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**The Public Contracts Regulations 2015
&
The Utilities Contracts Regulations 2016**

Guidance on Awarding Contracts

Overview, Key Points and Frequently Asked Questions

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What are the contract award provisions?

This guidance covers the contract award provisions of the Public Contracts Regulations 2015. The Regulations include a revised provision on **contract award criteria**, a brand new provision on **life-cycle costing**, and a revised provision on **abnormally low tenders**.

The corresponding provisions in the Utilities Contracts Regulations 2016 are: regulation 82 (contract award criteria), regulation 83 (life-cycle costing), and regulation 84 (abnormally low tenders).

What has changed?

The structure of the contract award provisions in the new rules has changed significantly when compared with those in the previous rules¹. Whether these differences are particularly noticeable in practice is likely to depend on what is being procured. The key changes include changes to the definition of Most Economically Advantageous Tender, more flexibility to take into account a wider range of characteristics as award criteria, and provisions for evaluating the cost-effectiveness of tenders through life-cycle costing.

Which rules do I need to follow?

Regulation 67 covers contract award criteria, Regulation 68 covers life-cycle costing, and Regulation 69 covers abnormally low tenders. These Regulations are attached for quick reference at **Annex A**.

A significant amount of further background information, which may be helpful to aid interpretation, can also be gained from the recitals to the Directive. This is particularly true for the contracts award provisions, whose final shape reflect compromise approaches reached at the end of the negotiations between the European Commission, the Member States and the European Parliament. The relevant recitals are 89 – 98.

Key points

The key changes include:

¹ Public Sector Directive (2004/18/EC) and the Public Contracts Regulations 2006 (regulation 30).

- 1. A significantly amended definition of the concept of “Most Economically Advantageous Tenderer” (MEAT) from that with which procurers will have become familiar, and a requirement to award contracts based upon the new definition**

The old rules provided a choice between using MEAT or lowest price award criteria. MEAT, as it was hitherto defined, was synonymous with the UK concept of awarding contracts that provided for the best Value for Money (or best price/quality ratio).

While the new rules **mandate MEAT**, the definition of MEAT has changed significantly, and the new definition is much more flexible. It permits, amongst other things, the awarding of contracts on the basis of lowest price.

There is relevant background here from the negotiation of the 2014 Public Sector Directive. During the course of the EU negotiations on this Directive, there was extended discussion about deleting the use of lowest price as a single award criterion, so that a greater emphasis would be put on quality aspects for awarding contracts. But views amongst negotiators varied widely. The outcome of the negotiations was:

- i) that the Directive would require contracts to be awarded on the basis of a revised definition of Most Economically Advantageous Tender (MEAT), which covers various options (See Regulation 67 at Annex A), **including the use of price only or cost only**; and
- ii) Member States would have the flexibility to decide at the national level, whether price-only criteria should be ruled out. Following public consultation, the UK Government decided not to rule out price-only criteria in the UK's implementing regulations, to provide more flexibility to UK contracting authorities.

- 2. There is more flexibility to take account of a wider range of characteristics of tenders**

The new rules make clear that contracting authorities, when evaluating the most economically advantageous tender, can take account of the best price-quality ratio. The concept of “best price-quality ratio” (BPQR) is synonymous with the old definition of MEAT – in essence, BPQR means price or cost plus other criteria and equates to value for money. So although there are superficial changes in terminology, contracting authorities may be reassured that longstanding flexibilities can prevail in practice. An example of what might be included in a BPQR assessment is given in the Q&A. As set out in the companion guidance on the Light Touch Regime, using BPQR is likely to be particularly important when service quality is paramount.

It should also be noted that Government policy is to secure value for money. This is set out in Annex 4.6 of HM Treasury's Managing Public Money. Value for

money means securing the best mix of quality and effectiveness for the least outlay over the period of the use of the goods or services bought. It is not about minimising up front prices.

