
STATUTORY INSTRUMENTS

2015 No. 102

The Public Contracts Regulations 2015

PART 2

RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE

CHAPTER 2

RULES ON PUBLIC CONTRACTS

SECTION 4

Techniques and Instruments for Electronic and Aggregated Procurement

Framework agreements

33.—(1) Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in this Part.

(2) In these regulations, “framework agreement” means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

(3) The term of a framework agreement shall not exceed 4 years, save in exceptional cases duly justified, in particular by the subject-matter of the framework agreement.

(4) Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this regulation.

(5) Those procedures may be applied only between those contracting authorities clearly identified for that purpose in the call for competition or the invitation to confirm interest and those economic operators party to the framework agreement as concluded.

(6) Contracts based on a framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph (7).

Awarding contracts based on a framework agreement

(7) Where a framework agreement is concluded with a single economic operator—

- (a) contracts based on that agreement shall be awarded within the limits laid down in the framework agreement; and
- (b) for the award of those contracts, contracting authorities may consult the economic operator which is party to the framework agreement in writing, requesting it to supplement its tender as necessary.

(8) Where a framework agreement is concluded with more than one economic operator, that framework agreement shall be performed in one of the following ways:—

- (a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out—
 - (i) all the terms governing the provision of the works, services and supplies concerned, and
 - (ii) the objective conditions for determining which of the economic operators that are party to the framework agreement shall perform them, which conditions shall be indicated in the procurement documents for the framework agreement;
 - (b) where the framework agreement sets out all the terms governing the provision of the works, services and supplies concerned—
 - (i) partly without reopening competition in accordance with sub-paragraph (a), and
 - (ii) partly through reopening competition amongst the economic operators which are party to the framework agreement,
 where this possibility has been stipulated by the contracting authorities in the procurement documents for the framework agreement;
 - (c) where not all the terms governing the provision of the works, services and supplies concerned are laid down in the framework agreement, through reopening competition amongst the economic operators which are party to the framework agreement.
- (9) For the purposes of paragraph (8)(b)—
- (a) the choice of whether specific works, supplies or services shall be acquired following a reopening of competition or directly on the terms set out in the framework agreement shall be made pursuant to objective criteria, which shall be set out in the procurement documents for the framework agreement;
 - (b) those procurement documents shall also specify which terms may be subject to reopening of competition.
- (10) The possibilities provided for in paragraph (8)(b) shall also apply to any lot of a framework agreement for which all the terms governing the provision of the works, services and supplies concerned are set out in the framework agreement, regardless of whether all the terms governing the provision of the works, services and supplies concerned under other lots have been set out.
- (11) The competitions referred to in paragraph (8)(b) and (c) shall be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms and, where appropriate, other terms referred to in the procurement documents for the framework agreement, in accordance with the following procedure:—
- (a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;
 - (b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
 - (c) tenders shall be submitted in writing, and their content shall not be opened until the stipulated time limit for reply has expired;
 - (d) contracting authorities shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the procurement documents for the framework agreement.

Dynamic purchasing systems

General features

34.—(1) Contracting authorities may use a dynamic purchasing system for commonly used purchases the characteristics of which, as generally available on the market, meet their requirements.

(2) The dynamic purchasing system shall be operated as a completely electronic process, and shall be open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria.

(3) The dynamic purchasing system may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned.

(4) Such characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.

(5) In order to procure under a dynamic purchasing system, contracting authorities shall follow the rules of the restricted procedure, subject to the following provisions of this regulation.

(6) All the candidates satisfying the selection criteria shall be admitted to the system, and the number of candidates to be admitted to the system shall not be limited in accordance with regulations 28(4) and 65.

(7) Where contracting authorities have divided the system into categories of products, works or services in accordance with paragraph (3), they shall specify the applicable selection criteria for each category.

Time limits

(8) The following provisions about time limits shall apply instead of those provided for in regulation 28(2) and (5) to (10).

(9) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which—

- (a) the contract notice is sent, or
- (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent.

