

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Text with EEA relevance)

TITLE II

RULES APPLICABLE TO CONTRACTS

CHAPTER I

Procedures

Article 43

Conditions relating to the GPA and other international agreements

In so far as they are covered by Annexes 3, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA and by the other international agreements by which the Union is bound, contracting entities within the meaning of Article 4(1)(a) shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.

Article 44

Choice of procedures

- 1 When awarding supply, works or service contracts, contracting entities shall apply the procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 47, a call for competition has been published in accordance with this Directive.
- 2 Member States shall provide that contracting entities may apply open or restricted procedures or negotiated procedures with prior call for competition as regulated in this Directive.
- 3 Member States shall provide that contracting entities may apply competitive dialogues and innovation partnerships as regulated in this Directive.
- 4 The call for competition may be made by one of the following means:
 - a a periodic indicative notice pursuant to Article 67 where the contract is awarded by restricted or negotiated procedure;
 - b a notice on the existence of a qualification system pursuant to Article 68 where the contract is awarded by restricted or negotiated procedure or by a competitive dialogue or an innovation partnership;
 - c by means of a contract notice pursuant to Article 69.

In the case referred to in point (a) of this paragraph, economic operators having expressed their interest following the publication of the periodic indicative notice shall

subsequently be invited to confirm their interest in writing by means of an invitation to confirm interest in conformity with Article 74.

5 In the specific cases and circumstances referred to expressly in Article 50, Member States may provide that contracting entities may apply a negotiated procedure without prior call for competition. Member States shall not allow the application of that procedure in any other cases than those referred to in Article 50.

Article 45

Open procedure

1 In open procedures any interested economic operator may submit a tender in response to a call for competition

The minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent.

The tender shall be accompanied by the information for qualitative selection that is requested by the contracting entity.

2 Where contracting entities have published a periodic indicative notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders, as laid down in the second subparagraph of paragraph 1 of this Article, may be shortened to 15 days, provided that all of the following conditions are fulfilled:

- a the periodic indicative notice included, in addition to the information required by Section I of Part A of Annex VI, all the information required by Section II of Part A of Annex VI, insofar as the latter information was available at the time the periodic indicative notice was published;
- b the periodic indicative notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

3 Where a state of urgency duly substantiated by the contracting entity renders impracticable the time limit laid down in the second subparagraph of paragraph 1, it may fix a time limit which shall be not less than 15 days from the date on which the contract notice was sent.

4 The contracting entity may reduce by five days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 of this Article where it accepts that tenders may be submitted by electronic means in accordance with first subparagraph of Article 40(4) and Article 40(5) and (6).

Article 46

Restricted procedure

1 In restricted procedures, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting entity.

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or the invitation to confirm interest was sent and shall in any event not be less than 15 days.

2 Only those economic operators invited to do so by the contracting entity following its assessment of the information provided may submit a tender. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 78(2).

The time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

In the absence of agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender was sent.

Article 47

Negotiated procedure with prior call for competition

1 In negotiated procedures with prior call for competition, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting entity.

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest was sent and shall in any event not be less than 15 days.

2 Only those economic operators invited by the contracting entity following its assessment of the information provided may participate in the negotiations. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 78(2).

The time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected candidates, provided that they all have the same time to prepare and submit their tenders.

In the absence of agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender was sent.

Article 48

Competitive dialogue

1 In competitive dialogues, any economic operator may submit a request to participate in response to a call for competition in accordance with points (b) and (c) of Article 44(4) by providing the information for qualitative selection that is requested by the contracting entity.

The minimum time limit for receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest was sent and shall in any event not be less than 15 days.

Only those economic operators invited by the contracting entity following the assessment of the information provided may participate in the dialogue. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 78(2). The contract shall be awarded on the

sole basis of the award criterion of the tender presenting the best price-quality ratio in accordance with Article 82(2).

2 Contracting entities shall set out and define their needs and requirements in the call for competition and/or in a descriptive document. At the same time and in the same documents, they shall also set out and define the chosen award criteria and set out an indicative timeframe.

3 Contracting entities shall open, with the participants selected in accordance with the relevant provisions of Articles 76 to 81, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the procurement with the chosen participants during this dialogue.

During the dialogue, contracting entities shall ensure equality of treatment among all participants. To that end, they shall not provide information in a discriminatory manner which may give some participants an advantage over others.

