



MINISTRY OF DEFENCE

MOD Consultation Document

on the approach to implementation of:
Directive 2009/81/EC of the European Parliament
and of the Council of July 2009



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MOD CONSULTATION DOCUMENT ON THE APPROACH TO IMPLEMENTATION OF:

DIRECTIVE 2009/81/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 13 July 2009

on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC

EXECUTIVE SUMMARY

This consultation document concerns the implementation of the new European Directive on defence and security procurement¹ (the “New Directive”). This is the first of two consultations: this one focuses on the approach to implementation; a later consultation will seek feedback on the implementation itself, including draft legislation.

The New Directive sets out new procurement rules for contracting authorities/entities which purchase military equipment, sensitive equipment, and related goods, works or services. It also provides rules where contracting authorities/entities purchase works and services for specifically military purposes or works or services for security purposes which involve, require or contain classified information. These rules have been specifically adapted to meet the concerns of European Member States about procuring defence and security goods, works and services under Directive 2004/18/EC (the “Classic Directive”). As the New Directive primarily affects defence contracting, the Ministry of Defence (MOD) has lead responsibility for coordinating transposition.

The New Directive provides Member States with common defence and security procurement rules, which take account of the special features of that market, such as security of information and security of supply, with the expectation that this will enable defence and security procurement business to be conducted more efficiently and that, in particular, the European defence market will be made more open and transparent.

This Directive has already been adopted at European level and its effect cannot be changed in the implementation process. However, some aspects are optional and MOD seeks stakeholder preferences on those options.

Respondents are urged to set out the rationale and evidence supporting their preferred options clearly. MOD will analyse the responses carefully and any decisions will take account of the evidence provided. Feedback is sought on all the topics highlighted in this document. However, MOD is particularly keen to receive stakeholder views on the following subjects:

- a. The general approach to replicate the implementation of those provisions, which are substantively the same as Directives 2004/18/EC (the “Classic Directive”) and 1989/665/EEC, as amended (the “Remedies Directive”);
- b. Scope – refer to Article 2;

¹ <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2009:216:SOM:EN:HTML>

- c. Subcontracting – refer to Article 21, Articles 51 to 53 and Annex V;
- d. Security of information – refer to Article 7, Article 20, Article 22, Article 39.2(d), Article 42.1.(j);
- e. Security of supply – refer to Article 20, Article 23, Article 39.2(d) and Article 42.1.(h);
- f. The candidate or tenderer risk to security – refer to Article 39.2(e).

Part 1 of this document sets out the background to the New Directive and proposed plans for its transposition into UK legislation.

Part 2 of the document highlights the key issues for stakeholder consideration and feedback.

A draft Impact Assessment and the text of the New Directive are attached at Annexes C and F respectively.

MOD welcomes input by Wednesday 10 March 2010. Please direct responses, or any questions on the consultation, to: EUDirective-Responses@mod.uk

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PART 1: BACKGROUND AND TRANSPOSITION PLANS

Purpose

1. This consultation document invites views on the MOD's approach to transposition of 2009/81/EC (the "New Directive") in setting out new procurement rules specifically adapted to the defence and security sectors, aimed at opening up the European defence and security market to greater transparency and competition.

Background

2. The New Directive will establish new procurement rules specifically adapted to meet the concerns of Member States about the sensitive nature of procurements in the defence and security sectors. Currently, all public sector procurements (civil and defence), unless they are exempt, are governed by the rules set out in the EC Public Procurement Directive 2004/18/EC (the "Classic Directive"). There are also particular rules for procurements by contracting entities in the water, energy, transport, telecommunications and postal services sectors governed by Directive 2004/17/EC (the "Utilities Directive"), where they relate to defence and security. The standard rules in the Classic Directive do not always permit the acquisition of military or security capability as effectively as they could, or deal explicitly with key requirements for acquisitions such as security of information.

3. The New Directive was adopted by the EU Council of Ministers and the European Commission and is largely based on the Classic Directive. However, its scope also extends to contracting entities to which the Utilities Directive applies if they procure equipment, works or services which are for security purposes and involve, require or contain classified information. Stakeholders should, however, note that as the Utilities Directive was not used as the basis for the New Directive, any differences in the procurement rules between the Utilities Directive and the Classic Directive are not reflected in the New Directive.

4. The New Directive also introduces a number of provisions concerning the award of public contracts in the defence and security fields which are either new, or are adaptations of the provisions which exist in the Classic Directive, in particular:

- a. The negotiated procedure with publication can be used without restriction. This gives contracting authorities/entities the flexibility to negotiate with suppliers in detail all features of complex procurements;
- b. Specific provisions on security of information are included which ensure that sensitive information will remain protected against unauthorised access;
- c. Special clauses on security of supply will provide contracting authorities/entities with greater certainty that equipment, works or services can be delivered, in particular in times of crisis or armed conflict;
- d. Special rules on subcontracting make it possible for contracting authorities/entities to require competitive procurements for sub-contractors on an EU-wide basis, potentially improving market access for SMEs and thus complementing the Small Business Act for Europe objectives.

Scope

5. MOD has responsibility for coordinating the transposition of the New Directive into UK law. The Scottish and UK Governments are currently considering devolution aspects of the New Directive. The Gibraltar Government is considering its options for transposition.

Approach

6. Implementation of Directive 2009/81/EC is mandatory. However, there is a measure of flexibility in implementation, as some elements of the New Directive are optional. Therefore the outcomes can be influenced to some extent by stakeholders' views. MOD aims to capture stakeholder views while managing the transposition, using the following methodology.

7. Stakeholders will be consulted on two separate occasions. The first, commenced by this document, will set out our proposals for implementation of the New Directive and seek appropriate feedback.

8. We propose to implement those provisions of the New Directive which replicate the Classic Directive and/or the Remedies Directive, as far as possible, in the same way as they are implemented in the Public Contracts Regulations 2006. Mandatory non-optional provisions will also simply have to be implemented. Therefore, in this document we are only providing information and consulting on:

- a. the new provisions of the New Directive;
- b. those provisions which are adapted from the equivalent provisions in the Classic Directive and/or the Utilities Directive and/or the Remedies Directive; and
- c. the proposed and/or possible approaches to the implementation of the optional elements of the New Directive, to gauge preferences and inform decisions on the options.

9. A second consultation will take place in 2010. It will include a draft Statutory Instrument (SI), taking account of the results of the first consultation; feedback will be sought on the proposed draft SI. The results of both consultation exercises will be published on the MOD and OGC websites. Following the second consultation, the draft SI will be finalised, made and laid before Parliament in advance of the implementation deadline of 20 August 2011.

10. MOD plans to transpose the New Directive by creating Defence and Security Procurement Regulations and amending the existing Public Contracts and Utilities Contracts Regulations to remove from the scope of the current UK Regulations those procurements covered by the New Directive. We are consulting simultaneously on these changes through a coordinated consultation process.

References

11. In this consultation document we use the term “New Directive” for Directive 2009/81/EC, “Classic Directive” for Directive 2004/18/EC¹, the “Utilities Directive” for 2004/17/EC² and the “Remedies Directives” for 89/665/EEC and 92/13/EEC, as amended by 2007/66/EC³.

12. For convenience, in this consultation document, we use the term “UK Regulations” to mean the Regulations that currently implement the Classic Directive in England, Wales and Northern Ireland i.e.: the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006.

¹ http://eur-lex.europa.eu/JOIndex.do?year=2004&serie=L&textfield2=134&Submit=Search&_submit=Search&ihmlang=en

² <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2004:134:SOM:EN:HTML>

³ http://eur-lex.europa.eu/JOIndex.do?year=2007&serie=L&textfield2=335&Submit=Search&_submit=Search&ihmlang=en

PART 2: Consultation Issues

Introduction

13. This part of the document introduces specific topics and information on which MOD is inviting feedback. This feedback is important, as it will help to shape the approach to implementation. The topics include:

- a. The general approach for those provisions of the New Directive which are identical or substantively the same as for the Classic Directive and/or the Remedies Directives;
- b. How the new provisions will work in practice; and
- c. The preferred choice of stakeholders where there are optional elements in the New Directive.

14. Stakeholders are reminded that implementation of the New Directive is mandatory. However, we welcome feedback that will help to shape the approach on specific issues where there is scope to influence transposition, as detailed below.

15. This consultation document introduces each of the discussion topics in turn, by stating the article being addressed and describing the key issues to be considered. The yellow text boxes (shaded, if printing in black and white) contain our specific requests for stakeholder feedback, and clarify mandatory provisions where appropriate.

Identical/Similar provisions of the New Directive

16. The New Directive is based substantially on the Classic Directive and the Remedies Directives, albeit the thresholds are aligned with those under the Utilities Directive, and the provisions of the Remedies Directives are largely replicated in the Articles of the New Directive. Therefore, there are a large number of provisions:

- a. which are drafted in an identical manner to the Classic and Remedies Directives;
- b. where slightly different language has been used but where the substance of the provision is the same;
- c. where provisions have been merged together but again where the substance has not altered as a result; or
- d. where slight adaptation is required (e.g. to remove cross references to the open procedure and dynamic purchasing systems not replicated in the New Directive), but which are otherwise substantially the same as the other Directives and on which no specific consultation responses are sought.

17. The Classic Directive has already been implemented by the Public Contracts Regulations 2006. The latest amendment to the Remedies Directive, namely Directive 2007/66/EC is about to be transposed by amendments to the Public Contracts Regulations 2006 and has already been subject to two public consultations by the Office of Government Commerce¹. Therefore, unless

¹ http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_european_procurement_directives.asp

there are specific and valid reasons to the contrary, for consistency with the existing Regulations, and for reasons of legal certainty, the MOD intends to implement identical/similar provisions in the same way as in the Public Contracts Regulations 2006. As the Utilities Directive was not used as a basis for the New Directive, the MOD does not intend to use the Utilities Contracts Regulations 2006 as a basis for implementation other than the definition of “utility” and Schedule 1 to deal with the incorporation into the New Directive of “contracting entity” from the Utilities Directive.

18. Annex E contains three comparator tables. Table 1 contains those provisions of the Defence Directive which the MOD considers falls into the categories listed above together with the implementing regulations in the Public Contracts Regulations 2006. Table 2 is the same but is specific to the Remedies Directives. Table 3 relates to the Utilities Directive and is included primarily for information, to highlight those Articles which are different to the Classic Directive and thus also different to the New Directive and those which are similar or the same. For completeness, the table also contains the implementing provisions in the Utilities Contract Regulations 2006.

Box 1: General approach to identical provisions or provisions which are substantively the same

The MOD would welcome comments on:

1. Any issues with this approach;
2. Whether the list in Annex E is considered to be accurate and, if not, to identify and explain the inaccuracies.

New/adapted provisions of the New Directive

Article 2 - Scope

19. The scope of the Directive covers rules for contracts awarded by contracting authorities and contracting entities for:

- a. Military equipment and works, goods and services related to the procurement of that equipment;
- b. Works or services for military purposes;
- c. Sensitive equipment and works, goods or services related to the procurement of that sensitive equipment; and
- d. Works and services for specifically military purposes or sensitive works and sensitive services.

20. “Military equipment” is defined in the New Directive as “equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions, or war material”. The words “arm, munitions or war material” are derived from Article 296EC of the EC Treaty where these words are defined by reference to a list adopted by the European Council in a Decision¹ in

¹ http://www.aof.mod.uk/aofcontent/tactical/toolkit/downloads/ecegs/ecegs_annd.pdf

1958 known as the “1958 List”. Further clarification of the definition of military equipment is set out in Recital 10. This states that Member States may limit themselves to the 1958 List only for transposition of the New Directive but that the 1958 List is to be interpreted broadly to cover new equipment (such as that on the EU’s Common Military List) given that the 1958 List is generic and dated. This suggests that there is some discretion to use the 1958 List in addition to more modern definitions of military equipment or to use the 1958 List only. Recital 10 also clarifies that civilian equipment adapted for military purposes to be used as arms, munitions or war material is also covered. The MOD proposes that the definition of military equipment includes but is not limited to the equipment listed in the 1958 List and the EU Common Military List.

21. “Sensitive equipment”, “sensitive works” and “sensitive services” are defined in the New Directive as equipment, works and services for security purposes involving, requiring and/or containing “classified information”. Classified information means information which has a certain level of security classification and which in the interests of national security requires protection.

22. The Directive does not define “security purposes”, but the scope of the provision is limited by reference to classified information, which requires protection in the interests of national security. The level of security classification required is also not defined but MOD’s intention is that the New Directive will apply to information or material that has the protective marking of “Restricted”, “Confidential”, “Secret” or “Top Secret”. The meaning of these protective markings can found under “Applying the correct protective marking” in Cabinet Office Security Policy No 2, see http://www.cabinetoffice.gov.uk/spf/sp2_pmac.aspx .

Box 2: Scope

The MOD would welcome comments on:

1. The transposition of the definition of military equipment in Article 2; and
2. The transposition of “sensitive equipment”, “sensitive works” and “sensitive services”.
3. The MOD intention to interpret security classification as “Restricted” or above, particularly the arguments for and against including classifications below “Restricted” e.g. “Protect”.

Article 3 - Mixed contracts

23. Article 3 provides that where a single contract covers works, supplies or services which fall within the scope of more than one of the New Directive, the Classic Directive and/or the Utilities Directive, then the rules of the New Directive should govern the procurement, provided that a single contract is objectively justifiable.

24. Article 3 also provides that where a single contract is partly covered by the scope of the New Directive but the other part does not fall within the scope of the New Directive, the Classic Directive or the Utilities Directive, the contract is excluded from all of the Directives, again provided the award of a single contract is objectively justifiable.

25. Article 3 also makes it clear that a single contract cannot be awarded with the sole intention of excluding the application of the procurement Directives.

26. The MOD does not intend to define what is meant by “objectively justifiable” as it considers that this will have to be assessed on a case by case basis.

Box 3: Mixed Contracts

The MOD would welcome comments on:

1. The proposal not to define what is meant by “objectively justifiable”; and
2. Any potential practical issues stakeholders can envisage with this provision.

Article 7 - Protection of classified information

27. This is a new provision which permits contracting authorities/entities to impose requirements on economic operators to protect the classified information they communicate throughout the tendering and contracting procedure. They may also request these economic operators to ensure compliance with such requirements by their subcontractors. The MOD intends to permit contracting authorities to impose such requirements in the implementing Regulations, in accordance with existing government-to-government bilateral arrangements.

28. Negotiated Security Arrangements/Agreements (SA) with a number of NATO, European Union and other countries provide security assurance that any classified information/material exchanged or generated between the participants or their security cleared contractors will be afforded appropriate safeguards in accordance with the existing national security laws and regulations of the recipient country.

29. Under the provisions of SAs, Invitations to Tender (ITT) and contracts involving access to and generation of classified information, “Confidential” or above, can only be issued to contractors that have been granted an appropriate facility security clearance by their respective National/Designated Security Authority. The ITT/contract will include a security provision that refers to the SA and obligates the contractor to apply a degree of security applicable to that required under national security laws and regulations for the protection of classified information. The security provision also requires equal obligations to be flowed down to any sub-contractors and, where appropriate, for the contracting authority to approve the placing of sub-contracts.

30. Whilst the contractor has responsibility to protect classified information received, under the obligations of the SA, the National/Designated Security Authority where the contractor is located is ultimately responsible for the protection of classified information in one of its security cleared contractors which has been provided by the other SA participant.

Box 4: Protection of classified information

The MOD invites comment on its proposed approach to implementing this provision.

Article 10 – Public contracts and framework agreements awarded by central purchasing bodies

31. Article 10 has been adapted, albeit slightly, from its equivalent in Article 11 of the Classic Directive. The definition of a central purchasing body now includes a European public body which acquires supplies or services on behalf of contracting authorities/entities or awards public contracts or framework agreements. Such a central purchasing body must comply with the provisions of the New Directive when procuring on behalf of contracting authorities/entities. Other than the reference in Recital 23, which makes reference to the European Defence Agency, a European public body is not defined.

Box 5: Public contracts and framework agreements awarded by central purchasing bodies

The MOD would welcome views on the relevance of such a contracting body for the Defence and Security sectors.

Article 11 – Use of exclusions

32. This is a new provision which provides that the contracts excluded by Articles 12 and 13 of the New Directive cannot be used simply to avoid the requirements of the New Directive. In the MOD's view, this is simply clarification of the existing position under the Classic Directive.

Box 6: Use of exclusions

This is a mandatory provision which the MOD brings to the attention of stakeholders for information only and no feedback is sought.

Article 12 – Contracts awarded pursuant to international rules

33. This provision is similar to Article 15 of the Classic Directive. However, Article 12(a) is broader in that it can apply to any international agreement between one or more Member States and one or more third countries where there are specific rules of procedure. It also clarifies that international arrangements such as Memoranda of Understanding (MoUs) are also covered. Article 12(c) is also adapted slightly from its equivalent in Article 15 of the Classic Directive more specifically to align with the way in which international organisations such as NATO carry out its procurements and where Member States contract in accordance with the rules of such organisations.

Box 7: Contracts awarded pursuant to international rules

This is a mandatory provision which the MOD brings to the attention of stakeholders for information only and no feedback is sought.

Article 13 - Specific exclusions

34. Many of the exemptions in the Classic Directive have been reproduced in Article 13 of the New Directive.

35. The equivalent provision to Article 14 of the Classic Directive that exempts secret contracts, contracts requiring special security measures and those when the protection of the essential interests of the Member States so require has been more narrowly drawn by the Commission. Article 13(a) of the New Directive prevents Member States being obliged to supply information contrary to the essential interests of its security.

36. New exemptions have been created in the New Directive to address the specific needs of the defence and security sectors, i.e. for intelligence activities (see Article 13(b)); cooperative armaments projects (see Article 13(c)); local purchases for operations outside the EU, (see Article 13(d)) and government to government contracts (see Article 13(f)). Stakeholders should also note that the exclusion for financial services (see Article 13(h)) is different to that in the Classic Directive in that, with the exception of insurance services, it applies to financial services generally.

Box 8: Specific exclusions

This is a mandatory provision which the MOD brings to the attention of stakeholders for information only and no feedback is sought.

Articles 15 and 16 – Service contracts listed in Annexes I and II

37. Articles 15 and 16 are substantively the same as the equivalent provisions of the Classic Directive (Articles 20 and 21). However, stakeholders should note that the New Directive has reclassified many of the services listed at Annex IIB of the Classic Directive. These are now listed at Annex IIA of the New Directive, which means that contracts for the re-classified services are fully subject to the New Directive.

38. In Annex I, categories 2 (Foreign military-aid-related services) and 3 (Defence services, military defence services and civil defence services) are new. Category 4 (Investigation and security services) is in Annex I of the New Directive but in Annex IIB of the Classic Directive. This is also the case for categories 8 (Rail transport services), 9 (Water transport services) and 10 (Supporting and auxiliary transport services). Category 12 is adapted from its equivalent in the Classic Directive to remove banking services. The words “and evaluation tests” are added to category 13 (Research and development services) and there is no reference to advertising services. Category 20 (Training and simulation services in the fields of defence and security) is a new category.

39. Annex II is also adapted from its equivalent in the Classic Directive (Annex IIB). As well as the omission of the categories that now appear in Annex I, categories 24 (Education and vocational educational services) and 26 (Recreational, cultural and sporting services) from Annex IIB of the Classic Directive are not replicated in Annex II of the New Directive.

Box 9: Articles 15 and 16 – Service contracts listed in Annexes I and II

This is a mandatory provision which the MOD brings to the attention of stakeholders for information only and no feedback is sought.

Article 18 - Technical specifications

40. Article 18 is slightly adapted from its equivalent provision in the Classic Directive (Article 23). However, the New Directive:

- a. removes the requirement for technical specifications to take into account accessibility criteria for people with disabilities;
- b. makes specific reference to technical requirements under international standardisation agreements to guarantee interoperability; and
- c. includes in the list of standards “civil technical specifications stemming from industry and widely recognised by it” and national “defence standards” defined in point 3 of Annex III and defence material specifications similar to those standards.

Box 10: Technical specifications

This is a mandatory provision which the MOD brings to the attention of stakeholders for information only and no feedback is sought.

Articles 21 and 50 to 54 and Annex V - Sub-contracting and Rules applicable to sub-contracting

41. Article 21 of the New Directive is substantially different to Article 25 of the Classic Directive. The current Regulations simply permit a contracting authority to require an economic operator to indicate in its tender any part of the contract it intends to subcontract and the identity of any subcontractor.

42. The New Directive allows Member States either to require or to give contracting authorities/entities the option to:

- a. ask tenderers to indicate the subject matter of any proposed subcontracts;
- b. ask tenderers to indicate changes of subcontractors during the life of the contract;
- c. oblige successful tenderers to compete on an EU-wide basis all or a certain portion of its proposed subcontracts to third parties;
- d. mandate a level of sub-contracting to third parties up to a maximum of 30% of the contract value.

43. If option (c) or (d) is exercised by a contracting authority/entity, a tenderer is required to award such subcontracts in compliance with Title III of the New Directive.

44. Article 21 also gives Member States the option of permitting contracting authorities/entities to reject subcontractors selected by the tenderer either at the award stage of the main contract or during the performance of the main contract. However, this can only be done on the basis of the criteria used for the selection of tenderers in the main contract.
45. The MOD intends to implement these provisions as options for contracting authorities/entities rather than mandatory requirements.
46. Title III comprises Articles 50 to 54. Stakeholders should note that bidding consortia are not considered to be subcontractors for the purposes of the Directive but undertakings forming part of a consortium should be exhaustively listed in the tender and kept updated.
47. Title III requires successful tenderers to advertise, by a notice, subcontracts that are above the thresholds set out in Article 8, (€412,000 for supplies and services and €5,150,000 for works) in the form provided at Annex V, thereby opening up subcontracts to EU-wide competition.
48. The EC Treaty principles of transparency, equal treatment and non-discrimination apply to subcontracting covered by the New Directive Title III (Article 51). They include subcontracts which fall below the thresholds following the Commission's Interpretative Communication¹ on contract awards which are not or not fully subject to the provisions of the Public Procurement Directives and the European Court of Justice decision in Telaustria Case C-324/98 [2000] (ECR I-10745)².
49. The same principles for selection of subcontractors apply to successful tenderers as apply to contracting authorities/entities when they award public contracts.
50. Article 52(6) also gives Member States the option of permitting successful tenderers to fulfil subcontracting requirements by use of a framework agreement. Restrictions imposed on the award of contracts under that framework agreement are similar to those placed on contracting authorities/entities.
51. The MOD intends to provide this option to successful tenderers.

Box 11: Sub-contracting

The MOD would welcome views on:

1. Its proposed approach to implementing these provisions; and
2. Whether stakeholders can foresee any difficulties with rejection of subcontractors during the performance of the main contract on the basis of the original selection criteria for the main contract; and
3. The likely impact of such measures.

¹ <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2006:179:SOM:EN:HTML>

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0324:EN:HTML>

Article 22 - Security of Information

52. Article 22 of the New Directive is a new provision which is specifically designed to meet Member States' concerns about the protection of classified information when tendering for and awarding contracts relating to defence and security. The Article permits contracting authorities/entities to specify in the contract documentation the measures and requirements necessary to ensure the security of any classified information involved, required or contained in a contract.

53. Such requirements can include but are not limited to:

- a. a commitment from the tenderer and any subcontractors who may have been identified to safeguard the confidentiality of all classified information in their possession or coming to their notice during the tendering process and throughout the duration of the contract and after termination or conclusion of the contract, in accordance with relevant laws, regulations and administrative provisions;
- b. a commitment from the tenderer to obtain the commitment provided in point a. from other subcontractors to which it will subcontract during the execution of the contract;
- c. sufficient information on subcontractors already identified to enable the contracting authority/entity to determine that each of them possesses the capabilities required to appropriately safeguard the confidentiality of classified information to which they have access or which they are required to produce when carrying out their subcontracting activities;
- d. a commitment from the tenderer to provide the information required under point c. on any new subcontractor before awarding a subcontract.

54. Member States have the option of requiring tenderers to comply with any national provisions on security clearance in the respect of the measures and requirements. However, there is also a requirement on Member States to recognise security clearances that they consider are of equivalent rigour. The MOD intends to provide contracting authorities/entities with the option to require tenderers to comply with its national provisions on security clearance, in accordance with existing government-to-government bilateral arrangements.

55. Negotiated Security Arrangements/Agreements (SA) with a number of NATO, European Union and other countries provide a security assurance that any classified information/material exchanged or generated between the participants or their contractors will be afforded appropriate safeguards in accordance with the national security laws and regulations of the recipient country. The SA's recognise each country's equivalent security classifications and other security requirements such as contractor facility and personnel security clearances granted by the National/Designated Security Authorities and also establish contractual conditions and disclosure protocols etc. Invitation to Tender (ITT) and contracts placed with contractors include a security clause that references the SA and the requirement to provide security measures to protect classified information.

56. Invitation to Tender and contracts involving access to/generation of classified information by the contractor at the level of Confidential or above require the contractor site to be granted a facility security clearance by the National/Designated Security Authority of the country where the contractor is located. The provisions of the SAs permit one participant to request the other to undertake facility security clearance action on a contractor to enable a tender relating to a classified contract to be released to the contractor concerned.

57. In addition to the provisions of the bilateral SA's, nations also take into account and apply other relevant security regulations or requirements placed on them through membership of NATO and the European Union.

58. From the obligations contained in SAs and the application of other applicable regulations, mutual confidence is obtained in the security policies of such nations with regard to the protection of any classified information and the acceptability of equivalent facility and personnel security clearances for access to classified information, which is vested in the government-to-government security assurances provided under the SAs etc.

Box 12: Security of information

The MOD would welcome views on

1. Its proposed approach to implementing these provisions; and
2. Whether stakeholders foresee any difficulties with the application of this provision through the contracting process and which may need to be addressed in implementation; and
3. The likely impact of such measures on suppliers in the defence and security sectors; and
4. How the mutual recognition of equivalent security clearances should be implemented.
5. Any additional measures that stakeholders would wish to adopt e.g. audit rights, dual key approach, process observation etc?