(10) No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent.

(11) The minimum time limit for receipt of tenders shall, subject to paragraph (12), be at least 10 days from the date on which the invitation to tender is sent.

(12) Sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and all selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

Requirement to use electronic communication

(13) All communications in the context of a dynamic purchasing system shall only be made by electronic means in accordance with regulation 22(1) to (7) and (11) to (20).

The call for competition etc

(14) For the purposes of awarding contracts under a dynamic purchasing system, contracting authorities shall—

- (a) publish a call for competition making it clear that a dynamic purchasing system is involved;
- (b) indicate in the procurement documents at least the nature and estimated quantity of the purchases envisaged, as well as all the necessary information concerning the dynamic

purchasing system, including how the dynamic purchasing system operates, the electronic equipment used and the technical connection arrangements and specifications;

- (c) indicate in the procurement documents any division into categories of products, works or services and the characteristics defining them;
- (d) offer unrestricted and full direct access, as long as the system is valid, to the procurement documents in accordance with regulation 53.

Requests to participate and their evaluation

(15) Contracting authorities shall give any economic operator, throughout the entire period of validity of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in paragraphs (5) to (12).

(16) Contracting authorities shall finalise their evaluation of such requests in accordance with the selection criteria within 10 working days following their receipt.

(17) That period may be prolonged to 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met.

(18) Despite paragraphs (16) and (17), as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, contracting authorities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period.

(19) Where contracting authorities intend to extend the evaluation period in accordance with paragraph (18), they shall indicate in the procurement documents the length of the extended period that they intend to apply.

(20) Contracting authorities shall inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.

Tendering and the award of the contract

(21) Contracting authorities shall invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with regulation 54.

(22) Where the dynamic purchasing system has been divided into categories of works, products or services, contracting authorities shall invite all participants having been admitted to the category corresponding to the specific procurement concerned to submit a tender.

(23) Contracting authorities shall award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice for the dynamic purchasing system or in the invitation to confirm interest.

(24) Those criteria may, where appropriate, be formulated more precisely in the invitation to tender.

Means of proof

(25) Contracting authorities may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed ESPD within 5 working days from the date on which that request is transmitted.

(26) Regulation 59(8) to (11) shall apply throughout the entire period of validity of the dynamic purchasing system.

Period of validity of the system

(27) Contracting authorities shall indicate the period of validity of the dynamic purchasing system in the call for competition.

(28) Contracting authorities shall notify the Commission of any change in the period of validity, using the following standard forms:—

- (a) where the period of validity is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
- (b) where the system is terminated, a contract award notice under regulation 50.

Charges

(29) No charges may be billed, prior to or during the period of validity of the dynamic purchasing system, to the economic operators which are interested in or party to the dynamic purchasing system.

Electronic auctions

35.—(1) Contracting authorities may use electronic auctions, in which—

- (a) new prices, revised downwards, or
- (b) new values concerning certain elements of tenders,

or both, are presented.

(2) Contracting authorities shall structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

When electronic auctions may and may not be used

(3) Public service contracts, and public works contracts, which have as their subject-matter intellectual performances (such as the design of works) which cannot be ranked using automatic evaluation methods, shall not be the subject of electronic auctions.

(4) In open or restricted procedures or competitive procedures with negotiation, contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the content of the procurement documents, in particular the technical specifications, can be established with precision.

(5) In procurements where the content of the procurement documents, in particular the technical specifications, can be established with precision, an electronic auction may be held—

- (a) on the reopening of competition among the parties to a framework agreement as provided for in regulation 33(8)(b) or (c), and
- (b) on the opening for competition of contracts to be awarded under a dynamic purchasing system.

(6) The electronic auction shall be based on one of the following elements of the tenders:—

- (a) solely on prices where the contract is awarded on the basis of price only;
- (b) on prices or on the new values of the features of the tenders indicated in the procurement documents, or on both, where the contract is awarded—
 - (i) on the basis of the best price-quality ratio, or
 - (ii) to the tender with the lowest cost using a cost-effectiveness approach.

