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Guidance for the application of conformity assessment to accessibility requirements for public procurement of ICT products and services in Europe

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CEN-CENELEC
Management Centre:
Avenue Marnix 17, B-1000
Brussels

CEN-CENELEC
Management Centre:
Avenue Marnix 17, B-1000
Brussels

ETSI Secretariat
650, Route des Lucioles
06921 Sophia-Antipolis Cedex
France

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Foreword

This Technical Report (CEN/CLC/ETSI/TR 101 552:2014) is part of the European Standardization Organizations (ESOs) coordinated response to Mandate M/376, "Standardization Mandate to CEN, CENELEC and ETSI in support of European accessibility requirements for public procurement of products and services in the ICT domain" [33].

It has been prepared by the CEN/CENELEC Project Team (PT) under the CEN/CENELC/ETSI Joint Working Group (JWG) on eAccessibility, the secretariat of which is held by AENOR.

Introduction

One of the key activities in the public procurement process is to assure that the product or service offered by the tenderer actually has the characteristics and qualities specified in the technical specifications and award criteria. Conformity assessment, as defined in the ISO/IEC 17000 series of standards (see Annex A.1), is an agreed framework for carrying out such assurance.

This Technical Report (TR) provides guidance to procuring bodies on which conformity assessment systems or schemes to refer to in their procurement.

"The purpose of this TR is to provide all reference documents needed to assess conformity, whether as a self declaration or a certification (referenced documentation following ISO/IEC 17000 series) needed to have the various schemes operational if procuring bodies would like to require a self declaration or a certificate." (See Mandate M/376 [33].) The TR includes generic (see Annex B) and EN 301 549 specific (see Annex C) templates for declaring or certifying conformity as well as advice on the conformity assessment methods that can be referred to in procurements.

The TR addresses conformity assessment both pre-award (mainly by the supplier during production) and post-award (according to provisions in the contract).

One of the bases for this TR is the report produced under phase I of the Mandate M/376: CEN/BT WG 185 / CLC/BT WG 101-5 Report on "Conformity assessment systems and schemes for accessibility requirements" (see [2]). Another basis is a report on verification of environmental requirements in public procurement, produced in 2006 by the Swedish Environmental Research Institute (see [32]).

1 Scope

This Technical Report (TR) incorporates all information and documentation needed in the frame of the procurement process in order to allow conveying the assessment of accessibility via conformity with the functional accessibility requirements contained in EN 301 549 (see clause 2, i), regardless of whether self-declaration, second party attestation or third party certification is requested, and with award criteria: the criteria, by which the award of a contract is judged.

In addition, this Technical Report provides procuring bodies with guidance on conformity assessment mechanisms for accessibility as part of contract management in the post-award stage. It is also useful in the pre-procurement research phase as well as during the contract negotiations. Finally it may be consulted by bidders preparing an offer.

2 Normative references

The following referenced documents are indispensable for the application of this document. For dated references, only the edition cited applies. For undated references, the latest edition of the referenced document (including any amendments) applies.

ETSI EN 301 549, *Accessibility requirements suitable for public procurement of ICT products and services in Europe*

ETSI/TR 101 550, *Documents relevant to EN 301 549 "Accessibility requirements suitable for public procurement of ICT products and services in Europe"*

ETSI/TR 101 551, *Guidelines on the use of accessibility award criteria for publicly procured ICT products and services in Europe*

EN ISO/IEC 17000:2004, *Conformity assessment - Vocabulary and general principles (ISO/IEC 17000:2004)*

3 Terms and definitions

For the purposes of this document, the following terms and definitions apply.

3.1
accessibility
extent to which products, systems, services, environments and facilities can be used by people from a population with the widest range of characteristics and capabilities to achieve a specified goal in a specified context of use

Note 1 to entry: Context of use includes direct use or use supported by assistive technologies.

[EN ISO 26800:2011, 3.1] (see [5])

3.2
accessible design
design focused on principles of extending standard design to persons with some type of performance limitation to maximize the number of potential customers who can readily use a product, building or service, which may be achieved by:

- designing products, services and environments that are readily usable by most users without any modification;
- making products or services adaptable to different users (adapting user interfaces); and

- having standardized interfaces to be compatible with special products for persons with disabilities

Note 1 to entry: Terms such as design for all, barrier-free design, inclusive design and transgenerational design are used similarly but in different contexts.

