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Service

THE PUBLIC CONTRACTS REGULATIONS 2015

&

THE UTILITIES CONTRACTS REGULATIONS 2016

GUIDANCE ON ELECTRONIC PROCUREMENT & ELECTRONIC COMMUNICATION

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OVERVIEW

What are the e-communication rules?

The new rules cover the use of electronic communications between authorities and suppliers, including the use of electronic auctions (e-auctions), and for the first time they explicitly cover the use of electronic catalogues. These rules include: timing and scope of e-communication requirements, accessibility, security, and exceptions to the mandatory use of e-communication. For the first time, some e-communication stages will be mandatory.

Why is this helpful / necessary?

It is widely agreed that e-communications can help reduce procurement process costs for suppliers and authorities, reduce procurement timescales, encourage access to opportunities for suppliers, facilitate compliance with the rules, and promote traceability, transparency and auditability in the procurement process.

What has changed?

Despite long-standing targets¹, the usage of e-communications across the EU as a whole remains patchy. The new rules therefore *require* the use of e-communication for all information exchange under Part 2 of the Regulations (with limited exceptions, and a transition period allowed after the Regulations come into force in most cases). But if e-communication is to be economically beneficial, trusted, and effective, it is necessary to use tools and techniques which are readily accessible to suppliers and authorities; which facilitate cross-border bidding; which meet appropriate security requirements; and to allow derogations in specific circumstances where e-communications are impracticable. In addition unrestricted and full direct, free of charge access to the procurement documents is normally required from the date of the publication in the Official Journal.

The new rules cover these points.

Which Regulations do I need to refer to?

Most of the rules governing e-communications between an authority and suppliers are found in Regulation 22 of the Public Contracts Regulations 2015. The corresponding provision in the 2016 Utilities Contracts Regulations (UCR 2016) is Regulation 40. Electronic auctions are covered in Regulation 35 and Regulation 53 of the UCR 2016. Dynamic Purchasing Systems in Regulation 34 and Regulation 52 of the UCR 2016. Electronic availability of procurement documents for suppliers in Regulation 53 and Regulation 73 of the UCR 2016.

The use of electronic catalogues in Regulation 36 and Regulation 54 of the UCR 2016.

¹ <https://joinup.ec.europa.eu/community/epractice/document/eu-manchester-ministerial-declaration-2005>

KEY POINTS

Phasing-in of rules on E-Communication

The most significant change compared with the old rules is that electronic means of communication will become the *mandatory* means of communication and information exchange in regulated procurement procedures. There are certain exceptions where e-communications are impracticable, plus an allowance for some oral communication. (Regulation 22 (1), (3) and (5) – (10)).

The Regulations require some e-communications obligations **with immediate effect** from when the new Regulations came into force (except in the situations listed in Regulation 22 (3), and (5) –(10)).

So, for procurements commenced² on or after 26 February 2015:

- Free and unrestricted electronic availability of procurement documents is required (Regulation 53)
- Dynamic Purchasing Systems to be operated as a completely electronic process (Regulation 34(2))
- E-auctions rules apply if authorities choose to use e-auctions (Regulation 35)
- E-catalogues rules apply if authorities choose to accept or require use of e-catalogues (Regulation 36).
- Rules on oral communications, data integrity, and permitted types of communication apply (Regulations 22(8)-(12) and 121)
- E-communication rules apply if authorities choose to use e-communication (Regulation 22(13)-(21)).

Various other obligations have been postponed until later dates to allow authorities as much time as possible (within the limits set by the Directive) to adapt. These later obligations are as follows:

From 18 April 2017

- Full requirements for e-communications apply to Central Purchasing Bodies (CPBs), including for individual call-offs for frameworks awarded by CPBs under the new rules). (Regulation 37(7)).

From 18 October 2018

- Full requirements for e-communications apply to all contracting authorities,

² Regulation 118 of the PCR 2015 sets out the circumstances in which a procurement can be considered to have commenced before this date.

including for call-offs under frameworks.