Taking account of social aspects

BPQR means price or cost plus other criteria. As set out in Regulation 67(2) of the 2015 Regulations, ‘such other criteria’ can include qualitative, environmental and/or social aspects, linked to the subject matter of the contract. The inclusion of **social aspects** is a new feature and a change for which the UK Government lobbied in the EU negotiations.

Taking account of the experience of staff assigned to the contract, where relevant

Regulation 67(3)(b) provides for taking into account the organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract.

This was another flexibility for which the UK Government campaigned, which provides long-sought legal clarity that buyers can take into account the relevant skills and experience of individuals when awarding contracts for consultants, lawyers, architects, etc. Historically this lack of clarity has been a common problem, as buyers have only been able to consider skills and experience when assessing a supplier’s general credentials at the start of a procurement, and have not been able to consider the skills and experience of the specific people when they are actually put forward to deliver the job.

This had previously been in doubt following the judgment in the Lianakis case (C532/06).

3. Fair Trade as an award criterion - Clarification resulting from case law

Regulation 67(3) (a) of the 2015 Regulations refers to trading and its conditions. As recital 97 to the 2014 Directive sets out, award criteria relating to trading and its conditions can for instance refer to the fact that the product concerned is of fair trade origin, including the requirement to pay a minimum price and price premium to producers. The clarification on products of fair trade origin stems from the Max Havelaar case (C368/10), where judgment was reached during the course of the negotiations.

The judgment confirmed that contracting authorities can use fair trade as an award criterion, where the criterion relates to products supplied under a specific contract and not just to a general purchasing policy of the tenderers.

4. Clarification of what counts as “Linked to the subject matter of the contract”

Every award criterion used must be linked to the subject matter of the contract. What counts as linked, however, has been clarified in the new directive and implemented in Regulation 67(5) of the 2015 Regulations. Contracting authorities should be aware of this change, to ensure that appropriate contract award criteria are used.

Regulation 67(5) states: “Award criteria shall be considered to be linked to the subject-matter of the contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle including factors involved in:

- (a) The specific process of production, provision or trading of those works, supplies or services; or
 - (b) a specific process for another stage of their life cycle,
- even where such factors do not involve part of their material substance.”

5. Life cycle costing

When a contracting authority uses cost as an award criterion, it should do so on the basis of a cost effectiveness approach. Life cycle costing (LCC) is an example of this approach, but contracting authorities are free to use other approaches.

Life cycle is defined in Regulation 2(1) of the 2015 Regulations (and Article 2(20) of the Directive) and is explained in recital 96 to the Directive as including all costs over the life cycle of works, supplies or services. Recital 96 states: “This means internal costs, such as research to be carried out, development, production, use, maintenance and end-of-life disposal costs but can also include costs imputed to environmental externalities, such as pollution caused by extraction of raw materials used in the product or caused by the product itself or its manufacturing, provided they can be monetised and monitored.”

As set out in Regulation 68(1), LCC should cover all or part of the following costs over the life cycle of the product, service or works, to the extent that they are relevant:

- (a) costs, borne by the contracting authority or other users, such as—
 - (i) costs relating to acquisition,
 - (ii) costs of use, such as consumption of energy and other resources,

- (iii) maintenance costs,
 - (iv) end of life costs, such as collection and recycling costs;
- (b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified.

Regulation 68(2) adds that the costs mentioned in Regulation 68(1)(b) may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

The method used for the assessment of costs imputed to environmental externalities must meet the requirements set out in Regulation 68(3), the aim of which is to make sure that this approach does not favour a particular supplier.

Regulation 68(5) sets out that where a common method for the calculation of life cycle costs has been made mandatory by a legislative act of the EU, that method has to be used. So far, there is only one such act, namely the Clean and Efficient Vehicles Directive (2009/33/EU).

6. Changes to the rules on abnormally low tenders

Both the old and new rules contain provisions requiring contracting authorities to seek explanations from bidders about abnormally low tenders, before taking action to reject the bidder.