Note 2 to entry: Accessible design is a subset of universal design, where products and environments are usable by all persons, to the greatest extent possible, without the need for adaptation or specialized design.

[ISO/IEC Guide 71:2001, 3.2; CEN/CENELEC Guide 6:2002, 3.2] (see [26] and [1])

3.3
assistive technology (AT)
hardware or software added to, or incorporated within, a system that increases accessibility for an individual

Note 1 to entry: Examples are Braille display, screen reader, screen magnification software and eye tracking devices

[EN ISO 9241-171:2008, 3.5] (see [6])

3.4
award criteria
the criteria by which the award of a contract is judged

3.5
conformity assessment
demonstration that specified requirements relating to a product, process, system, person or body are fulfilled.

[EN ISO/IEC 17000:2004] (see Annex A.1)

3.6
contracting authority
the state, regional or local authorities, bodies governed by public law, or associations of such bodies

3.7
impairment
problem in body function or structure such as a significant deviation or loss which can be temporary due, for example, to injury, or permanent, slight or severe and can fluctuate over time, in particular, deterioration due to ageing.

Note 1 to entry: Body function can be a physiological or psychological function of a body system; body structure refers to an anatomic part of the body such as organs, limbs and their components (as defined by the World Health Organization (WHO) in ICIDH-2 of July 1999). (see [23])

Note 2 to entry: This definition differs from that in ISO 9999:2002 and, slightly, from ICIDH-2/ICF: May 2001, WHO. (see [24])

[ISO/IEC Guide 71:2001, 3.4; CEN/CENELEC Guide 6:2002, 3.4] (see [26] and [1])

3.8
public contract
contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities

3.9
selection criteria
the criteria by which the eligibility or ability of a contractor is judged

3.10
user
person who interacts with the product, service or environment

Note 1 to entry: Adapted from ISO 9241-11:1998.

[ISO/IEC Guide 71:2001, 3.6; CEN/CENELEC Guide 6:2002, 3.6] (see [26] and [1])

4 Key issues for conformity assessment in relation to procurement

4.1 The Standard EN 301 549 and related documents

The European Norm (EN) 301 549 (see clause 2, i) specifies in Clause 5 to 13 the functional accessibility requirements applicable to ICT products and services together with a full description of the test procedures and evaluation methodology for each requirement in Annex C in a form that is suitable for use in public procurement. The EN does not prioritise functional accessibility requirements. Possible prioritization is left to the user of the EN.

EN 301 549 is to be used as the basis for the procurement toolkit which will primarily be useful for procuring bodies to identify the accessibility requirements for their purchases, and also for manufacturers to employ it within their design, build and quality control procedures. It will be also useful for manufacturers of assistive technology and for interested users with disabilities who are relying on accessible ICT products and services.

EN 301 549 reflects in Clause 4 the accessibility needs of the users and shows what accessibility features are expected in publicly bought ICT. It also contains all of the necessary functional accessibility requirements, providing a reference document so that if procedures are followed by different actors, the results of testing are similar and the interpretation of those results is clear and transparent, regardless of whether self-declaration, second party attestation or third party certification is requested.

The test descriptions and evaluation methodology included in Annex C of EN 301 549 are elaborated to a level of detail fully compliant with ISO/IEC 17007:2009 (see Annex A.3) so that conformance testing can give conclusive results.

The Technical Report (TR) 101 550 (see clause 2, ii) lists the documents used in the creation of EN 301 549 and provides a source reference for any other documents needed to implement the test procedures specified in that document. The TR 101 550 also provides additional explanation to assist users of EN 301 549 with clarifications and supporting information about measurement methods, particularly where no globally agreed tests presently exist. Where there are any test gaps, these are identified and test descriptions and evaluation methodologies are developed. In those exceptional cases where it is not possible to do so, recommendations are given on how the gaps should be filled.

The Technical Report (TR) 101 551 (see clause 2, iii) provides procuring bodies with guidance on the award criteria relevant to each area of user needs to be addressed in the procurement of accessible ICT products and services.