Article 23 - Security of Supply

59. Article 23 is also a new provision to meet Member States' wish to be assured that when placing a defence or security contract with a supplier from another Member State, the contract could/would be fully performed. To that end, Article 23 permits contracting authorities/entities to require tenderers to provide certain documentation and/or commitments to provide assurance that there will be security of supply. These can include but are not limited to:

- a. certification or documentation demonstrating to the satisfaction of the contracting authority/entity that the tenderer will be able to honour its obligations regarding the export, transfer and transit of goods associated with the contract, including any supporting documentation received from the Member State(s) concerned;
- b. an indication of any restriction on the contracting authority/entity regarding disclosure, transfer or use of the products and services or any result of those products and services, which would result from export control or security arrangements;
- c. certification or documentation demonstrating that the organisation and location of the tenderer's supply chain will allow it to comply with the requirements of the contracting authority/entity concerning security of supply set out in the contract documents; and a commitment to ensure that possible changes in its supply chain during the execution of the contract will not adversely affect compliance with these requirements;

- d. a commitment from the tenderer to establish and/or maintain the capacity required to meet additional needs required by the contracting authority/entity as a result of a crisis, according to terms and conditions to be agreed;
- e. any supporting documentation received from the tenderer's national authorities regarding the fulfilment of additional needs required by the contracting authority/entity as a result of a crisis;
- f. a commitment from the tenderer to carry out the maintenance, modernisation or adaptation of the supplies covered by the contract;
- g. a commitment from the tenderer to inform the contracting authority/entity in due time of any change in its organisation, supply chain or industrial strategy that may affect its obligations to that authority/entity;
- h. a commitment from the tenderer to provide the contracting authority/entity, according to terms and conditions to be agreed, with all specific means necessary for the production of spare parts, components, assemblies and special testing equipment, including technical drawings, licenses and instructions for use, in the event that it is no longer able to provide these supplies.

60. The MOD intends to implement this provision in full in the new Regulations as a series of options for contracting authorities/entities to be used on a case by case basis.

Box 13: Security of Supply

The MOD would welcome views on:

1. Its proposed approach to implementing these provisions; and
2. Whether stakeholders can foresee any difficulties with the application of these proposals through the contracting process which may need to be addressed in implementation; and
3. The likely impact of such measures on suppliers in the defence and security sectors.
4. Any additional measures that stakeholders would wish to adopt?

Article 25 – Procedures to be applied

61. Stakeholders should note that there is no open procedure in the New Directive. Contracting authorities/entities also have a free choice between use of the negotiated procedure (with prior publication) and the restricted procedure. Competitive dialogue can be used in the same circumstances as in the Classic Directive. The negotiated procedure without publication of a contract notice can also be used, but only in limited circumstances.

Box 14: Procedures to be applied

This is a mandatory provision which the MOD brings to the attention of stakeholders for information only and no feedback is sought.

Article 28 - Cases justifying use of negotiated procedure without publication of a contract notice

62. This provision is broadly similar to its equivalent in the Classic Directive. However, there are some new elements. In Article 28(c), the non-competitive negotiated procedure (without prior publication) is available where the time periods of other procedures are incompatible with the urgency resulting from a crisis. "Crisis" is defined in the New Directive as:

"any situation in a Member State or third country in which a harmful event has occurred which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life and health of people, or has a substantial impact on property values, or requires measures in order to supply the population with necessities; a crisis shall also be deemed to have arisen if the occurrence of such a harmful event is deemed to be impending; armed conflicts and wars shall be regarded as crises..."

63. The length of contracts which can be awarded for additional deliveries (Article 28(3) (a)) and repetition of similar works and services (Article 28(4) (b)) is increased from 3 years (Classic Directive) to five years (New Directive). The MOD intends to increase the duration permitted in line with the New Directive.

64. We believe that the definition of crisis set out in the New Directive is a broadly drawn definition. Therefore we are inclined simply to repeat the definition from the New Directive.

Box 15: Cases justifying use of negotiated procedure without publication of a contract notice

The MOD welcomes feedback from stakeholders on its approach to implementing this provision.

Article 29 - Framework Agreements

65. The provisions of Article 29 on framework agreements are substantially the same as its equivalent in the Classic Directive save that the permitted duration for such agreements has been increased from four years (Classic Directive) to seven years (New Directive). There is also further clarification on what constitutes exceptional circumstances which would justify a framework agreement for longer than seven years. These include the expected service life and/or technical difficulties likely to be caused by changing a supplier.

66. The MOD intends to make the duration of framework agreements seven years.

Box 16: Framework agreements

The MOD would welcome views on its proposal to extend the duration of framework agreements from four to seven years.

Article 38 - Verification of the suitability and choice of participants and award of contracts

67. This Article is substantially the same as its equivalent in the Classic Directive (Article 44). However, in Article 38(3), the minimum number of participants invited to tender in relation to the restricted procedure has been reduced from five (Classic Directive) to three (New Directive). MOD intends to implement this minimum.

68. Article 38(3) also provides that where the contracting authority/entity considers the number of candidates requesting to participate is too low, it may re-advertise the requirement and invite candidates selected from either of the two advertisements to tender, negotiate or participate in dialogue.

Box 17: Verification of the suitability and choice of participants and award of contracts

The MOD seeks views on the reduction in the minimum number of candidates from five to three, for tenders run under the restricted procedure.

Article 39 - Personal Situation of the candidate or tenderer

69. This Article is largely the same as its equivalent in the Classic Directive (Article 45), however, there are a few new elements. First, there is a specific requirement to exclude from contracts candidates or tenderers who have been convicted of terrorist offences or offences linked to terrorist activities as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA¹ or inciting, aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision (Article 39(1) (d)).

70. Article 39(2) (c) also contains references to infringements of export legislation in respect of defence and/or security equipment as a specific example of an offence amounting to professional misconduct.

71. Article 39(2) (d) also makes it clear that it is permissible for a contracting authority/entity to exclude from a contract candidates/tenderers whom it can show have breached previous contractual requirements relating to security of information and security of supply on the basis that such a breach would constitute grave professional misconduct.

72. Article 39(2) (e) is a new provision which is intended to capture situations where a candidate or tenderer is known (by means of evidence which may include protected sources) to lack "reliability" to the extent they pose a risk to national security.

73. The MOD intends to transpose the provisions at Article 39(2) (c); Article 39(2) (d) and Article 39(2) (e) as laid out in the New Directive.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:164:0003:0007:EN:PDF>

Box 18: Personal Situation of the Candidate or Tenderer

The MOD would welcome views on:

1. Its approach to implementing the provisions at Article 39(2)(c); Article 39(2)(d) and Article 39(2)(e); and
2. Whether stakeholders can foresee any difficulties with the application of these proposal through the process of selecting tenderers which may need to be addressed in implementation; and
3. The likely impact of such measures on potential suppliers.

Article 42 - Technical and/or professional ability

74. Article 42 is adapted from Article 48 of the Classic Directive. The principal differences in terms of the evidence of technical and professional ability between the two articles are as follows:

- a. The required list of principal deliveries or services provided can go back five years (New Directive - Article 42(1)(a)(ii)) as opposed to three (Classic Directive);
- b. Checks on production capacities may be carried out as a matter of course rather than just where products or services to be provided are complex (Article 42(1)(d));
- c. The description of tools, materials, technical equipment is specifically adapted for defence and security procurements and so includes requirements to demonstrate the ability to cope with additional requirements resulting from a crisis (Article 42(1)(h));
- d. Evidence may be required to demonstrate the ability to process, store and transmit classified information at the level of protection required by the contracting authority (Article 42(1)(j)).

The MOD intends to implement these changes.

75. Article 42(1)(j) also permits Member States to require that the evidence provided must comply with their national laws on security clearances. The MOD intends to implement this provision in the same way as for Article 22 of the New Directive.

76. There is also an option for the contracting authority/entity to grant additional time, where appropriate, to determine the necessary security clearances and to request that national/designated security authorities of a Member State check various aspects in relation to a candidate, such as facilities, personnel or administrative procedures, which are proposed for the performance of a contract. The MOD intends to provide this option for contracting authorities/entities.

77. There is a new provision at Article 42(6), which states that economic operators may provide evidence of their technical or professional ability by other documents considered appropriate by a contracting authority/entity in the event that, for valid reasons, the required references cannot otherwise be provided. This is a mandatory provision that the MOD must implement.

Box 19: Technical and/or professional ability

The MOD would welcome views on:

1. Its approach to implementing the provisions of Article 42(1)(a)(ii), 42(1)(d), 42(1)(h), 42(1)(j) and Article 42(6); and
2. Whether stakeholders can foresee any difficulties with the application of these proposals through the process of selecting tenderers which may need to be addressed in implementation.

Article 43 – Quality assurance standards

78. Article 43 is substantially the same as Article 49 of the Classic Directive. However, Article 43 makes reference to independent accredited bodies as opposed to independent bodies in Article 49 of the Classic Directive. Accreditation is referenced to European accreditation standards. This is not a requirement of the Classic Directive.

79. The MOD intends to transpose “European standards concerning accreditation and certification” as “European standards, or where these do not exist, International standards, concerning accreditation and certification”. This will cover activities undertaken to International (ISO) standards that have not so far been adopted as European standards.

80. The Directive states that the contracting authority “shall also accept other evidence of equivalent quality management systems from economic operators”. MOD intends to clarify, in the Regulations, that the decision as to what evidence is equivalent is a matter for the contracting authority.

Box 20: Quality assurance standards

The MOD would welcome views on:

1. Any impact of the change from “independent bodies” to “independent accredited bodies”, which may need to be addressed in implementation; and
2. The MOD intention to use International standards for accreditation and certification, where European standards do not exist; and
3. The MOD intention to clarify, in the Regulations, that the decision as to what evidence is equivalent is a matter for the contracting authority.

Articles 55 to 64 - Rules to be applied to reviews

81. The Directive sets out national review procedures that allow suppliers to challenge procurement decisions and provide remedies to protect the rights of suppliers taking part in procurement procedures, which are substantially the same as the Remedies Directives, the provisions of which have been reproduced in the New Directive.

82. Article 56(1)(b) requires measures to be available other than those specified in Article 56(1)(a), such as payment of a sum, where infringements have not been put right. This is likely to be implemented by way of a fine on the contracting authority.
83. Article 56(5) makes it clear that defence and security interests are included in the public interest test to be applied by the courts in assessing whether to grant interim measures in the event of a breach of requirements of the New Directive.
84. Article 56(10) requires Member States to ensure that bodies responsible for review procedures guarantee an adequate level of confidentiality for classified information and other information contained in files transmitted by the parties; and to act in conformity with defence and security interests throughout the procedure.
85. Paragraph 2 of Article 56(10) gives Member States the option to decide that a specific body has sole jurisdiction for review of contracts in the fields of defence and security as it considers that the courts can deal effectively with such reviews.
86. Paragraph 3 of Article 56(10) gives Member States the option to provide that only certain individuals are permitted to conduct reviews of defence and security contracts involving classified information. Member States also have the option of imposing specific security measures concerning the registration of applications for review, the reception of documents and the storage of files.
87. The fourth paragraph of Article 56(10) places a requirement on Member States to balance the right to a fair trial with the requirements of confidentiality of classified information. The MOD is currently consulting the Ministry of Justice on the provisions of Article 56(10) before determining its implementation strategy.
88. Article 60 on ineffectiveness contains two specific defence/security related adaptations from the equivalent provision of the Remedies Directive (Article 2d).
89. The first paragraph of Article 60(3) provides Member States with the option to require review bodies not to consider a contract ineffective despite a breach which would normally require ineffectiveness where there are overriding reasons in the general interest, first and foremost in connection with defence and security interests.
90. The MOD intends to provide the courts with the power not to consider the contract ineffective in the circumstances described in the first paragraph of Article 60(3).
91. The fifth paragraph of Article 60(3) also specifies that a contract cannot be considered ineffective if the consequences of such ineffectiveness would seriously endanger the very existence of a wider defence or security programme which is essential for a Member State's security interests. The MOD does not intend to define "wider defence or security programme" but intends to leave it to the courts to decide on a case by case basis.

Box 21: Rules to be applied to reviews

The MOD is currently consulting the Ministry of Justice on these provisions but would welcome views, in particular, on "Article 56(1)(b)" and "Article 56(10)" because we don't have "an approach to implementing the provisions" as we are still consulting with MOJ.

Articles 70 and 71 – Amendments

92. These articles simply remove those procurements covered by the New Directive from the scope of the Utilities and the Classic Directive, respectively.

Box 22: Amendments

This is a mandatory provision which the MOD brings to the attention of stakeholders for information only and no feedback is sought.

Transitional policy

93. The New Directive requires the new rules to be implemented by 20 August 2011, but it does not explicitly address transitional issues. For example, the Directive does not say whether we are required to apply the new rules immediately to all current contracts and procurements in progress as soon as 20 August 2011 strikes or whether it is appropriate for a sensibly phased migration to the new rules.

94. The MOD's preference at this time would be to apply the new rules only to new procurement processes beginning after 20 August 2011. A similar approach is being adopted for the Remedies Directive and was adopted for the Classic Directive, and that transitional policy is covered in Regulation 49 of the Public Contracts Regulations 2006¹. It would also seem to be consistent with the approach taken by the European Court of Justice in case C-337/98 (Commission v France) to the interpretation of Directive 93/38/EEC (the former Utilities Procurement Directive) which similarly did not address explicitly whether it was intended to apply to procurement processes that had already begun before the time by which the Directive was required to be transposed. However, stakeholders' feedback is sought to confirm this as suitable for the effective conduct of procurement operations or whether stakeholders might prefer any alternative options or wish to draw our attention to any legal arguments for taking a different view of what is required or permitted by the Directive.

Box 23: Transitional Policy

The MOD would welcome views on the suggested transitional policy.

IMPACT ASSESSMENT

95. Impact Assessments (IA) are generally required for transposition of EU Directives. The Department for Business, Innovation and Skills (BIS) guidance on impact assessment² clarifies that an assessment should be carried out for any government proposal that:

- a) Imposes or reduces costs on businesses or the third sector;

¹ <http://www.opsi.gov.uk/si/si2006/20060005.htm#49>

² <http://www.berr.gov.uk/whatwedo/bre/consultation-guidance/page44450.html>

- b) Similarly affects costs in the public sector, unless those costs fall below a threshold of £5M, in which case only a developmental/option stage assessment is required.

96. MOD's current view is that there is unlikely to be a significant cost impact of the New Directive on either cost to businesses, the third sector or to the public sector. Any changes will affect public sector processes to some extent, but these are anticipated to be under the £5M threshold. However, MOD is using this first consultation to test this thinking and requests feedback from stakeholders. MOD's initial impact assessment is attached to this document on which comments are welcome (Annex C refers).

Box 24: Impact Assessment

MOD seeks comments on the initial impact assessment included at Annex C to this consultation document.

Conclusion

97. Directive 2009/81/EC introduces new procurement provisions. These provisions are intended to improve competition within the European defence and security market.

98. This consultation document aims to provide a UK-tailored breakdown of the main implications and the optional elements of the New Directive, and seeks stakeholder feedback on those options.

99. The MOD acknowledges that many of the issues described in this document are not straightforward. However, MOD urges stakeholders to give careful consideration to these matters and provide comments and suggestions where requested, as this will ensure a more effective and relevant transposition.

What happens next?

100. This consultation will run from 11 December 2009 to 10 March 2010. Once feedback has been analysed and the results have been collated, MOD will consider the responses and then publish a summary later in 2010 as part of a second round of consultation.

101. Prior to this public consultation, the document has been circulated for comments across government. We now seek views from across government, businesses, trade unions, professionals and the public. Responses may be submitted by letter, fax or email. When responding, please state whether you are responding as an individual or on behalf of an organisation (see Annex D, Consultation response form).

102. The consultation can be found at:

<http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/ConsultationsandCommunications/PublicConsultations/200981ECFirstConsultation>

We look forward to receiving your comments.

MOD Defence Equipment & Support
International Relations Group
December 2009

CONSULTATION CODE OF PRACTICE

1. This consultation complies with the Better Regulation Executive's *Code of Practice on Consultation*. The six consultation criteria, as outlined in the code of practice, are applicable to this consultation.

The criteria

- a) Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- b) Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- c) Ensure that your consultation is clear, concise and widely accessible.
- d) Give feedback regarding the responses received and how the consultation process influenced the policy.
- e) Monitor your department's effectiveness at consultation, including through the use of a designated consultation coordinator.
- f) Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

2. The complete code is available on the <http://www.berr.gov.uk/whatwedo/bre/consultation-guidance/page44420.html>

Comments or complaints

3. If you wish to comment on the conduct of this consultation or make a complaint about the way it has been conducted, please write to:

Sandra Eaton
Deputy Head International Relations Group
Ministry of Defence
Maple 1, Mailpoint 2133
Abbey Wood
Bristol BS34 8JH
Tel: 0117 913 0269
Fax: 0117 913 0921
Email: EUDirective-Responses@mod.uk

LIST OF ORGANISATIONS CONSULTED

AeroSpace, Defence and Security
Cabinet Office
Department for Business, Innovation and Skills
Department for Energy and Climate Change
Department for Environment, Food and Rural Affairs
Department for Transport
Foreign and Commonwealth Office
GCHQ
Gibraltar European Business Unit
HM Treasury
Home Office
National Defence Industry Council
Northern Ireland Executive
Northern Ireland Office
Office of Government Commerce
Scottish Government
Scotland Office
Wales Office
Welsh Assembly Government

ANNEX C - Summary: Intervention & Options

Department /Agency: Ministry of Defence	Title: Impact Assessment of UK Transposition of EU Directive 2009/81/EC (The Defence Directive)	
Stage: Draft	Version: 1	Date: December 2009
Related Publications: " Directives: 2007/66/EC; 2004/18/EC; 2004/17/EC "		

What is the problem under consideration? Why is government intervention necessary?

On 20 August 2009, the EU published a Directive (Council Directive 2009/81/EC – the “New Directive”) that creates new public procurement rules specifically adapted to the defence and security sectors. The problem being addressed by the EU in formulating the New Directive was to provide a more effective set of rules for public procurement in those sectors, with the aim of enabling more efficient acquisition of military or security capability under the framework of EU procurement rules and opening up the European defence market. Government intervention is necessary to transpose the New Directive by the EU’s deadline of 20 August 2011.

What are the policy objectives and the intended effects?

The policy objectives are to:

- transpose the New Directive and thereby adhere to the UK’s EU Treaty obligations;
- implement procurement rules specifically adapted to the defence and security sectors;
- open the majority of defence procurements to open competition in Europe, thereby providing industry with the opportunity to compete for programmes that may previously have been unfairly limited to national companies.

The New Directive is intended to:

- ease the conduct of business in the defence and security sectors;
- encourage some Member States away from inappropriate use of Article 296EC and the other derogations of the Treaty;
- reduce reliance on exemptions;
- increase the number of requirements advertised in the OJEU, potentially broadening the supplier base;
- mitigate risks associated with overseas suppliers e.g. export control, security of supply;
- increase in export opportunities.

The New Directive may result in:

- a more complicated procurement process, as some acquisition teams will be required to use both the New & Classic Directives;
- additional training and support costs for contracting authorities/entities;
- increased administration costs for contract competitions (this should be offset by the greater visibility of supply chain opportunities helping to ensure that prime contractors find the best, most innovative and efficient sub-contractors).

What policy options have been considered? Please justify any preferred option.

The majority of the provisions in the New Directive are mandatory. Those provisions over which European Member States have discretion are explained in the consultation documents published with this assessment. MOD is consulting stakeholders on the impact of its proposals; consultation feedback will be used to develop this impact assessment.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

This impact assessment will be subject to pre and post-legislative scrutiny by the Better Regulation Executive (BRE). MOD is consulting with BRE on the process and timescales involved.

The European Commission will review the implementation of the New Directive by 21 August 2016. This will inform the UK and other Member States of the success of the Directive.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

LORD DRAYSONDate: 7 December 2009

Summary: Analysis & Evidence

Policy Option:	Description:
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups'				
	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;">One-off (Transition)</td> <td style="width: 30%; text-align: center;">Yrs</td> </tr> <tr> <td>£</td> <td></td> </tr> </table>		One-off (Transition)	Yrs	£	
	One-off (Transition)		Yrs			
	£					
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Average Annual Cost (excluding one-off)						
£						
Total Cost (PV)		£ Not known				
Other key non-monetised costs by 'main affected groups' additional training and support costs for contracting authorities/entities; increased administration costs for contract competitions (this should be offset by the greater visibility of supply chain opportunities helping to ensure that prime contractors find the best, most innovative and efficient sub-contractors).						

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups'				
	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;">One-off</td> <td style="width: 30%; text-align: center;">Yrs</td> </tr> <tr> <td>£</td> <td style="text-align: center;">0</td> </tr> </table>		One-off	Yrs	£	0
	One-off		Yrs			
	£		0			
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;">Average Annual Benefit (excluding one-off)</td> <td></td> </tr> <tr> <td>£</td> <td></td> </tr> </table>	Average Annual Benefit (excluding one-off)		£			
Average Annual Benefit (excluding one-off)						
£						
Total Benefit (PV)		£ Not known				
Other key non-monetised benefits by 'main affected groups'						

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	England, Wales, NI [Scotland & Gibraltar]			
On what date will the policy be implemented?	20 August 2011			
Which organisation(s) will enforce the policy?	The High Court			
What is the total annual cost of enforcement for these organisations?	£ n/k			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£			
What is the value of changes in greenhouse gas emissions?	£			
Will the proposal have a significant impact on competition?	Yes			
Annual cost (£-£) per organisation (excluding one-off)	Micro	S m	Medium	Large
Are any of these organisations exempt?	No	Y	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of £	Decrease of £	Net Impact £

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

To be determined by the consultation process

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes/No	Yes/No
Small Firms Impact Test	Yes/No	Yes/No
Legal Aid	Yes/No	Yes/No
Sustainable Development	Yes/No	Yes/No
Carbon Assessment	Yes/No	Yes/No
Other Environment	Yes/No	Yes/No
Health Impact Assessment	Yes/No	Yes/No
Race Equality	Yes/No	Yes/No
Disability Equality	Yes/No	Yes/No
Gender Equality	Yes/No	Yes/No
Human Rights	Yes/No	Yes/No
Rural Proofing	Yes/No	Yes/No

CONSULTATION RESPONSE FORM

1. The closing date for this consultation is 10 March 2010.
2. Please set out your responses to this consultation using this response form.

Name: _____

Organisation's name _____

Remit (if applicable) _____

Address _____

Email _____

Return completed forms (preferably by email) to:

Cheryl Nicholson
International Relations Group
Ministry of Defence
Maple 1, Mailpoint 2133
Abbey Wood
Bristol BS34 8JH
Tel: 030 679 80868
Fax: 0117 913 0921
Email: EUDirective-Responses@mod.uk

Please tick one box from the following list of options that best describes you;

- | | |
|--------------------------|-------------------------|
| <input type="checkbox"/> | Individual |
| <input type="checkbox"/> | Central Government |
| <input type="checkbox"/> | Government Agency |
| <input type="checkbox"/> | Devolved Administration |
| <input type="checkbox"/> | Local Government |
| <input type="checkbox"/> | Third Sector |
| <input type="checkbox"/> | Private Sector |
| <input type="checkbox"/> | Small/Medium Enterprise |
| <input type="checkbox"/> | Professional Body |
| <input type="checkbox"/> | Trade Union |

Questions

Box 1: Identical/Similar provisions of the New Directive - general approach

The MOD would welcome comments on:

1. Any issues with this approach;
2. Whether the list in Annex E is considered to be accurate and, if not, to identify and explain the inaccuracies.

Box 1: Responses

Question 1

Question 2

Box 2: Article 2 - Scope

The MOD would welcome comments on:

1. The transposition of the definition of military equipment in Article 2; and
2. The transposition of “sensitive equipment”, “sensitive works” and “sensitive services”.
3. The MOD intention to interpret security classification as “Restricted” or above, particularly the arguments for and against including classifications below “Restricted” e.g. “Protect”.

Box 2: Responses

Question 1

Question 2

Question 3

Box 3: Article 3 - Mixed Contracts

The MOD would welcome comments on:

1. The proposal not to define what is meant by “objectively justifiable”; and
2. Any potential practical issues stakeholders can envisage with this provision.

Box 3: Responses

Question 1

Question 2

Box 4: Article 7 - Protection of classified information

The MOD invites feedback on implementing this provision.

Box 4: Response

Question 1

Box 5: Article 10 - Public contracts and framework agreements awarded by central purchasing bodies

The MOD would welcome any views on the relevance of such a contracting body for the Defence and Security sectors.

Box 5: Response

Question 1

Box 11: Articles 21 and 50 to 54 and Annex V - Sub-contracting and Rules applicable to sub-contracting

The MOD would welcome views on:

1. Its proposed approach to implementing these provisions; and
2. Whether stakeholders can foresee any difficulties with rejection of subcontractors during the performance of the main contract on the basis of the original selection criteria for the main contract; and
3. The likely impact of such measures.

Box 11: Responses

Question 1

Question 2

Question 3

Box 12: Article 22 - Security of information

The MOD would welcome views on

1. Its proposed approach to implementing these provisions; and
2. Whether stakeholders can foresee any difficulties with the application of this provision through the contracting process which may need to be addressed in implementation; and
3. The likely impact of such measures on suppliers in the defence and security sectors; and
4. How the option to require tenderers to comply with national provisions on security clearance should be implemented.
5. Any additional measures that stakeholders would wish to adopt e.g. audit rights, dual key approach, process observation etc?

Box 12: Responses

Question 1

Question 2

Question 3

Question 4

Question 5

Box 13: Article 23 - Security of Supply

The MOD would welcome views on:

1. Its proposed approach to implementing these provisions; and
2. Whether stakeholders can foresee any difficulties with the application of these proposals through the contracting process which may need to be addressed in implementation; and
3. The likely impact of such measures on suppliers in the defence and security sectors.
4. Any additional measures that stakeholders would wish to adopt?

Box 13: Responses

Question 1

Question 2

Question 3

Question 4

Box 15: Article 28 - Cases justifying use of negotiated procedure without publication of a contract notice

The MOD welcomes feedback from stakeholders on its approach to implementing this provision.

Box 15: Responses

Question 1

Box 16: Article 29 - Framework agreements

The MOD would welcome views on its proposal to extend the duration of framework agreements from four to seven years.

Box 16: Response

Question 1

Box 17: Article 38 - Verification of the suitability and choice of participants and award of contracts

The MOD seeks views on the reduction in minimum number of candidates from five to three, for tenders run under the restricted procedure.

Box 17: Response

Question 1

Box 18: Article 39 - Personal Situation of the candidate or tenderer

The MOD would welcome views on:

1. Its approach to implementing the provisions at Article 39(2)(c); Article 39(2)(d) and Article 39(2)(e); and
2. Whether stakeholders can foresee any difficulties with the application of these proposal through the process of selecting tenderers which may need to be addressed in implementation; and
3. The likely impact of such measures on potential suppliers.