The requirements to use e-communications from 18 April 2017 and 18 October 2018 as applicable, will apply to all procurement processes from that date, including those which are already in progress (provided that the procurement process had commenced on or after 26 February 2015). In order to prevent potential problems and confusion, contracting authorities should plan for any procurement process that will, or may, straddle that date, and ensure that appropriate systems and processes are in place and suppliers are adequately informed. It may be preferable to introduce full e-communications sufficiently in advance to ensure that any procurement processes that are live at the applicable date apply the e-communications requirements throughout, creating consistency for bidders. At least, it is likely to be advantageous to ensure any individual key stages of the procurement process (for example, the period for submission of tenders) which span the applicable date, fully meet the e-communications requirements.

Although e-communication is not mandatory at this stage, individual authorities may use e-communications in the interim, and may require suppliers to communicate electronically. Where authorities do implement e-communications, or continue to use existing e-communication solutions, before the deadline, they must comply with the relevant requirements in the Regulations.

The new rules also allow for circumstances where e-communication is not feasible. These include cases where generally available electronic tools or formats cannot be used, or where specific security risks or problems preclude e-communications (Regulation 22(3) and (5)).

Oral Communications

Oral communication is also permissible, except for “essential elements” of the procurement process (which include requests to participate and completed tenders), provided the oral communications are sufficiently documented (Regulation 22(8)). Oral communication is likely to be particularly relevant in the competitive procedure with negotiation, the competitive dialogue, and the innovation partnership procedures.

Security Requirements

In line with the flexibilities offered by the directive, the Regulations set a security framework within which individual authorities make their own decisions on the necessary security for each stage of the procurement process. The security framework is set out at Regulation 22(18) and (19). To allow flexibility for changes in technology and best practice, this is implemented as a number of principles and high-level obligations, not a detailed set of technical requirements or specific policies. The framework requires authorities to determine an appropriate level of security, having regard to various risks, such as risks to the functioning of the procurement process, risks to national security, risks of inadvertent disclosure, and various other matters.

As previously, the new rules provide for the use of electronic signatures supported by

certificates. However the new rules make it clear that an obligation on suppliers to use e-signatures should depend on the risk as assessed by the authority, having regard in particular to the issues set out in Regulation 22(19), Regulation 22 (17)(c) and Regulation 22(20) and (21).

E-auctions

The rules on e-auctions (Regulation 35) are in substance similar to those in the old rules. E-auctions may be used in the open, restricted, negotiated with competition, and for individual awards under frameworks and DPS (Regulation 35(3)-(5)). As in the old rules e-auctions may only be used where the specification can be established with precision, (and not for contracts involving “intellectual performance”). E-auctions may be used for revision of prices (usually downward) and /or include values of other elements which can be automatically ranked (Regulation 35(6)).

Procurement documents must include details of how the auction is to be undertaken (Regulation 35(7) and (8)). The e-auction must follow an initial assessment of tenders against the award criteria (Regulation 35(2)). The new e-auction rules make explicit that unsuitable or unacceptable tenders must not be taken into the e-auction, including tenders which are submitted late, or otherwise do not comply with the procurement documents, or are submitted by suppliers who not meet the exclusion and selection requirements. (Regulation 35 (10)-(13)).

As in the old rules, the new Regulations set out various conditions for how the e-auction is to be run, how the formula to calculate the most economically advantageous tender may operate, the information which must be provided to bidders, and how the auction may be brought to an end and the contract awarded (Regulation 35(14)-(28)). As in the past, the identity of tenderers must not be disclosed during the auction.

Electronic catalogues (regulation 36)

For the first time, the new rules explicitly cover the use of electronic catalogues. Authorities may require tenders to consist of, or include, electronic catalogues, and may require the catalogues to comply with the technical specification and format set out by the authority. Where the presentation of tenders in the form of e-catalogues is accepted or required, this must be stated in the contract notice or invitation to confirm interest, and the procurement documents must give details. The use of e-catalogues must meet the e-communication requirements in Regulation 22.

E-catalogues may be used for further competitions in frameworks either by inviting resubmitted catalogues, or by collecting information from previously-submitted catalogues, provided suppliers are given the chance to refuse that collection. E-catalogues may also be used in the DPS; please see separate guidance on the DPS.

FAQ

What is the difference between “e-procurement” and “e-communications”?

The directive and the UK regulations do not use the term electronic procurement or e-procurement, referring only to electronic [e-] communications. For consistency this guidance follows the same approach.