4.2 Selection of type of evidence

One of the key activities in the procurement process is to assure that the product or service offered by the tenderer actually has the characteristics and qualities specified in the technical specifications and award criteria. There are two main reasons for assuring compliance: ensuring value for money and equal treatment of bidders. If the procuring body does not control compliance, it runs the risk of paying for something that does not have the intended functionality. Secondly, false statements of a tender may be accepted, giving honest bidders a competitive disadvantage. Not controlling the compliance violates the principle of equal treatment of bidders, laid down in the Treaty of the Functioning of the European Union (TFEU).

The Court of Justice of the European Union has laid down that award criteria must be verifiable. In decision C-448/01 "Wienstrom" the Court says: "Therefore, an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement." (see [4]).

Hence, the purpose of requiring the bidder to submit evidence of compliance to the technical specifications and the award criteria laid down in the call for tender is to enable the procuring body to make sure that the criteria are fulfilled.

Statements and documents giving evidence may be more or less detailed and credible. The procuring body is faced with the task to decide which kind of evidence, with which degree of credibility, to require. This selection must be based on a number of factors, such as the impact on the user in case of non-compliance, cost and time of the conformity assessment imposed on the bidder, appropriateness with respect to the development and manufacturing process of the subject-matter of the procurement etc. Since some of these factors can be conflicting, the selection is sometimes an issue of finding a sufficiently good type of evidence.

Clause 7 of this TR discusses different factors to be taken into account when deciding which conformity assessment system to be required from the bidder.

Clause 8 provides guidance on selection of a conformity assessment system or scheme.

4.3 Methods to follow-up the supplier’s performance of contracts

ICT is often subject to changes during its use. Software and hardware may need updating and upgrading because of new or modified business or user needs at the customer side, or because the supplier, within the framework of a maintenance contract, wants to introduce new technology resulting in easier or less frequent maintenance. Changes of this kind may affect the accessibility of ICT products and services. The procuring body needs to follow up the consequences of such changes. Long-term contracts normally contain clauses on how changes should be initiated, decided and implemented.

When an organization has awarded a service contract, it must follow up whether the service is being delivered to the level of accessibility specified in the contract, to the agreed quality and price.

In the context of procurement, follow-up of the supplier's performance of the contract is often part of contract management.

An important reason for following up, however outside the scope of this TR, is to collect information and feedback for use in the next procurement of the product or service in question.

Clause 9 of this TR discusses how to ensure maintenance of the contracted specification of accessibility during operation and use.

5 Legal issues

5.1 General legal issues on public procurement

Public Procurement (also called Government Procurement or Public Tendering) is the procurement of goods and services on behalf of public authorities by executive agencies such as national, regional and local public bodies, including central government, local authorities, fire and police authorities, defence, health services, joint consortia of public bodies, and public and private utilities. Government procurement is the subject of the "Agreement on Government Procurement" (1996) [34], a multilateral international treaty under the auspices of the World Trade Organization (WTO).

5.2 European legal issues on public procurement

Public procurement in the European Union is the process for awarding contracts for the purchase of goods and services by the public authorities of the European Union and its Member States. It has been the subject of European regulation since decades because of its importance in the European single market. In 2004, European procurement legislation was consolidated following the principles of simplification and modernisation.

The Directive 2004/17/EC "coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors" [14] and Directive 2004/18/EC "on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts" [15] allow the procurement of framework agreements and introduce a new procurement procedure, the "competitive dialogue". They had to be transposed into national law by 31 January 2006.

In 2007 the Remedies Directives were also updated by Directive 2007/66 "amending Directive 89/665 and 92/13 with regard to improving the effectiveness of review procedures concerning the award of public contracts" [16].

Companies based in one European country can bid freely for public authorities' contracts in other EU countries. Authorities throughout the EU used harmonised, transparent procedures for selecting contractors. The "Small Business Act for Europe" (SBA 2008 [20], revised 2011 [21]) is further promoting measures that make it easier for smaller businesses to bid for public contracts on an equal basis with larger competitors.

The Single Market thematic web site on EUROPE [1] is managed by the Internal Market and Services Directorate General (DG MARKT) and provides detailed information on public procurement in three languages. The Public contracts - Your Europe - Business web site [2] provides detailed (country specific) information on Public Contracts with public authorities of the European Union and its Member States.