Preliminary requirements

(7) Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice or in the invitation to confirm interest.

(8) Where contracting authorities have decided to hold an electronic auction, the procurement documents shall include at least the following details:—

- (a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
- (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject-matter of the contract;
- (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- (d) the relevant information concerning the electronic auction process;
- (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;
- (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

Admissibility of tenders

(9) Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them.

(10) A tender shall be considered admissible where—

- (a) it has been submitted by a tenderer which has not been excluded under regulation 57 and which meets the selection criteria; and
- (b) it is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.

(11) In particular, tenders—

- (a) which do not comply with the procurement documents,
- (b) which were received late,
- (c) where there is evidence of collusion or corruption, or
- (d) which have been found by the contracting authority to be abnormally low,

shall be considered irregular for the purposes of paragraph (10)(b).

(12) In particular—

- (a) tenders submitted by tenderers which do not have the required qualifications, and
- (b) tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure,

shall be considered unacceptable for the purposes of paragraph (10)(b).

(13) For the purposes of paragraph (10)(b)—

- (a) 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 authority's needs and requirements as specified in the procurement documents; and
- (b) a request to participate shall be considered not to be suitable where the economic operator concerned—
 - (i) is to be or may be excluded under regulation 57, or
 - (ii) does not meet the selection criteria.

Commencement and structure of the auction

(14) All tenderers that have submitted admissible tenders shall be invited simultaneously to participate in the electronic auction using, as of the date and time specified in the invitation, the connections in accordance with the instructions set out in the invitation.

(15) The electronic auction may take place in a number of successive phases.

(16) The electronic auction shall not start sooner than 2 working days after the date on which invitations are sent out.

(17) The invitation shall be accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in regulation 67(9).

The formula to be used

(18) The invitation shall also state the mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices or new values submitted, or both.

(19) Except where the most economically advantageous offer is identified on the basis of price alone, that formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in other procurement documents.

(20) For the purposes of paragraph (19), any ranges of weightings shall be reduced beforehand to a specified value.

(21) Where variants are authorised in accordance with regulation 45, a separate formula shall be provided for each variant.

Communication of information

(22) Throughout each phase of an electronic auction the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment.

(23) Contracting authorities may, where this has been previously indicated, communicate other information concerning other prices or values submitted.

(24) Contracting authorities may also at any time announce the number of participants in the current phase of the auction.

(25) In no case, however, may contracting authorities disclose the identities of the tenderers during any phase of an electronic auction.

Closing the auction and awarding the contract

(26) Contracting authorities shall close an electronic auction in one or more of the following manners:—

- (a) at the previously indicated date and time;
- (b) when they receive no more new prices or new values which meet the requirements concerning minimum differences, provided that they have previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction; or
- (c) when the previously indicated number of phases in the auction has been completed.

(27) Where contracting authorities intend to close an electronic auction in accordance with paragraph (26)(c), whether or not in combination with paragraph (26)(b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

(28) After closing an electronic auction, contracting authorities shall award the contract in accordance with regulation 67 on the basis of the results of the electronic auction.

Electronic catalogues

Generally

36.—(1) Where the use of electronic means of communication is required, contracting authorities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

(2) Tenders presented in the form of an electronic catalogue may be accompanied by other documents, completing the tender.

(3) Electronic catalogues shall be established by the candidates or tenderers with a view to participating in a given procurement procedure in accordance with the technical specifications and format established by the contracting authority.

(4) Electronic catalogues shall also comply with the requirements for electronic communication tools set out in regulation 22 as well as with any additional requirements set by the contracting authority in accordance with that regulation.

(5) Where the presentation of tenders in the form of electronic catalogues is accepted or required, contracting authorities shall—

- (a) state so in the contract notice or in the invitation to confirm interest; and
- (b) indicate in the procurement documents all the necessary information relating to the matters covered by regulation 22(16) to (20) so far as they concern the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

Framework agreements

(6) Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, contracting authorities may provide that the reopening of competition for specific contracts is to take place on the basis of updated catalogues.

