
STATUTORY INSTRUMENTS

1991 No. 2680

The Public Works Contracts Regulations 1991

PART III

PROCEDURES LEADING TO THE AWARD OF A PUBLIC WORKS CONTRACT

Prior information notices

9. A contracting authority intending to seek offers in relation to a public works contract shall, as soon as possible after the decision approving the planning of the work or works, send to the Official Journal a notice, in a form substantially corresponding to that set out in Part A of Schedule 2, and containing the information therein specified in relation to the contract.

Selection of contract award procedure

10. –

(1) For the purpose of seeking offers in relation to a proposed public works contract (but, in the case of a public housing scheme works contract, subject to regulation 24) a contracting authority shall use the open procedure, the restricted procedure or the negotiated procedure and shall decide which of those procedures to use in accordance with the following paragraphs of this regulation.

(2) A contracting authority may use the negotiated procedure in the following circumstances–

(a) subject to paragraph (4) below, in the event that the procedure leading to the award of a public works contract by the contracting authority using the open or negotiated procedure was discontinued–

(i) because of irregular tenders, or

(ii) following an evaluation made in accordance with regulation 11(7) or 12(4);

and without prejudice to the generality of the meaning of the words “irregular tenders” a tender may be considered irregular if the contractor fails to meet the requirements of, or the tender offers variations on the requirements specified in, the contract documents where this is not permitted under the terms of the invitation to tender, or the work, works, materials or goods offered do not meet the technical specifications (within the meaning of regulation 8(1)) of the contracting authority;

(b) when the work or works are to be carried out under the contract purely for the purpose of research, experiment or development but not where the works are to be carried out to establish commercial viability or to recover research and development costs;

(c) exceptionally, when the nature of the work or works to be carried out under the contract is such, or the risks attaching thereto are such, as not to permit prior overall pricing;

(d) subject to paragraph (4) below, in the absence of tenders or of appropriate tenders in response to an invitation to tender by the contracting authority using the open or restricted procedure;

(e) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the work or works to be carried out under the contract may only be carried out by a particular person;

- (f) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the contracting authority, the time limits specified in regulations 11, 12 and 13 if the open or restricted procedures or the negotiated procedure pursuant to paragraphs (2)(a) to (c) are used cannot be met;
 - (g) subject to paragraph (5) below, when a contracting authority wants a person who has entered into a public works contract with the contracting authority to carry out additional works which through unforeseen circumstances were not included in the project initially considered or in the original public works contract and—
 - (i) such works cannot for technical or economic reasons be carried out separately from the works carried out under the original public works contract without great inconvenience to the contracting authority, or
 - (ii) such works can be carried out separately from the works carried out under the original public works contract but are strictly necessary to the later stages of that contract; and
 - (h) subject to paragraph (6) below, when a contracting authority wishes a person who has entered into a public works contract with that contracting authority to carry out new works which are a repetition of works carried out under the original contract and which are in accordance with the project for the purpose of which the first contract was entered into.
- (3) A contracting authority shall not use the negotiated procedure pursuant to paragraphs (2)(a) or (d) above unless the proposed terms of the contract are substantially unaltered from the proposed terms of the contract in relation to which offers were sought using the open or restricted procedure.
- (4) A contracting authority shall not use the negotiated procedure pursuant to paragraph (2)(g) above where the aggregate value of the consideration to be given under contracts for the additional works exceeds 50 per cent of the value of the consideration payable under the original contract; and, for the purposes of this paragraph, the value of the consideration shall be taken to include the estimated value of any goods which the contracting authority provided to the person awarded the contract for the purpose of carrying out the contract.
- (5) A contracting authority shall not use the negotiated procedure pursuant to paragraph (2)(h) above unless the contract notice relating to the original contract stated that a public works contract for new works which would be a repetition of the works carried out under the original contract may be awarded using the negotiated procedure pursuant to paragraph (2)(h) above and unless the procedure for the award of the new contract is commenced within three years of the original contract being entered into.
- (6) In all other circumstances the contracting authority shall use the open procedure or the restricted procedure.
- (7) A contracting authority using the negotiated procedure pursuant to paragraph (2)(d) above shall, if the Commission requests it, submit a report recording the fact that it has done so to the Treasury for onward transmission to the Commission.