Box 18: Responses

Question 1

Question 2

Question 3

Box 19: Article 42 - Technical and/or professional ability

The MOD would welcome views on:

1. Its approach to implementing the provisions at Article 42(1)(a)(ii), 42(1)(d), 42(1)(h), 42(1)(j) and Article 42(6); and
2. Whether stakeholders can foresee any difficulties with the application of these proposals through the process of selecting tenderers which may need to be addressed in implementation.

Box 19: Responses

Question 1

Question 2

Box 20: Article 43 - Quality assurance standards

The MOD would welcome views on:

1. Any impact of the change from “independent bodies” to “independent accredited bodies”, which may need to be addressed in implementation; and
2. The MOD intention to use International standards for accreditation and certification, where European standards do not exist; and
3. The MOD intention to clarify, in the Regulations, that the decision as to what evidence is equivalent is a matter for the contracting authority.

Box 20: Response

Question 1

Question 2

Question 3

Box 21: Articles 55 to 64 - Rules to be applied to reviews

The MOD is currently consulting the Ministry of Justice on these provisions but would welcome views, in particular, on Article 56(1)(b) and its approach to implementing the provisions at Article 56(10).

Box 21: Response

Question 1

Box 23: Transitional Policy

The MOD would welcome views on the suggested transitional policy.

Box 23: Response

Question 1

Box 24: Impact Assessment

MOD seeks comments on the initial impact assessment included at Annex C to this consultation document.

Box 24: Response

Question 1

Comparator Table Listing Classic Directive/Implementing Regulation and Corresponding Provisions of Defence Directive

1. There are some Articles of the Directive where the drafting has changed from the Classic Directive but the substance remains the same, for example because provisions that were separate paragraphs in the Classic Directive have been merged or because slightly different language has been used for the same purpose. For the purposes of the tables below, these changes have been classified as “Identical”. The table does not identify where the scope has been expanded to include contracting entities as well as contracting authorities as this is a general change applicable to the whole of the New Directive.

Table 1

Directive 2004/18/Article “The Classic Directive”	Public Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Identical/Adapted
Article 2 – Principles of awarding contracts	Regulation 4(3) – Economic operators	Article 4	Identical
Article 4 – Economic operators	Regulation 28 – Consortia and Regulation 29 – Corporations	Article 5	Identical
Article 6 – Confidentiality		Article 6	Adapted - broadly the same as Article 6 in the Classic Directive. However, there is a specific reference to confidentiality being subject to national law, in particular freedom of information rights and to contractually acquired rights.
Article 7 – Threshold amounts for public contacts	Regulation 8(1) to (6) – Thresholds	Article 8	The New Directive adapts the wording of the Classic Directive and sets the thresholds for application of the Directive as EUR 412 000 for public supply and public service contracts and EUR 5 150 000 for public works contracts.
Article 9 – Methods for calculating the estimated value of public contracts, framework agreements and dynamic purchasing systems	Regulation 8(7) to (18) - Thresholds	Article 9	Adapted – Article 9(3) has been slightly adapted to include partitioning contracts into identical separate partial contracts as part of the exclusion; and

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Directive 2004/18/Article “The Classic Directive”	Public Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Identical/Adapted
			“banking and other financial services” reference has been removed in Article 9(8)(a)(ii); and Reference to dynamic purchasing system has been removed in Article 9(9).
Article 19 – Reserved contracts	Regulation 7 – Reserved contracts	Article 14	Identical
Article 20 – Service contracts listed in Annex IIA	Regulation 2(2) - Interpretation	Article 15	Identical – NB Changes to Annex I
Article 21 – Service contracts listed in Annex IIB	Regulation 2(2) – Interpretation	Article 16	Identical – NB Changes to Annex II
Article 22 – Mixed contracts including services listed in Annex IIA and services listed in Annex IIB	Regulation 2(2) - Interpretation	Article 17	Identical
Article 24 – Variants	Regulation 10 – Variations	Article 19	Identical
Article 26 – Conditions for performance of contracts		Article 20	Adapted - contains specific examples of the types of performance conditions that can be included in contact documents relating to the performance of a contract. These are subcontracting, security of classified information and security of supply which are elaborated on further in Articles 21, 22 and 23. Environmental and social considerations are also specifically mentioned.
Article 27 – Obligations relating to taxes, environmental protection, employment protection provisions and working conditions	Regulation 38 – Obligations relating to taxes, environmental protection, employment protection and working conditions	Article 24	Adapted – includes a reference to “third countries”.
Article 28 – Use of open, restricted and negotiated	Regulation 12 – Selection of contract	Article 25	Adapted – omission of open procedure.

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Directive 2004/18/Article “The Classic Directive”	Public Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Identical/Adapted
procedures of competitive dialogue	award procedures		
Article 29 – Competitive dialogue	Regulation 18 – The competitive dialogue	Article 27	Adapted – paragraph 1 omits references to open procedure and inserts reference to negotiated procedure with publication of a contract notice.
Articles 35 – Notices	Regulation 11 – Prior information notices and Regulation 31 – Contract award notice	Article 30	Adapted – paragraph 1 does not have the thresholds in from 2004/18 and there is no reference to Part A services. Paragraph 2 omits references to open procedure and dynamic purchasing systems. The last sub-paragraph of Article 2(2) makes specific reference to defence and security interests being part of the public interest ground on which information relating to the award of a contract/conclusion of a framework agreement can be withheld.
Article 36 – Form and manner publication of notices	Regulation 42 – Publication of notices	Article 32	Identical
Article 37 – Non-mandatory publication	Regulation 42(8) – Publication of notices	Article 31	Identical
Article 38 – Time limits for receipt of requests to participate and for receipt of tenders	Regulation 15 – The open procedure Regulation 16 – The restricted procedure Regulation 17 – The negotiated procedure and Regulation 18 – The competitive dialogue procedure	Article 33	Adapted only in relation to removal of open procedure references.
Article 40 – Invitations to submit a tender, participate in the dialogue or negotiate	Regulation 16 – The restricted procedure Regulation 17 – The negotiated procedure	Article 34	Identical

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Directive 2004/18/Article “The Classic Directive”	Public Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Identical/Adapted
	and Regulation 18 – The competitive dialogue procedure		
Article 41 – Informing candidates and tenderers	Regulation 32(1) to (7) Information about contract award procedures	Article 41	Adapted – paragraph 1 removes references to dynamic purchasing systems; paragraphs 2 and 3 add in references to requirements for security of information and security of supply.
Article 42 – Rules applicable to communication	Regulation 44 – Means of communication	Article 36	Identical
Article 43 – Content of reports	Regulation 32(8) to (10) – Information about contract award procedures	Article 37	Adapted – 1(b) new (award procedure) – (d) adapted exceeding time limits and 50% limit; (e) new justification for exceeding 7 years on framework; (j) like (h) in 2004/18 but removing dynamic purchasing systems reference.
Article 46 – Suitability to pursue the professional activity	Regulation 23(4)(j) – Criteria for the rejection of economic operators and Schedule 6 – Professional or Trade Registers	Article 40	Adapted – additional clarification that Article 46 is without prejudice to Community law on freedom of establishment and freedom to provide services.
Article 47 – Economic and financial standing	Regulation 24 – Information as to economic and financial Standing	Article 41	Identical
Article 50 – Environmental management standards	Regulation 25(2)(h) and (4) – Information as to technical or professional ability	Article 44	Identical
Article 51 – Additional documentation and information	Regulation 26 – Supplementary information	Article 45	Identical
Article 52 – Official lists of approved economic operators and certification by bodies established under public or private law	Regulation 27 – Official lists of approved economic operators	Article 46	Identical

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Directive 2004/18/Article “The Classic Directive”	Public Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Identical/Adapted
Article 53 – Contract award criteria	Regulation 30 – Criteria for the award of public contract	Article 47	Adapted - there is a minor adaptation from the equivalent Article in the Classic Directive (Article 53). The illustrative list at 47.1(a) clarifies that security of supply, interoperability and operational characteristic form part of the consideration of the most economic advantageous tender.
Article 54 – Use of electronic auctions	Regulation 21 – Electronic auctions	Article 48	Adapted – removal of reference to open and dynamic purchase systems in paragraph 2.
Article 55 – Abnormally low tenders	Regulation 30(6) to (9) – Criteria for the award of a public contract	Article 49	Identical
Article 75 – Statistical obligations	Regulation 40(1) – Statistical and other reports	Article 65	Identical
Article 76 – Content of statistical report	Regulation 40 – Statistical and other reports	Article 66	Adapted
Article 77 – Advisory Committee	Implementation is not required	Article 67	Adapted
Article 78 – Revision of the thresholds	Implementation is not required	Article 68	Adapted
Article 79 – Amendments	Implementation is not required	Article 69	Adapted
Article 83 – Entry into force	Implementation is not required	Article 74	Implementation is not required
Article 84 – Addressees	Implementation is not required	Article 75	Implementation is not required
Annex VIIA – Information to be included in public contract notices	References to Annexes in Regulations	Annex IV	Adapted - Paragraph 8 (ref. to GPA) under eq. in Annex VIIA Prior Information Notice omitted; paragraph 10 under “Contract Notices” – subcontractors is new; paragraph 18 adapted - justification for frameworks over 4 years omitted; paragraph 22 of eq. Annex omitted and moved to paragraph 11 of Contract

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Directive 2004/18/Article “The Classic Directive”	Public Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Identical/Adapted
			Award Notice and amended to 7 years; paragraph 3 of Contract Award Notice adapted; paragraph 13 of eq. Annex of Contract Award Notice omitted (mediation body).
Annex VIII – Features concerning publication	Regulation 11 – Prior information notices and Regulation 42 – Publication of notices	Annex VI	Adapted – Paragraph 2(a) of eq. Annex VIII (publication on the internet) omitted.
Annex IXA– Registers – public works contracts	Regulation 23(4)(j) - Criteria for the rejection of economic operators and Schedule 6 – Professional and trade registers	Annex VIIA	Identical
Annex IXB – Registers – public supply contracts	Regulation 23(4)(j) – Criteria for the rejection of economic operators and Schedule 6 – Professional and trade registers	Annex VIIB	Identical
Annex IXC – Registers – public service contracts	Regulation 23(4)(j) – Criteria for the rejection of economic operators and Schedule 6 – Professional and trade registers	Annex VIIC	Identical
Annex X – Requirements relating to equipment for the electronic receipt of tenders, requests to participate and plans and projects in design contests	Regulation 44(6) – Means of Communication	Annex VIII	Identical

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Table 2

Current Remedies Directive (89/665/EEC) as amended by 2007/66/EC))	Implementing Regulations	Equivalent Defence Directive Article	Adapted/Identical
Article 1 – Scope and Availability of Review Procedures	1(1) – Draft Regulation 47(1) – 1(2) and 1(3) – Draft Regulation 47(2) and (47B); 1(4) – Draft Regulation 47F(1);	Article 55	Identical
Article 2a – Standstill Period	Draft Regulation 32A Last two paragraphs. - Proposed amendments to Regulation 32(2)(b) and (d)	Article 57	Identical
Article 2b – Derogations from the Standstill Period	Regulation 5 and draft regulation 32A (1) which exclude parts of the Regulations and no mention of contracts pursuant to frameworks and dynamic purchasing systems. [Art. 2b (b) is unclear – seek OGC’s input]	Article 58	Adapted – minor 58(c) removes reference to dynamic purchase system.
Article 2c – Time Limits for Applying for Review	Draft regulation 47D(3)	Article 59	Identical
Article 2e – Infringements of this Directive and alternative penalties	Draft Regulations 47J, 47L and 47N	Article 61	Identical
Article 2f – Time Limits	Draft regulation 47E	Article 62	Identical
Article 3 – Corrective Mechanism	Not implemented	Article 63	Identical
Article 3a – Content of Voluntary ex-ante transparency	Draft regulation 47K(3)(b) – incomplete	Article 64	Identical
Article 2c – Time Limits for Applying for Review	Draft regulation 47D(3)	Article 59	Identical
Article 2e – Infringements of this Directive and alternative penalties	Draft Regulations 47J, 47L and 47N	Article 61	Identical
Article 2f – Time Limits	Draft regulation 47E	Article 62	Identical
Article 3 – Corrective Mechanism	Not implemented	Article 63	Identical

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Current Remedies Directive (89/665/EEC) as amended by 2007/66/EC))	Implementing Regulations	Equivalent Defence Directive Article	Adapted/Identical
Article 3a – Content of Voluntary ex-ante transparency	Draft regulation 47K(3)(b) – incomplete	Article 64	Identical

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Table 3

Utilities Directive (2004/17/EC) Article	Utilities Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Adapted/Identical
Article 1 – Definitions	Regulation 2 – Interpretation	Article 1	Adapted
Article 2 – Contracting entities	Regulation 3 – Utilities	Article 1 by reference	Identical
Article 3- Gas, heat and electricity	Regulation 3 – Utilities and Schedule 1	Article 1 by reference	Identical
Article 4 – Water	Regulation 3 – Utilities and Schedule 1	Article 1 by reference	Identical
Article 5 – Transport services	Regulation 3 – Utilities and Schedule 1	Article 1 by reference	Identical
Article 6 – Postal services		Article 1 by reference	Identical
Article 7 – Exploration for, or extraction of, oil, gas, coal, or other solid fuels, as well as ports and airports	Regulation 3 – Utilities and Schedule 1	Article 1 by reference	Identical
Article 8 – Lists of contracting entities	Implementation is not required	Not replicated	
Article 9 – Contracts covering several activities	Regulation 5 – Application	Not replicated	
Article 10 – Principles of awarding contracts	Regulation 4(3) – Economic operators	Article 4	Identical
Article 11 – Economic operators	Regulation 28 – Consortia and Regulation 29 - Corporations	Article 5	Identical
Article 12 – Conditions relating to agreements concluded within the World Trade Organisation	Regulation 4(2) – Economic operators	Not replicated	
Article 13 – Confidentiality	Regulation 41 – Confidentiality of information	Article 6	Adapted – Article 13(1) not replicated.
Article 14 – Framework agreements	Regulation 18 – Framework agreements	Article 29	Adapted – Utilities Directive framework process not used.

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Utilities Directive (2004/17/EC) Article	Utilities Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Adapted/Identical
Article 15 – Dynamic purchasing systems	Regulation 19 – Dynamic purchasing systems	Not replicated	
Article 16 – Contract thresholds	Regulation 11 – Thresholds	Article 8	Adapted – similar to the Classic Directive.
Article 17 – Methods of calculating the estimated value of contracts, framework agreements and dynamic systems	Regulation 11 – Thresholds	Article 9	Adapted – based on Classic Directive not Utilities Directive.
Article 18 – Works and service concessions	Regulation 6(o) – General exclusions	Not replicated	
Article 19 – Contracts awarded for purposes of resale or lease to third parties	Regulation 6(c) – General exclusions	Not replicated	
Article 20 – Contracts awarded for purposes other than the pursuit of an activity covered or for the pursuit of such an activity in a third country	Regulation 6(b) – General exclusions	Not replicated	
Article 21 – Contracts which are secret or require special security measures	Regulation 6(d) – General exclusions	Article 13(a)	Adapted – same as for the Classic Directive.
Article 22 – Contracts awarded pursuant to international rules	Regulation 6(e) – General exclusions	Article 12	Adapted – same as for the Classic Directive.
Article 23 – Contracts awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture	Regulation 7 – Exclusion of contracts awarded to affiliated undertakings or joint ventures	Not replicated	
Article 24 – Contracts relating to certain services excluded from the scope of this Directive	Regulation 6(j), (k), (l), (m) & (n) – General exclusions	Article 13	Adapted – same as for the Classic Directive.

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Utilities Directive (2004/17/EC) Article	Utilities Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Adapted/Identical
Article 25 – Service contracts awarded on the basis of an exclusive right	Regulation 6(i) – General exclusions	Not replicated	
Article 26 – Contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or of fuels for the production of energy	Regulation 6(f) & (g) – General exclusions	Not replicated	
Article 27 – Contracts subject to special arrangements	Regulation 8 – Exemption in respect of certain utilities operating in the energy sector	Not replicated	
Article 28 – Reserved contracts	Regulation 10 – Reserved contracts	Article 14	Identical
Article 29 – Contracts and framework agreements awarded by central purchasing bodies	Regulation 21 – Central purchasing bodies	Article 10	Adapted – same as for the Classic Directive.
Article 30 – Procedure for establishing whether a given activity is directly exposed to competition	Regulation 9 – Exemption of contracts where activity is directly exposed to competition	Not replicated	
Article 31 – Service contracts listed in Annex XVII A	Regulation 5 – Application	Article 15	Identical
Article 32 – Service contracts listed in Annex XVII B	Regulation 5 – Application	Article 16	Identical
Article 33 – Mixed service contracts including services listed in Annex XVII A and services listed in Annexes XVII B	Regulation 2(2) - Interpretation	Article 17	Identical
Article 34 – Technical specifications	Regulation 12 – Technical specifications in contract documents	Article 18	Adapted – same as the Classic Directive.

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Utilities Directive (2004/17/EC) Article	Utilities Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Adapted/Identical
Article 35 – Communication of technical specifications	Regulation 12 – Technical specifications in contract documents	Articles 33/34	Adapted
Article 36 - Variants	Regulation 13 – Variations	Article 19	Identical
Article 37 – Subcontracting	Regulation 43 – Sub-contracting	Article 21	Adapted (see section on sub-contracting in Part 2).
Article 38 – Conditions for performance of contracts	Regulation 36 – Conditions for performance of contracts	Article 20	Adapted – same as the Classic Directive.
Article 39 – Obligations relating to taxes, environmental protection, employment protection provisions and working conditions	Regulation 35 – Obligations relating to taxes, environmental protection, employment protection and working conditions	Article 24	Adapted – based on Classic Directive so “works” are included in paragraph (2).
Article 40 – Use of open, restricted and negotiated procedures	Regulation 14 – The open, restricted and negotiated procedures and Regulation 17 – Award without a call for competition	Articles 25, 26 and 28	Adapted - Utilities Directive merges what are separate provisions in the New Directive. There is no open procedure and “artistic reasons” not included in negotiated procedure without publication of a contract notice.
Article 41 – Periodic indicative notices and notices on the existence of a system of qualification	Regulation 15 – Periodic indicative notices and Regulation 25 – Qualification system	Article 30	Adapted – same as for the Classic Directive and no system of qualification.
Article 42 – Notices used as a means of calling for competition	Regulation 16 – Call for competition	Not replicated	
Article 43 – Contract award notices	Regulation 32 – Contract award notices	Article 30(3)	Adapted – similar to Classic Directive but the Utilities Directive is different from its equivalent in the Classic Directive as Article 37 of the

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Utilities Directive (2004/17/EC) Article	Utilities Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Adapted/Identical
			Classic Directive included.
Article 44 – Form and manner of publication of notices	Regulation 40 – Publication of notices	Articles 31 and 32	Adapted – same as the Classic Directive.
Article 45 – Time-limits for the receipt of requests to participate and for the receipt of tenders	Regulation 22 – Time limits	Article 33	Adapted – Utilities Directive and Classic Directive differ slightly, e.g. Article 45(3) (b) and (c) are not replicated.
Article 46 – Open procedures: specifications, additional documents and information	Regulation 22 – Time limits	Not replicated	
Article 47 – Invitations to submit a tender or to negotiate	Regulation 22 – Time limits and Regulation 25 - Qualification system	Article 34	Adapted – no open procedure and with reference to competitive dialogue which is not in the Utilities Directive.
Article 48 – Rules applicable to communication	Regulation 42 – Means of communication	Article 36	Identical
Article 49 – Information to applicants for qualification, candidates and tenderers	Regulation 33 – Information about contract award procedures and Regulation 25 – Qualification system	Article 35	Adapted – same as the Classic Directive.
Article 50 – Information to be stored concerning awards	Regulation 37 – Preservation of records	Not replicated	
Article 51 – General provisions	Regulation 23 – General	Not replicated	
Article 52 – Mutual recognition concerning administrative, technical or financial conditions, and certificates, tests and evidence	Regulation 24 – Mutual recognition concerning administrative, technical or financial conditions	Article 43 (in respect of Article 52(2) and Article 44 in respect of Article 52(3))	Adapted – see Part 2 in respect of Article 43; Identical in relation to Article 44.
Article 53 – Qualification systems	Regulation 25 – Qualification system	Not replicated	
Article 54 – Criteria for qualitative selection	Regulation 26 – Criteria for rejection	Articles 38, 39, 41 and 42	Adapted – based on Classic Directive.

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Utilities Directive (2004/17/EC) Article	Utilities Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Adapted/Identical
	of economic operators and Regulation 27 - Criteria for selection of economic operators		Specific references such as bank statements not in the Utilities Directive and are not replicated in the New Directive. The specific examples of evidence of technical abilities not in Utilities Directive. There are a set minimum number of candidates for the restricted and negotiated procedures unlike the Utilities Directive.
Article 55 – Contract award criteria	Regulation 30 – Criteria for the award of a contract	Article 47	Adapted – same as the Classic Directive.
Article 56 – Use of electronic auctions	Regulation 20 – Electronic auctions	Article 48	Adapted – same as the Classic Directive.
Article 57 – Abnormally low tenders	Regulation 30 - Criteria for the award of a contract	Article 49	Identical
Article 58 – Tenders comprising products originating in third countries	Regulation 31- Rejection of third country tenders	Not replicated	
Article 59 – Relations with third countries as regards works, supplies and service contracts	Implementation is not required	Not replicated	
Article 60 – General provision	Regulation 34 – Design contests	Not replicated	
Article 61 – Thresholds	Regulation 34 – Design contests	Not replicated	
Article 62 – Design contests excluded	Regulation 34 – Design contents	Not replicated	
Article 63 – Rules on advertising and transparency	Regulation 34 – Design contests	Not replicated	
Article 64 – Means of communication	Regulation 34 – Design contests	Not replicated	

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Utilities Directive (2004/17/EC) Article	Utilities Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Adapted/Identical
Article 65 – Rules on the organisation of design contests, the selection of participants and the jury	Regulation 34 – Design contests	Not replicated	
Article 66 – Decisions of the jury	Regulation 34 – Design contests	Not replicated	
Article 67 – Statistical obligations	Regulation 38 – Statistical and other reports	Article 65	Adapted
Article 68 – Committee procedure	Implementation is not required	Article 67	Adapted
Article 69 – Revision of the thresholds	Implementation is not required	Article 68	Adapted
Article 70 – Amendments	Implementation is not required	Article 69	Adapted
Article 71 – Implementation of the Directive	Implementation is not required	Article 72	Adapted
Article 72 – Monitoring mechanisms	Implementation is not required	Article 73	Adapted
Article 73 – Repeal	Implementation is not required	Not replicated	
Article 74 – Entry into force	Implementation is not required	Article 74	Adapted
Article 75 – Addressees	Implementation is not required	Article 75	Adapted
Annex 1 – Contracting entities in the sectors of transport or distribution of gas or heat	Schedule 1 – Utilities and Activities	Not replicated	
Annex II – Contracting entities in the sectors of production, transport or distribution of electricity	Schedule 1 – Utilities and Activities	Not replicated	
Annex III – Contracting entities in the sectors of production, transport or distribution of drinking water	Schedule 1 – Utilities and Activities	Not replicated	

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Utilities Directive (2004/17/EC) Article	Utilities Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Adapted/Identical
Annex IV – Contracting entities in the field of rail services	Schedule 1 – Utilities and Activities	Not replicated	
Annex V – Contracting entities in the field of urban railway, tramway, trolleybus or bus services	Schedule 1 – Utilities and Activities	Not replicated	
Annex VI – Contracting entities in the postal services sector	Schedule 1 – Utilities and Activities	Not replicated	
Annex VII – Contracting entities in the sectors of exploration for and extraction of oil or gas	Schedule 1 – Utilities and Activities	Not replicated	
Annex VIII – Contracting entities in the sectors of exploration for and extraction of coal and other solid fuels	Schedule 1 – Utilities and Activities	Not replicated	
Annex IX – Contracting entities in the field of maritime or inland port or other terminal facilities	Schedule 1 – Utilities and Activities	Not replicated	
Annex X – Contracting entities in the field of airport installations	Schedule 1 – Utilities and Activities	Not replicated	
Annex XI – List of community legislation referred to in Article 30(3)	References to legislation in Regulation 9(3)(c) – Exemption of contracts where activity is directly exposed to competition	Not replicated	
Annex XII – List of activities as set out in Article 1(2), (b)	Schedule 2 – Activities constituting works	Not replicated	
Annex XIII – Information to be included in contract notices A. Open procedures	References to Annexes in Regulations	Annex IV	Adapted

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Utilities Directive (2004/17/EC) Article	Utilities Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Adapted/Identical
B. Restricted procedures C. Negotiated procedures D. Simplified contract notice for use in a dynamic purchasing system			
Annex XIV – Information to be included in the notice on the existence of a qualification system	References to Annex in Regulations	Not replicated	
Annex XV A – Information to be included in the periodic indicative notice	References to Annex in Regulations	Annex IV	Adapted – Utilities Directive differs from the Classic Directive.
Annex XV B – Information to be included in notices of publication of a periodic notice on a buyer profile not used as a means of calling for competition	References to Annex in Regulations	Annex IV	Identical
Annex XVI - Information to be included in the contract award notice	References to Annex in Regulations	Annex IV	Adapted – Utilities Directive differs from the Classic Directive.
Annex XVII A – Services within the meaning of Article 31	Schedule 3 – Categories of services	Annex I	Adapted – same as the Classic Directive.
Annex XVII B – Services within the meaning of Article 32	Schedule 3 – Categories of services	Annex II	Adapted – same as the Classic Directive.
Annex XVIII – Information to be included in the design contest notices	References to Annex in Regulations	Not replicated	
Annex XIX – Information to be included in the results of design contest notices	References to Annex in Regulations	Not replicated	
Annex XX - Features concerning publication	References to Annex in Regulations	Not replicated	

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Utilities Directive (2004/17/EC) Article	Utilities Contracts Regulations 2006 Implementation	Defence Directive Equivalent Article	Adapted/Identical
Annex XXI - Definition of certain technical specifications	Regulation 12 – Technical specifications in contract documents	Annex III	Adapted – same as the Classic Directive.
Annex XXII - Summary table of the time limits laid down in Article 45	Implementation is not required	Not replicated	
Annex XXIII - International labour law provisions within the meaning of Article 59(4)	Implementation is not required	Not replicated	
Annex XXIV – Requirements relating to devices for the electronic receipt of tenders, requests to participate, applications for qualification as well as plans and projects in contests	Regulation 42 – Means of communication	Annex VIII	Identical
Annex XXV – Time limits for transposition and implementation	Implementation is not required	Not replicated	
Annex XXVI – Correlation Table	Implementation is not required	Not replicated	

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ANNEX F

**DIRECTIVE 2009/81/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 13 July 2009**

**on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting
authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC
(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) and Articles 55 and 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾

[OJ C 100, 30.4.2009, p. 114. \(i\)](#),

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁽²⁾

[Opinion of the European Parliament of 14 January 2009 \(not yet published in the Official Journal\) and Council Decision of 7 July 2009. \(2\)](#),

Whereas:

(1) National security remains the sole responsibility of each Member State, in the fields of both defence and security.