However, the term electronic procurement / e-procurement is also widely used by many stakeholders. A brief discussion of these terms may be useful.

CCS is not aware of a statutory or universally agreed definition of e-procurement. However e-procurement may include tools and solutions to help procuring organisations, including contracting authorities, to run the complete procurement process, such as assembling requirement and tender documents, facilitating marking of tenders, plus management of post-award “purchase to pay” processes, contract management, and interfaces with finance systems.

While Regulation 22 sets out specific requirements for systems used to communicate with bidders and on the processing of tender information, the internal processes conducted by the authority, and post-award activities, remain largely out of scope of the rules. But of course contracting authorities may choose to use such tools and solutions to complement the use of e-communications as required in the rules, in order to reap the full benefits of “end-to-end” e-procurement.

As e-communication will be compulsory in due course, will there be a central e-communication solution in England?

There is no current plan to introduce a single central solution. We estimate that most central government departments, and over half of local authorities already use e-communication systems and solutions for some or most elements of the procurement process, as do many other wider public sector bodies. Some sectors have a pre-existing strategy for e-communication, including the NHS e-procurement strategy. Wales and Scotland already have central solutions available to their authorities.

CCS uses e-communications for its own procurement process and for the award of individual contracts by its customers, as do other various other central purchasing bodies. There are various consortia, for example of local authorities within specific geographical areas, which have put introduced e-communication and sometimes, wider e-procurement. These often use a solution provided by an e-procurement service provider, usually with an entry portal configured for the specific consortium.

As there is already a substantial and well-established use of e-communications and e-procurement by public bodies, a new central solution is not necessary. There is currently a vibrant marketplace for e-communication services, with a variety of e-solution and service providers, which helps to encourage agile and innovation solutions and value for money in these services, and which can cater for the national size, scale and diversity of

public authorities' e-communication / e-procurement requirements.

Given the acknowledged benefits of e-communication, why do the Regulations postpone the obligation for e-communications?

The Government recognises that e-communication is beneficial and should be used to maximum effect. Many public bodies have already introduced it. However, there was a clear majority of responses to stakeholder engagement and formal consultations that the *legally mandatory* use of e-communications should be postponed as permitted by the Directive. This postponement allows authorities and suppliers time to adapt to the new regulations as a whole before also *having* to use e-communication as well, and will allow a longer lead-time for those bodies that do not already use e-communications. This may be particularly useful to small suppliers and authorities.

Can authorities and suppliers meet the obligation to use e-communications by use of ordinary office email?

As in the old rules there are specific requirements governing electronic tools and techniques, plus some specific requirements covering requests to participate and transmission and receipt of tenders. These are set out in Regulations 22 (16) and (17). These include requirements that the exact time and date of receipt of requests and tenders can be ascertained; that documents can only be accessed after the set time and dates; that only authorised persons can have access; and that infringements of these requirements are detectable.

It is for contracting authorities to be satisfied that the solution they use fulfils the relevant requirements. In general, it is likely that authorities will need to use dedicated e-communication solutions (which offer for example dedicated electronic “tender boxes”) rather than simply use ordinary email. This is not a significant change from the old rules - very similar requirements were included at Regulation 44 in the PCR 2006. For any e-communication solution or service they procure, authorities should include in the specification a requirement covering these security needs. Likewise if authorities have access to an e-communication solution through other routes they should satisfy themselves that these security needs are met.

Is there a requirement to use advanced electronic (digital) signatures supported by qualified certificates?

Under the new rules authorities are required to specify the level of security for e-communications in the various stages of the procurement procedure, which shall be assessed in accordance with relevant security matters set out in Regulation 22 (19). This is a new provision.

Authorities *may* decide that the level of security attached to a procurement requires the use of advanced electronic signatures either on a case-by-case basis or more generally, having regard to the relevant security matters set out in Regulation 22(19). UK authorities are not obliged to require the use of advanced electronic signatures, either

generally or in any specific circumstances.

If authorities decide to use advanced e-signatures, how have the rules changed?