The open procedure

11. –

- (1) A contracting authority using the open procedure shall comply with the following paragraphs of this regulation.
- (2) The contracting authority shall publicise its intention to seek offers in relation to the public works contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part B of Schedule 2, inviting tenders and containing the information therein specified in relation to the contract.
- (3) Subject to paragraph (4) below, the date which the contracting authority shall fix as the last date for the receipt by it of tenders made in response to the contract notice shall be specified in the

notice and shall be not less than 52 days from the date of despatch of the notice but, if the contract documents are too bulky to be supplied within this time or it is necessary that contractors be given the opportunity to inspect the site on which the work or works under the contract is or are to be carried out or documents relating to the contract documents, then that minimum period shall be extended to allow for such supply or inspection.

(4) Where the contracting authority has published a notice in accordance with regulation 9 in relation to the public works contract it may substitute for the period of not less than 52 days specified in paragraph (3) above a period of not less than 36 days.

(5) The contracting authority shall send the contract documents within 6 days of the receipt of a request from any contractor provided that the documents are requested in good time and any fee specified in the contract notice has accompanied the request.

(6) The contracting authority shall supply such further information relating to the contract documents as may reasonably be requested by a contractor provided that the request is received in sufficient time to enable the contracting authority to supply the information no later than 6 days before the date specified in the contract notice as the final date for the receipt of tenders.

(7) The contracting authority may exclude a tender from the evaluation of offers made in accordance with regulation 20 only if the contractor may be treated as ineligible to tender on a ground specified in regulation 14 or if the contractor fails to satisfy the minimum standards of economic and financial standing and technical capacity required of contractors by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

The restricted procedure

12. –

(1) A contracting authority using the restricted procedure shall comply with the following paragraphs of this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the public works contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part C of Schedule 2, inviting requests to be selected to tender and containing the information therein specified in relation to the contract.

(3) Subject to paragraph (14) below, the date which the contracting authority shall fix as the last date for the receipt by it of requests to be selected to tender shall be specified in the contract notice and shall be not less than 37 days from the date of the despatch of the notice.

(4) The contracting authority may exclude a contractor from those persons from whom it will make the selection of persons to be invited to tender only if the supplier may be treated as ineligible on a ground specified in regulation 14 or if the contractor fails to satisfy the minimum standards of economic and financial standing and technical capacity required of contractors by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

(5) The contracting authority shall make the selection of the contractors to be invited to tender in accordance with regulations 14, 15, 16 and 17; and in making the selection and in issuing invitations the contracting authority shall not discriminate between contractors on the grounds of their nationality or the member State in which they are established.

(6) The contracting authority may predetermine the range within which the number of persons which it intends to invite to tender for the contract shall be fixed but only if–

- (a) the lower number of the range is not less than 5 and the higher number not more than 20,
- (b) the range is determined in the light of the nature of the work to be carried out under the contract, and

