline for tenders.

Selective procedures

(restricted, negotiated, competitive dialogue)

Must allow at least 37* days for requests to participate from despatch of notice by post/fax (15 days if accelerated).

* May allow 7 days less if notice sent electronically (net 10 days if accelerated) using a service such as BiP's Project service.

Contract documents must be sent with invitation to tender (ITT) or participate (ITP) or made available online or without delay via 3rd party.

Additional information must be provided not later than 6 days before deadline (4 if accelerated).

Restricted Procedure

Must allow at least 40* days for submission of tenders from ITT (10 if accelerated) but following prior information, may reduce to 36 days in general or at least 22 days.

- May allow 5 days less if contract documents are made available on the internet.

All Procedures

Notification of decisions, as soon as possible.

Debriefing on request, as quickly as possible and within 15 days of request.

OJEU

The OJEU is allowed:

- 12 days to publish notices from despatch by post or fax (5 if accelerated).
- 5 days from despatch electronically.

PIN Notices

069: Contracting authorities can in any case apply reduced timescales provided they make known either by the publication of a Prior Information Notice (PIN) or in their Buyer Profile, as much of the information needed for a contract notice as is available at the time. If so the deadline for receipt of tenders or expressions of interest can be reduced to 36 days in general or not less than 22 days, if necessary.

The PIN notice must either be sent to the Commission or published on the authority's own Buyer Profile as soon as possible after the decision approving the planning of works and, for supplies and service contracts, a PIN needs to be published at the beginning of the contracting authority's financial year.

Contracting authorities who publish the prior information notice on their Buyer Profile site must send the Commission, electronically, a notice of the publication of the buyer profile, in accordance with the format and modalities for sending notices indicated in the Directive's Annex VIII. (See part II – page 14)

Publication of Complementary or Additional Information

- Contracting authorities are encouraged to publish the specifications and the additional documents in their entirety on the Internet.
- The Buyer Profile may include prior information notices as referred to in Article 35(1), first subparagraph, information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address.

The formats for sending notices electronically are accessible through BiP's Project service. Visit: www.delta-ets.com

070: *The following rules apply to the transmission of requests to participate:*

- Requests to participate in procedures for the award of public contracts may be made in writing or by telephone.
- Where requests to participate are made by telephone, a written confirmation must be sent before expiry of the time limit set for their receipt.
- Contracting authorities may require that requests for participation made by fax must be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof. Any such requirement, together with the time limit for sending confirmation by post or electronic means, must be stated by the contracting authority in the contract notice.

Conduct of Award Procedures

071: Contracts shall be awarded on the basis of the criteria laid down, taking into account permitted variants, after the suitability of the economic operators not excluded for reasons of their personal position has been checked by the contracting authority in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to and, where appropriate, with the non-discriminatory rules and criteria for limiting the number of suitable candidates.

072: Contracting authorities may require candidates and tenderers to meet minimum economic, financial and technical capacity levels. The extent of the information which may be requested and the minimum levels of ability required for a specific contract must be related and proportionate to the subject matter of the contract. These minimum levels shall be indicated in the contract notice.

073: In restricted procedures, negotiated procedures with publication of a contract notice and in the competitive dialogue procedure, contracting authorities may limit the number of suitable candidates they will invite to tender, to negotiate or to conduct a dialogue with, provided a sufficient number of suitable candidates are available. The contracting authorities shall indicate in the contract notice the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appropriate, the maximum number. In the restricted procedure the minimum shall be five. In the negotiated procedure with publication of a contract notice and the competitive dialogue procedure the minimum shall be three. In any event the number of candidates invited shall be sufficient to ensure genuine competition.

074: Where the contracting authorities exercise the option of reducing the number of solutions to be discussed or of tenders to be negotiated, as provided for, they shall do so by applying the award criteria stated in the contract notice, in the specifications or in the descriptive document. In the final stage, the number arrived at shall make for genuine competition insofar as there are enough solutions or suitable candidates.

Chapter 2

Tendering Techniques & Procedures

Dynamic Purchasing Systems

Introduction

075: In view of the rapid expansion of electronic purchasing systems, appropriate rules are needed to enable contracting authorities to take full advantage of the possibilities afforded by these systems. Against this background, it is necessary to define a completely electronic dynamic purchasing system for commonly used purchases, and lay down specific rules for setting up and operating such a system in order

to ensure the fair treatment of any economic operator who wishes to take part therein. Any economic operator which submits an indicative tender in accordance with the specification and meets the selection criteria should be allowed to join such a system. This purchasing technique allows the contracting authority, through the establishment of a list of Candidates already selected and the opportunity given to new Candidates to take part, to have a particularly broad range of tenders as a result of the electronic facilities available, and hence to ensure optimum use of public funds through broad competition.