(2) The gradual establishment of a European defence equipment market is essential for strengthening the European Defence Technological and Industrial Base and developing the military capabilities required to implement the European Security and Defence Policy.

(3) Member States agree on the need to foster, develop and sustain a European Defence Technological and Industrial Base that is capability driven, competent and competitive. In order to achieve this objective, Member States may use different tools, in conformity with Community law, aiming at a truly European defence equipment market and a level playing field at both European and global levels. They should also contribute to the in-depth development of the diversity of the European defence-related supplier base, in particular by supporting the involvement of small and medium-sized enterprises (SMEs) and non-traditional suppliers in the European Defence Technological and Industrial Base, fostering industrial cooperation and promoting efficient and responsive lower tier suppliers. In this context, they should take into account the Commission's Interpretative Communication of 7 December 2006 on the application of Article 296 of the Treaty in the field of defence procurement and the Commission Communication of 5 December 2007 on a Strategy for a stronger and more competitive European defence industry.

(4) One prerequisite for the creation of a European defence equipment market is the establishment of an appropriate legislative framework. In the field of procurement, this involves the coordination of procedures for the award of contracts to meet the security requirements of Member States and the obligations arising from the Treaty.

(5) To achieve this objective, in its resolution of 17 November 2005 on the Green Paper on defence procurement⁽³⁾ [OJ C 280 E, 18.11.2006, p. 463. \(3\)](#), the European Parliament called on the Commission to draft a directive taking particular account of the security interests of Member States, further developing the common foreign and security policy, promoting greater European cohesion and preserving the role of the Union as a 'civil power'.

(6) Better coordination of award procedures, for instance for contracts regarding logistics services, transportation and warehousing, also have the potential to reduce costs in the defence sector and significantly lower the sector's environmental impact.

(7) These procedures should reflect the Union's overall approach to security, which responds to changes in the strategic environment. The emergence of asymmetrical transnational threats has increasingly blurred the boundary between external and internal and military and non-military security.

(8) Defence and security equipment is vital for both the security and the sovereignty of Member States and for the autonomy of the Union. As a result, purchases of goods and services in the defence and security sectors are often of a sensitive nature.

(9) This results in specific requirements, particularly in the fields of security of supply and security of information. These requirements relate especially to purchases of arms, munitions and war material for the armed forces, as well as services and works directly relating thereto, but also to certain particularly sensitive purchases in the field of non-military security. In these fields, the absence of Union-wide regimes hampers the openness of defence and security markets between Member States. This situation requires rapid improvement. A Union-wide regime on security of information, including the mutual recognition of national security clearances and allowing the exchange of classified information between contracting authorities/entities and European companies, would be particularly useful. At the same time, Member States should take concrete measures to improve security of supply between them aiming at the progressive establishment of a system of appropriate guarantees.

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(10) For the purposes of this Directive, military equipment should be understood in particular as the product types included in the list of arms, munitions and war material adopted by the Council in its Decision 255/58 of 15 April 1958⁽¹⁾ [Decision defining the list of products \(arms, munitions and war material\) to which the provisions of Article 223\(1\)\(b\) — now Article 296\(1\)\(b\) — of the Treaty apply \(doc. 255/58\). Minutes of 15 April 1958: doc. 368/58.](#) (1), and Member States may limit themselves to this list only when transposing this Directive. This list includes only equipment which is designed, developed and produced for specifically military purposes. However, the list is generic and is to be interpreted in a broad way in the light of the evolving character of technology, procurement policies and military requirements which lead to the development of new types of equipment, for instance on the basis of the Common Military List of the Union. For the purposes of this Directive, military equipment should also cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material.

(11) In the specific field of non-military security, this Directive should apply to procurements which have features similar to those of defence procurements and are equally sensitive. This can be the case in particular in areas where military and non-military forces cooperate to fulfil the same missions and/or where the purpose of the procurement is to protect the security of the Union and/or the Member States, on their own territory or beyond it, against serious threats from non-military and/or non-governmental actors. This may involve, for example, border protection, police activities and crisis management missions.

(12) This Directive should take account of the needs of the contracting authority/entity throughout the whole life cycle of the product, i.e., research and development, industrial development, production, repair, modernisation, modification, maintenance, logistics, training, testing, withdrawal and disposal. These stages include, for example, studies, evaluation, storage, transport, integration, servicing, dismantling, destruction and all other services following the initial design. Some contracts may include the supply of parts, components and/or subassemblies to be incorporated in or affixed to products, and/or the supply of specific tools, test facilities or support.

(13) For the purposes of this Directive, research and development should cover fundamental research, applied research and experimental development. Fundamental research consists in experimental or theoretical work undertaken mainly with a view to acquiring new knowledge regarding the underlying foundation of phenomena and observable facts, without any particular application or use in view. Applied research also consists of original work undertaken with a view to acquiring new knowledge. However, it is directed primarily towards a particular practical end or objective. Experimental development consists in work based on existing knowledge obtained from research and/or practical experience with a view to initiating the manufacture of new materials, products or devices, establishing new processes, systems and services or considerably improving those that already exist. Experimental development may include the realisation of technological demonstrators, i.e. devices demonstrating the performance of a new concept or a new technology in a relevant or representative environment.

Research and development does not include the making and qualification of pre-production prototypes, tools and industrial engineering, industrial design or manufacture.

(14) This Directive should take account of the needs of the contracting authority/entity for works and services which, although not directly linked to the supply of military equipment or sensitive equipment, are necessary to fulfil certain military or security requirements.

(15) The award of contracts concluded in the Member States by contracting entities as referred to in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors⁽²⁾ [OJ L 134, 30.4.2004, p. 1.](#) (2) and by contracting authorities as referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts⁽³⁾ [OJ L 134, 30.4.2004, p. 114.](#) (3) is subject to compliance with the principles of the Treaty and in particular the free movement of goods, the freedom of establishment and the freedom to provide services, and with the principles deriving there from, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

Transparency and competition obligations for contracts below the application thresholds for this Directive should be determined by Member States in compliance with those principles and taking account, in particular, of situations where there is a cross-border interest. In particular, it is for Member States to determine the most suitable arrangements for awarding such contracts.

For contracts above a certain value, it is advisable to draw up provisions for the Community coordination of national procedures for the award of such contracts which are based on these principles so as to guarantee their effects and an effective opening-up of procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the above-mentioned rules and principles and with other rules of the Treaty.

(16) Articles 30, 45, 46, 55 and 296 of the Treaty make provision for specific exceptions to the application of the principles set out in the Treaty and, consequently, to the application of law derived there from. It therefore follows that none of the provisions of this Directive should prevent the imposition or application of any measures considered necessary to safeguard interests recognised as legitimate by these provisions of the Treaty.

This means in particular that the award of contracts which fall within the field of application of this Directive can be exempted from the latter where this is justified on grounds of public security or necessary for the protection of essential security interests of a Member State. This can be the case for contracts in the fields of both defence and security which necessitate such extremely demanding security of supply requirements or which are so confidential and/or important for national sovereignty that even the specific provisions of this Directive are not sufficient to safeguard Member States' essential security interests, the definition of which is the sole responsibility of Member States.

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(17) Nevertheless, in accordance with the case-law of the Court of Justice of the European Communities, the possibility of recourse to such exceptions should be interpreted in such a way that their effects do not extend beyond that which is strictly necessary for the protection of the legitimate interests that those Articles help to safeguard. Thus, the non-application of this Directive must be proportionate to the aims pursued and cause as little disturbance as possible to the free movement of goods and the freedom to provide services.

(18) Contracts relating to arms, munitions and war material awarded by contracting authorities/entities operating in the field of defence are excluded from the scope of the Government Procurement Agreement (GPA) concluded at the World Trade Organization. The other contracts covered by this Directive are also exempted from the application of the GPA by virtue of Article XXIII thereof. Article 296 of the Treaty and Article XXIII(1) of the GPA have a different scope and are subject to different standards of judicial review. Member States may still rely on Article XXIII(1) of the GPA in situations where Article 296 of the Treaty cannot be invoked. The two provisions have therefore to meet different conditions for application.

This exclusion means also that in the specific context of defence and security markets, Member States retain the power to decide whether or not their contracting authority/entity may allow economic operators from third countries to participate in contract award procedures. They should take that decision on grounds of value for money, recognizing the need for a globally competitive European Defence

Technological and Industrial Base, the importance of open and fair markets and the obtaining of mutual benefits. Member States should press for increasingly open markets. Their partners should also demonstrate openness, on the basis of internationally-agreed rules, in particular as concerns open and fair competition.

(19) A contract shall be deemed to be a works contract only if its subject-matter specifically covers the execution of activities under Division 45 of the 'Common Procurement Vocabulary' laid down by Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV)⁽¹⁾ OJ L 340, 16.12.2002, p. 1. (1) (hereinafter the 'CPV'), even if the contract covers the provision of other services necessary for the execution of such activities. Service contracts may, in some cases, include works. However, insofar as such works are incidental to the principal subject-matter of the contract, and are only 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 works contract.

(20) Defence and security contracts often contain classified information which the laws, regulations or administrative provisions in force in the Member State concerned require, for security reasons, to be protected from unauthorised access. In the military field, the Member States have systems for classifying this information for military purposes. However, when it comes to non-military security matters, there is more diversity in Member States' practice, where other information must similarly be protected. Therefore, it is appropriate to make use of a concept which takes into account the diversity of practices in Member States and can encompass both the military and non-military fields. At any rate, procurement in these fields should not, where appropriate, affect the obligations arising from Commission Decision 2001/844/EC, ECSC, Euratom of 29 November 2001 amending its internal Rules of Procedure⁽¹⁾ OJ L 317, 3.12.2001, p. 1. (1) or Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations⁽²⁾ OJ L 101, 11.4.2001, p. 1. (2) Moreover, Article 296(1)(a) of the Treaty gives Member States the possibility to exempt contracts in the fields of both defence and security from the rules of this Directive if the application of this Directive would oblige them to supply information, the disclosure of which they consider contrary to the essential interests of their security. This can be the case in particular where contracts are so sensitive that their very existence must be kept secret.

(21) The contracting authorities/entities should be allowed to use framework agreements, which make it necessary to provide a definition of framework agreements and specific rules. Under these rules, when a contracting authority/entity 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 this framework agreement during its term of validity either by applying the terms set forth in the framework agreement or, if not all terms have been fixed in advance, by reopening competition between the parties to the framework agreement. The reopening of competition should comply with certain rules, the aim of which is to guarantee the required flexibility and compliance with the general principles, in particular the principle of equal treatment. For the same reasons, the term of framework agreements should be limited and should not exceed seven years, except in cases that are duly justified by the contracting authorities/entities.

(22) Contracting authorities/entities may make use of electronic purchasing techniques, providing such use complies with the rules drawn up under this Directive and with the principles of equal treatment, non-discrimination and transparency. Since use of the technique of electronic auctions is likely to increase, such auctions should be given a Community definition and governed by specific rules in order to ensure that they operate in full accordance with those principles. To that end, provision should be made for such electronic auctions to deal only with contracts for works, supplies or services for which the specifications can be determined with precision. Such may in particular be the case for recurring supplies, works and service contracts. With the same objective, it must also be possible to establish the respective ranking of the tenderers at any stage of the electronic auction. Recourse to electronic auctions enables contracting authorities/entities to ask tenderers 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. In order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting authority/entity, may be the object of electronic auctions, that is, only the elements which are quantifiable so that they can be expressed in figures or percentages. On the other hand, those aspects of tenders which imply an appreciation of non-quantifiable elements should not be the object of electronic

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auctions. Consequently, certain works contracts and certain service contracts having as their subject-matter intellectual performances, such as the design of works, should not be the object of electronic auctions.

(23) Centralised purchasing techniques help to increase competition and streamline purchasing. Consequently, Member States should be allowed to provide that contracting authorities/entities may purchase goods, works and/or services through a central purchasing body. Provision should therefore be made for a Community definition of central purchasing bodies and of the conditions under which, in accordance with the principles of non-discrimination and equal treatment, contracting authorities/entities purchasing works, supplies and/or services through a central purchasing body may be deemed to have complied with this Directive. A contracting authority/entity which is bound to apply this Directive should in any event be eligible to act as a central purchasing body. At the same time, Member States should also be free to designate European public bodies not subject to this Directive, such as the European Defence Agency, as central purchasing bodies, provided that such bodies apply procurement rules compliant with all the provisions of this Directive to those purchases.

(24) Contracting authorities/entities may find themselves obliged to award a single contract for acquisitions which is covered partially by this Directive, with the remaining part either falling within the scope of Directive 2004/17/EC or Directive 2004/18/EC or not being subject to this Directive, Directive 2004/17/EC or Directive 2004/18/EC. This applies when the relevant procurements cannot, for objective reasons, be separated and awarded through separate contracts. In such cases the contracting authorities/entities should be able to award a single contract, provided that their decision is not taken for the purpose of excluding contracts from the application of this Directive or of Directive 2004/17/EC or Directive 2004/18/EC.

(25) Multiplying the number of thresholds for applying coordinated provisions complicates matters for contracting authorities/entities. Given the average value of contracts in the fields of defence and security, it is appropriate to align the application thresholds of this Directive to the thresholds that already have to be met by contracting entities in applying Directive 2004/17/EC. The thresholds of this Directive should also be revised together with those of Directive 2004/17/EC when the latter thresholds are revised.

(26) In addition, provision should be made for cases where this Directive does not apply because specific rules on the awarding of contracts which derive from international agreements or arrangements between Member States and third countries apply. The rules under certain agreements relating to the stationing of troops from a Member State in another Member State or a third country, or the stationing of troops from a third country in a Member State, should also preclude the use of award procedures under this Directive. This Directive should not apply either to contracts awarded by international organisations for their purposes or to contracts which must be awarded by a Member State in accordance with rules that are specific to such organisations.

(27) In the fields of defence and security, some contracts are so sensitive that it would be inappropriate to apply this Directive, despite its specificity. That is the case for procurements provided by intelligence services, or procurements for all types of intelligence activities, including counter-intelligence activities, as defined by Member States. It is also the case for other particularly sensitive purchases which require an extremely high level of confidentiality, such as, for example, certain purchases intended for border protection or combating terrorism or organised crime, purchases related to encryption or purchases intended specifically for covert activities or other equally sensitive activities carried out by police and security forces.

(28) Member States often conduct cooperative programmes to develop new defence equipment together. Such programmes are particularly important because they help to develop new technologies and bear the high research and development costs of complex weapon systems. Some of these programmes are managed by international organisations, namely the *Organisation conjointe de coopération en matière d'armement* (OCCAR) and NATO (via specific agencies), or by agencies of the Union, such as the European Defence Agency, which then award contracts on behalf of Member States. This Directive should not apply to such contracts. For other such cooperative programmes, contracts are awarded by contracting authorities/entities of one Member State also on behalf of one or more other Member States. In these cases too, this Directive should not apply.

(29) In the event that armed forces or security forces from Member States conduct operations beyond the borders of the Union, and when imposed by operational requirements, authorisation should be given to contracting authorities/entities deployed in the field of operations not to apply the rules of this Directive when they award contracts to economic operators located in the area of operations, including with respect to civilian purchases directly connected to the conduct of those operations.

(30) Given the specificity of the defence and security sector, purchases of equipment as well as works and services by one government from another should be excluded from the scope of this Directive.

(31) 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 procurement rules inappropriate.

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

(33) Financial services are also entrusted to persons or bodies under conditions that are not compatible with the application of procurement rules.

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(34) 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 service contracts contributes to this end. This Directive should 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/entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority/entity, are therefore not covered by this Directive.

(35) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for contracts to such workshops or reserve performance of contracts to the context of sheltered employment programmes.

(36) For the purpose of applying this Directive to the service contracts falling within its scope and for monitoring purposes, services should be subdivided into categories that correspond to particular headings of the CPV classification and brought together in two Annexes according to the regime to which they are subject. As regards services in Annex II, the relevant provisions of this Directive should be without prejudice to the application of Community rules specific to the services in question. However, in order to apply the provisions of this Directive instead of those of Directive 2004/17/EC or Directive 2004/18/EC, it has to be established that the relevant service contracts come within the scope of application of this Directive.

(37) As regards service contracts, full application of this Directive should be limited, for a transitional period, to contracts where its provisions will permit the full potential for increased cross-border trade to be realised. It is necessary to monitor contracts for other services during this transitional period before a decision is taken on the full application of this Directive.

(38) The technical specifications drawn up by contracting authorities/entities need to allow procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions. To do so, technical specifications should, on the one hand, be established on the basis of performance and functional requirements. On the other hand, where reference is made to the European standard or to international or national standards, including those specific to the field of defence, tenders based on other equivalent arrangements must be considered by the contracting authorities/entities. This equivalence can be assessed in particular with regard to interoperability and operational efficiency requirements. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting authorities/entities must be able to provide a reason for any decision that equivalence does not exist in a given case. There are also international agreements on standardisation which aim to ensure the interoperability of the armed forces and which can have the force of law in Member States. Should one of these agreements apply, the contracting authorities/entities may demand that tenders comply with the standards described in that agreement. The technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the contracting authority/entity cover.

(39) The detailed technical specifications and additional information concerning contracts must, as is customary in the Member States, be given in the contract documents for each contract, or in an equivalent document.

(40) Potential subcontractors should not be discriminated against on grounds of nationality. In the context of defence and security, it can be appropriate for contracting authorities/entities to oblige the successful tenderer to organise a transparent and non-discriminatory competition when awarding subcontracts to third parties. This obligation may apply to all subcontracts or only to specific subcontracts chosen by the contracting authority/entity.

In addition, it seems appropriate to complement the tenderer's right to subcontract with the option offered to the Member State to allow or to require its contracting authorities/entities to ask that subcontracts representing at least a certain share of the value of the contract be awarded to third parties on the understanding that related undertakings are not to be regarded as third parties. When such a share is required, the successful tenderer should award subcontracts following a transparent and non-discriminatory competition, so that all interested undertakings have the same opportunity to benefit from the advantages of subcontracting. At the same time, the proper functioning of the successful tenderer's supply chain should not be jeopardised. Therefore, the percentage that can be subcontracted to third parties at the request of the contracting authority/entity should appropriately reflect the object and value of the contract.

During a negotiated procedure or competitive dialogue with subcontracting requirements, the contracting authority/entity and the tenderers may discuss subcontracting requirements or recommendations with a view to ensuring that the contracting authority/entity is fully informed of the impact of different subcontracting options on, in particular, cost, quality or risk. In any event, subcontractors initially proposed by the successful tenderer should be free to participate in competitions organised for the award of subcontracts.

In the context of defence and security markets, the Member States and the Commission should also encourage the development and dissemination of best practices between Member States and European industry with a view to promoting free movement and competitiveness in Union subcontracting markets, as well as the effective management of suppliers and SMEs, in order to achieve the best value for money. Member States should communicate to all successful tenderers the benefits of transparent and competitive tendering and supplier diversity for subcontracts, and develop and disseminate best practice on supply-chain management in the defence and security markets.

(41) 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 the contract documents.

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(42) In particular, the conditions of performance may contain requirements by the contracting authorities/entities as regards security of information and security of supply. These requirements are particularly important given the sensitive nature of the equipment covered by this Directive, and concern the whole of the supply chain.

(43) In order to ensure security of information, contracting authorities/entities may require in particular commitments from both contractors and subcontractors to protect classified information against unauthorised access, as well as sufficient information regarding their capacity to do so. In the absence of a Community regime on security of information, it is for the contracting authorities/entities or Member States to define these requirements in accordance with their national laws and regulations, and to determine whether they consider security clearances issued in accordance with the national law of another Member State as equivalent to those issued by their own competent authorities.

(44) Security of supply can imply a great variety of requirements, including, for example, internal rules between subsidiaries and the parent company with respect to intellectual property rights, or the provision of critical service, maintenance and overhaul capacities to ensure support for purchased equipment throughout its life-cycle.

(45) In any case, no performance conditions may pertain to requirements other than those relating to the performance of the contract itself.

(46) The laws, regulations and collective agreements, at both national and Community levels, which are in force in the areas of employment conditions and safety at work apply during performance of a contract, provided 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 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⁽ⁱ⁾ OJ L 18, 21.1.1997, p. 1. (i) 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 contract.

(47) The contracts covered by this Directive are characterised by specific requirements in terms of complexity, security of information or security of supply. Extensive negotiation is often required to satisfy these requirements when awarding contracts. As a result, the contracting authorities/entities may use the negotiated procedure with the publication of a contract notice, as well as the restricted procedure, for contracts covered by this Directive.

(48) Contracting authorities/entities which carry out particularly complex projects may, without any fault on their part, find it objectively impossible to define the means of satisfying their needs or to assess what the market can offer in the way of technical solutions and/or financial or legal solutions. This situation may arise in particular in the case of projects requiring the integration or combination of several technological or operational capabilities, or projects involving complex and structured financing, the financial and legal make-up of which cannot be defined in advance. In this case, use of the restricted procedure and the negotiated procedure with the publication of a contract notice would not be feasible, as it would not be possible to define the contract with enough precision to allow candidates to draw up their offers. It is therefore necessary to provide for a flexible procedure ensuring competition between economic operators and allowing the contracting authorities/entities 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 aspect of the tender, by imposing substantial new requirements on the successful tenderer or by involving any tenderer other than the one selected as the most economically advantageous.

(49) Before launching a procedure for the award of a contract, contracting authorities/entities may, using a technical dialogue, seek or accept advice which may be used in the preparation of specifications, provided, however, that such advice does not have the effect of precluding competition.

(50) Use of the negotiated procedure with publication of a contract notice could be impossible or entirely inappropriate in certain exceptional circumstances. The contracting authorities/entities should thus, in certain very specific cases and circumstances, be able to use the negotiated procedure without publication of a contract notice.

(51) Certain circumstances should be partly the same as those provided for in Directive 2004/18/EC. In this respect, consideration should be given in particular to the fact that defence and security equipment is often technically complex. Consequently, incompatibility or disproportionate technical difficulties in operation and maintenance justifying the use of the negotiated procedure without publication of a contract notice in the case of supply contracts for additional deliveries should be assessed in the light of this complexity and the associated requirements for interoperability and standardisation of equipment. This is the case, for example, for the integration of new components into existing systems or for the modernisation of such systems.

(52) It may be the case for certain purchases within the scope of this Directive that only one economic operator is able to execute the contract because it holds exclusive rights, or for technical reasons. In such cases, the contracting authority/entity should be allowed to award contracts or framework agreements directly to that economic operator. However, technical reasons for only one economic operator being able to execute a contract should be rigorously defined and justified on a case-by-case basis. They could include, for instance, strict technical impracticability for a candidate other than the chosen economic operator to achieve the required goals, or the necessity to use specific know-how, tools or means which only one operator has at its disposal. This may be the case, for example, for the modification or retrofitting of particularly complex equipment. Technical reasons may also derive from specific interoperability or safety requirements which must be fulfilled in order to ensure the functioning of the armed forces or security forces.

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(53) The specific nature of the contracts subject to this Directive also demonstrates the need to provide for new circumstances which may arise in the fields covered by it.

(54) The armed forces of Member States may, for example, be called on to intervene in crisis situations abroad, for instance as part of peace-keeping operations. At the launch, or during the course, of such an intervention, the security of Member States and their armed forces may necessitate the award of certain contracts at a speed which is incompatible with the usual deadlines imposed by the award procedures laid down by this Directive. Such emergencies could also arise for the security forces, for example in the case of a terrorist attack on the territory of the Union.

(55) Stimulating research and development is a key way of strengthening the European Defence Technological and Industrial Base, and the opening-up of procurement helps to achieve this objective. The importance of research and development in this specific field justifies maximum flexibility in the award of contracts for research supplies and services. At the same time, however, this flexibility should not preclude fair competition in the later phases of the life cycle of a product. Research and development contracts should therefore cover activities only up to the stage where the maturity of new technologies can be reasonably assessed and de-risked. Research and development contracts should not be used beyond that stage as means of avoiding the provisions of this Directive, including by predetermining the choice of tenderer for the later phases.

On the other hand, the contracting authority/entity should not have to organise a separate tender for the later phases if the contract which covers the research activities already includes an option for those phases and was awarded through a restricted procedure or a negotiated procedure with the publication of a contract notice, or, where applicable, a competitive dialogue.

(56) In order to ensure transparency, provision should be made for rules on publication by the contracting authorities/entities of appropriate information prior to, and at the end of, the award procedure. In addition, further specific information should be provided to candidates and tenderers regarding the results of that procedure. However, contracting authorities/entities should be allowed to withhold some of the information so required when and insofar as its release would impede law enforcement or otherwise be contrary to the public interest, harm the legitimate commercial interests of economic operators or might prejudice fair competition between them. In the light of the nature and the features of the works, supplies and services covered by this Directive, grounds of public interest relating to compliance with national mandatory provisions falling within the scope of national public policy, notably with regard to defence and security, are of particular relevance in this regard.

(57) In view of new developments in information and communications technology, and the simplifications these can bring, electronic means should be 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.

(58) To ensure the development of effective competition in the field of procurement covered by this Directive, it is necessary that contract notices drawn up by the contracting authorities/entities 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, they must be given adequate information as regards the subject-matter of the contract and the conditions attached thereto. Improved visibility should therefore be ensured for public notices by means of appropriate instruments, such as standard contract notice forms and the CPV, which is the reference nomenclature for contracts.