In accordance with Article 39, contracting entities shall not reveal to the other participants solutions proposed or other confidential information communicated by a participating candidate or tenderer in the dialogue without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

4 Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria laid down in the call for competition or in the descriptive document. In the call for competition or the descriptive document, the contracting entity shall indicate whether it will use that option.

5 The contracting entity shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

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

Those tenders may be clarified, specified and optimised at the request of the contracting entity. However, such clarification, specification, optimisation or additional information may not involve changes to the essential aspects of the tender or of the procurement, including the needs and requirements set out in the call for competition or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

7 Contracting entities shall assess the tenders received on the basis of the award criteria laid down in the call for competition or in the descriptive document.

At the request of the contracting entity, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with Article 82(2) may be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract provided such negotiations do not have the effect of materially modifying essential aspects of the tender or of the procurement, including the needs and requirements set out in the call for competition or in the descriptive document and does not risk distorting competition or causing discrimination.

8 Contracting entities may specify prizes or payments to the participants in the dialogue.

Article 49

Innovation partnership

1 In innovation partnerships, any economic operator may submit a request to participate in response to a call for competition in accordance with points (b) and (c) of Article 44(4) by providing the information for qualitative selection that is requested by the contracting entity.

In the procurement documents, the contracting entity shall identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. It shall indicate which elements of this description define the minimum requirements to be met by all tenders. The indications shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

The contracting entity may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.

The minimum time limit for receipt of requests to participate shall, as a general rule, be fixed at no less than 30 days from the date on which the contract notice is sent and shall in any event not be less than 15 days. Only those economic operators invited by the contracting entity following the assessment of the information provided may participate in the procedure. Contracting entities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 78(2). The contracts shall be awarded on the sole basis of the award criterion of the tender presenting the best price-quality ratio in accordance with Article 82(2).

2 The innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting entities and the participants.

The innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

Based on those targets, the contracting entity may decide after each phase to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts, provided that the contracting entity has indicated in the procurement documents those possibilities and the conditions for their use.

3 Unless otherwise provided for in this Article, contracting entities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve the content thereof.

The minimum requirements and the award criteria shall not be subject to negotiations.

4 During the negotiations, contracting entities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall inform all tenderers, whose tenders

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have not been eliminated, pursuant to paragraph 5, in writing of any changes to the technical specifications or other procurement documents other than those setting out the minimum requirements. Following those changes, contracting entities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

In accordance with Article 39, contracting entities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

5 Negotiations during innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in the procurement documents. In the contract notice, the invitation to confirm interest or in the procurement documents, the contracting entity shall indicate whether it will use that option.

6 In selecting candidates, contracting entities shall in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

Only those economic operators invited by the contracting entity following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting entity that cannot be met by existing solutions.

In the procurement documents, the contracting entity shall define the arrangements applicable to intellectual property rights. In the case of an innovation partnership with several partners, the contracting entity shall not, in accordance with Article 39, reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

7 The contracting entity shall ensure that the structure of the partnership and, in particular the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market. The estimated value of supplies, services or works purchased shall not be disproportionate in relation to the investment for their development.

Article 50

Use of the negotiated procedure without prior call for competition

Contracting entities may use a negotiated procedure without prior call for competition in the following cases:

- (a) where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of the contract are not substantially altered;

A tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting

entity's needs and requirements as specified in the procurement documents. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Articles 78(1) or 80(1), or does not meet the selection criteria laid down by the contracting entity pursuant to Articles 78 or 80;

- (b) where a contract is purely for the purpose of research, experiment, study or development, and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek, in particular, those ends;
- (c) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:
 - (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
 - (ii) competition is absent for technical reasons;
 - (iii) the protection of exclusive rights, including intellectual property rights.

The exceptions set out in points (ii) and (iii) shall only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;

- (d) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting entity, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting entity;
- (e) in the case of supply contracts for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting entity to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- (f) for new works or services consisting in the repetition of similar works or services assigned to the contractor to which the same contracting entities awarded an earlier contract, provided that such works or services conform to a basic project for which a first contract was awarded according to a procedure in accordance with Article 44(1).

The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded. As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting entities when they apply Articles 15 and 16;

- (g) for supplies quoted and purchased on a commodity market;
- (h) for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;
- (i) for purchases of supplies or services under particularly advantageous conditions from either a supplier which is definitively winding up its business activities or the

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liquidator in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws or regulations;

- (j) where the service contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the rules provided for in the design contest, to the winner or to one of the winners of that contest; in the latter case, all the winners shall be invited to participate in the negotiations.