The new rules contain new provisions that are intended to ensure that use of advanced e-signatures is consistent with existing European rules on e-signatures, and on cross-border processing of electronically signed documents. This is to avoid creating barriers to cross border participation in public procurement. These include a requirement that authorities accept advanced e-signatures supported by a qualified certificate, taking into account whether the certificate service provider is on a “trusted list” as defined in the Regulations, and subject to certain requirements as to technical processing of signature formats and online validation of the certificate (Regulation 22 (17)(c)).

Where a tender is signed with support of a qualified certificate on a trusted list, contracting authorities must not apply additional requirements that may hinder the use of those signatures by tenderers (Regulation 22 (17)(c)(ii)).

The rules also place requirements on competent authorities or other issuing entities to ensure that any advanced signature formats they establish when signing and issuing documents for use in procurement procedures allow effective processing and validation of the signature (Regulations 22(20) and 22 (21)).

Under what circumstances are authorities not required to use e-communication?

As by default e-communication will now be compulsory, for the first time the rules have to specify the grounds and circumstances where e-communications are *not* obligatory. These are set out in Regulation 22 (3) and 22 (5).

Regulation 22 (3) sets out cases where necessary e-procurement tools, applications, or office equipment are not or cannot be made generally available for use by suppliers, or where physical models need to be submitted. Regulation 22(5) covers cases where there is an actual breach of e-communication security, or where a particularly high level of security is required which cannot be properly ensured by using electronic tools and devices which either are available, or can be made available, to suppliers.

Authorities must indicate the reasons for the use of these exemptions in the written report at the end of the procurement process, so they must not be used to evade e-communication where it is in fact practicable.

The rules also allow oral communication for elements other than “essential elements” of the procedure (it would be difficult to effectively use the negotiated procedure or competitive dialogue otherwise) provided these oral communications are adequately documented. Essential elements include procurement documents, requests to participate, confirmation of interest, and tenders.

How should the phrases “in general use”, “generally available,” “related tools devices, applications or equipment” in Regulation 22(2), 22(3) and 22(13) be applied?

These phrases which are carried over from the previous rules, are not further defined in the Directive or Regulations, and CCS is not aware of judgments on the matter from the CJEU, or from courts in the jurisdictions covered by the Regulations. The European Commission has not issued specific guidance, although it has explicitly mentioned the internet as a “great example of interoperability”. In the absence of definitive guidance or case-law, the words bear their natural meaning in the context of the Directive.

Authorities may wish to consider using documents in “open” formats; allowing the use of on-line forms which do not require suppliers to have or to install specific application software; and ensuring that their e-communications requirements do not require the latest versions of operating systems or software, or need high capacity bandwidth. Where feasible access to e-communications through a range of devices may be appropriate.

Authorities should be alert to any information or complaints from suppliers that e-communications are causing any problems of availability or accessibility, and seek to review the tools or formats used or required, and/or offer suppliers additional or alternative means of access.

The Commission has confirmed that the reference to “provisional tokens” in Regulation 22(14) (b) would be a temporary code or password, or an e-mail with a link, which would allow the supplier to access the electronic tools used for the public procurement procedure.

Is early market engagement covered by the e-communication requirement?

All early market engagement should be carried out in accordance with Regulation 40. Communication under regulation 40 is likely to be ‘communication and information exchange under this Part’ for the purposes of Regulation 22(1), and therefore will be covered by the e-communication requirement. However, the conditions for oral communication in Regulation 22(8) are likely to apply in respect of pre-market engagement, and therefore oral communication will normally be permitted during pre-market engagement. The content of the oral communication should be documented to a sufficient degree and by appropriate means.

What is the security framework mentioned in the directive, and how is it transposed in the Regulations?

The directive requires that Member States set the level of security for each stage in the procurement process, or establish a “framework” within which authorities make their own decisions on the level of security. Following consultation, and consistently with the policy of maximum flexibility in transposition, the Regulations provide for a framework within which authorities are to make their own decisions. In considering security risks,

contracting authorities must have regard to such matters set out in the framework as are relevant to the circumstances.

This framework is deliberately a high level statement of security principles; it does not contain detailed process or technical requirements, or refer to other specific documents. The intention is to provide a framework which is generally applicable across public procurements, and which avoids the risk of obsolescence as specific security technologies and techniques evolve.