Definition

- 076: A “dynamic purchasing system” is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.
- 077: Member States may provide that contracting authorities may use dynamic purchasing systems.

Procedure

- 078: In order to set up a dynamic purchasing system, contracting authorities must follow the rules of the open procedure in all its phases up to the award of the contracts to be concluded under this system. All the Candidates satisfying the selection criteria and having submitted an indicative tender which complies with the specification and any possible additional documents must be admitted to the system; indicative tenders may be improved at any time provided that they continue to comply with the specification. With a view to setting up the system and to the award of contracts under that system, contracting authorities must use solely electronic means.
- 079: *For the purposes of setting up the dynamic purchasing system, contracting authorities must:*
 - a) Publish a contract notice making it clear that a dynamic purchasing system is involved.
 - b) Indicate in the specification, amongst others, the nature of the purchases envisaged under the system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications.
 - c) Offer by electronic means, on publication of the notice and up to the expiry of the system, unrestricted, direct and full access to the specification and to any additional documents and indicate in the notice the internet address at which such documents may be consulted.
- 080: Contracting authorities must give any economic operator, throughout the entire period of the dynamic purchasing system, the possibility of submitting an indicative tender and of being admitted to the system. They must complete evaluation with a maximum of 15 days from the date of submission of the indicative tender. However, they may extend the evaluation period provided that no invitation to tender is issued in the meantime. The contracting authority must inform the Candidate referred to in the first subparagraph at the earliest possible opportunity of its admittance to the dynamic purchasing system or of the rejection of its indicative tender.
- 081: Each specific contract must be the subject of an invitation to tender. Before issuing the invitation to tender, contracting authorities must publish a simplified contract notice inviting all interested economic operators to submit an indicative tender, within a time-limit that may not be less than 15 days from the date on which the simplified notice was sent. Contracting authorities may not proceed with tendering until they have completed evaluation of all the indicative tenders received by that deadline.
- 082: Contracting authorities must invite all Candidates admitted to the system to submit a tender for each specific contract to be awarded under the system. To that end they must set a time limit for the submission of tenders. They must award the contract to the Candidate which submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the dynamic purchasing system. Those criteria may, if appropriate, be formulated more precisely in the invitation referred to in the first subparagraph.

Duration

- 083: A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases. Contracting authorities may not resort to this system to prevent, restrict or distort competition. No charges may be billed to the interested economic operators or to parties to the system.

Electronic Reverse Auctions

Introduction

- 084: Since use of the technique of electronic auctions is likely to increase, such auctions are given a Community definition and governed by specific rules in order to ensure that they operate in full accordance with the principles of equal treatment, non-discrimination and transparency. To that end, provision is made for such electronic auctions to deal only with contracts for works, supplies or services for which the specifications can be determined with precision.
- 085: With the same objective, it must also be possible to establish the respective ranking of the Candidates at any stage of the electronic auction.
- 086: Recourse to electronic auctions enables contracting authorities to ask Candidates to submit new prices, revised downwards, and when the contract is awarded to the most economically advantageous tender, also to improve elements of the tenders other than prices.
- 087: However, in order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention by the contracting authority, may be improved. To this end, such elements must be quantifiable so that they can be expressed in figures or percentages.

Definition

- 088: An “electronic auction” is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

Procedure

- 089: Member States may provide that contracting authorities may use electronic auctions.
- 090: In open, restricted or negotiated procedures with a call for competition contracting authorities may decide that the award of a public contract will be preceded by an electronic auction when the contract specifications can be established with precision.
- 091: Similarly, an electronic auction may be held on the reopening of competition among the parties to a framework agreement or on the opening for competition of contracts to be awarded under a dynamic purchasing system.
- 092: *The electronic auction may be based either:*
 - Solely on prices when the contract is awarded to the lowest price. or
 - On prices and/or on the new values of the features of the tenders indicated in the specification when the contract is awarded to the most economically advantageous tender (“most economically advantageous tender” and “lowest price” are the only permissible award criteria).
- 093: Contracting authorities which decide to hold an electronic auction must state that fact in the contract notice.

The specifications must include, inter alia, the following details:

 - a) The features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages.
 - b) Any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract.
 - c) The information which will be made available to Candidates in the course of the electronic auction and, where appropriate, when it will be made available to them.
 - d) The relevant information concerning the electronic auction process.
 - e) The conditions under which the Candidates will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding.
 - f) The relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.
- 094: Before proceeding with the electronic auction, contracting authorities must make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them.