- (c) the range is specified in the contract notice.
- (7) The number of persons invited to tender shall be sufficient to ensure genuine competition.
- (8) The contracting authority shall send invitations to each of the contractors selected to tender and the invitation shall be accompanied by the contract documents, or the invitation shall state the address for requesting them.
- (9) The invitation shall be sent in writing simultaneously to each contractor selected to tender.
- (10) The following information shall be included in the invitation—
 - (a) the address to which requests for the contract documents (if not accompanying the invitation) and further information relating to those documents should be sent, the final date for making such a request and the amount and terms of the fee which may be charged for supplying that material;
 - (b) the final date for the receipt of tenders, the address to which they must be sent and the language or languages in which they must be drawn up;
 - (c) a reference to the contract notice published in accordance with paragraph (2) above;
 - (d) an indication of the information to be included with the tender which the contracting authority may require to be provided in accordance with regulations 15, 16 and 17; and
 - (e) the criteria for the award of the contract if this information was not specified in the contract notice published in accordance with paragraph (2) above.
- (11) Subject to paragraphs (12) and (14) below, the date which the contracting authority shall fix as the last date for the receipt by it of tenders made in response to the invitation to tender which shall be specified in the invitation to tender in accordance with paragraph (10)(b) above shall not be less than 40 days from the date of the despatch of the invitation but, if it is necessary that contractors should be given the opportunity to inspect the premises on which the works under the contract are to be carried out or documents relating to the contract documents, then that minimum period shall be extended to allow for such inspection.
- (12) Subject to paragraph (14) below, where the contracting authority has published a notice in accordance with regulation 9 in relation to the public works contract, it may substitute for the period of not less than 40 days in paragraph (11) above a period of not less than 26 days.
- (13) Subject to paragraph (14) below, the contracting authority shall supply such further information relating to the contract documents as may reasonably be requested by a contractor selected to tender provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than 6 days before the date specified in the invitation to tender as the final date for the receipt of tenders.
- (14) Where compliance with the minimum periods referred to in paragraphs (3), (11), (12) and (13) above is rendered impracticable for reasons of urgency, the contracting authority may substitute for the period specified in paragraph (3) a period of not less than 15 days and for the periods specified in (11) and (12) periods of not less than 10 days and for the period specified in paragraph (13) a period of not less than 4 days and, in those circumstances, the contracting authority must send the invitation to tender by the most rapid means possible.
- (15) A contracting authority shall not refuse to consider an application to be invited to tender if it is made by letter, telegram, telex, facsimile or telephone provided that, in the last 4 cases, it is confirmed by letter before the date fixed by the contracting authority as the last date for the receipt of requests to be selected to tender.

The negotiated procedure

13. –

(1) A contracting authority using the negotiated procedure shall comply with the following provisions of this regulation except that—

- (a) a contracting authority using the negotiated procedure pursuant to regulation 10(2)(d), (e), (f), (g) or (h), and
- (b) a contracting authority using the negotiated procedure pursuant to regulation 10(2)(a) who invites to negotiate the contract every contractor who submitted a tender following an invitation made during the course of the discontinued open or restricted procedure (not being a tender which was excluded pursuant to regulation 11(6)), need not comply with paragraphs (2) to (6) below.

(2) The contracting authority shall publicise its intention to seek offers in relation to the public works contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part D of Schedule 3, inviting requests to be selected to negotiate and containing the information therein specified in relation to the contract.

(3) Subject to paragraph (4) below, the date which the contracting authority shall fix as the last date for the receipt by it of requests to be selected to negotiate shall be specified in paragraph 6(a) of the contract notice and shall be not less than 37 days from the date of despatch of the notice.

(4) Where compliance with the minimum period of 37 days in paragraph (3) above is rendered impracticable for reasons of urgency, the contracting authority may substitute a period of not less than 15 days and, in those circumstances, the contracting authority must send the invitation to negotiate the contract by the most rapid means possible.

(5) Where there is a sufficient number of persons who are suitable to be selected to negotiate the contract, the number selected to negotiate shall be not less than 3.

(6) A contracting authority shall not refuse to consider an application to be selected to negotiate if it is made by letter, telegram, telex, facsimile or by telephone provided that, in the last 4 cases, it is confirmed by letter before the date fixed by the contracting authority as the last date for the receipt of requests to be selected to negotiate.

(7) The contracting authority may exclude a contractor from those persons from whom it will make the selection of persons to be invited to negotiate the contract only if the supplier may be treated as ineligible on a ground specified in regulation 14 or if the contractor fails to satisfy the minimum standards of economic and financial standing and technical capacity required of contractors by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

(8) The contracting authority shall make the selection of the contractors to be invited to negotiate in accordance with regulations 14, 15, 16 and 17; and in making the selection and in issuing the invitations to negotiate the contracting authority shall not discriminate between contractors on the grounds of their nationality or the member State in which they are established.