
STATUTORY INSTRUMENTS

2016 No. 274

The Utilities Contracts Regulations 2016

PART 2

RULES APPLICABLE TO CONTRACTS

CHAPTER 1

Procedures

Conditions relating to the GPA and other international agreements

43. In so far as they are covered by Annexes 3 to 7 to the EU's Appendix I to the GPA and by the other international agreements by which the EU is bound, utilities within the meaning of regulation 5(1)(a) shall accord to the works, supplies, services and economic operators of signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU.

Choice of Procedures

44.—(1) When awarding supply, works or service contracts, utilities shall apply procedures that conform to these Regulations.

(2) Such contracts may be awarded only if a call for competition has been published in accordance with these Regulations and the Utilities Contracts Directive, except where regulation 50 permits utilities to apply a negotiated procedure without prior call for competition.

(3) Utilities may apply—

- (a) open or restricted procedures or negotiated procedures with prior call for competition as regulated by these Regulations;
- (b) competitive dialogues and innovation partnerships as regulated by these Regulations.

(4) The call for competition may be made by one of the following means—

- (a) a periodic indicative notice in accordance with regulation 67 where the contract is awarded by restricted or negotiated procedure or competitive dialogue;
- (b) a notice on the existence of a qualification system in accordance with regulation 68 where the contract is awarded by restricted or negotiated procedure or by a competitive dialogue or an innovation partnership;
- (c) a contract notice in accordance with regulation 69.

(5) For the purposes of paragraph (4)(a), economic operators which have 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 accordance with regulation 74.

Open Procedure

45.—(1) In open procedures, any interested economic operator may submit a tender in response to a call for competition.

(2) The minimum time limit for the receipt of tenders shall, subject to paragraphs (4) to (6), be 35 days from the date on which the contract notice is sent.

(3) The tender shall be accompanied by the information for qualitative selection that is requested by the utility.

(4) Where utilities have published a periodic indicative notice which was not itself used as a means of calling for competition, the minimum time limit for receipt of tenders, as laid down in paragraph (2), may be shortened to 15 days, provided that both of the following conditions are fulfilled—

- (a) the periodic indicative notice included all the information required by Section I and II of Part A of Annex VI to the Utilities Contracts Directive, insofar as the information in Section II 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.

(5) Where a state of urgency duly substantiated by the utility renders impracticable the time limit laid down in paragraph (2), it may fix a time limit which shall be not less than 15 days from the date on which the contract notice is sent.

(6) The utility may reduce by 5 days the time limit for receipt of tenders set out in paragraph (2) where it accepts that tenders may be submitted by electronic means in accordance with regulation 40.

Restricted Procedure

46.—(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 utility.

(2) The minimum time limit for the receipt of the requests to participate shall, in general, be fixed at no less than 30 days—

- (a) from the date on which the contract notice is sent; or
- (b) where a periodic indicative notice is used as a means of calling for competition, from the date on which the invitation to confirm interest is sent,

and shall in any event not be less than 15 days.

(3) Only those economic operators invited to do so by the utility following its assessment of the information provided may submit a tender.

(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(3) and (4).

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

(6) In the absence of such an agreement on the time limit for receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender is sent.

Negotiated Procedure with prior call for competition

47.—(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 utility.

(2) The minimum time limit for the receipt of requests to participate shall, in general, be fixed at no less than 30 days—

- (a) from the date on which the contract notice is sent; or
- (b) where a periodic indicative notice is used as a means of calling for competition, from the date on which the invitation to confirm interest is sent,

and shall in any event not be less than 15 days.

(3) Only those economic operators invited by the utility following its assessment of the information provided may participate in the negotiations.

(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(3) and (4).

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

(6) In the absence of such an 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 is sent.

Competitive dialogue

General and selection of participants

General and selection of participants

48.—(1) In competitive dialogues, any economic operator may submit a request to participate in response to a call for competition in accordance with regulation 44(4) by providing the information for qualitative selection that is requested by the utility.

(2) The minimum time limit for receipt of requests to participate shall, in general, be fixed at no less than 30 days—

- (a) from the date on which the contract notice is sent; or
- (b) where a periodic indicative notice is used as a means of calling for competition, the date on which the invitation to confirm interest is sent,

and shall in any event not be less than 15 days.

(3) Only those economic operators invited by the utility following the assessment of the information provided may participate in the dialogue.

(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(3) and (4).

(5) 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 regulation 82(1) to (4).

(6) Utilities shall set out and define their needs and requirements in the call for competition, in a descriptive document or in both.

(7) At the same time and in the same documents, utilities shall also set out and define the chosen award criteria and set out an indicative timeframe.