- 095: All Candidates who have submitted admissible tenders must be invited simultaneously by electronic means to submit new prices and/or new values; the invitation will contain all relevant information concerning individual connection to the electronic equipment being used and must state the date and time of the start of the electronic auction.
- 096: The electronic auction may take place in a number of successive phases. The electronic auction may not start sooner than two working days after the date on which invitations are sent out.
- 097: When the contract is to be awarded on the basis of the most economically advantageous tender, the invitation must be accompanied by the outcome of the full evaluation of the relevant Candidate's tender, carried out in accordance with the weighting declared.
- 098: The invitation must also state the mathematical formula to be used in the electronic auction to determine automatic re-rankings on the basis of the new prices and/or new values submitted. That formula must incorporate the weighting of all the criteria fixed to determine the most economically advantageous tender, as indicated in the contract notice or in the specifications; for that purpose, any ranges must, however, be reduced beforehand to a specified value.
- 099: Where variants are authorised, a separate formula must be provided for each variant.
- 100: Throughout each phase of an electronic auction the contracting authorities must instantaneously communicate to all Candidates at least sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the Candidates during any phase of an electronic auction.
- 101: *The contracting authorities may close an electronic auction in one or more of the following manners:*
- At the date and time fixed in advance, which they must indicate in the invitation to take part in the auction.
 - When they receive no more new prices or new values which meet the requirements concerning minimum differences. In that event, the contracting authorities must state in the invitation to take part in the auction the time which they will allow to elapse after receiving the last submission before they close the electronic auction.
 - When the number of phases in the auction, fixed in the invitation to take part in the auction, has been completed.
- 102: When the contracting authorities have decided to close an electronic auction in accordance with subparagraph (c), possibly in combination with the arrangements laid down in subparagraph (b) (above), the invitation to take part in the auction must indicate the timetable for each phase of the auction.
- 103: When they have closed an electronic auction the contracting authorities must award the contract on the basis of the results of the electronic auction and in accordance with the declared award criteria.
- 104: The contracting authorities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject of the contract, as put up for tender in the published contract notice and defined in the specification.
- Preparation**
- 105: Before undertaking the actual e-auction the contracting authorities must have invested in substantial planning. They must ensure the auction process is fully compliant with the process outlined in the Consolidated Procurement Directive as outlined above.
Secondly, contracting authorities should address the following issues early, by ensuring:
- They have established effective criteria for the admission or selection of participants.
 - The object of the procurement can be accurately specified.
 - There is a confirmed commitment to purchase.
 - The value is high enough to make it commercially viable.
 - There is a competitive supplier base.
 - Key suppliers are willing to participate.
 - Selected suppliers possess similar processes, procedures and capabilities.
 - Award will not distort the marketplace in future.
 - The availability of good intelligence on past transactions within the market.
- 106: Contracting authorities should not proceed until all of the above have been completed. Suppliers should seek information from the contracting authority relative to the process as outlined above.
- ## Competitive Dialogue
- ### Introduction
- 107: Contracting authorities which carry out exceptionally complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical, financial or legal (i.e. contractual) solutions.
- 108: This situation may arise in particular with the implementation of important integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing, the financial and legal make-up of which cannot be defined in advance.
- 109: To the extent that use of open or restricted procedures does not allow the award of such contracts, a flexible procedure should be provided which preserves not only competition between economic operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate.
- 110: However, this procedure must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful Candidate, or by involving any Candidate other than the one selected as the most economically advantageous.
- ### Competitive Dialogue
- 111: Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non-discriminatory criteria are indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority is required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure.
- ### Definition
- 112: "Competitive Dialogue" is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to the procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.
- ### Procedure
- 113: *Member States may provide that where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract, the latter may make use of the competitive dialogue procedure for complex contracts, defined as contracts:*
- Where they are not objectively able to define the technical means capable of satisfying their needs or objectives.
and/or
 - Where they are not objectively able to specify the legal and/or financial make-up of a project.
- 114: The contract must be awarded on the sole basis of the award criterion for the most economically advantageous tender.