(59) Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures⁽¹⁾ [OJ L 13, 19.1.2000, p. 12](#). ⁽¹⁾ 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)⁽²⁾ [OJ L 178, 17.7.2000, p. 1](#). ⁽²⁾ should, in the context of this Directive, apply to the transmission of information by electronic means. Procurement procedures require a level of security and confidentiality higher than that required by those Directives. Accordingly, devices for the electronic receipt of offers and requests to participate should comply with specific additional requirements. To this end, the use of electronic signatures, in particular advanced electronic signatures, should be encouraged to as great an extent as possible. Moreover, the existence of voluntary accreditation schemes could constitute a favourable framework for enhancing the level of certification service provision for these devices.

(60) The use of electronic means leads to savings in time. As a result, provision should be made for reducing the minimum time-limits for receipt of offers and requests to participate where electronic means are used, subject however to the condition that they are compatible with the specific modes of transmission envisaged at Community level.

(61) Verification of the suitability of candidates and the selection thereof should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities/entities 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/entity should be 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, where appropriate, demand of economic operators before admitting them to the procurement procedure.

(62) A contracting authority/entity may limit the number of candidates in the restricted and negotiated procedures with publication of a contract notice and in a competitive dialogue. Any reduction in the number of candidates should be performed on the basis of objective

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criteria indicated in the contract notice. For criteria relating to the personal situation of economic operators, a general reference in the contract notice to the situations set out in this Directive may suffice.

(63) In the competitive dialogue and 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/entities should be entitled to make provision for the procedure to be conducted in successive stages in order gradually to 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 it, ensure that there is genuine competition.

(64) The relevant Community rules on the 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.

(65) The award of contracts to economic operators which have participated in a criminal organisation or which have been found guilty of corruption or fraud to the detriment of the financial interests of the European Communities, money laundering, the financing of terrorism or terrorist and terrorism-related offences, should be avoided. Where appropriate, the contracting authorities/entities should ask candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of a candidate or tenderer, may seek the cooperation of the competent authorities of the Member State concerned. Such economic operators should be excluded as soon as the contracting authority/entity 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 procurement legislation on unlawful agreements which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct. It should also be possible to exclude economic operators if the contracting authority/entity has information, where applicable provided by protected sources, establishing that they are not sufficiently reliable so as to exclude risks to the security of the Member State. Such risks could derive from certain features of the products supplied by the candidate, or from the shareholding structure of the candidate.

(66) Non-compliance with national provisions implementing Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation⁽¹⁾ OJ L 303, 2.12.2000, p. 16. (1) and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions⁽²⁾ OJ L 39, 14.2.1976, p. 40. (2) which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

(67) Given the sensitive nature of the defence and security sectors, the reliability of economic operators to which contracts are awarded is vital. This reliability depends, in particular, on their ability to respond to requirements imposed by the contracting authority/entity with respect to security of supply and security of information. In addition, nothing in this Directive should prevent a contracting authority/entity from excluding an economic operator at any point in the process for the award of a contract if the contracting authority/entity has information that to award all or any part of the contract to that economic operator could cause a risk to the essential security interests of that Member State.

(68) In the absence of a Community regime as regards the security of information, it is for the contracting authorities/entities or Member States to define the level of technical capacity which is required in this regard for participation in an award procedure and to assess whether candidates have achieved the required security level. In many cases, Member States have bilateral security agreements with rules on the mutual recognition of national security clearances. Even where such agreements exist, the capacities of economic operators from other Member States as regards security of information can be verified, and such verification should be carried out in accordance with the principles of non-discrimination, equal treatment and proportionality.

(69) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in a transparent and objective manner under conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: 'the lowest price' and 'the most economically advantageous tender'.

(70) To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation, which has been established by case-law, to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities/entities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria, in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting authorities/entities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.

(71) Where the contracting authorities/entities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority/entity. The determination of these criteria depends on the object of the contract, since they must allow the level of performance

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offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications and the value for money of each tender to be measured.

(72) Compliance with transparency and competition obligations should be ensured by an efficient review system, based on the system which Council Directives 89/665/EEC⁽¹⁾

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33). (1) and 92/13/EEC⁽²⁾ Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14). (2), as amended by Directive 2007/66/EC of the European Parliament and of the Council⁽³⁾ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p. 31). (3), provide for contracts covered by Directives 2004/17/EC and 2004/18/EC. In particular, the possibility of challenging the award procedure before the contract is signed should be provided for, as should the guarantees necessary for the efficiency of the review, such as the standstill period. The possibility of challenging illegal direct awards or contracts concluded in violation of this Directive should also be provided for.

(73) However, review procedures should take into account the protection of defence and security interests as regards the procedures of review bodies, the choice of interim measures or penalties for infringements of obligations relating to transparency and competition. In particular, Member States should be able to provide that the review body independent of the contracting authority/entity, may not consider a contract ineffective, even though it has been awarded illegally on the grounds referred to in this Directive, where it finds, after having examined all relevant aspects, that the exceptional circumstances of the case concerned require certain overriding reasons relating to a general interest to be respected. In the light of the nature and features of the works, supplies and services covered by this Directive, such overriding reasons should be first and foremost related to the general interests of defence and security of Member States. This can be the case, for example, when the ineffectiveness of a contract would seriously endanger not only the fulfilment of the specific project aimed at by it, but the very existence of a wider defence and/or security programme of which the project is a part.

(74) Certain technical conditions, and in particular those concerning notices and statistical reports, as well as the nomenclature used and the conditions of reference to that nomenclature, need to be adopted and amended in the light of changing technical requirements. It is therefore appropriate to put in place a flexible and rapid adoption procedure for this purpose.

(75) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽⁴⁾ OJ L 184, 17.7.1999, p. 23. (4).

(76) In particular, the Commission should be empowered to revise the threshold amounts for contracts by aligning them to the thresholds laid down in Directive 2004/17/EC and to amend certain reference numbers in the CPV nomenclature and the procedures for reference in notices to certain headings in the CPV, as well as the technical details and characteristics of devices for electronic receipt. Since those measures are of general scope and are designed to amend non-essential elements of this Directive, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

(77) When, on imperative grounds of urgency, the normal time-limits for the regulatory procedure with scrutiny cannot be complied with, the Commission should be able to apply the urgency procedure provided for in Article 5a(6) of Decision 1999/468/EC for the adoption of these measures.

(78) In accordance with point 34 of the Inter-institutional agreement on better law-making⁽⁵⁾ OJ C 321, 31.12.2003, p. 1. (5), Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(79) The Commission should carry out a periodic assessment to examine whether the defence equipment market is functioning in an open, transparent and competitive way, including the impact of this Directive on the market, for example on involvement of SMEs,

HAVE ADOPTED THIS DIRECTIVE:

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TITLE I

DEFINITIONS, SCOPE AND GENERAL PRINCIPLES

Article 1 **Definitions**

For the purposes of this Directive, the following definitions shall apply:

1. 'Common Procurement Vocabulary (CPV)' means the reference nomenclature applicable to contracts awarded by contracting authorities/entities, as adopted by Regulation (EC) No 2195/2002;
2. 'Contracts' means contracts for pecuniary interest concluded in writing as referred to in Article 1(2)(a) of Directive 2004/17/EC and Article 1(2)(a) of Directive 2004/18/EC;
3. 'Works contracts' means contracts having as their object either the execution, or both the design and execution, of works related to one of the activities mentioned in Division 45 of the CPV, or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority/entity. A 'work' means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic or technical function;
4. 'Supply contracts' means contracts other than works contracts having as their object the purchase, lease, rental or hire-purchase, with or without the option to buy, of products.

A contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations shall be considered to be a 'supply contract';
5. 'Service contracts' means contracts other than works or supply contracts having as their object the provision of services.
A contract having as its object both products and services shall be considered to be a 'service contract' if the value of the services in question exceeds that of the products covered by the contract.

A contract having as its object services and including activities mentioned in Division 45 of the CPV that are only incidental to the principal object of the contract shall be considered to be a service contract;
6. 'Military equipment' means equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material;
7. 'Sensitive equipment', 'sensitive works' and 'sensitive services' means equipment, works and services for security purposes, involving, requiring and/or containing classified information;
8. 'Classified information' means any information or material, regardless of the form, nature or mode of transmission thereof, to which a certain level of security classification or protection has been attributed, and which, in the interests of national security and in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, requires protection against any misappropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any other type of compromise;
9. 'Government' means the State, regional or local government of a Member State or third country;
10. 'Crisis' means any situation in a Member State or third country in which a harmful event has occurred which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life and health of people, or has a substantial impact on property values, or requires measures in order to supply the population with necessities; a crisis shall also be deemed to have arisen if the occurrence of such a harmful event is deemed to be impending; armed conflicts and wars shall be regarded as crises for the purposes of this Directive;
11. 'Framework agreement' means an agreement between one or more contracting authorities/entities 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;
12. 'Electronic auction' means 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.

Consequently, certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, may not be the object of electronic auctions;

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13. ‘Contractor’, ‘supplier’ and ‘service provider’ means any natural or legal person or public entity or consortium of such persons and/or bodies which offers on the market to execute works, supply products and provide services, respectively;

14. ‘Economic operator’ means a contractor, supplier or service provider. It is used merely in the interests of simplification;

15. ‘Candidate’ means an economic operator which has sought an invitation to take part in a restricted or negotiated procedure or a competitive dialogue;

16. ‘Tenderer’ means an economic operator which has submitted a tender under a restricted or negotiated procedure or a competitive dialogue;

17. ‘Contracting authorities/entities’ means contracting authorities as referred to in Article 1(9) of Directive 2004/18/EC and contracting entities as referred to in Article 2 of Directive 2004/17/EC;

18. ‘Central purchasing body’ means a contracting authority/entity as referred to in Article 1(9) of Directive 2004/18/EC and Article 2(1)(a) of Directive 2004/17/EC, or a European public body, which:

- acquires supplies and/or services intended for contracting authorities/entities, or,
- awards contracts or concludes framework agreements for works, supplies or services intended for contracting authorities/entities,

19. ‘Restricted procedures’ means procedures in which any economic operator may ask to participate and whereby only those economic operators invited by the contracting authority/entity may submit a tender;

20. ‘Negotiated procedures’ means procedures in which the contracting authority/entity invites the economic operators of its choice and negotiates the terms of the contract with one or more of these;

21. ‘Competitive dialogue’ means a procedure in which any economic operator may ask to participate and whereby the contracting authority/entity conducts a dialogue with the candidates admitted to that 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.

For the purposes of recourse to the procedure referred to in the first subparagraph, a contract is considered to be ‘particularly complex’ where the contracting authority/entity is not objectively able:

- to define the technical means in accordance with Article 18(3)(b), (c) or (d), capable of satisfying its needs or objectives, and/or,
- to specify the legal and/or financial make-up of a project,

22. ‘Subcontract’ means a contract for pecuniary interest concluded in writing between a successful tenderer for a contract and one or more economic operators for the purposes of carrying out that contract and having as its object works, supplies of products or the performance of services;

23. ‘Related undertaking’ means any undertaking over which the successful tenderer can exert a dominant influence, whether directly or indirectly, or any undertaking which can exert a dominant influence on the successful tenderer or which, as the successful tenderer, is subject to the dominant influence of another undertaking as a result of ownership, financial participation or the rules which govern it. A dominant influence on the part of the undertaking is presumed when, directly or indirectly in relation to another undertaking, it:

- holds a majority of the undertaking’s subscribed capital,
- controls a majority of the votes attached to the shares issued by the undertaking, or,
- is entitled to appoint more than half of the undertaking’s administrative, management or supervisory bodies,

24. ‘Written’ or ‘in writing’ means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means;

25. ‘Electronic means’ means any means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

26. ‘Life cycle’ means all the possible successive stages of a product, i.e. research and development, industrial development, production, repair, modernisation, modification, maintenance, logistics, training, testing, withdrawal and disposal;

27. ‘Research and development’ means all activities comprising fundamental research, applied research and experimental development, where the latter may include the realisation of technological demonstrators, i.e., devices that demonstrate the performance of a new concept or a new technology in a relevant or representative environment;

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28. 'Civil purchases' means contracts not subject to Article 2 covering the procurement of non-military products, works or services for logistical purposes and concluded in accordance with the conditions specified in Article 17.

Article 2 **Scope**

Subject to Articles 30, 45, 46, 55 and 296 of the Treaty, this Directive shall apply to contracts awarded in the fields of defence and security for:

- (a) the supply of military equipment, including any parts, components and/or subassemblies thereof;
- (b) the supply of sensitive equipment, including any parts, components and/or subassemblies thereof;
- (c) works, supplies and services directly related to the equipment referred to in points (a) and (b) for any and all elements of its life cycle;
- (d) works and services for specifically military purposes or sensitive works and sensitive services.

Article 3 **Mixed contracts**

1. A contract having as its object works, supplies or services falling within the scope of this Directive and partly within the scope of Directive 2004/17/EC or Directive 2004/18/EC shall be awarded in accordance with this Directive, provided that the award of a single contract is justified for objective reasons.

2. The award of a contract having as its object works, supplies or services falling partly within the scope of this Directive, with the other part not being subject to either this Directive, or to Directive 2004/17/EC or Directive 2004/18/EC, shall not be subject to this Directive, provided that the award of a single contract is justified for objective reasons.

3. The decision to award a single contract may not, however, be taken for the purpose of excluding contracts from the application of this Directive or of Directive 2004/17/EC or Directive 2004/18/EC.

Article 4 **Procurement principles**

Contracting authorities/entities shall treat economic operators equally and in a non-discriminatory manner and shall act in a transparent way.

TITLE II

RULES ON CONTRACTS

CHAPTER I

General provisions

Article 5

Economic operators

1. Candidates or tenderers which, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of service and works contracts as well as supply contracts covering in addition services and/or siting and installation operations, legal persons may be required to indicate in the tender or the request to participate the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

2. Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities/entities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

Article 6

Confidentiality obligations of contracting authorities/entities

Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers as set out in Article 30(3) and Article 35, and in accordance with the national law to which the contracting authority/entity is subject, in particular legislation regarding access to information, the contracting authority/entity, subject to contractually acquired rights, shall not disclose information forwarded to it by economic operators which such operators have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.

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Article 7

Protection of classified information

Contracting authorities/entities may impose on economic operators requirements aimed at protecting the classified information they communicate throughout the tendering and contracting procedure. They may also request these economic operators to ensure compliance with such requirements by their subcontractors.

CHAPTER II

Thresholds, central purchasing bodies and exclusion provisions

Section 1

Thresholds

Article 8

Threshold amounts for contracts This Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds:

- (a) EUR 412 000 for supply and service contracts;
- (b) EUR 5 150 000 for works contracts.

Article 9

Methods for calculating the estimated value of contracts and of framework agreements

1. The calculation of the estimated value of a contract shall be based on the total amount payable, net of VAT, as estimated by the contracting authority/entity. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract.

Where the contracting authority/entity provides for prizes or payments to candidates or tenderers, it shall take them into account when calculating the estimated value of the contract.

2. This estimate must be valid at the moment at which the contract notice is sent, as provided for in Article 32(2), or, in cases where such notice is not required, at the moment at which the contracting authority/entity commences the contract award procedure.

3. No works project or proposed purchase of a certain quantity of supplies and/or services may be partitioned to create essentially identical separate partial contracts or otherwise subdivided to prevent its coming within the scope of this Directive.

4. With regard to works contracts, the calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies necessary for executing the works and placed at the contractor's disposal by the contracting authorities/entities.

5. (a) Where a proposed work or purchase of services may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 8, this Directive shall apply to the awarding of each lot.

However, the contracting authorities/entities may waive such application in respect of lots the estimated value of which, net of VAT, is less than EUR 80 000 for services or EUR 1 000 000 for works, provided that the aggregate value of those lots does not exceed 20 % of the aggregate value of the lots as a whole;

(b) Where a proposal for the acquisition of similar supplies may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying Article 8(a) and (b). Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 8, this Directive shall apply to the awarding of each lot.

However, the contracting authorities/entities may waive such application in respect of lots the estimated value of which, net of VAT, is less than EUR 80 000, provided that the aggregate cost of those lots does not exceed 20 % of the aggregate value of the lots as a whole.

6. With regard to supply contracts relating to the leasing, hire, rental or hire-purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:

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- (a) in the case of fixed-term contracts, where that term is less than or equal to 12 months, the total estimated value for the term of the contract or, where the term of the contract is greater than 12 months, the total value, including the estimated residual value;
 - (b) in the case of contracts without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.

7. In the case of supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:

(a) either the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year, adjusted, if possible, to take account of the changes in quantity or value which could occur in the course of the 12 months following the initial contract; or

(b) the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year if that is longer than 12 months.

The choice of method used to calculate the estimated value of a contract may not be made with the intention of excluding it from the scope of this Directive

8. With regard to service contracts, the value to be taken as a basis for calculating the estimated contract value shall, where appropriate, be the following:

(a) for the following services:

- (i) insurance services: the premium payable and other forms of remuneration;
- (ii) design contracts: fees, commission payable and other forms of remuneration;

(b) for service contracts which do not indicate a total price:

- (i) in the case of fixed-term contracts, where that term is less than or equal to 48 months: the total value for their full term;
- (ii) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.

9. With regard to framework agreements, the estimated value to be taken into consideration shall be the maximum estimated value, net of VAT, of all the contracts envisaged for the total term of the agreement.

Section 2

Central purchasing bodies

Article 10

Contracts and framework agreements awarded by central purchasing bodies

1. Member States may stipulate that contracting authorities/entities may purchase works, supplies and/or services from or through a central purchasing body.

2. Contracting authorities/entities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(18) shall be deemed to have complied with this Directive insofar as:

- the central purchasing body has complied with it, or,
- when the central purchasing body is not a contracting authority/entity, the contract award rules applied by it are compliant with all the provisions of this Directive and the contracts awarded can be subject to efficient remedies comparable to those provided for in Title IV.

Section 3

Excluded contracts

Article 11

Use of exclusions

None of the rules, procedures, programmes, agreements, arrangements or contracts referred to in this section may be used for the purpose of circumventing the provisions of this Directive.

Article 12

Contracts awarded pursuant to international rules

This Directive shall not apply to contracts governed by:

- (a) specific procedural rules pursuant to an international agreement or arrangement concluded between one or more Member States and one or more third countries;
- (b) specific procedural rules pursuant to a concluded international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
- (c) specific procedural rules of an international organisation purchasing for its purposes, or to contracts which must be awarded by a Member State in accordance with those rules.

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Specific exclusions

This Directive shall not apply to the following:

- (a) contracts for which the application of the rules of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security;
- (b) contracts for the purposes of intelligence activities;
- (c) contracts awarded in the framework of a cooperative programme based on research and development, conducted jointly by at least two Member States for the development of a new product and, where applicable, the later phases of all or part of the life-cycle of this product. Upon the conclusion of such a cooperative programme between Member States only, Member States shall indicate to the Commission the share of research and development expenditure relative to the overall cost of the programme, the cost-sharing agreement as well as the intended share of purchases per Member State, if any;
- (d) contracts awarded in a third country, including for civil purchases, carried out when forces are deployed outside the territory of the Union where operational needs require them to be concluded with economic operators located in the area of operations;
- (e) service contracts for the acquisition or rental, under whatever financial arrangements, of land, existing buildings or other immovable property, or concerning rights in respect thereof;
- (f) contracts awarded by a government to another government relating to:
 - (i) the supply of military equipment or sensitive equipment,
 - (ii) works and services directly linked to such equipment, or
 - (iii) works and services specifically for military purposes, or sensitive works and sensitive services;
- (g) arbitration and conciliation services;
- (h) financial services, with the exception of insurance services;
- (i) employment contracts;
- (j) research and development services other than those where the benefits accrue exclusively to the contracting authority/entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority/entity.

Section 4

Special arrangements

Article 14

Reserved contracts

Member States may reserve the right to participate in contract award procedures to sheltered workshops or provide for such contracts to be performed 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.

The contract notice shall make reference to this provision.

CHAPTER III

Arrangements for service contracts

Article 15

Service contracts listed in Annex I

Contracts which have as their object services covered by Article 2 that are listed in Annex I shall be awarded in accordance with Articles 18 to 54.

Article 16

Service contracts listed in Annex II

Contracts which have as their object services covered by Article 2 that are listed in Annex II shall be subject solely to Article 18 and Article 30(3).

Article 17

Mixed contracts including services listed in Annexes I and II

Contracts which have as their object services covered by Article 2 that are listed both in Annex I and in Annex II shall be awarded in accordance with Articles 18 to 54 where the value of the services listed in Annex I is greater than the value of the services listed in Annex II. In other cases, contracts shall be awarded in accordance with Article 18 and Article 30(3).

CHAPTER IV

Specific rules governing contract documentation

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Article 18

Technical specifications

1. The technical specifications as defined in point 1 of Annex III shall be set out in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents).

2. Technical specifications shall afford equal access for tenderers and shall not have the effect of creating unjustified obstacles to the opening up of procurement to competition.

3. Without prejudice to either compulsory national technical rules (including those related to product safety) or the technical requirements to be met by the Member State under international standardisation agreements in order to guarantee the interoperability required by those agreements, and provided they are compatible with Community law, technical specifications shall be drawn up:

(a) either by reference to technical specifications defined in Annex III and, in order of preference, to:

- national civil standards transposing European standards,
- European technical approvals,
- common civil technical specifications,
- national civil standards transposing international standards,
- other international civil standards,
- other technical reference systems established by the European standardisation bodies, or, where these do not exist, other national civil standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products,
- civil technical specifications stemming from industry and widely recognised by it, or,
- the national ‘defence standards’ defined in point 3 of Annex III and defence materiel specifications similar to those standards,

Every reference shall be followed by the expression ‘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 tenderers to determine the subject-matter of the contract and to allow contracting authorities/entities to award the contract;

(c) or in terms of performance or functional requirements as mentioned in point (b), with reference to the specifications mentioned in point (a) as a means of presuming conformity with such performance or functional requirements;

(d) or by referring to the specifications mentioned in point (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in point (b) for other characteristics.

4. Where a contracting authority/entity makes use of the option of referring to the specifications mentioned in paragraph 3(a), it can not 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 tenderer proves in its tender to the satisfaction of the contracting authority/entity, by whatever appropriate means, that the solutions which it proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

5. Where a contracting authority/entity uses the option laid down in paragraph 3 to prescribe performance-related 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 or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

In its tender, the tenderer must prove to the satisfaction of the contracting authority/entity 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/entity.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

6. Where contracting authorities/entities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b), they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by any other eco-label, provided that:

- those specifications are appropriate as a means of defining 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,

Contracting authorities/entities 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 from the manufacturer or a test report from a recognised body.

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7. '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/entities shall accept certificates from recognised bodies established in other Member States.

8. Unless justified by the subject-matter of the contract, technical specifications shall 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 shall 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 shall be accompanied by the words 'or equivalent'.

Article 19

Variants

Where the criterion for award is that of the most economically advantageous tender, contracting authorities/entities may authorise tenderers to submit variants.

2. Contracting authorities/entities shall indicate in the contract notice whether or not they authorise variants. Variants shall not be authorised without this indication.

3. Contracting authorities/entities authorising variants shall state in the tender specifications the minimum requirements to be met by the variants and any specific requirements for their presentation.

Only variants meeting the minimum requirements laid down by the contracting authorities/entities shall be taken into consideration.

4. In procedures for awarding supply or service contracts, contracting authorities/entities which have authorised variants may not reject a variant on the sole ground that it would, if successful, lead either to a service contract rather than a supply contract, or to a supply contract rather than a service contract.

Article 20

Conditions for performance of contracts

Contracting authorities/entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents). These conditions may, in particular, concern subcontracting or seek to ensure the security of classified information and the security of supply required by the contracting authority/entity, in accordance with Articles 21, 22 and 23, or take environmental or social considerations into account.

Article 21

Subcontracting

1. The successful tenderer shall be free to select its subcontractors for all subcontracts that are not covered by the requirement referred to in paragraphs 3 and 4, and shall in particular not be required to discriminate against potential subcontractors on grounds of nationality.

2. The contracting authority/entity may ask or may be required by a Member State to ask the tenderer:
—to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractor, as well as the subject-matter of the subcontracts for which they are proposed; and/or,
—to indicate any change occurring at the level of subcontractors during the execution of the contract,

3. The contracting authority/entity may oblige or may be required by a Member State to oblige the successful tenderer to apply the provisions set out in Title III to all or certain subcontracts which the successful tenderer intends to award to third parties.

4. Member States may provide that the contracting authority/entity may ask or be required to ask the successful tenderer to subcontract to third parties a share of the contract. The contracting authority/entity that imposes such subcontracting shall express this minimal percentage in the form of a range of values, comprising a minimum and maximum percentage. The maximum percentage may not exceed 30 % of the value of the contract. Such a range shall be proportionate to the object and value of the contract and the nature of the industry sector involved, including the level of competition in that market and the relevant technical capabilities of the industrial base.

Any percentage of subcontracting falling within the range of values indicated by the contracting authority/entity shall be considered to fulfil the subcontracting requirement set out in this paragraph.

Tenderers may propose to subcontract a share of the total value which is above the range required by the contracting authority/entity. The contracting authority/entity shall ask tenderers to specify in their tender which part or parts of their offer they intend to subcontract to fulfil the requirement referred to in the first subparagraph.

The contracting authority/entity may ask or may be required by a Member State to ask tenderers also to specify which part or parts of their offer they intend to subcontract beyond the required percentage, as well as the subcontractors they have already identified.

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The successful tenderer shall award subcontracts corresponding to the percentage which the contracting authority/entity requires it to subcontract in accordance with the provisions of Title III.

5. In all cases, where a Member State provides that contracting authorities/entities may reject the subcontractors selected by the tenderer at the stage of the award procedure of the main contract or by the successful tenderer during the performance of the contract, such rejection may only be based on criteria applied for the selection of the tenderers for the main contract. If the contracting authority/entity rejects a subcontractor, it must produce a written justification to the tenderer or the successful tenderer, setting out why it considers that the subcontractor does not meet the criteria.

6. Requirements referred to in paragraphs 2 to 5 shall be indicated in the contract notices.

7. Paragraphs 1 to 5 shall be without prejudice to the question of the principal economic operator's liability.

Article 22

Security of information

When contracts involve, require and/or contain classified information, the contracting authority/entity shall specify in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents) the measures and requirements necessary to ensure the security of such information at the requisite level.