Conduct of the dialogue

(8) Utilities—

- (a) shall open, with the participants selected in accordance with the relevant provisions of regulations 76 to 81, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs, and

- (b) may discuss all aspects of the procurement with the chosen participants during this dialogue.
- (9) During the dialogue, utilities shall ensure equality of treatment among all participants and, to that end, they shall not provide information in a discriminatory manner which may give some participants an advantage over others.
- (10) In accordance with regulation 39, utilities 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.
- (11) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.
- (12) 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.
- (13) In the call for competition or the descriptive document, the utility shall indicate whether it will use the option described in paragraph (12).
- (14) The utility shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

Final tenders

- (15) Having declared that the dialogue is concluded and having so informed the remaining participants, utilities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue.
- (16) Those tenders shall contain all the elements required and necessary for the performance of the project.
- (17) Those tenders may be clarified, specified and optimised at the request of the utility.
- (18) But such clarification, specification or optimisation or any 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.
- (19) Utilities shall assess the tenders received on the basis of the award criteria laid down in the call for competition or in the descriptive document.
- (20) At the request of the utility, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 82(1) to (4) 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—
 - (a) 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
 - (b) do not risk distorting competition or causing discrimination.

Prizes and payments

- (21) Utilities may specify prizes or payments to the participants in the dialogue.

Innovation partnership

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

(2) In the procurement documents, the utility shall—

- (a) 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, and
- (b) indicate which elements of this description define the minimum requirements to be met by all tenders.

(3) The information provided under paragraph (2) 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.

(4) The utility may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.

(5) The minimum time limit for receipt of requests to participate shall, in general, 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.

(6) Only those economic operators invited by the utility following the assessment of the information provided may participate in the procedure.

(7) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(3) and (4).

(8) 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 regulation 82(1) to (4).

(9) 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 utility and the participants.

(10) 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 services or the completion of the works.

(11) The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

(12) Based on those targets, the utility may decide after each phase to—

- (a) terminate the innovation partnership; or
- (b) in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts,

provided that the utility has indicated in the procurement documents those possibilities and the conditions for their use.

(13) Subject to the following provisions of this regulation, utilities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

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

(15) During the negotiations, utilities shall ensure the equal treatment of all tenderers and to that end—

- (a) they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others;

- (b) they shall inform all tenderers, whose tenders have not been eliminated under paragraph (18) in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements; and
 - (c) following any such changes, utilities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.
- (16) In accordance with regulation 39, utilities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.
- (17) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.
- (18) 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 call for competition, in the invitation to confirm interest or in another procurement document.
- (19) In the call for competition, the invitation to confirm interest or in another procurement document, the utility shall indicate whether it will use the option described in paragraph (18).
- (20) In selecting candidates, utilities shall in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.
- (21) Only those economic operators invited by the utility following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the utility that cannot be met by existing solutions.
- (22) In the procurement documents, the utility shall define the arrangements applicable to intellectual property rights.
- (23) In the case of an innovation partnership with several partners, the utility shall not, in accordance with regulation 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.
- (24) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.
- (25) The utility 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.
- (26) The estimated value of supplies, services or works purchased shall not be disproportionate in relation to the investment for their development.

Use of the negotiated procedure without prior call for competition

50.—(1) Utilities may use the negotiated procedure without prior call for competition in the following cases—

- (a) where no tenders, no suitable tenders, 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;
- (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, but only in the case of paragraphs (ii) and (iii), where 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) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the utility, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with;
 - (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 utility 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 utility awarded an earlier contract, provided that such works or services conform to a basic project for which a first contract was awarded following a procedure in accordance with regulation 44(1) and (2);
 - (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 liquidator in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws or regulations;
 - (j) where the service contract concerned—
 - (i) follows a design contest organised in accordance with these Regulations, and
 - (ii) 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, provided that all the winners are invited to participate in the negotiations.
- (2) For the purposes of paragraph (1)(a)—
- (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 utility's needs and requirements as specified in the procurement documents;
 - (b) a request for participation shall be considered not to be suitable where the economic operator concerned—
 - (i) is to be or may be excluded in accordance with regulation 78(1) or 80(1), or
 - (ii) does not meet the selection criteria.
- (3) For the purposes of paragraph (1)(d), the circumstances invoked to justify extreme urgency must not in any event be attributable to the utility.
- (4) For the purposes of paragraph (1)(f)—

- (a) the basic project shall indicate the extent of the possible additional works or services and the conditions under which they will be awarded;
- (b) as soon as the first contract is put up for tender, the possible use of the procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the utilities when they apply regulations 16 and 17.