(7) In such a case, contracting authorities shall use one of the following methods:—

- (a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the contract in question; or
- (b) notify tenderers that they intend to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the contract in question, provided that the use of that method has been indicated in the procurement documents for the framework agreement.

(8) Where contracting authorities reopen competition for specific contracts in accordance with paragraph (7)(b), they shall—

- (a) notify tenderers of the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question; and
- (b) give tenderers the possibility to refuse such collection of information.

(9) Contracting authorities shall allow for an adequate period between the notification and the actual collection of information.

(10) Before awarding the contract, contracting authorities shall present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.

Dynamic purchasing systems

(11) Contracting authorities may award contracts based on a dynamic purchasing system by requiring that offers for a specific contract are to be presented in the format of an electronic catalogue.

(12) Contracting authorities may also award contracts based on a dynamic purchasing system in accordance with paragraphs (7)(b) and (8) to (10) provided that the request to participate in

the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting authority.

(13) For the purposes of paragraph (12), the catalogue shall be completed subsequently by the candidates, when they are informed of the contracting authority's intention to constitute tenders by means of the procedure set out in paragraph (7)(b).

Centralised purchasing activities and central purchasing bodies

37.—(1) Contracting authorities may acquire supplies or services, or both, from a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(a).

(2) Contracting authorities may acquire works, supplies and services, or any one or more of them, by—

- (a) using contracts awarded by a central purchasing body;
- (b) using dynamic purchasing systems operated by a central purchasing body; or
- (c) to the extent set out in regulation 33(5), by using a framework agreement concluded by a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(b).

(3) Where a dynamic purchasing system which is operated by a central purchasing body may be used by other contracting authorities, this shall be mentioned in the call for competition setting up that dynamic purchasing system.

(4) A contracting authority fulfils its obligations under this Part when it acquires supplies or services from a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(a).

(5) A contracting authority also fulfils its obligations under this Part where it acquires works, supplies or services by—

- (a) using contracts awarded by the central purchasing body;
- (b) using dynamic purchasing systems operated by the central purchasing body; or
- (c) to the extent set out in regulation 33(5), by using a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(b).

(6) However, the contracting authority concerned shall be responsible for fulfilling the obligations imposed by this Part in respect of any parts of the procedure that it conducts itself, such as—

- (a) awarding a contract under a dynamic purchasing system which is operated by a central purchasing body;
- (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body;
- (c) determining, under regulation 33(8)(a) or (b), which of the economic operators, party to the framework agreement, shall perform a given task under a framework agreement that has been concluded by a central purchasing body.

(7) All procurement procedures conducted by a central purchasing body shall be performed using electronic means of communication, in accordance with the requirements set out in regulation 22.

(8) Contracting authorities may, without applying the procedures provided for in this Part, award a public service contract for the provision of centralised purchasing activities to a central purchasing body.

(9) Such public service contracts may also include the provision of ancillary purchasing activities.

(10) In these Regulations, “centralised purchasing activities” means activities conducted on a permanent basis in one of the following forms:—

- (a) the acquisition of supplies or services, or both, intended for contracting authorities;
- (b) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities.

Occasional joint procurement

38.—(1) Two or more contracting authorities may agree to perform certain specific procurements jointly.

(2) Where the conduct of a procurement procedure in its entirety is carried out jointly in the name and on behalf of all the contracting authorities concerned, they shall be jointly responsible for fulfilling their obligations under this Part.

(3) Such joint responsibility applies also in cases where one contracting authority manages the procedure, acting on its own behalf and on the behalf of the other contracting authorities concerned.

(4) Where the conduct of a procurement procedure is not in its entirety carried out in the name and on behalf of the contracting authorities concerned—

- (a) they shall be jointly responsible only for those parts carried out jointly, and
- (b) each contracting authority shall have sole responsibility for fulfilling its obligations under this Part in respect of the parts it conducts in its own name and on its own behalf.