To this end, the contracting authority/entity may require that the tender contain, *inter alia*, the following particulars:

(a) a commitment from the tenderer and the subcontractors already identified to appropriately safeguard the confidentiality of all classified information in their possession or coming to their notice throughout the duration of the contract and after termination or conclusion of the contract, in accordance with the relevant laws, regulations and administrative provisions;

(b) a commitment from the tenderer to obtain the commitment provided in point (a) from other subcontractors to which it will subcontract during the execution of the contract;

(c) sufficient information on subcontractors already identified to enable the contracting authority/entity to determine that each of them possesses the capabilities required to appropriately safeguard the confidentiality of the classified information to which they have access or which they are required to produce when carrying out their subcontracting activities;

(d) a commitment from the tenderer to provide the information required under point (c) on any new subcontractor before awarding a subcontract.

In the absence of harmonisation at Community level of national security clearance systems, Member States may provide that the measures and requirements referred to in the second subparagraph have to comply with their national provisions on security clearance. Member States shall recognise the security clearances which they consider equivalent to those issued in accordance with their national law, notwithstanding the possibility to conduct and take into account further investigations of their own, if considered necessary.

Article 23

Security of supply

The contracting authority/entity shall specify in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents) its security of supply requirements.

To this end, the contracting authority/entity may require that the tender contain, *inter alia*, the following particulars:

(a) certification or documentation demonstrating to the satisfaction of the contracting authority/entity that the tenderer will be able to honour its obligations regarding the export, transfer and transit of goods associated with the contract, including any supporting documentation received from the Member State(s) concerned;

(b) the indication of any restriction on the contracting authority/entity regarding disclosure, transfer or use of the products and services or any result of those products and services, which would result from export control or security arrangements;

(c) certification or documentation demonstrating that the organisation and location of the tenderer's supply chain will allow it to comply with the requirements of the contracting authority/entity concerning security of supply set out in the contract documents, and a commitment to ensure that possible changes in its supply chain during the execution of the contract will not affect adversely compliance with these requirements;

(d) a commitment from the tenderer to establish and/or maintain the capacity required to meet additional needs required by the contracting authority/entity as a result of a crisis, according to terms and conditions to be agreed;

(e) any supporting documentation received from the tenderer's national authorities regarding the fulfilment of additional needs required by the contracting authority/entity as a result of a crisis;

(f) a commitment from the tenderer to carry out the maintenance, modernisation or adaptation of the supplies covered by the contract;

(g) a commitment from the tenderer to inform the contracting authority/entity in due time of any change in its organisation, supply chain or industrial strategy that may affect its obligations to that authority/entity;

(h) a commitment from the tenderer to provide the contracting authority/entity, according to terms and conditions to be agreed, with all specific means necessary for the production of spare parts, components, assemblies and special testing equipment, including technical drawings, licenses and instructions for use, in the event that it is no longer able to provide these supplies.

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A tenderer may not be required to obtain a commitment from a Member State that would prejudice that Member State's freedom to apply, in accordance with relevant international or Community law, its national export, transfer or transit licensing criteria in the circumstances prevailing at the time of such a licensing decision.

Article 24

Obligations relating to taxes, environmental protection, employment protection provisions and working conditions

1. A contracting authority/entity may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, region, locality or third country in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

2. The contracting authority/entity which supplies the information referred to in paragraph 1 shall request the tenderers 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 works are to be carried out or the service is to be provided.

The first subparagraph shall be without prejudice to the application of the provisions of Article 49 concerning the examination of abnormally low tenders.

CHAPTER V

Procedures

Article 25

Procedures to be applied

In awarding contracts, contracting authorities/entities shall apply the national procedures adjusted for the purposes of this Directive.

Contracting authorities/entities may choose to award contracts by applying the restricted procedure or the negotiated procedure with publication of a contract notice.

Under the circumstances referred to in Article 27, they may award their contracts by means of a competitive dialogue.

In the specific cases and circumstances referred to expressly in Article 28, the contracting authorities/entities may apply a negotiated procedure without publication of a contract notice.

Article 26

Negotiated procedure with publication of a contract notice

1. In negotiated procedures with publication of a contract notice, contracting authorities/entities shall negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements they have set in the contract notice, the contract documents and supporting documents, if any, and to seek out the best tender in accordance with Article 47.

2. During the negotiations, contracting authorities/entities shall ensure the equal treatment of all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

3. Contracting authorities/entities may provide for the negotiated procedure to take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria set out in the contract notice or the contract documents. The contract notice or the contract documents shall indicate whether or not this option has been used.

Article 27

Competitive dialogue

1. In the case of particularly complex contracts, Member States may provide that where contracting authorities/entities consider that use of the restricted procedure or the negotiated procedure with publication of a contract notice will not allow the award of the contract, the latter may make use of the competitive dialogue in accordance with this Article.

A contract shall be awarded on the sole basis of the award criterion for the most economically advantageous tender.

2. Contracting authorities/entities shall publish a contract notice setting out their needs and requirements, which they shall define in that notice and/or in a descriptive document.

3. Contracting authorities/entities shall open with the candidates selected in accordance with the relevant provisions of Articles 38 to 46, a dialogue, the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue.

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During the dialogue, contracting authorities/entities shall ensure equality of treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

Contracting authorities/entities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue, without the agreement of that candidate.

4. Contracting authorities/entities 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 set out in the contract notice or the descriptive document. The contract notice or the descriptive document shall indicate that recourse may be had to this option.

5. The contracting authority/entity shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are likely to meet its needs.

6. Having declared that the dialogue is concluded and having so informed the participants, contracting authorities/entities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. These tenders shall contain all the elements required and necessary for the performance of the project.

These tenders may be clarified, specified and fine-tuned at the request of the contracting authority/entity. However, such clarification, specification, fine-tuning or 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 have a discriminatory effect.

7. Contracting authorities/entities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or the descriptive document and shall choose the most economically advantageous tender in accordance with Article 47.

At the request of the contracting authority/entity, the tenderer 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 of the call for tenders and does not risk distorting competition or causing discrimination. 8. The contracting authorities/entities may specify prices or payments to the participants in the dialogue.

Article 28

Cases justifying use of the negotiated procedure without publication of a contract notice

In the following cases, contracting authorities/entities may award contracts by a negotiated procedure without prior publication of a contract notice and shall justify the use of this procedure in the contract award notice as required in Article 30(3):

(1) for works contracts, supply contracts and service contracts:

(a) when no tenders or no suitable tenders or no applications have been submitted in response to a restricted procedure, a negotiated procedure with prior publication of a contract notice or a competitive dialogue, provided that the initial conditions of the contract are not substantially altered and on condition that a report is sent to the Commission, if it so requests;

(b) in the event of irregular tenders or the submission of tenders which are unacceptable under national provisions compatible with Articles 5, 19, 21 to 24 and Chapter VII of Title II, in response to a restricted procedure, a negotiated procedure with publication or a competitive dialogue, insofar as:

(i) the original terms of the contract are not substantially altered, and

(ii) they include in the negotiated procedure all of, and only, the tenderers which satisfy the criteria of Articles 39 to 46 and which, during the prior restricted procedure or competitive dialogue, had submitted tenders in accordance with the formal requirements of the tendering procedure;

(c) when the periods laid down for the restricted procedure and negotiated procedure with publication of a contract notice, including the shortened periods referred to in Article 33(7), are incompatible with the urgency resulting from a crisis. This may apply for instance in the cases referred to in point (d) of the second paragraph of Article 23;

(d) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities/entities in question, the time-limit for the restricted procedure or the negotiated procedure with publication of a contract notice, including the shortened time-limits as referred to in Article 33(7), cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority/entity;

(e) when, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;

(2) for service contracts and supply contracts:

(a) for research and development services other than those referred to in Article 13;

(b) for products manufactured purely for the purpose of research and development, with the exception of quantity production to establish commercial viability or recover research and development costs;

(3) for supply contracts:

(a) for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority/entity to acquire material having different technical characteristics which would result in incompatibility or disproportionate

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technical difficulties in operation and maintenance.

The length of such contracts, as well as that of recurrent contracts, may not exceed five years, except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause;

(b) for supplies quoted and purchased on a commodity market;

(c) for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national laws or regulations;

(4) for works contracts and service contracts:

(a) for additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services:

(i) when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities/entities, or

(ii) when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional works or services may not exceed 50 % of the amount of the original contract;

(b) for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities/entities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the restricted procedure, the negotiated procedure with publication of a contract notice or a competitive dialogue.

As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed, and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities/entities when they apply Article 8.

This procedure may be used only during the five years following the conclusion of the original contract, except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause;

(5) for contracts related to the provision of air and maritime transport services for the armed forces or security forces of a Member State deployed or to be deployed abroad, when the contracting authority/entity has to procure such services from economic operators that guarantee the validity of their tenders only for such short periods that the time-limit for the restricted procedure or the negotiated procedure with publication of a contract notice, including the shortened time-limits as referred to in Article 33(7), cannot be complied with.

Article 29

Framework agreements

1. Member States may provide that contracting authorities/entities may conclude framework agreements.

2. For the purpose of concluding a framework agreement, contracting authorities/entities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 47.

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between the contracting authorities/entities and the economic operators originally party to the framework agreement.

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 referred to in paragraph 3.

The term of a framework agreement may not exceed seven years, except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause.

In such exceptional circumstances, the contracting authorities/entities shall provide an appropriate justification for those circumstances in the notice referred to in Article 30(3).

Contracting authorities/entities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those contracts, contracting authorities/entities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.

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4. 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 that satisfy the selection criteria and/or of admissible tenders that meet the award criteria.

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 contract documents of the framework agreement, in accordance with the following procedure:

(a) for every contract to be awarded, contracting authorities/entities shall consult in writing the economic operators capable of performing the contract;

(b) contracting authorities/entities shall 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-matter of the contract and the time needed to submit tenders;

(c) tenders shall be submitted in writing and their content remain confidential until the stipulated time-limit for reply has expired;

(d) contracting authorities/entities shall award each contract to the tenderer which has submitted the best tender on the basis of the award criteria set out in the contract documents of the framework agreement.

CHAPTER VI

Rules on advertising and transparency

Section 1

Publication of notices

Article 30

Notices

1. Contracting authorities/entities may make known, by means of a prior information notice published by the Commission or by themselves on their 'buyer profile', as described in point 2 of Annex VI:

(a) where supplies are concerned, the estimated total value of the contracts or the framework agreements by product area which they intend to award over the following 12 months.

The product area shall be established by the contracting authorities/entities by reference to the CPV nomenclature;

(b) where services are concerned, the estimated total value of the contracts or framework agreements in each of the categories of services which they intend to award over the following 12 months;

(c) where works are concerned, the essential characteristics of the contracts or framework agreements which they intend to award.

The notices referred to in the first subparagraph shall be sent to the Commission or published on the buyer profile at the earliest opportunity after the decision approving the project for which the contracting authorities/entities intend to award contracts or framework agreements.

Contracting authorities/entities that publish a prior information notice on their buyer profiles shall send the Commission, electronically, a notice of publication of the prior information notice on a buyer profile, in accordance with the format and detailed procedures for sending notices set out in point 3 of Annex VI.

Publication of the notices referred to in the first subparagraph shall be compulsory only where the contracting authorities/entities take the option of shortening the time-limits for the receipt of tenders as laid down in Article 33(3).

This paragraph shall not apply to negotiated procedures without the prior publication of a contract notice.

2. Contracting authorities/entities which wish to award a contract or a framework agreement by restricted procedure, negotiated procedure with the publication of a contract notice or a competitive dialogue shall make known their intention by means of a contract notice.

3. Contracting authorities/entities which have awarded a contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement.

In the case of framework agreements concluded in accordance with Article 29, the contracting authorities/entities shall not be bound to send a notice of the results of the award procedure for each contract based on that agreement.

Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where release of such information would impede law enforcement or otherwise be contrary to the public interest, in particular defence and/or security

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interests, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

Article 31

Non-mandatory publication

Contracting authorities/entities may publish, in accordance with Article 32, notices concerning contracts which are not subject to the publication requirement laid down in this Directive.

Article 32

Form and manner of publication of notices

1. Notices shall include the information referred to in Annex IV and, where appropriate, any other information deemed useful by the contracting authority/entity in the format of the standard forms adopted by the Commission in accordance with the advisory procedure referred to in Article 67(2).

2. Notices sent by contracting authorities/entities to the Commission shall be sent either by electronic means in accordance with the format and procedures for transmission set out in point 3 of Annex VI, or by other means. In the event of recourse to the accelerated procedure set out in Article 33(7), notices must be sent either by fax or by electronic means, in accordance with the format and procedures for transmission set out in point 3 of Annex VI.

Notices shall be published in accordance with the technical characteristics for publication set out in point 1(a) and (b) of Annex VI.

3. Notices drawn up and transmitted by electronic means in accordance with the format and procedures for transmission set out in point 3 of Annex VI shall be published no later than five days after they are sent.

Notices which are not transmitted by electronic means in accordance with the format and procedures for transmission set out in point 3 of Annex VI shall be published no later than 12 days after they are sent, or, in the case of the accelerated procedure referred to in Article 33(7), no later than five days after they are sent.

4. Contract notices shall be published in full in an official language of the Community, as chosen by the contracting authority/entity, this original language version constituting the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

The costs of publication of such notices by the Commission shall be borne by the Community.

5. Notices and their contents may not be published at national level or on a buyer profile before the date on which they are sent to the Commission.

Notices published at national level shall not contain information other than that contained in the notices sent to the Commission or published on a buyer profile in accordance with the first subparagraph of Article 30(1), but shall mention the date of dispatch of the notice to the Commission or its publication on a buyer profile.

Prior information notices may not be published on a buyer profile before the dispatch to the Commission of the notice of their publication in that form; they shall mention the date of that dispatch.

6. The content of notices not sent by electronic means in accordance with the format and procedures for transmission set out in point 3 of Annex VI shall be limited to approximately 650 words.

7. Contracting authorities/entities must be able to supply proof of the dates on which notices are dispatched.

8. The Commission shall give the contracting authority/entity confirmation of the publication of the information sent, mentioning the date of such publication. Such confirmation shall constitute proof of publication.

Section 2

Time-limits

Article 33

Time-limits for receipt of requests to participate and for receipt of tenders

1. When fixing the time-limits for receipt of requests to participate and tenders, contracting authorities/entities shall take particular account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time-limits set by this Article.

2. In restricted procedures, negotiated procedures with the publication of a contract notice and use of a competitive dialogue, the minimum time-limit for receipt of requests to participate shall be 37 days from the date on which the contract notice is sent.

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In the case of restricted procedures, the minimum time-limit for the receipt of tenders shall be 40 days from the date on which the invitation is sent.

3. When contracting authorities/entities have published a prior information notice, the minimum time-limit for the receipt of tenders under the second subparagraph of paragraph 2 may, as a general rule, be shortened to 36 days, but under no circumstances to less than 22 days. The time-limit shall run from the date on which the invitation to tender was sent.

The shortened time-limits referred to in the first subparagraph shall be permitted, provided that the prior information notice has included all the information required for the contract notice set out in Annex IV, insofar as that information is available at the time the notice is published and that the prior information notice was sent for publication between 52 days and 12 months before the date on which the contract notice was sent.

4. Where notices are drawn up and transmitted by electronic means in accordance with the format and procedure for sending notices set out in point 3 of Annex VI, the time-limit for the receipt of the requests to participate referred to in the first subparagraph of paragraph 2 may be shortened by seven days.

5. The time-limits for receipt of tenders referred to in the second subparagraph of paragraph 2 may be reduced by five days where the contracting authority/entity offers unrestricted and full direct access by electronic means to the contract documents and any supporting documents from the date of publication of the notice in accordance with Annex VI, specifying in the text of the notice the Internet address at which this documentation is accessible.

This reduction may be added to that referred to in paragraph 4. 6.

If, for whatever reasons, the contract documents and supporting documents or additional information, although requested in good time, are not supplied within the time-limits set out in Article 34, or where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the contract documents, the time-limits for the receipt of tenders shall be extended so that all economic operators concerned may be aware of all the information needed to produce tenders.

7. In the case of restricted procedures and negotiated procedures with publication of a contract notice, where urgency renders impracticable the minimum time-limits laid down in this Article, contracting authorities/entities may fix:

—a time-limit for receipt of requests to participate which may not be less than 15 days from the date on which the contract notice is dispatched, or less than 10 days if the notice was sent by electronic means, in accordance with the format and procedure for sending notices set out in point 3 of Annex VI; and

—in the case of restricted procedures, a time-limit for receipt of tenders which shall not be less than 10 days from the date of the invitation to tender, Section 3

Information content and means of transmission

Article 34

Invitations to tender, negotiate or participate in a dialogue

1. In restricted procedures, negotiated procedures with the publication of a contract notice and competitive dialogues, the contracting authorities/entities shall simultaneously and in writing invite the selected candidates to submit their tenders or to negotiate, or, in the case of a competitive dialogue, to take part in the dialogue.

2. The invitation to the candidates shall include either:

—a copy of the contract documents or of the descriptive document and any supporting documents, or,

—a reference to accessing the documents referred to in the first indent when they are made directly available by electronic means in accordance with Article 33(5),

3. Where the contract documents, the descriptive document and/or any supporting documents are held by an entity other than the contracting authority/entity responsible for the award procedure, the invitation shall state the address from which that documentation may be requested and, if appropriate, the closing date for requesting such documents, the sum payable for obtaining them and any payment procedures. The competent department shall send that documentation to the economic operator without delay upon receipt of a request.

4. The additional information on the contract documents, the descriptive document and/or the supporting documents shall be sent by the contracting authority/entity or the competent department not less than six days before the deadline fixed for the receipt of tenders, provided that it is requested in good time. In the event of a restricted or an accelerated procedure, that period shall be four days.

5. In addition to the particulars provided for in paragraphs 2, 3 and 4, the invitation shall contain at least:

(a) a reference to the contract notice published;

(b) the deadline for receipt of tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up. In the case of a competitive dialogue, this information shall not be contained in the invitation to take part in the dialogue, but in the invitation to submit a tender;

(c) in the case of a competitive dialogue, the date and the address set for the start of the consultation stage and the language or languages used;

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- (d) an indication of any documents to be annexed, either to support the verifiable statements provided by the candidate in accordance with Article 38, or to supplement the information provided for in that Article under the same conditions as those laid down in Articles 41 and 42;
- (e) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance of the criteria used to define the economically most advantageous tender, if they are not given in the contract notice, the contract documents or the descriptive document.

Article 35

Information for candidates and tenderers

1. The contracting authorities/entities shall, at the earliest opportunity, inform candidates and tenderers of decisions reached concerning the award of a contract or the conclusion of a framework agreement, including the grounds for any decision not to award a contract or conclude a framework agreement for which there has been competitive tendering or to recommence the procedure; that information shall be given in writing upon request to the contracting authorities/entities.
2. At the request of the party concerned, the contracting authority/entity shall, subject to paragraph 3, at the earliest opportunity and at the latest within 15 days of receipt of the written request for information, inform the parties as follows:
 - (a) any unsuccessful candidate of the reasons for the rejection of the application;
 - (b) any unsuccessful tenderer of the reasons for the rejection of the tender, including, in particular, for the cases referred to in Article 18(4) and (5) the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements, and in the cases referred to in Articles 22 and 23, the reasons for its decision of non-conformity with the requirements of security of information and security of supply;
 - (c) any tenderer which has made an admissible tender that has been rejected, of the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement.
3. Contracting authorities/entities may decide to withhold certain information on the contract award or the conclusion of the framework agreements referred to in paragraph 1 where release of such information would impede law enforcement or otherwise be contrary to the public interest, in particular defence and/or security interests, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

Section 4

Communication

Article 36

Rules applying to communication

1. All communication and information exchange referred to in this Title may be made by post, fax, electronic means in accordance with paragraphs 4 and 5, telephone in the cases and circumstances referred to in paragraph 6, or a combination of those means, according to the choice of the contracting authority/entity.
2. The means of communication chosen must be generally available and thus not restrict the access of economic operators to the tendering procedure.
3. Communication and the exchange and storage of information shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of requests to participate and tenders are preserved, and that the contracting authorities/entities examine the content of requests to participate and tenders only after the time-limit set for submitting them has expired.
4. The tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, generally available and compatible with information and communication technology products in general use.
5. The following rules shall apply to devices for the electronic transmission and receipt of tenders and devices for the electronic receipt of requests to participate:
 - (a) information regarding the specifications necessary for the electronic submission of tenders and requests to participate, including encryption, shall be available to interested parties. Moreover, devices for the electronic receipt of tenders and requests to participate shall conform to the requirements of Annex VIII;
 - (b) Member States may, in compliance with Article 5 of Directive 1999/93/EC, require electronic tenders to be accompanied by an advanced electronic signature, in conformity with paragraph 1 thereof;
 - (c) Member States may introduce or maintain voluntary arrangements for accreditation intended to improve the level of the certification service provided for such devices;
 - (d) candidates shall undertake to submit, before expiry of the time-limit laid down for submission of tenders or requests to participate, the documents, certificates and declarations referred to in Articles 39 to 44 and Article 46, if they do not exist in electronic format.
6. The following rules shall apply to the transmission of requests to participate:
 - (a) requests to participate in procedures for the award of contracts may be made in writing or by telephone;

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(b) where requests to participate are made by telephone, a written confirmation must be sent before expiry of the time-limit set for their receipt;

(c) contracting authorities/entities may require that requests for participation made by fax must be confirmed by post or electronic means where this is necessary for the purposes of legal proof. Any such requirement, together with the time-limit by which it must be met, must be stated by the contracting authority/entity in the contract notice.

Section 5

Reports

Article 37

Content of reports

1. For every contract and framework agreement, the contracting authorities/entities shall draw up a written report to confirm that the selection procedure was undertaken in a transparent and non-discriminatory manner, which shall include at least the following:

(a) the name and address of the contracting authority/entity and the subject and value of the contract or framework agreement;

(b) the award procedure chosen;

(c) in the case of a competitive dialogue, the circumstances justifying the use of this procedure;

(d) in the case of a negotiated procedure without prior publication of a contract notice, the circumstances referred to in Article 28 which justify the use of this procedure; if appropriate, justification for exceeding the time-limits laid down in the second subparagraph of Article 28(3)(a) and the third subparagraph of Article 28(4)(b) and for exceeding the 50 % limit laid down in the second subparagraph of Article 28(4)(a);

(e) if appropriate, the reasons for the framework agreement lasting more than seven years;

(f) the name of the candidates chosen and the reason for this choice;

(g) the name of the candidates excluded and the reasons for their rejection;

(h) the reasons for the rejection of tenders;

(i) the name of the successful tenderer and the reasons why its tender was selected, and, if known, the share of the contract or framework agreement which the successful tenderer intends, or will be required, to subcontract to third parties;

(j) if necessary, the reasons why the contracting authority/entity decided not to award a contract or framework agreement.

2. Contracting authorities/entities shall take appropriate steps to document the progress of award procedures conducted by electronic means.

3. The report, or the main features of it, shall be communicated to the Commission, if it so requests.

CHAPTER VII

Conduct of the procedure

Section 1

General provisions

Article 38

Verification of the suitability and choice of participants and award of contracts

1. Contracts shall be awarded on the basis of the criteria laid down in Articles 47 and 49, taking into account Article 19, after the suitability of the economic operators not excluded under Articles 39 or 40 has been checked by contracting authorities/entities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 41 to 46 and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

2. Contracting authorities/entities may require candidates to meet minimum capacity levels in accordance with Articles 41 and 42.

The extent of the information referred to in Articles 41 and 42 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.

3. In restricted procedures, negotiated procedures with publication of a contract notice and competitive dialogues, contracting authorities/entities may limit the number of suitable candidates they will invite to tender or with which they will conduct a dialogue. In this case:

—the contracting authorities/entities 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. The minimum number of candidates they intend to invite may not be less than three;

—subsequently, the contracting authorities/entities shall invite a number of candidates at least equal to the minimum number set in advance, provided a sufficient number of suitable candidates is available,

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Where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum number, the contracting authority/entity may continue the procedure by inviting the candidate or candidates with the required capabilities.

If the contracting authority/entity considers that the number of suitable candidates is too low to ensure genuine competition, it may suspend the procedure and republish the initial contract notice in accordance with Article 30(2) and Article 32, fixing a new deadline for the submission of requests to participate. In this case, the candidates selected upon the first publication and those selected upon the second shall be invited in accordance with Article 34. This option shall be without prejudice to the ability of the contracting authority/entity to cancel the ongoing procurement procedure and launch a new procedure.

4. In the context of an award procedure, the contracting authority/entity may not include economic operators other than those which made a request to participate, or candidates without the requisite capabilities.

5. Where the contracting authorities/entities exercise the option of reducing the number of solutions to be discussed or of tenders to be negotiated, as provided for in Article 26(3) and Article 27(4), they shall do so by applying the award criteria stated in the contract notice or the contract documents. In the final stage, the number arrived at shall make for genuine competition insofar as there are enough solutions or suitable candidates.

Section 2

Criteria for qualitative selection

Article 39

Personal situation of the candidate or tenderer

1. Any candidate or tenderer which has been the subject of a conviction by final judgment of which the contracting authority/entity is aware, for one or more of the reasons listed below, shall be excluded from participation in a contract:

(a) participation in a criminal organisation, as defined in Article 2(1) of Joint Action 98/733/JHA⁽¹⁾

Joint Action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (OJ L 351, 29.12.1998, p. 1). (1);

(b) corruption, as defined in Article 3 of the Act of 26 May 1997⁽²⁾

Council Act of 26 May 1997 drawing up, on the basis of Article K.3 (2) (c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 195, 25.6.1997, p. 1). (2) and Article 2(1) of Framework Decision 2003/568/JHA⁽³⁾

Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p. 54). (3);

(c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities⁽¹⁾

OJ C 316, 27.11.1995, p. 49. (1);

(d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Framework Decision

2002/475/JHA⁽²⁾ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p. 3). (2) respectively, or inciting, aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;

(e) money laundering and terrorist financing, as defined in Article 1 of Directive 2005/60/EC⁽³⁾

Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15). (3).

Member States shall specify, in accordance with their national law and having regard to Community law, the implementing conditions for this paragraph.

They may provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.