This framework is not intended to require authorities to undertake onerous assessment of the risks, nor is it intended to necessarily require a higher level of security than that which authorities currently apply. In deciding and applying the necessary level of security authorities will of course have to comply with the other requirements of Regulation 22. In particular, many of the requirements of Regulation 22(16) relate to the security of data communicated between the parties.

Contracting authorities are recommended to comply with relevant IT security policies and practices of their own organisations, and to consult with their organisation's IT security officials as appropriate.

Central government departments and bodies should comply with the Government's security policy framework, and other authorities are recommended to take this into account:

<https://www.gov.uk/government/publications/security-policy-framework>.

Authorities are also recommended to consider published guidance from the Office of Cyber Security & Information Assurance (OCSIA) where relevant:

<https://www.gov.uk/government/policies/keeping-the-uk-safe-in-cyberspace>

What are the different “stages” of the procurement process referred to in Regulation 22(18) for which the level of security is to be decided?

The Directive does not specifically set out the stages, and in order to allow maximum flexibility for authorities, specific stages are not set out in the Regulations either. Authorities are free to make their own decisions. The context is of course the different communications between the authority and suppliers, so different stages should reflect those communication points. The nature and number of stages will probably differ between different procurement procedures; for example in most cases the open procedure may require fewer stages than will the negotiated procedure with competition.

These “stages” may include some of the following, as applicable to the procurement process:

- Requests to participate or expressions of interest (from suppliers to the authority);
- Transmission of completed Pre-Qualification Questionnaires or European Single Procurement Documents (from suppliers to the authority;)
- Invitations to submit tenders (from the authority to suppliers);
- Requests for further information (from suppliers to the authority), and responses thereto (from authority to suppliers);

- Invitations to candidates to negotiate, or to participate in a dialogue (from authority to suppliers);
- Invitations to participate in an e-auction (from authority to supplier);
- Communication of information during an e-auction;
- Communications between suppliers and authorities during a negotiation or competitive dialogue;
- Transmission of completed tenders (from suppliers to authority);
- Notices of decisions to award a contract or to conclude a framework agreement (from authority to suppliers);
- Proof of compliance with the exclusion and selection requirements provided by the winning bidder (from supplier to the authority).

May authorities set a generic level of security for the different stages across all procurements or does a separate decision need to be made for each stage of every procurement?

It is likely that similar levels of risk will apply to a particular stage across a range of procurements. To promote consistency, and to reduce unnecessary duplication of effort, authorities might choose to set a default level of security for each stage, and also identify matters and types of matters which may be likely to reduce or increase the level of risk from that default, in different procurements. Individual stages in individual procurements would then be judged against the default level and whether or not, and if so, how, any of the other matters apply. However, authorities are free to adopt a different approach.

Which stage[s] is likely to require the highest level of security?

That is for the authority to decide. Completed tenders are critical to the authority's decision about the award of contract, and will usually contain information from the supplier which is commercially confidential, must not be accessible to other bidders, and where access within the authority must also be closely controlled, so in CCS's view it is likely that transmission and handling of completed tenders will require the highest identified level of security within a procurement process. In practice, if authorities use the same e-procurement solution or system for the process from end to end, the level of security may be similar throughout.

Electronic catalogues are to be provided in accordance with the technical specifications and format established by the authority. What does that mean?

The Directive and Regulations do not provide further detail. This will need to be decided by the authority in each case. However this may cover such matters as the subject matter of the catalogue; any product and service classification which is to be followed; any specific descriptors of the product or service, as required by the authority, which may include as applicable compliance with technical specifications in accordance with Regulation 22 (8) – (13); pricing matters (e.g. unit price, volume discounts etc). It may also cover the format; for example, any specific spreadsheet format in which the

catalogue is to be presented.

In CCS view, the key purpose of the rules requiring the authority to establish the catalogue format is that the catalogue should:

- a) include the information needed by the authority to decide the most economically advantageous bid; and
- b) do so in a sufficiently standardised manner to enable the authority to effectively compare different catalogues against the award criteria.

I am about to submit a Contract Notice for a procurement under the Restricted Procedure, what procurement documents do I have to provide?

“Procurement document” is defined in Regulation 2(1) to mean any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.