Procurement involving contracting authorities from other member States

39.—(1) Without prejudice to regulation 12, contracting authorities may act jointly with contracting authorities from other member States in the award of public contracts by using one of the means provided for in this regulation.

(2) Contracting authorities shall not use the means provided for in this regulation for the purpose of avoiding the application of mandatory public law provisions in the law of the jurisdiction to which they are subject, where those provisions are in conformity with EU law.

Centralised purchasing

(3) Contracting authorities shall be free to use centralised purchasing activities offered by central purchasing bodies located in another member State.

(4) The provision of centralised purchasing activities by a central purchasing body located in another member State shall be conducted in accordance with the national provisions of the member State where the central purchasing body is located.

(5) The national provisions of the member State where the central purchasing body is located shall also apply to the following:—

- (a) the award of a contract under a dynamic purchasing system;
- (b) the conduct of a reopening of competition under a framework agreement;
- (c) the determination, for the purposes of points (a) or (b) of Article 33(4) of the Public Contracts Directive (to which effect is given in these Regulations by regulation 33(8)(a) and (b)), of which of the economic operators that are party to the framework agreement shall perform a given task.

Joint procurement

(6) In the circumstances set out in paragraph (7), contracting authorities may—

- (a) award a public contract, conclude a framework agreement or operate a dynamic purchasing system jointly with contracting authorities from other member States; and

- (b) to the extent set out in regulation 33(5), award contracts based on the framework agreement or on the dynamic purchasing system.
- (7) The circumstances are that—
 - (a) there is an agreement that determines—
 - (i) the responsibilities of the parties and the applicable national provisions, and
 - (ii) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts; and
 - (b) the allocation of responsibilities and the applicable national law were referred to in the procurement documents.
- (8) For the purposes of paragraph (7)(a)—
 - (a) the agreement may be—
 - (i) an agreement made between the participating contracting authorities, or
 - (ii) an international agreement concluded between the member States concerned; and
 - (b) the agreement may have allocated specific responsibilities among the participating contracting authorities and determined the applicable provisions of the national laws of any of their respective member States.
- (9) In procurements under paragraph (6)—
 - (a) the other provisions of this Part apply only where they are the applicable national provisions determined by an agreement referred to in paragraph (7)(a); and
 - (b) where provisions of this Part do apply, a contracting authority fulfils its obligations under this Part when it purchases works, supplies or services from a contracting authority which is responsible for the procurement procedure.

Joint entities

(10) Contracting authorities may, with contracting authorities from other member States, set up joint entities for the purposes of paragraph (1), subject to compliance with paragraph (11).

(11) This paragraph is complied with if, before undertaking any given procurement, the participating contracting authorities, by a decision of the competent body of the joint entity, have agreed on the applicable national procurement provisions of one of the following member States:—

- (a) the member State where the joint entity has its registered office;
- (b) the member State where the joint entity is carrying out its activities.

(12) The agreement may either apply for an undetermined period, when fixed in the constitutive act of the joint entity, or may be limited to a certain period of time, certain types of contracts or to one or more individual contract awards.

(13) The other provisions of this Part apply to procurement by the joint entity only where they are the national provisions applicable in accordance with paragraphs (11) and (12).

(14) In this regulation, “joint entity” includes European groupings of territorial cooperation established under Regulation (EC) No 1082/2006 of the European Parliament and of the Council⁽¹⁾ and other entities established under EU law.

Meaning of certain expressions in relation to other member States

- (15) In this regulation—

(1) OJ No L 210, 31.7.2006, p19, amended by Regulation (EU) No 1302/2013 of the European Parliament and of the Council (OJ No L 347, 20.12.2013, p303).

“central purchasing body located in another member State” means any person which is a central purchasing body for the purposes of the Public Contracts Directive in the member State in which it is located;

“contracting authority from another member State” means any person which is a contracting authority for the purposes of the Public Contracts Directive in a member State other than the United Kingdom; and references to “participating contracting authorities” shall, to the extent that they are from another member State, be interpreted accordingly.