- 115: The contracting authorities must publish a contract notice setting out their needs and requirements, which they must define in the notice and/or in a descriptive document.
- 116: The contracting authorities may open a dialogue with the candidates selected in accordance with the normal provisions for the selection of participants, the aim of which will be to identify and define the means best fitted to satisfy their needs. They may discuss all aspects of the contract with the chosen candidate during this dialogue.
- 117: During the dialogue, the contracting authorities must ensure equality of treatment among all Candidates. In particular, they must not provide information in a discriminatory manner which may give some Candidates an advantage over others. The contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement.
- 118: The contracting authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The contract notice or the descriptive document must indicate that recourse may be had to this.
- 119: The contracting authority may continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs.
- 120: Having declared that the dialogue is concluded and having so informed the participants, contracting authorities must ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. These tenders must contain all the elements required and necessary for the performance of the project.
- 121: The tenders may be clarified and made more precise at the request of the contracting authority. However, such clarification, specification or provision of additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or to have a discriminatory effect.
- 122: Contracting authorities must assess the tenders received on the basis of the award criteria laid down in the contract notice or the descriptive document and choose the most economically advantageous tender accordingly.
- 123: At the request of the contracting authority, the Candidate identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender, provided this does not have the effect of modifying substantial aspects of the tender or the call for tender and does not risk distorting competition or causing discrimination.
- 124: The contracting authorities may specify prices or payments to the participants in the dialogue.

Framework Agreements

Introduction

- 125: A Community definition of framework agreements, together with specific rules on framework agreements concluded for contracts falling within the scope of this Directive, is provided. Under these rules, when a contracting authority enters into a framework agreement in accordance with the provisions of this Directive relating, in particular, to advertising, time limits and conditions for the submission of tenders, it may enter into contracts based on such a framework agreement during its term of validity either by applying the terms set forth in the framework agreement or, if all terms have not been fixed in advance in the framework agreement, by reopening competition between all the parties to the framework agreement in relation to those terms.
- 126: The reopening of competition should comply with certain rules the aim of which is to guarantee the required flexibility and to guarantee respect for the general principles, in particular the principle of equal treatment.

Definition

- 127: A "framework agreement" is an agreement between one or more contracting authorities and one or more economic operators, the

purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

Procedure

- 128: Member States may provide that contracting authorities may conclude framework agreements.
- 129: For the purpose of concluding a framework agreement, contracting authorities must follow the rules of procedure for all phases up to the award of contracts based on that framework agreement.
- 130: The parties to the framework agreement will be chosen by applying the award criteria set. Contracts based on a framework agreement must be awarded in accordance with the procedures laid down below. These procedures may be applied only between the contracting authorities and the economic operators originally party to the framework agreement.
- 131: When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement, in particular, in the case of a framework awarded to a single supplier, contractor or service provider.
- 132: The term of a framework agreement may not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement. Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.
- 133: Where a framework agreement is concluded with a single economic operator, contracts based on that agreement must be awarded within the limits of the terms laid down in the framework agreement. For the award of those contracts, contracting authorities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.
- 134: Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria.
- 135: *Contracts based on framework agreements concluded with several economic operators may be awarded either:*
- By application of the terms laid down in the framework agreement without reopening competition.
 - or
 - Where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:
 - a) For every contract to be awarded, contracting authorities must consult in writing (all) the economic operators capable of executing the subject of the contract;
 - b) Contracting authorities must fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject of the contract and the time needed to send in tenders;
 - c) Tenders must be submitted in writing, and their content must remain confidential until the stipulated time limit for reply has expired;
 - d) Contracting authorities must award each contract to the Candidate who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

Technical Specifications

Introduction

- 136: *The Directive provides that technical specifications may be based:*
- On European standards or technical specifications or, in their absence, national standards.
 - In terms of performance or functional requirements.

- In terms of performance or functional requirements with reference to European or national specifications as a presumption of conformity.
or
- In terms of European or national specifications for some characteristics and performance or functional requirements for others.

When a contracting authority specifies its requirement by reference to a European or national specification or standard it will be required to consider offers which do not comply with that specification or standard but which the Candidate can prove meet the contracting authority's requirement in an equivalent manner.

- 137: With regard to taking environmental issues into account in technical specifications, the directive recalls that, Under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development. The Consolidated Directive therefore clarifies how contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.
- 138: The Directive also recalls, in a more general sense, that nothing in the Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.
- 139: The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions.
- 140: Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and requirements, and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, Candidates should be permitted to use any form of evidence. Contracting authorities must be able to provide a reason for any decision that equivalence does not exist in a given case.
- 141: Contracting authorities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics and/or specific environmental effects of product groups or services. They can, but are not obliged to, use appropriate specifications that are defined in eco-labels, such as the European Eco-label, (multi-)national eco-labels or any other eco-label providing the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and providing the label is accessible and available to all interested parties.
- 142: In appropriate cases, in which the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a public contract, the application of such measures or schemes may be required. Environmental management schemes, whether or not they are registered under Community instruments such as Regulation (EC) No 761/2001 (EMAS), can demonstrate that the economic operator has the technical capability to perform the contract.
- 143: Moreover, a description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence.