On 20th December 2011, as announced in the Single Market Act form April 2011, the European Commission adopted its proposals on a reform of public procurement. These proposals are part of an overall programme aiming at an in-depth modernisation of public procurement in the European Union. This programme includes the revision [3] of the EU Public Procurement Directives 2004/17/EC (see [14]) and 2004/18/EC (see [15]), which were evaluated in 2011 (see [17]).

The new Commission proposals for both directives have been published on 20th December 2011 (see [10] and [11]).

The proposed reform of the European rules on public tendering aims to thoroughly modernise the existing tools and instruments. Main objectives of the reform are:

- to simplify rules and procedures and make them more flexible;
- to encourage access to public procurement for SMEs;
- to facilitate a qualitative improvement in the use of public procurement by ensuring greater consideration for social and environmental criteria such as life-cycle costs or the integration of vulnerable and disadvantaged persons, thereby helping to achieve the objectives of the Europe 2020 Strategy (see [9] and [22]);
- the principle of the "most economically advantageous tender" (MEAT) is the standard award criterion (replacing the criteria of lowest price);
- improvements to the existing guarantees aimed at combating conflicts of interest, favouritism and corruption in order to better ensure the integrity of procedures, given the financial implications;
- the appointment by the Member States of a single national authority responsible for monitoring, performing and checking public contracts to ensure that the rules are properly applied in practice.

[1] http://ec.europa.eu/internal_market/publicprocurement/index_en.htm (Last access 2013/11/05)

[2] http://ec.europa.eu/youreurope/business/profiting-from-eu-market/benefiting-from-public-contracts/index_en.htm (Last access 2013/11/05)

[3] http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/index_en.htm (Last access 2013/11/05)

On 26 June 2013 the European Parliament and the Council reached an agreement on the revision of the EU Public Procurement Directives. The new rules on public procurement were approved by the European Parliament on 15th January 2014. The new legislation overhauls the current EU public procurement rules and for the first time sets common EU standards on concession contracts to boost fair competition and ensure best value for money by introducing new award criteria that place more emphasis on environmental considerations, social aspects and innovation. With the new criterion of the "most economically advantageous tender" (MEAT) in the award procedure, procurers will be able to put more emphasis on quality, environmental considerations, social aspects or innovation while still taking into account the price and life-cycle-costs of what is procured. The Directive 2014/.../EU will enter into force 20 days after publication in the Official Journal of the European Union. After this date, member states will have 24 months to implement the provisions of the new rules into national law. Article 42 "Technical Specifications" (part 1), Article 62 "Quality assurance standards and environmental management standards" (part 1), Article 67 "Contract award criteria" (part 2(a)), and Article 76 "Principles of awarding contracts" (part 2) as well as ANNEX VII "Definition of certain technical specifications" (part 1 (a) and (b)) are considering "accessibility for disabled persons" or "Design for all users".

5.3 European common framework for the marketing of products (CE Mark)

The CE Mark ("Conformité Européenne", "European Conformity"), existing in its present form since 1993, is a mandatory conformance mark on many products placed on the market in the European Economic Area (EEA). The EC directives for CE marking affect the following product groups:

- Active implantable medical devices;
- Appliances burning gaseous fuels;
- Cableway installations designed to carry persons;
- Eco-design of energy related products;
- Electromagnetic compatibility;
- Equipment and protective systems intended for use potentially explosive atmospheres;
- Explosives for civil uses;
- Hot-water boilers;
- In vitro diagnostic medical devices;
- Lifts;
- Low voltage;
- Machinery;
- Measuring Instruments;
- Medical devices;
- Noise emission in the environment;
- Non-automatic weighing instruments;
- Personal protective equipment;
- Pressure equipment;
- Pyrotechnics;

- Radio and telecommunications terminal equipment;
- Recreational craft;
- Safety of toys;
- Simple pressure vessels.

With the CE Mark on a product the manufacturer is declaring, on one's sole responsibility, conformity with all of the legal requirements (e.g. safety, health, environmental protection requirements) of the applicable EC directives. Manufacturers have to check on their sole responsibility, which EU directives they need to apply. Depending on the level of risk of the product, the manufacturer chooses the conformity assessment procedure from the modules called out by the directive for the product. If stipulated in the directives, an authorized third party (Notified Body) must be involved in the conformity assessment procedure. The manufacturer has to carry out a conformity assessment, set up a technical file and sign an EC declaration of conformity before the product can bear CE marking. The documentation has to be made available to authorities on request. Distributors must have affirmation from the manufacturer or importer that the necessary measures have been taken.