However, CCS take the view that this provides a wide explanation of what might constitute procurement documents and that where individual regulations refer to “procurement documents”, what is meant by that wording changes based on the different stages of the process that has been reached. As the procurement and competition becomes more crystallised, CCS expect more of the documents falling within that wide definition of procurement documents to be generated and therefore supplied. In contrast, at very early stages, fewer of the documents, if any, would be included. We believe a purposive interpretation is appropriate here.

What about procurement documents in the competitive procedure with negotiation, competitive dialogue and innovation partnership, where some documents may depend on the outcome of negotiations or dialogue?

The rules do not specifically cover these cases where elements of the final documents may necessarily depend on the outcomes of negotiations or dialogues. However, Regulation 29 (2) sets out some minimum information which must be provided about the requirement. This “...shall be sufficiently precise to enable suppliers to identify the nature and scope of the requirement and decide whether to request to participate”. A similar requirement is set out in Regulation 31(2) and (3) on the innovation partnership. Regulation 30 (6) and 30(13) cover certain information which must be provided in the competitive dialogue.

This would mean that for procedures involving negotiations, or two stage process, the contracting authority would need to publish all the documents that are available so the

market could make the decision on whether to express an interest or not. In construction for example, detailed specifications are normally not available until further into the procurement process and therefore those documents would not be required to be published at the advert stage. However the procurement documents that explain what the final output would be, volume/size, any specific specialities etc would be required at advert stage as the supplier needs them so they can make the decision on whether to express an interest or not, and whether they would have the capacity and capability to do the work, and if not time to start preparing to build that capacity/capability. These documents would then be added to as more detailed information is developed.

Regulation 53(1) just refers to a 'notice' not a 'contract notice'. Does this mean I have to publish the full suite of procurement documents even when I'm merely publishing an ordinary Prior Information Notice (PIN) as a means of early market warming?

As mentioned above CCS take the view that where individual regulations refer to "procurement documents", what is meant by that wording changes based on the different stages of the process that has been reached.

CCS understands that PINs are often used to undertake early market soundings and as a means of pre-engagement for a procurement that may or may not go ahead, subject to the outcomes of the market engagement etc. Procurement documentation at this stage is likely to be embryonic. In Annex V, Part B I of the Directive, which details the information to be included in Prior Information Notices, it states at point (7) that the contracting authority must provide a brief description of the procurement. More information is required in a PIN that is being used as a call for competition (Annex V, Part B II) and more still for a Contract Notice (Annex V, Part C).

An example of this can be seen in how award criteria are dealt with in the Directive. In Annex V Part B I (PINs for early market soundings), looking at the information to be included in the PIN, there is no reference to award criteria. Annex V, Part B II (PINs used as a call for competition) in listing additional information to be supplied, states: "As far as already known, brief description of criteria to be used for award of the contract". Annex V, Part C (contract notices) refers to: "Criteria to be used for award of the contract or contracts". This highlights the way in which the information is expected to crystallise and become more detailed as the process develops.

Therefore what is meant by procurement documents in relation to a PIN generally, for example, to undertake early market soundings, would be different to what is meant by procurement documents in relation to a PIN used as a call for competition. Each should fulfil the requirements of what is meant at that stage of the procurement process. For example, Regulation 48(1) deals with using PINs as a way of taking early market soundings. Where this occurs, there will be a later stage where the contracting authority uses a contract notice. At the point of using a contract notice, the obligation to provide further and more extensive procurement documents will apply.

In contrast, Regulations 26(9) and (10), 48(5) and (7) and 54 deal with situations where the other, special kind of PIN (as means of calling for competition) has been used, and

where the authority has to invite parties that initially expressed an interest, to confirm their continuing interest. That invitation to confirm continuing interest will need to provide relevant procurement documents, because where the special PIN has been used, there will be no subsequent contract notice that would trigger the requirement to provide the further documents.

Are there circumstances in which a contracting authority is not required to make documents available online?

Contracting authorities are not obliged to require electronic means of communication in the submission process in the following situations:

- (a) due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;
- (b) the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting authority;
- (c) the use of electronic means of communication would require specialised office equipment that is not generally available to contracting authorities; or
- (d) the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means.