Definition of Certain Technical Specifications

144: *For the purposes of this Directive:*

- 1a) "Technical specification", in the case of public works contracts, means the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority.
- These may also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.
- 1b) "Technical specification", in the case of public supply or service contracts, means a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures.
- These characteristics may include levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling and production processes and methods:
- 2) "Standard" means a technical specification approved by a recognised standardising body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:
- International standard – a standard adapted by an international standards organisation and made available to the general public.
 - European standard – a standard adopted by a European standards organisation and made available to the general public.
 - National Standard – a standard adopted by a national standards organisation and made available to the general public.
- 3) "European technical approval" means a favourable technical assessment of the fitness for use of a product for a particular purpose, based on the fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. European technical approvals are issued by an approval body designated for this purpose by the Member State.
- 4) "Common technical specification" means a technical specification laid down in accordance with a procedure recognised by the Member States which has been published in the Official Journal of the European Union.
- 5) "Technical reference" means any product produced by European standardisation bodies, other than official standards, according to procedures adopted for the development of market needs.
- 145: The technical specifications as defined must be set out in the contract documentation, such as contract notices, contract documents or additional documents.
- 146: Technical specifications must afford equal access for Candidates and not have the effect of creating unjustified obstacles to the opening of public procurement to competition.

147: *Without prejudice to compulsory national technical rules, to the extent that they are compatible with Community law, the technical specifications must be formulated:*

- a) Either by reference to technical specifications as defined and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or – when these do not exist – to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference must be accompanied by the words “or equivalent”.
- b) Or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow Candidates to determine the subject matter of the contract and to allow contracting authorities to award the contract.
- c) Or in terms of performance or functional requirements as mentioned in (b), with reference to the specifications mentioned in (a) as a means of presuming conformity with such performance or functional requirements.
- d) Or by referring to the specifications mentioned in (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in (b) for other characteristics.

148: Where a contracting authority makes use of the option of referring to the specifications mentioned in paragraph (a), it cannot reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which it has referred, once the Candidate proves in his tender to the satisfaction of the contracting authority, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications. An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

149: When a contracting authority uses the option to prescribe in terms of performance or functional requirements, it may not reject a tender for works, products or services which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard, a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

150: In his tender, the Candidate must prove to the satisfaction of the contracting authority and by any appropriate means that the work, product or service in compliance with the standard meets the performance or functional requirements of the contracting authority. An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

151: *Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or multi-national eco-labels, or by and any other eco-label, providing that:*

- Those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract.
 - The requirements for the label are drawn up on the basis of scientific information.
 - The eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate.
- and
- They are accessible to all interested parties.

152: Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical

specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

153: “Recognised bodies”, within the meaning of this Article, are test and calibration laboratories and certification and inspection bodies which comply with applicable European standards. Contracting authorities must accept certificates from recognised bodies established in other Member States.

154: Unless justified by the subject matter of the contract, technical specifications must not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference will be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference must be accompanied by the words “or equivalent”.

Variants

155: Where the criterion for award is that of the most economically advantageous tender, contracting authorities may authorise Candidates to submit variants.

156: The contracting authorities must indicate in the contract notice whether or not they authorise variants, variants must not be authorised without this indication.

157: The contracting authorities authorising variants must state in the contract documents the minimum requirements to be respected by the variants and any specific requirements for their presentation.

158: Only variants meeting the minimum requirements laid down by these contracting authorities may be taken into consideration. In the procedures for awarding public supply or service contracts, contracting authorities which have authorised variants may not reject a variant on the sole ground that it would lead, if successful, to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

Publication of Notices

159: a) Notices referred to in Articles 35, 58, 64 and 69 are sent by the contracting authorities to the Office for Official Publications of the European Union in the format required by Commission Directive 2001/78/EC of 13 September 2001 on the use of standard forms in the publication of public contract notices. The Prior Information Notices referred to in Article 35(l), first subparagraph, published on a buyer profile as described in point 2(b), and must also use that format, as must the notice of such publication.

b) Notices referred to in Articles 35, 58, 64 and 69 are published by the Office for Official Publications of the European Union or by the contracting authorities in the event of a Prior Information Notice published on a buyer profile in accordance with Article 35(l), first subparagraph.

In addition, contracting authorities may publish this information on the internet at referred to in point 2(b).

c) The Office for Official Publications of the European Union will give the contracting authority the confirmation referred to in Article 36(8).

Publication of Complementary or Additional Information

160: a) Contracting authorities are encouraged to publish the specifications and the additional documents in their entirety on the internet.

b) The buyer profile may include Prior Information Notices as referred to in Article 35(l), first subparagraph, information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as a contact point, a telephone and a fax number, a postal address and an email address.

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