For the purposes of this paragraph, the contracting authorities/entities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority/entity, the contracting authority/entity may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

2. Any economic operator may be excluded from participation in a contract where that economic operator:

(a) is bankrupt or is being wound up, where its affairs are being administered by a court, where it has entered into an arrangement with creditors, where it has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by a court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

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(c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning its professional conduct, such as, for example, infringement of existing legislation on the export of defence and/or security equipment;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authority/entity can supply, such as a breach of obligations regarding security of information or security of supply during a previous contract;

(e) has been found, on the basis of any means of evidence, including protected data sources, not to possess the reliability necessary to exclude risks to the security of the Member State;

(f) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which it is established or with those of the country of the contracting authority/entity;

(g) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which it is established or with those of the country of the contracting authority/entity;

(h) is guilty of serious misrepresentation in supplying the information required under this Section, or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

3. Contracting authorities/entities shall accept the following as sufficient evidence that none of the cases specified in paragraph 1 or paragraph 2(a), (b), (c), (f) or (g) applies to the economic operator:

(a) as regards paragraph 1 and paragraph 2(a), (b) and (c), the production of an extract from the 'judicial record' or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or provenance, showing that these requirements have been met;

(b) as regards paragraph 2(f) and (g), a certificate issued by the competent authority in the Member State concerned.

Where the country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraph 1 and paragraph 2(a), (b) and (c), they may be replaced by a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or provenance.⁴

Member States shall designate the authorities and bodies competent to issue the documents, certificates and declarations referred to in paragraph 3, and shall inform the Commission thereof. Such notification shall be without prejudice to data protection law.

Article 40

Suitability to pursue the professional activity

Where a candidate is required to be enrolled on a professional or trade register in its Member State of origin or establishment in order to pursue its professional activity, it may be requested to prove its enrolment on such a register or to provide a declaration on oath or a certificate as described in Part A of Annex VII for works contracts, Part B of Annex VII for supply contracts and Part C of Annex VII for service contracts. The lists set out in Annex VII are indicative. Member States shall notify the Commission and the other Member States of any changes to their registers and of the means of evidence referred to in these lists.

In procedures for the award of service contracts, insofar as candidates have to possess a particular authorisation or be a member of a particular organisation in order to be able to perform the service concerned in their country of origin, the contracting authority/entity may require them to prove that they hold such authorisation or membership.

This Article shall be without prejudice to Community law on the freedom of establishment and the freedom to provide services.

Article 41

Economic and financial standing

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

(a) appropriate statements from a bank or, where appropriate, evidence of professional risk indemnity insurance;

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

(c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, insofar as information on such turnovers is available.

2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority/entity that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

3. Under the same conditions, a consortium of economic operators as referred to in Article 4 may rely on the capacities of participants in the consortium or of other entities.

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4. Contracting authorities/entities shall specify in the contract notice which reference or references referred to in paragraph 1 they have chosen, and which other references must be provided.

5. If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority/ entity, it may prove its economic and financial standing by any other document which the contracting authority/entity considers appropriate.

Article 42

Technical and/or professional ability

1. Evidence of economic operators' technical abilities may, as a general rule, be furnished by one or more of the following means, according to the nature, quantity or importance and use of the works, supplies or services:

(a) (i) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and location of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent authority shall submit these certificates to the contracting authority/entity directly;

(ii) a list of the principal deliveries effected or the main services provided, as a general rule, in the past five years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given:

—where the recipient was a contracting authority/ entity, in the form of certificates issued or countersigned by the competent authority,

—where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator,

(b) an indication of the technicians or technical bodies involved, whether or not they belong directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of works contracts, those upon which the contractor can call in order to carry out the work;

(c) a description of the technical facilities and measures used by the economic operator to ensure quality and the undertaking's study and research facilities, as well as internal rules regarding intellectual property;

(d) a check carried out by the contracting authorities/entities or on their behalf by a competent official body of the country in which the economic operator is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the economic operator and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate;

(e) in the case of works contracts, service contracts or supply contracts also covering siting and installation operations or services, the educational and professional qualifications of the economic operator and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work;

(f) for works contracts and services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;

(g) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;

(h) a description of the tools, material, technical equipment, staff numbers and know-how and/or sources of supply — with an indication of the geographical location when it is outside the territory of the Union — which the economic operator has at its disposal to perform the contract, cope with any additional needs required by the contracting authority/entity as a result of a crisis or carry out the maintenance, modernisation or adaptation of the supplies covered by the contract;

(i) with regard to the products to be supplied, provision of:

(i) samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority/entity so requests;

(ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products, clearly identified by references to specifications or standards;

(j) in the case of contracts involving, entailing and/or containing classified information, evidence of the ability to process, store and transmit such information at the level of protection required by the contracting authority/entity.

In the absence of harmonisation at Community level of national security clearance systems, Member States may provide that this evidence has to comply with the relevant provisions of their respective national laws on security clearance. Member States shall recognise security clearances which they consider equivalent to those issued in accordance with their national law, notwithstanding the possibility to conduct and take into account further investigations of their own, if considered necessary.

The contracting authority/entity may, where appropriate, grant candidates which do not yet hold security clearance additional time to obtain such clearance. In this case, it shall indicate this possibility and the time-limit in the contract notice.

The contracting authority/entity may ask the national security authority of the candidate's Member State or the security authority designated by that Member State to check the conformity of the premises and facilities that may be used, the industrial and administrative procedures that will be followed, the methods for managing information and/or the situation of staff likely to be employed to carry out the contract.

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2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It shall in that case prove to the contracting authority/entity that it will have at its disposal the resources necessary for the execution of the contract, for example by producing an undertaking by those entities to put the necessary resources at the disposal of the economic operator.
3. Under the same conditions, a group of economic operators as referred to in Article 5 may rely on the abilities of participants in the group or of other entities.
4. In procedures for awarding contracts having as their object supplies requiring siting or installation work, the provision of services and/or the execution of works, the ability of economic operators to provide the service or to execute the installation or the work may be evaluated in particular with regard to their skills, efficiency, experience and reliability.
5. The contracting authority/entity shall specify in the notice which of the references referred to in the first paragraph it has chosen and which other references must be provided.
6. If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority/ entity, it may prove its technical and/or professional ability by any other document which the contracting authority/entity considers appropriate.

Article 43

Quality management systems standards

Should they require the production of certificates drawn up by independent accredited bodies attesting the compliance of the economic operator with certain quality management systems standards, contracting authorities/entities shall refer to quality management systems based on the relevant European standards certified by independent accredited bodies conforming to the European standards concerning accreditation and certification. They shall recognise equivalent certificates from independent accredited bodies established in other Member States. They shall also accept other evidence of equivalent quality management systems from economic operators.

Article 44

Environmental management standards

Should contracting authorities/entities, in the cases referred to in Article 42(1)(f), require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators.

Article 45

Additional documentation and information

The contracting authority/entity may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 39 to 44.

Article 46

Official lists of approved economic operators and certification by bodies established under public or private law

1. Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established under public or private law.

Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the provisions of Article 39(1) and (2)(a) to (d) and (h), Article 40, Article 41(1), (4) and (5), Article 42(1)(a) to (i), (2) and (4), Article 43 and, where appropriate, Article 44.

Member States shall also adapt them to Article 41(2) and Article 42(2) as regards applications for registration submitted by economic operators belonging to a group and claiming resources made available to them by the other companies in the group. In such a case, these operators must prove to the authority establishing the official list that they will have these resources at their disposal throughout the period of validity of the certificate attesting to their being registered in the official list, and that throughout the same period these companies must continue to fulfil the qualitative selection requirements laid down in the Articles referred to in the second subparagraph on which operators rely for their registration.

2. Economic operators registered on the official lists or having a certificate may, for each contract, submit to the contracting authority/entity a certificate of registration issued by the competent authority or the certificate issued by the competent certification body. The certificates shall state the references which enabled them to be registered in the list or to obtain certification and the classification given in that list.

3. Certified registration on official lists by the competent authorities or a certificate issued by the certification body shall not, for the purposes of the contracting authorities/entities of other Member States, constitute a presumption of suitability except as regards Article 39(1) and (2)(a) to (d) and (h), Article 40, Article 41(1)(b) and (c) and Article 42(1)(a)(i) and (b) to (g) in the case of contractors, Article 42(1)(a)(ii), (b) to (e) and (i) in the case of suppliers and Article 42(1)(a)(ii), (b) to (e) and (g) in the case of service providers.

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4. Information which can be deduced from registration on official lists or certification may not be questioned without justification. With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is offered.

The contracting authorities/entities of other Member States shall apply paragraph 3 and the first subparagraph of this paragraph only to economic operators established in the Member State holding the official list.

5. For any registration of economic operators of other Member States in an official list or for their certification by the bodies referred to in paragraph 1, no further proof or statement can be required other than those requested of national economic operators and, in any event, only those provided for under Articles 39 to 43 and, where appropriate, Article 44.

However, economic operators from other Member States may not be obliged to undergo such registration or certification in order to participate in a contract. Contracting authorities/entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.

6. Economic operators may apply at any time to be registered on an official list or for a certificate to be issued. They must be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body.

7. The certification bodies referred to in paragraph 1 shall be bodies complying with European certification standards.

8. Member States which have official lists or certification bodies as referred to in paragraph 1 shall be obliged to inform the Commission and the other Member States of the address of the body to which applications should be sent.

Section 3

Award of the contract

Article 47

Contract award criteria

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

- (a) when the award is made to the most economically advantageous tender from the point of view of the contracting authority/entity, various criteria linked to the subject-matter of the contract in question: for example, quality, price, technical merit, functional characteristics, environmental characteristics, running costs, lifecycle costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, security of supply, interoperability and operational characteristics; or
- (b) the lowest price only.

2. Without prejudice to the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority/entity shall specify in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents) the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

The weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority/entity, weighting is not possible for demonstrable reasons, the contracting authority/entity shall indicate in the contract documentation (contract notices, contract documents, descriptive documents or supporting documents) the criteria in descending order of importance.

Article 48

Use of electronic auctions

1. Member States may provide that contracting authorities/entities may use electronic auctions.

2. In restricted and negotiated procedures with publication of a contract notice, the contracting authorities/entities may decide that the award of a contract shall be preceded by an electronic auction when the contract specifications can be established with precision.

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in the second indent of the second subparagraph of Article 29(4).

The electronic auction shall be based:

- solely on price, where the contract is awarded to the lowest price; or,
- on price and/or on the new values of the features of the tenders indicated in the contract documents, where the contract is awarded to the most economically advantageous tender,

3. Contracting authorities/entities which decide to hold an electronic auction shall state that fact in the contract notice.

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The contract documents shall 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 limitations 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 tenderers 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 tenderers 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.

4. Before proceeding with an electronic auction, contracting authorities/entities shall make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them.

All tenderers which have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values; the invitation shall contain all relevant information concerning individual connection to the electronic equipment being used and shall state the date and time of the start of the electronic auction. 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.

5. When the contract is to be awarded on the basis of the most economically advantageous tender, the invitation shall be accompanied by the outcome of a full evaluation of the relevant tenderer, carried out in accordance with the weighting provided for in the first subparagraph of Article 47(2).

The invitation shall 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 shall 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 shall, however, be reduced in advance to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.

6. Throughout each phase of an electronic auction, the contracting authorities/entities shall instantaneously communicate to all tenderers 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 contract documents. 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 tenderers during any phase of an electronic auction.

7. Contracting authorities/entities shall close an electronic auction in one or more of the following manners:

- (a) in accordance with the date and time fixed in advance, as indicated in the invitation to take part in the auction;
- (b) when they receive no more new prices or new values which meet the requirements concerning minimum differences. In that event, the contracting authorities/entities shall state in the invitation to take part in the auction the time which they will allow to elapse after receiving the last submission before closing the electronic auction;
- (c) when the phases in the auction, fixed in the invitation to take part in the auction, have been completed.

When the contracting authorities/entities decide to close an electronic auction in accordance with point (c), possibly in combination with the arrangements laid down in point (b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

8. After closing an electronic auction, contracting authorities/entities shall award the contract in accordance with Article 47 on the basis of the results of the electronic auction.

Contracting authorities/entities 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-matter of the contract, as put up for tender in the published contract notice and defined in the contract documents.

Article 49

Abnormally low tenders

1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority/entity shall, before it rejects those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

- (a) the economics of the construction method, manufacturing process or services provided;
- (b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods or services;

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- (c) the originality of the work, supplies or services proposed by the tenderer;
- (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;
- (e) the possibility of the tenderer obtaining State aid.

2. The contracting authority/entity shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

3. Where a contracting authority/entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time-limit fixed by the contracting authority/entity, that the aid in question was granted legally. Where the contracting authority/entity rejects a tender in those circumstances, it shall inform the Commission thereof.

TITLE III

RULES APPLICABLE TO SUBCONTRACTING

CHAPTER I

Subcontracts awarded by successful tenderers which are not contracting authorities/entities

Article 50

Scope

1. Where, in accordance with Article 21(3) and (4), this Title applies, Member States shall take the necessary measures to ensure that successful tenderers which are not contracting authorities/entities apply the rules set out in Articles 51 to 53 when they award subcontracts to third parties.

2. For the purposes of paragraph 1, groups of undertakings which have been formed to obtain the contract, or undertakings related to them, shall not be considered third parties.

The tenderer shall include the exhaustive list of such undertakings in the tender. That list shall be updated following any change in the relationship between the undertakings.

Article 51

Principles

The successful tenderer shall act transparently and treat all potential subcontractors in an equal and non-discriminatory way.

Article 52

Thresholds and rules on advertising

1. When a successful tenderer which is not a contracting authority/entity awards a subcontract which has a value, excluding VAT, estimated not to be lower than the thresholds laid down in Article 8, it shall make known its intention by the way of a notice.

2. Subcontract notices shall contain the information referred to in Annex V and any other information deemed useful by the successful tenderer, if necessary with the approval of the contracting authority/entity.

Subcontract notices shall be drawn up in accordance with the standard form adopted by the Commission in accordance with the advisory procedure referred to in Article 67(2).

3. Subcontract notices shall be published in accordance with Article 32(2) to (5).

4. A subcontract notice shall not be required when a subcontract meets the conditions of Article 28.

5. Successful tenderers may publish, in accordance with Article 32, subcontract notices for which advertising is not required.

6. Member States may also provide that the successful tenderer may fulfil the subcontracting requirement set out in Article 21(3) or (4) by awarding subcontracts on the basis of a framework agreement concluded in accordance with the rules set out in Articles 51 and 53 and in paragraphs 1 to 5 of this Article.

Subcontracts based on such a framework agreement shall be awarded within the limits of the terms laid down in the framework agreement. They may only be awarded to economic operators that were originally party to the framework agreement. When awarding contracts, the parties shall in all circumstances propose terms consistent with those of the framework agreement.

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The term of a framework agreement may not exceed seven years, except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause.

Framework agreements may not be used improperly or in such a way as to prevent, restrict or distort competition.

7. For the award of subcontracts which have a value, excluding VAT, estimated to be less than the thresholds laid down in Article 8, successful tenderers apply the principles of the Treaty regarding transparency and competition.

8. Article 9 shall apply to the calculation of the estimated value of subcontracts.

Article 53

Criteria for qualitative selection of subcontractors

In the subcontract notice, the successful tenderer shall indicate the criteria for qualitative selection prescribed by the contracting authority/entity, as well as any other criteria it will apply for the qualitative selection of subcontractors. All these criteria shall be objective, non-discriminatory and consistent with the criteria applied by the contracting authority/entity for the selection of the tenderers for the main contract. The capabilities required must be directly related to the subject of the subcontract, and the levels of ability required must be commensurate with it.

The successful tenderer shall not be required to subcontract if it proves to the satisfaction of the contracting authority/entity that none of the subcontractors participating in the competition or their proposed bids meet the criteria indicated in the subcontract notice and thereby would prevent the successful tenderer from fulfilling the requirements set out in the main contract.

CHAPTER II

Subcontracts awarded by successful tenderers which are contracting authorities/entities

Article 54

Rules to be applied

Where successful tenderers are contracting authorities/entities, they shall comply with the provisions on main contracts laid down in Titles I and II when they award subcontracts.

TITLE IV

RULES TO BE APPLIED TO REVIEWS

Article 55

Scope and availability of review procedures

1. The review procedures provided for in this Title apply to the contracts referred to in Article 2, subject to the exceptions provided for in Articles 12 and 13.

2. Member States shall take the measures necessary to ensure that decisions taken by the contracting authorities/entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 56 to 62, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.

3. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made in this Title between national rules implementing Community law and other national rules.

4. Member States shall ensure that review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

5. Member States may require that the person wishing to use a review procedure has notified the contracting authority/entity of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 57(2) or any other time-limits for applying for review in accordance with Article 59.

6. Member States may require that the person concerned first seek review with the contracting authority/entity. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.

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The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority/entity has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority/entity has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

Article 56

Requirements for review procedures

1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 55 include provision for powers:

(a) to take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting authority/entity, and to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question; or

(b) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in point (a) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

In both the above cases, the powers provided for shall include the power to award damages to persons injured by the infringement.

2. The powers specified in paragraph 1 and Articles 60 and 61 may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting authority/entity, reviews a contract award decision, Member States shall ensure that the contracting authority/entity cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 57(2) and Article 60(4) and (5).

4. Except where provided for in paragraph 3 of this Article and Article 55(6), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, in particular defence and/or security interests, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.

6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

7. Except where provided for in Articles 60 to 62, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 55(6), paragraph 3 of this Article or Articles 57 to 62, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

8. Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority/entity and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The decisions taken by the independent body shall, by means determined by each Member State, be legally binding.

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10. Member States shall ensure that the bodies responsible for review procedures guarantee an adequate level of confidentiality of classified information or other information contained in the files transmitted by the parties, and act in conformity with defence and/or security interests throughout the procedure.

To this end, Member States may decide that a specific body has sole jurisdiction for the review of contracts in the fields of defence and security.

In any case, Member States may provide that only the members of review bodies personally authorised to deal with classified information may examine applications for review involving such information. They may also impose specific security measures concerning the registration of applications for review, the reception of documents and the storage of files.

Member States shall determine how review bodies are to reconcile the confidentiality of classified information with respect for the rights of the defence, and, in the case of a judicial review or of a review by a body which is a court or tribunal within the meaning of Article 234 of the Treaty, shall do so in such a way that the procedure complies, as a whole, with the right to a fair trial.

Article 57

Standstill period

1. Member States shall ensure that the persons referred to in Article 55(4) have sufficient time for effective review of the contract award decisions taken by contracting authorities/entities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 59.

2. A contract may not be concluded following the decision to award a contract falling within the scope of this Directive before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and either has been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting authority/entity has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

- a summary of the relevant reasons as set out in Article 35(2), subject to Article 35(3), and,
- a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph,

Article 58

Derogations from the standstill period

Member States may provide that the periods referred to in Article 57(2) do not apply in the following cases:

- (a) where this Directive does not require prior publication of a contract notice in the *Official Journal of the European Union*;
- (b) where the only tenderer concerned within the meaning of Article 57(2) is the one which is awarded the contract and there are no candidates concerned;
- (c) in the case of a contract based on a framework agreement as provided for in Article 29.

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 60 and 62 where:

- there is an infringement of the second indent of the second subparagraph of Article 29(4), and,
- the contract value is estimated to be equal to or to exceed the thresholds set out in Article 8,

Article 59

Time-limits for applying for review

Where a Member State provides that any application for review of a decision of a contracting authority/entity taken in the context of, or in relation to, a contract award procedure falling within the scope of this Directive must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the decision of the contracting authority/entity is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the decision of the contracting authority/entity is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the decision of the contracting authority/entity. The communication of the decision of the contracting authority/entity to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for review concerning decisions referred to in Article 56(1)(b) that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

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Article 60

Ineffectiveness

1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority/entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

- (a) where the contracting authority/entity has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with this Directive;
- (b) in the case of an infringement of Article 55(6), Article 56(3) or Article 57(2), where this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with another infringement of Titles I or II, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;
- (c) in the cases referred to in the second subparagraph of Article 58(c), where Member States have invoked the derogation from the standstill period for contracts based on a framework agreement.

2. The consequences of a contract being considered ineffective shall be provided for by national law. National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of alternative penalties within the meaning of Article 61(2).

3. Member States may provide that the review body independent of the contracting authority/entity may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest, first and foremost in connection with defence and/or security interests, require that the effects of the contract should be maintained.

Economic interests in the effectiveness of the contract may only be considered as overriding reasons relating to a general interest within the meaning of the first subparagraph, if ineffectiveness would lead to disproportionate consequences.

However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest within the meaning of the first subparagraph. Economic interests directly linked to the contract include, *inter alia*, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.

In any event, a contract may not be considered ineffective if the consequences of this ineffectiveness would seriously endanger the very existence of a wider defence or security programme which is essential for a Member State's security interests.

In all the abovementioned cases, Member States shall provide for alternative penalties within the meaning of Article 61(2), which shall be applied instead.

4. Member States shall provide that paragraph 1(a) does not apply where:

- the contracting authority/entity considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with this Directive,
- the contracting authority/entity has published in the *Official Journal of the European Union* a notice as described in Article 64 expressing its intention to conclude the contract, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice,

5. Member States shall provide that paragraph 1(c) does not apply where:

- the contracting authority/entity considers that the award of a contract is in accordance with the second indent of the second subparagraph of Article 29(4),
- the contracting authority/entity has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 57(2), to the tenderers concerned, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Article 61

Infringements of this Title and alternative penalties

1. In the case of an infringement of Article 55(6), Article 56(3) or Article 57(2) which is not covered by Article 60(1)(b), Member States shall provide for ineffectiveness in accordance with Article 60(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority/entity shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

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2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

- the imposition of fines on the contracting authority/entity, or,
- the shortening of the duration of the contract,

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority/entity and, in the cases referred to in Article 60(2), the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.

Article 62

Time-limits

1. Member States may provide that the application for review in accordance with Article 60(1) must be made:

(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

- the contracting authority/entity published a contract award notice in accordance with Articles 30(3), 31 and 32, provided that this notice includes justification of the decision of the contracting authority/entity to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*, or
- the contracting authority/entity informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 35(2), subject to Article 35(3). This option also applies to the cases referred to in Article 58(c); and

(b) in any case, before the expiry of a period of at least 6 months with effect from the day following the date of the conclusion of the contract.

2.

In all other cases, including applications for a review in accordance with Article 61(1), the time-limits for the application for a review shall be determined by national law, subject to Article 59.

Article 63

Corrective mechanism

1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of procurement has been committed during a contract award procedure falling within the scope of this Directive.

2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

- (a) its confirmation that the infringement has been corrected;
- (b) a reasoned submission as to why no correction has been made; or
- (c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority/entity on its own initiative or on the basis of the powers specified in Article 56(1)(a).

4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 56(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State concerned shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject-matter is begun. That new notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

Article 64

Content of a notice for voluntary ex ante transparency

The notice referred to in the second indent of Article 60(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 67(2), shall contain the following information:

- (a) the name and contact details of the contracting authority/entity;
- (b) a description of the object of the contract;
- (c) a justification of the decision of the contracting authority/entity to award the contract without prior publication of a contract notice in the *Official Journal of the European Union*;
- (d) the name and contact details of the economic operator in favour of which a contract award decision has been taken; and
- (e) where appropriate, any other information deemed useful by the contracting authority/entity.

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TITLE V

STATISTICAL OBLIGATIONS, EXECUTORY POWERS AND FINAL PROVISIONS

Article 65

Statistical obligations

In order to permit assessment of the results of applying this Directive, Member States shall forward to the Commission a statistical report, prepared in accordance with Article 66, addressing supply, services and works contracts awarded by contracting authorities/entities during the preceding year, by no later than 31 October of each year,

Article 66

Content of the statistical report

The statistical report shall specify the number and value of contracts awarded, by Member State or third country of the successful tenderer. It shall address, separately, supply, services and works contracts.

The data referred to in the first paragraph shall be broken down by procedure used and shall specify, for each procedure, supplies, services and works identified by group of the CPV nomenclature.

Where contracts have been concluded in accordance with the negotiated procedure without publication of a contract notice, the data referred to in the first paragraph shall also be broken down by the circumstances referred to in Article 28.

The content of the statistical report shall be determined in accordance with the advisory procedure referred to in Article 67(2).

Article 67

Committee procedure

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC⁽¹⁾ *OJ L 185, 16.8.1971, p. 15. (i)* (the Committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

With regard to the revision of the thresholds laid down in Article 8, the time-limits laid down in Article 5a(3)(c), (4)(b) and (e) of Decision 1999/468/EC shall be set at four, two and six weeks respectively, in view of the time constraints resulting from the calculation and publication methods laid down in the second subparagraph of Article 69(1) and Article 69(3) of Directive 2004/17/EC.

4. Where reference is made to this paragraph, Article 5a(1), (2), (4) and (6) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 68

Revision of thresholds

1. At the same time as the revision of the thresholds laid down in Directive 2004/17/EC referred to in Article 69 thereof, the Commission shall also revise the thresholds laid down in Article 8 of this Directive by aligning:

(a) the threshold established in Article 8(a) of this Directive to the revised threshold laid down in Article 16(a) of Directive 2004/17/EC;

(b) the threshold established in Article 8(b) of this Directive to the revised threshold laid down in Article 16(b) of Directive 2004/17/EC.

Such revision and alignment, designed to amend non-essential elements of this Directive, shall be carried out in accordance with the regulatory procedure with scrutiny referred to in Article 67(3). On imperative grounds of urgency, the Commission may have recourse to the urgency procedure referred to in Article 67(4).

2. The value of the thresholds set pursuant to paragraph 1 in the national currencies of Member States which do not participate in the Euro shall be aligned to the values of the thresholds laid down in Directive 2004/17/EC referred to in paragraph 1, calculated in accordance with the second subparagraph of Article 69(2) of Directive 2004/17/EC.

3. The revised thresholds referred to in paragraph 1 and their corresponding values in national currencies shall be published by the Commission in the *Official Journal of the European Union* at the beginning of the November following their revision.

Article 69

Amendments

1. In accordance with the advisory procedure referred to in Article 67(2), the Commission may amend:

(a) the procedures for the drawing-up, transmission, receipt, translation, collection and distribution of the notices referred to in Article 30 and the statistical reports provided for in Article 65;

(b) the procedure for sending and publishing the data referred to in Annex VI on grounds of technical progress or for

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administrative reasons;

(c) the list of registers, declarations and certificates set out in Annex VII, when, on the basis of notifications from Member States, this proves necessary.

2.

Acting in accordance with the regulatory procedure with scrutiny referred to in Article 67(3), the Commission may amend the following non-essential elements of this Directive:

(a) the reference numbers in the CPV nomenclature set out in Annexes I and II, insofar as this does not change the material scope of this Directive, and the procedures for reference in the notices to particular headings in the CPV within the categories of services listed in those Annexes;

(b) the technical details and characteristics of the devices for electronic receipt referred to in points (a), (f) and (g) of Annex VIII.