The new provisions are listed in Regulation 69, which place a duty on the contracting authority to investigate tenders it considers abnormally low. The main change to be aware of, is a new requirement to disregard tenders that are abnormally low because they are in breach of international environmental, social or labour law provisions (Regulation 69(5), which refers to Regulation 56(2)).

No action is necessary where no tenders received appear to contain abnormally low prices.

Q&A

What is the difference between price & cost?

Cost is the acquisition price plus other economic costs. Using the example of buying printers, the award criteria using cost would be the acquisition price plus other costs, such as the cost of consumables (ink), electricity consumption or costs connected to dismantling and recycling.

What other criteria apart from price or cost might a BPQR approach include?

Using the example of printers above, other criteria could include:

use of recyclable materials for the production of the printers, length of warranty, after sales service, noise emission, involvement of persons from a disadvantaged group in the production process and user friendliness.

Recital 93 says that ‘value for money’ can be assessed on the basis of factors other than solely the price or remuneration where national provisions exist which fix prices for supplies or the remuneration of certain services. Are there examples of such supplies or services?

In some Member States the price of books is fixed. In such cases, other factors, such as delivery or after sales service would need to be evaluated.

ANNEX A – Regulations 67, 68 and 69

Contract award criteria

67.—(1) Contracting authorities shall base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority.

(2) That tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

(3) Such criteria may comprise, for example—

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

(4) The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

(5) Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in—

- (a) the specific process of production, provision or trading of those works, supplies or services, or
- (b) a specific process for another stage of their life cycle,

even where those factors do not form part of their material substance.

(6) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority.

(7) Award criteria shall—

- (a) ensure the possibility of effective competition; and
- (b) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

(8) In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

Weighting

(9) The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

(10) Those weightings may be expressed by providing for a range with an appropriate maximum spread.

(11) Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

Life-cycle costing

68.—(1) Life-cycle costing shall, to the extent relevant, cover part or all of the following costs over the life cycle of a product, service or works:—

- (a) costs, borne by the contracting authority or other users, such as—

- (i) costs relating to acquisition,
 - (ii) costs of use, such as consumption of energy and other resources,
 - (iii) maintenance costs,
 - (iv) end of life costs, such as collection and recycling costs;
- (b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified.
- (2) The costs mentioned in paragraph (1)(b) may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.
- (3) The method used for the assessment of costs imputed to environmental externalities shall fulfil all of the following conditions:—
- (a) it is based on objectively verifiable and non-discriminatory criteria and, in particular, where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain economic operators;
 - (b) it is accessible to all interested parties;
 - (c) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the EU is bound.
- (4) Where contracting authorities assess costs using a life-cycle costing approach, they shall indicate in the procurement documents—
- (a) the data to be provided by the tenderers, and
 - (b) the method which the contracting authority will use to determine the life-cycle costs on the basis of those data.
- (5) Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the EU, that common method shall be applied for the assessment of life-cycle costs.
- (6) A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XIII to the Public Contracts Directive as amended from time to time.

Abnormally low tenders

- 69—(1) Contracting authorities shall require tenderers to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.
- (2) The explanations given in accordance with paragraph (1) may in particular relate to—
- (a) the economics of the manufacturing process, of the services provided or of the construction method;
 - (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
 - (c) the originality of the work, supplies or services proposed by the tenderer;
 - (d) compliance with applicable obligations referred to in regulation 56(2);
 - (e) compliance with obligations referred to in regulation 71;
 - (f) the possibility of the tenderer obtaining State aid.
- (3) The contracting authority shall assess the information provided by consulting the tenderer.
- (4) The contracting authority may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).
- (5) The contracting authority shall reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 56(2).
- (6) Where the contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only—
- (a) after consultation with the tenderer, and

(b) where the tenderer is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of TFEU.

(7) Where the contracting authority rejects a tender in the circumstances referred to in paragraph (6), it shall inform the Commission.