Aspects like "ergonomics", "usability", and "accessibility" are not subject to EC directives and therefore not covered by the CE mark. The "DECISION No 768/2008/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC" [13] and the "Council Decision of 22 July 1993 concerning the modules for the various phases of the conformity assessment procedures and the rules for the affixing and use of the CE conformity marking, which are intended to be used in the technical harmonization directives" [12] form a common framework for the marketing of products, providing:

- common definitions;
- common conformity assessment procedures;
- obligations for manufacturers, importers and distributors;
- rules for the use of the CE Marking;
- notification criteria for the conformity assessment bodies;
- safeguard procedures.

"The common framework will be a toolbox for future sectoral regulations on the approximation of legislation (harmonisation). It draws on the "new approach", according to which legislation shall be restricted to the setting of essential requirements and use of harmonised standards. As far as possible, future sectoral legislation must therefore draw on the provisions of this Decision and define essential requirements for the marketing of products. Where necessary, specific legislation may nevertheless offer other solutions.[...].

This Decision sets a clearer framework for conformity assessment. It establishes a number of conformity assessment procedures (specified in the annex), from which the legislator can choose the most appropriate. Furthermore, it lays down the rules and conditions for affixing the CE marking, which is subject to the general principles defined by Regulation No 765/2008. Member States shall ensure correct application of the regime governing the CE marking and provide sanctions for infringements."[4]

[4] http://europa.eu/legislation_summaries/consumers/consumer_safety/l10141_en.htm (Last access 2013/11/05)

In certain conformity assessment procedures, the conformity assessment is carried out by the conformity assessment bodies which are notified, i.e. declared, to the European Commission by the Member States. This decision sets out common criteria for the notification of the conformity assessment bodies. The conformity assessment bodies must offer all guarantees of independence, objectivity, impartiality, confidentiality and professional integrity. In addition, they must possess the necessary technical competencies and means in order to correctly carry out the tasks entrusted to them.

5.4 Accessibility in European public procurement

The inclusion of the requirement "Accessibility" in European public procurement procedures is a strategy to improve accessibility to people with disabilities and older people by using a harmonised European approach in the domain of ICT (Mandate M/376), which is relevant for this Technical Report, and in the domain of buildings (mandate 420), which will not be considered in this document. Such a European approach will help to overcome single national regulations and standards of European Member States and can help to avoid a fragmentation of the ICT market due to accessibility requirements. It will also help the user of ICT products and services, because ICT based services are no longer restricted to single countries and the accessibility requirements of persons with disabilities are almost identical across Europe.

The following text is partly derived from Clause 7 of CEN/CENELEC report from phase I of Mandate M/376 (see [2]):

The European Commission included express reference within the Directives 2004/17/EC (see [14]) and 2004/18/EC (see [15]) to the desirability for procuring bodies to use accessibility criteria when defining the technical specifications of a desired product or service (art.23 Public Sector Directive 2004/17/EC, art.34 Utilities Directive 2004/18/EC). Furthermore, both Procurement Directives specify general rules on technical specifications and on the acceptance of proof that tenders satisfy the requirements set out in the technical specifications. Due to their similar wording, the relevant provisions of the Public Sector Directive 2004/17/EC are illustrated only.

Clause 29 of the preamble gives the justification for these rules: "The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and requirements, and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on equivalent arrangements must be considered by contracting authorities." "To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting authorities must be able to provide a reason for any decision that equivalence does not exist in a given case." "The technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the contracting authority cover."

"Technical specification" is defined in Annex VI of the Directive 2004/17/EC.

§ 1b is applicable for ICT products. It defines technical specification as: "the required characteristics of a product or a service, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures".

The rules on technical specifications and acceptance of proofs are stated in Article 23 of the Directive 2004/17/EC.

§ 1 specifies that technical specifications shall be set out in the contract documentation, and that: "whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users".

The Directive 2004/17/EC contains no equivalent to the concept of undue burden, which is one of the key concepts in the US Section 508 legislation. Undue burden means significant difficulty or expense which would