On imperative grounds of urgency, the Commission may have recourse to the urgency procedure referred to in Article 67(4).

Article 70

Amendment to Directive 2004/17/EC

The following Article shall be inserted in Directive 2004/17/EC:

'Article 22a

Contracts in the fields of defence and security

This Directive shall not apply to contracts to which Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security applies, nor to contracts to which that Directive does not apply pursuant to Articles 8, 12 and 13 thereof. (*)

[OJ L 217, 20.8.2009, p. 76](#) '.

Article 71

Amendment to Directive 2004/18/EC

Article 10 of Directive 2004/18/EC shall be replaced by the following:

'Article 10

Contracts in the fields of defence and security

Subject to Article 296 of the Treaty, this Directive shall apply to public contracts awarded in the fields of defence and security, with the exception of contracts to which Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security applies.

This Directive shall not apply to contracts to which Directive 2009/81/EC does not apply pursuant to Articles 8, 12 and 13 thereof. (*)

[OJ L 217, 20.8.2009, p. 76](#) '.

Article 72

Transposition

1. By 21 August 2011, Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 73

Review and reporting

1. By 21 August 2012, the Commission shall report on the measures taken by Member States with a view to the transposition of this Directive, and in particular Article 21 and Articles 50 to 54 thereof.

2. The Commission shall review the implementation of this Directive and report thereon to the European Parliament and the Council by 21 August 2016. It shall evaluate in particular whether, and to what extent, the objectives of this Directive have been achieved with regard to the functioning of the internal market and the development of a European defence equipment market and a European Defence Technological and Industrial Base, having regard, *inter alia*, to the situation of small and medium-sized enterprises. Where appropriate, the report shall be accompanied by a legislative proposal.

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3. The Commission shall also review the application of Article 39(1), investigating in particular the feasibility of harmonising the conditions for the reinstatement of candidates or tenderers with prior convictions excluding them from participation in public procurements, and shall, if appropriate, bring forward, a legislative proposal to that effect.

Article 74

Entry into force

This Directive shall enter into force on the day following its publication in the *Official Journal of the European Union*.

Article 75

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 13 July 2009.

For the European Parliament

The President

H.-G. PÖTTERING

For the Council

The President

E. ERLANDSSON

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ANNEX I

Services referred to in Articles 2 and 15

Category No	Subject	CPV Reference No
1	Maintenance and repair services	50000000-5, from 50100000-6 to 50884000-5 (except from 50310000-1 to 50324200-4 and 50116510-9, 50190000-3, 50229000-6, 50243000-0) and from 51000000-9 to 51900000-1
2	Foreign military-aid-related services	75211300-1
3	Defence services, military defence services and civil defence services	75220000-4, 75221000-1, 75222000-8
4	Investigation and security services	From 79700000-1 to 79720000-7
5	Land transport services	60000000-8, from 60100000-9 to 60183000-4 (except 60160000-7, 60161000-4), and from 64120000-3 to 64121200-2
6	Air transport services of passengers and freight, except transport of mail	60400000-2, from 60410000-5 to 60424120-3 (except 60411000-2, 60421000-5), from 60440000-4 to 60445000-9 and 60500000-3
7	Transport of mail by land and by air	60160000-7, 60161000-4, 60411000-2, 60421000-5
8	Rail transport services	From 60200000-0 to 60220000-6
9	Water transport services	From 60600000-4 to 60653000-0, and from 63727000-1 to 63727200-3
10	Supporting and auxiliary transport services	From 63100000-0 to 63111000-0, from 63120000-6 to 63121100-4, 63122000-0, 63512000-1 and from 63520000-0 to 63700000-6
11	Telecommunication services	From 64200000-8 to 64228200-2, 72318000-7, and from 72700000-7 to 72720000-3
12	Financial services: Insurance services	From 66500000-5 to 66720000-3
13	Computer and related services	From 50310000-1 to 50324200-4, from 72000000-5 to 72920000-5 (except 72318000-7 and from 72700000-7 to 72720000-3), 79342410-4, 9342410-4
14	Research and development services ⁽¹⁾ and evaluation tests	From 73000000-2 to 73436000-7
15	Accounting, auditing and bookkeeping services	From 79210000-9 to 79212500-8
16	Management consulting services ⁽²⁾ and related services	From 73200000-4 to 73220000-0, from 79400000-8 to 79421200-3 and 79342000-3, 79342100-4, 79342300-6, 79342320-2, 79342321-9, 79910000-6, 79991000-7 and 98362000-8
17	Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services	From 71000000-8 to 71900000-7 (except 71550000-8) and 79994000-8
18	Building-cleaning services and property management services	From 70300000-4 to 70340000-6 and from 90900000-6 to 90924000-0
19	Sewage and refuse disposal services; sanitation and similar services	From 90400000-1 to 90743200-9 (except 90712200-3), from 90910000-9 to 90920000-2 and 50190000-3, 50229000-6, 50243000-0
20	Training and simulation services in the fields of defence and security	80330000-6, 80600000-0, 80610000-3, 80620000-6, 80630000-9, 80640000-2, 80650000-5, 80660000-8

¹ Except research and development services referred to in Article 13(j).

² Except arbitration and conciliation services.

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ANNEX II

Services referred to in Articles 2 and 16		
Category No	Subject	CPV Reference No
21	Hotel and restaurant services	From 55100000-1 to 55524000-9 and from 98340000-8 to 98341100-6
22	Supporting and auxiliary transport services	From 63000000-9 to 63734000-3 (except 63711200-8, 63712700-0, 63712710-3), from 63727000-1 to 63727200-3 and 98361000-1
23	Legal services	From 79100000-5 to 79140000-7
24	Personnel placement and supply services ⁽¹⁾	From 79600000-0 to 79635000-4 (except 79611000-0, 79632000-3, 79633000-0) and from 98500000-8 to 98514000-9
25	Health and social services	79611000-0 and from 85000000-9 to 85323000-9 (except 85321000-5, 85322000-2)
26	Other services	

⁽¹⁾ Except employment contracts

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ANNEX III

Definition of certain technical specifications referred to in Article 18

For the purposes of this Directive, the following definitions shall apply:

1. (a) ‘Technical specifications’, in the case of works contracts: 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/entity. These characteristics shall include levels of environmental performance, design for all requirements (including accessibility for people with disabilities) 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. They shall also include rules relating to design and costing, the test, inspection and acceptance conditions for works and techniques or methods of construction and all other technical conditions which the contracting authority/entity 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;
- (b) ‘Technical specification’, in the case of supply or service contracts: a specification in a document defining the required characteristics of a product or service, such as quality and environmental performance levels, design for all requirements (including accessibility for people with disabilities), and conformity-assessment, performance, use of the product, its 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 methods and procedures, as well as conformity assessment procedures;
2. ‘Standard’: a technical specification approved by a recognised standardisation body for repeated or continuous application, compliance with which is not compulsory, from one of the following categories:
 - international standard: a standard adopted by an international standards organisation and made available to the general public,
 - European standard: a standard adopted by a European standardisation body 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. ‘Defence standard’: a technical specification the observance of which is not compulsory and which is approved by a standardisation body specialising in the production of technical specifications for repeated or continuous application in the field of defence;
4. ‘European technical approval’: a favourable technical assessment of the fitness for use of a product for a specific purpose, based on 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;
5. ‘Common technical specification’: a technical specification laid down in accordance with a procedure recognised by Member States which has been published in the *Official Journal of the European Union*;
6. ‘Technical reference’: any product produced by European standardisation bodies, other than official standards, according to procedures adapted to developments in market needs.

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ANNEX IV

Information to be included in the notices referred to in Article 30

NOTICE OF PUBLICATION OF A PRIOR INFORMATION NOTICE ON A BUYER PROFILE

1. Country of the contracting authority/entity
2. Name of the contracting authority/entity
3. Internet address of the 'buyer profile' (URL)
4. CPV nomenclature reference no(s)

PRIOR INFORMATION NOTICE

1. The name, address, fax number and e-mail address of the contracting authority/entity and, if different, of the service from which additional information may be obtained and, in the case of services and works contracts, of the departments, e.g. the relevant governmental Internet site, from which information can be obtained concerning the general regulatory framework for taxes, environmental protection, employment protection and working conditions applicable in the place where the contract is to be performed.

2. Where appropriate, indication whether the contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes.

3. In the case of works contracts: the nature and extent of the works and the place of execution; if the work is to be subdivided into several lots, the essential characteristics of those lots by reference to the work; if available, an estimate of the range of the cost of the proposed works; CPV nomenclature reference no(s).

In the case of supply contracts: the nature and quantity or value of the products to be supplied, CPV nomenclature reference no(s).

In the case of services contracts: the total value of the proposed purchases in each of the service categories, CPV nomenclature reference no(s).

4. Estimated date for initiating the award procedures in respect of the contract or contracts, in the case of service contracts by category.

5. Where appropriate, indicate whether a framework agreement is involved.

6. Where appropriate, other information.

7. Date of dispatch of the notice or of dispatch of the notice of publication of the prior information notice on the buyer profile.

CONTRACT NOTICES

Restricted procedures, negotiated procedures with publication of a contract notice and competitive dialogues:

1. Name, address, telephone and fax number, e-mail address of the contracting authority/entity.

2. Where appropriate, indication whether the contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes.

3. (a) The award procedure chosen;(b) Where appropriate, the reasons for use of the accelerated procedure (in restricted and negotiated procedures);

(c) Where appropriate, indicate whether a framework agreement is involved;

(d) Where appropriate, the holding of an electronic auction.

4. Form of the contract.

5. Place of execution/performance of the works, for delivery of products or of the provision of services.

6. (a) Works contracts:

—nature and extent of the works and general nature of the work. Indication in particular of options concerning supplementary works, and, if known, the provisional timetable for recourse to these options as well as the number of possible renewals, if any. If the work or the contract is subdivided into several lots, the size of the different lots; CPV nomenclature reference no(s),

—information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects,

—in the case of a framework agreement, indication also of the planned duration of the framework agreement, the estimated total value of the works for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded.

(b) Supply contracts:

—nature of the products to be supplied, indicating in particular whether tenders are requested with a view to purchase, lease rental, hire or hire purchase or a combination of these, CPV nomenclature reference no(s). Quantity of products to be supplied, indicating

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in particular options concerning supplementary purchases and, if known, the provisional timetable for recourse to these options as well as the number of renewals, if any; CPV nomenclature reference no(s),

—in the case of regular or renewable contracts during the course of a given period, indication also, if known, of the timetable for subsequent contracts for intended purchases of supplies,

—in the case of a framework agreement, indication also of the planned duration of the framework agreement, the estimated total value of the supplies for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded.

(c) Service contracts:

—category and description of the service. CPV nomenclature reference no(s). Quantity of services to be provided. Indication in particular of options concerning supplementary purchases and, if known, the provisional timetable for recourse to these options as well as the number of renewals, if any. In the case of renewable contracts over a given period, an estimate of the time frame, if known, for subsequent contracts for intended purchases of services.

In the case of a framework agreement, indication also of the planned duration of the framework agreement, the estimated total value of the services for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded,

—indication of whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession,

Reference to the law, regulation or administrative provision,

—indication of whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the execution of the service,

7. If the contracts are subdivided into lots, indication of the possibility for economic operators of tendering for one, for several and/or for all the lots.

8. Admission or prohibition of variants.

9. Where applicable, indication of the percentage of the contract's global value which is required to be subcontracted to third parties through a tendering procedure (Article 21(4)).

10. Where applicable, selection criteria regarding the personal situation of subcontractors that may lead to their exclusion, and required information proving that they do not fall within the cases justifying exclusion. Information and any necessary formalities for assessment of the minimum economic and technical capacities required of the subcontractors. Minimum level(s) of capacities possibly required.

11. Time-limit for completion of works/supplies/services or duration of the works/supply/services contract. Where possible, time-limit by which works will begin or time-limit by which delivery of supplies or services will begin.

12. Where applicable, particular conditions to which the performance of the contract is subject.

13. (a) The final date for the receipt of requests to participate;
(b) address to which they must be sent;
(c) the language or languages in which they must be drawn up.

14. Where applicable, any deposits and guarantees required.

15. Main terms concerning financing and payment and/or references to the texts in which these are contained.

16. Where applicable, the legal form to be taken by the grouping of economic operators to which the contract is to be awarded.

17. Selection criteria regarding the personal situation of economic operators that may lead to their exclusion, and information required proving that they do not fall within the cases justifying exclusion. Selection criteria, information and any necessary formalities for assessment of the minimum economic and technical standards required of the economic operator. Minimum level(s) of standards possibly required.

18. In the case of framework agreements: the number and, where appropriate, proposed maximum number of economic operators which will be members of it and the duration of the framework agreement.

19. In the case of a competitive dialogue or a negotiated procedure with the publication of a contract notice, indication, if appropriate, of recourse to a staged procedure in order gradually to reduce the number of solutions to be discussed or tenders to be negotiated.

20. In the case of a restricted procedure, a negotiated procedure or a competitive dialogue, when recourse is had to the option of reducing the number of candidates to be invited to submit tenders, to engage in dialogue or to negotiate: minimum and, if appropriate, proposed maximum number of candidates and objective criteria to be used to choose that number of candidates.

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21. Criteria referred to in Article 47 to be used for award of the contract: 'lowest price' or 'most economically advantageous tender'. Criteria representing the most economically advantageous tender as well as their weighting or the criteria in descending order of importance shall be mentioned where they do not appear in the specifications or, in the event of a competitive dialogue, in the descriptive document.
22. Where appropriate, date(s) of publication of the prior information notice in accordance with the technical specifications of publication indicated in Annex VI or statement that no such publication was made.
23. Date of dispatch of the notice.

CONTRACT AWARD NOTICE

1. Name and address of the contracting authority/entity.
2. Award procedure chosen. In the case of a negotiated procedure without prior publication of a contract notice (Article 28), justification.
3. Works contracts: nature and extent of the services.
Supply contracts: nature and quantity of products supplied, where appropriate, by the supplier; CPV nomenclature reference no(s).
Service contracts: category and description of the service; CPV nomenclature reference no(s); quantity of services purchased.
4. Date of contract award.
5. Contract award criteria.
6. Number of tenders received.
7. Name and address of the successful economic operators.
8. Price or range of prices (minimum/maximum) paid.
9. Value of the tender (tenders) retained or the highest tender and lowest tender taken into consideration for the contract award.
10. Where appropriate, proportion of contract to be subcontracted to third parties and its value.
11. If appropriate, the reasons for the framework agreement lasting more than seven years.
12. Date of publication of the tender notice in accordance with the technical specifications for publication in Annex VI.
13. Date of dispatch of this notice.

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ANNEX V

Information to be included in the subcontract notices referred to in Article 52

1. The name, address, fax number and e-mail address of the successful tenderer and, if different, of the service from which additional information may be obtained.
2. (a) Place of execution/performance of the works, for delivery of products or of the provision of services;(b) nature, quantity and extent of the works and general nature of the work; CPV nomenclature reference no(s);
(c) nature of the products to be supplied, indicating whether tenders are requested with a view to purchase, lease rental, hire or hire purchase or a combination of these, CPV nomenclature reference no(s);
(d) category and description of service; CPV nomenclature reference no(s).
3. Any time-limit for completion imposed.
4. Name and address of the body from which the specifications and the additional documents may be requested.
5. (a) Time-limit for the receipt of applications to participate and/or the receipt of tenders;
(b) address to which they must be sent;
(c) language(s) in which they must be written.
6. Any deposits or guarantees required.
7. Objective criteria which will be applied for selection of the subcontractors related to their personal situation or the assessment of their bid.
8. Any other information.
9. Date of dispatch of the notice.

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ANNEX VI

FEATURES CONCERNING PUBLICATION

1. Publication of notices

(a) The notices referred to in Articles 30 and 52 must be sent by the contracting authorities/entities or successful tenderers to the Publications Office of the European Union in the format referred to in Article 32. The prior information notices referred to in Article 30(1), first subparagraph, published on a buyer profile as described in point 2, must also use that format, as must the notice of such publication.

The notices referred to in Articles 30 and 52 must be published by the Office for Publications Office of the European Union or by the contracting authorities/entities in the case of a prior information notice published on a buyer profile in accordance with the first subparagraph of Article 30(1).

In addition, contracting authorities/entities may publish this information on the Internet on a 'buyer profile' as referred to in point 2;

(b) the Office for Publications Office of the European Union shall give the contracting authority/entity the confirmation of publication referred to in Article 32(8).

2. Publication of supplementary information

The buyer profile may include prior information notices as referred to in Article 30(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 fax number, a postal address and an e-mail address.

3. Format and procedures for sending notices electronically

The format and procedure for sending notices electronically are accessible at the Internet address '<http://simap.europa.eu>'.

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ANNEX VII

REGISTERS⁽¹⁾

For the purposes of Article 40, 'registers' means those listed in this Annex and, where changes have been made at national level, the registers which have replaced them. This Annex is only indicative and does not prejudice the compatibility of these registers with Community law on the freedom of establishment and the freedom to provide services. ⁽¹⁾

PART A

Works contracts

The professional registers and corresponding declarations and certificates for each Member State are:

- in Belgium the 'Registre du Commerce'/'Handelsregister',
- in Bulgaria, the 'Търговски регистър',
- in the Czech Republic, the 'obchodní rejstřík',
- in Denmark, the 'Erhvervs- og Selskabsstyrelsen',
- in Germany, the 'Handelsregister' and the 'Handwerksrolle',
- in Estonia, the 'Registrite ja Infosüsteemide Keskus',
- in Ireland, the contractor may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name, —
- in Greece, the 'Μητρώο Εργοληπτικών Επιχειρήσεων — ΜΕΕΠ' of the Ministry for Environment, Town and Country Planning and Public Works (Υ.Π.Ε.ΧΩ.Δ.Ε),
- in Spain, the 'Registro Oficial de Licitadores y Empresas Clasificadas del Estado',
- in France, the 'Registre du commerce et des sociétés' and the 'Répertoire des métiers',
- in Italy, the 'Registro della Camera di commercio, industria, agricoltura e artigianato',
- in Cyprus, the contractor may be requested to provide a certificate from the 'Council for the Registration and Audit of Civil Engineering and Building Contractors (Συμβούλιο Εγγραφής και Ελέγχου Εργοληπτών Οικοδομικών και Τεχνικών Έργων)' in accordance with the Registration and Audit of Civil Engineering and Building Contractors Law,
- in Latvia, the 'Uzņēmumu reģistrs',
- in Lithuania, the 'Juridinių asmenų registras',
- in Luxembourg, the 'Registre aux firmes' and the 'Rôle de la Chambre des métiers',
- in Hungary, the 'Cégnylvántartás', the 'egyéni vállalkozók jegyzői nyilvántartása',
- in Malta, the contractor obtains his 'numru ta' registrazzjoni tat-Taxxa tal-Valur Miżjud (VAT) u n-numru tal-licenzja ta' kummerc', and, in the case of a partnership or company, the relevant registration number as issued by the Malta Financial Services Authority,
- in the Netherlands, the 'Handelsregister',
- in Austria, the 'Firmenbuch', the 'Gewerberegister', the 'Mitgliederverzeichnisse der Landeskammern',
- in Poland, the 'Krajowy Rejestr Sądowy',
- in Portugal, the 'Instituto da Construção e do Imobiliário' (INCI),
- in Romania, the 'Registrul Comerțului',
- in Slovenia, the 'Sodni register' and the 'obrtni register',
- in Slovakia, the 'Obchodný register',
- in Finland, the 'Kaupparekisteri'/'Handelsregistret',
- in Sweden, the 'aktiebolags-, handels- eller föreningsregistren',
- in the United Kingdom, the contractor may be requested to provide a certificate from the Registrar of Companies or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established in a specific place under a given business name.

PART B

Supply contracts

The relevant professional and trade registers and declarations and certificates are:

- in Belgium the 'Registre du Commerce'/'Handelsregister',
- in Bulgaria, the 'Търговски регистър',
- in the Czech Republic, the 'obchodní rejstřík',
- in Denmark, the 'Erhvervs- og Selskabsstyrelsen',
- in Germany, the 'Handelsregister' and the 'Handwerksrolle',
- in Estonia, the 'Registrite ja Infosüsteemide Keskus',
- in Greece, the 'Βιοτεχνικό ή Εμπορικό ή Βιομηχανικό Επιμελητήριο' and the 'Μητρώο Κατασκευαστών Αμυντικού Υλικού',
- in Spain, the 'Registro Mercantil' or, in the case of non-registered individuals, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question,
- in France, the 'Registre du commerce et des sociétés' and the 'Répertoire des métiers',
- in Ireland, the supplier may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies that he is certified as incorporated or registered or, if he is not so certified, a certificate stating that the person concerned has declared on

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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,

- in Italy, the ‘Registro della Camera di commercio, industria, agricoltura e artigianato’, and the ‘Registro delle commissioni provinciali per l’artigianato’,
- in Cyprus, the supplier may be requested to provide a certificate from the ‘Registrar of Companies and Official Receiver’ (Εφορος Εταιρειών και Επίσημος Παραλήπτης) or, if this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name,
- in Latvia, the ‘Uzņēmumu reģistrs’,
- in Lithuania, the ‘Juridinių asmenų registras’,
- in Luxembourg, the ‘Registre aux firmes’ and the ‘Rôle de la Chambre des métiers’,
- in Hungary, the ‘Cégnylvántartás’, the ‘egyéni vállalkozók jegyzői nyilvántartása’,
- in Malta: the supplier obtains his ‘numru ta’ registrazzjoni tat-Taxxa tal-Valur Miżjud (VAT) u n-numru tal-licenzja ta’ kummerċ’, and, in the case of a partnership or company, the relevant registration number as issued by the Malta Financial Services Authority,
- in the Netherlands, the ‘Handelsregister’,
- in Austria, the ‘Firmenbuch’, the ‘Gewerberegister’, the ‘Mitgliederverzeichnisse der Landeskammern’,
- in Poland, the ‘Krajowy Rejestr Sądowy’,
- in Portugal, the ‘Registro Nacional das Pessoas Colectivas’,
- in Romania, the ‘Registrul Comerţului’, —
- in Slovenia, the ‘Sodni register’ and the ‘obrtni register’,
- in Slovakia, the ‘Obchodný register’,
- in Finland, the ‘Kaupparekisteri’/‘Handelsregistret’,
- in Sweden, the ‘aktiebolags-, handels- eller föreningsregistren’,
- in the United Kingdom, the supplier may be requested to provide a certificate from the Registrar of Companies stating that he is certified as incorporated or registered or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in a specific place under a given business name.

PART C

Service contracts

The relevant professional and trade registers and declarations and certificates are:

- in Belgium, the ‘Registre du commerce/Handelsregister’ and the ‘Ordres professionnels/Beroepsorden’,
- in Bulgaria, the ‘Търговски регистър’,
- in the Czech Republic, the ‘obchodní rejstřík’,
- in Denmark, the ‘Erhvervs- og Selskabsstyrelsen’,
- in Germany, the ‘Handelsregister’, the ‘Handwerksrolle’, the ‘Vereinsregister’, the ‘Partnerschaftsregister’ and the ‘Mitgliedsverzeichnisse der Berufskammern der Länder’,
- in Estonia, the ‘Registrite ja Infosüsteemide Keskus’,
- in Ireland, the service provider may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies or, if he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name,
- in Greece, the service provider may be asked to provide a declaration on the exercise of the profession concerned made on oath before a notary; in the cases provided for by existing national legislation, for the provision of research services as mentioned in Annex I, the professional register ‘Μητρώο Μελετητών’ and the ‘Μητρώο Γραφείων Μελετών’,
- in Spain, the ‘Registro Oficial de Licitadores y Empresas Clasificadas del Estado’,
- in France, the ‘Registre du commerce et des sociétés’ and the ‘Répertoire des métiers’,
- in Italy, the ‘Registro della Camera di commercio, industria, agricoltura e artigianato’, the ‘Registro delle commissioni provinciali per l’artigianato’ or the ‘Consiglio nazionale degli ordini professionali’,
- in Cyprus, the service provider may be requested to provide a certificate from the ‘Registrar of Companies and Official Receiver’ (Εφορος Εταιρειών και Επίσημος Παραλήπτης) or, if this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name,
- in Latvia, the ‘Uzņēmumu reģistrs’,
- in Lithuania, the ‘Juridinių asmenų registras’,
- in Luxembourg, the ‘Registre aux firmes’ and the ‘Rôle de la Chambre des métiers’,
- in Hungary, the ‘Cégnylvántartás’, the ‘egyéni vállalkozók jegyzői nyilvántartása’, some ‘szakmai kamarák nyilvántartása’ or, in the case of some activities, a certificate stating that the person concerned is authorised to be engaged in the commercial activity or profession in question,
- in Malta: the service provider can obtain his ‘numru ta’ registrazzjoni tat-Taxxa tal-Valur Miżjud (VAT) u n-numru tal-licenzja ta’ kummerċ’, and, in the case of a partnership or company, the relevant registration number as issued by the Malta Financial Services Authority,
- in the Netherlands, the ‘Handelsregister’,
- in Austria, the ‘Firmenbuch’, the ‘Gewerberegister’, the ‘Mitgliederverzeichnisse der Landeskammern’,
- in Poland, the ‘Krajowy Rejestr Sądowy’,
- in Portugal, the ‘Registro Nacional das Pessoas Colectivas’,

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- in Romania, the ‘Registrul Comerțului’,
- in Slovenia, the ‘Sodni register’ and the ‘obrtni register’,
- in Slovakia, the ‘Obchodný register’,
- in Finland, the ‘Kaupparekisteri’/‘Handelsregistret’,
- in Sweden, the ‘aktiebolags-, handels- eller föreningsregistren’,
- in the United Kingdom, the service provider may be requested to provide a certificate from the Registrar of Companies or, if he is not so certified, a certificate stating that he has declared on oath that he is engaged in the profession in question in a specific place under a given business name.

ANNEX VIII

Requirements relating to devices for the electronic receipt of requests to participate and tenders

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

- (a) electronic signatures relating to requests to participate and tenders comply with national provisions adopted pursuant to Directive 1999/93/EC;
- (b) the exact time and date of the receipt of requests to participate and tenders 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 various stages of the contract award procedure, 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.

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For ease of reference, the following documents have been placed on MOD's consultation website:

- 2004/17/EC – Utilities Directive
- 2004/18/EC – Classic Directive
- 2007/66/EC – Remedies Directive

<http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/ConsultationsandCommunications/PublicConsultations/200981ECFirstConsultation>

