
STATUTORY INSTRUMENTS

2011 No. 1848

The Defence and Security Public Contracts Regulations 2011

PART 5

THE AWARD OF A CONTRACT

Criteria for the award of a contract

31.—(1) Subject to regulation 19(29) and to paragraphs (6) and (9) of this regulation, a contracting authority shall award a contract on the basis of the offer which—

- (a) is the most economically advantageous from the point of view of the contracting authority; or
- (b) offers the lowest price.

(2) A contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, functional characteristics, environmental characteristics, running costs, life cycle costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period, period of completion, security of supply, interoperability and operational characteristics.

(3) Where a contracting authority intends to award a contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or contract documents.

(4) When stating the weightings referred to in paragraph (3), a contracting authority may give the weightings a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract.

(5) Where, in the opinion of the contracting authority, it is not possible to provide weightings for the criteria referred to in paragraph (3) on objective grounds, the contracting authority shall indicate the criteria in descending order of importance in the contract notice or contract documents.

(6) If an offer for a contract is abnormally low the contracting authority may reject that offer but only if it has—

- (a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;
- (b) taken account of the evidence provided in response to a request in writing; and
- (c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator.

(7) Where a contracting authority requests an explanation in accordance with paragraph (6), the information requested may, in particular, include—

- (a) the economics of the method of construction, the manufacturing process or the services provided;

- (b) the technical solutions suggested by the economic operator or the exceptionally favourable conditions available to the economic operator for the execution of the work or works, for the supply of goods or for the provision of the services;
 - (c) the originality of the work, works, goods or services proposed by the economic operator;
 - (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the contract is to be performed; or
 - (e) the possibility of the economic operator obtaining State aid.
- (8) Where a contracting authority establishes that a tender is abnormally low because the economic operator has obtained State aid, the offer may be rejected on that ground alone only after—
- (a) consultation with the economic operator; and
 - (b) the economic operator is unable to prove, within a reasonable time limit fixed by the contracting authority, that the aid was granted in a way which is compatible with the TFEU.
- (9) Where a contracting authority rejects an abnormally low offer in accordance with paragraph (8), it shall send a report justifying the rejection to the Cabinet Office for onward transmission to the Commission, except—
- (a) where the contracting authority is the Secretary of State for Defence, in which case the Ministry of Defence must transmit the report to the Commission; or
 - (b) where the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006(1) or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006(2) and the Secretary of State for Defence is “another contracting authority” within the meaning of those provisions, in which case the contracting authority must send the report to the Ministry of Defence for onward transmission to the Commission.
- (10) In this regulation “offer” includes a bid by one part of a contracting authority to provide services, to carry out work or works or to make goods available to another part of the contracting authority when the former part is invited by the latter part to compete with the offers sought from other persons.

Contract award notice

32.—(1) Subject to paragraphs (2) and (3), a contracting authority which has awarded a contract or concluded a framework agreement shall, not later than 48 days after the award or conclusion, send to the Official Journal a notice, in the form of a contract award notice—

- (a) subject to sub-paragraph (b), containing the information specified in Annex IV to the Defence and Security Procurement Directive; or
- (b) if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for this purpose, in that form and containing the information therein specified.

(2) Any of the information specified in the form of the contract award notice in Annex IV to the Defence and Security Procurement Directive or, if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for that purpose, specified in that form, to be included in the contract award notice may be omitted in a particular case where to publish such information—

- (a) would impede law enforcement;
- (b) would otherwise be contrary to the public interest, in particular defence or security interests;

(1) S.I. 2006/5; amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2683, 2008/2848, 2009/1307 and 2009/2992.

(2) S.S.I. 2006/1; amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2010/222. S.S.I. 2009/428 was amended by S.S.I. 2009/439.

- (c) would prejudice the legitimate commercial interest of any person; or
- (d) might prejudice fair competition between economic operators.

(3) A contracting authority shall not be required to send a contract award notice in accordance with paragraph (1) where it awards a contract under a framework agreement.

Information about contract award procedures

Award decision notice

33.—(1) Subject to paragraph (11), a contracting authority shall, at the earliest opportunity after the decision has been made, inform the tenderers and candidates of its decision to—

- (a) award the contract, or
- (b) conclude the framework agreement,

and shall do so by notice in writing by the most rapid means of communication practicable.

(2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the contract;
- (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
 - (i) the economic operator which is to receive the notice, and
 - (ii) the economic operator—
 - (aa) to be awarded the contract; or
 - (bb) to become a party to the framework agreement,

and anything required by paragraph (8);

- (c) the name of the economic operator—
 - (i) to be awarded the contract; or
 - (ii) to become a party to the framework agreement; and
- (d) a precise statement of either—

- (i) when, in accordance with regulation 34, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies; or

- (ii) the date before which the contracting authority will not, in conformity with regulation 34, enter into the contract or conclude the framework agreement.

(3) Where it is to be sent to a candidate, the notice referred to in paragraph (1) shall include—

- (a) the reasons why the candidate was unsuccessful; and
- (b) the information mentioned in paragraph (2), but as if the words “and relative advantages” were omitted from sub-paragraph (b).

(4) Where the contract or framework agreement is permitted by these Regulations to be awarded or concluded without the prior publication of a contract notice, the contracting authority need not comply with paragraph (1).

(5) Where the only tenderer is the one who is to be awarded the contract or who is to become a party to the framework agreement, and there are no candidates, the contracting authority need not comply with paragraph (1).

(6) Where a contracting authority awards a contract under a framework agreement, that contracting authority need not comply with paragraph (1).

Reasons to be given on request to unsuccessful economic operators

(7) Except to the extent that the contracting authority has already informed the economic operator (whether by notice under paragraph (1) or otherwise), and subject to paragraph (11), a contracting authority shall at the earliest opportunity and at the latest within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful (whether in accordance with regulation 17(7), 17(8), 18(9), 18(10), 18(24), 18(25), 19(10), 19(11), 19(24), 19(25), 20(9) or 31)—

- (a) inform that economic operator of the reasons why it was unsuccessful; and
 - (b) if the economic operator submitted an admissible tender, the contracting authority shall inform that economic operator of the characteristics and relative advantages of the successful tender and—
 - (i) the name of the economic operator to be awarded the contract; or
 - (ii) the names of the parties to the framework agreement.
- (8) The reasons referred to in paragraphs (2)(b) and (7)(a) shall include—
- (a) any reason for the contracting authority's decision that the economic operator did not meet the technical specifications—
 - (i) as specified in regulation 12(5) by an equivalent means; or
 - (ii) in terms of the performance or functional requirements in regulation 12(6) by an equivalent means; and
 - (b) any reason for the contracting authority's decision that the economic operator did not meet its requirements of security of information and security of supply as set out in accordance with regulations 38 and 39.

Abandonment or recommencement of procedure

(9) Subject to paragraph (11), a contracting authority shall as soon as possible after the decision has been made, inform any candidates and tenderers, of its decision to abandon or to recommence a contract award procedure in respect of which a contract notice has been published, in relation to—

- (a) the award of a contract; or
- (b) the conclusion of a framework agreement.

(10) A contracting authority which informs an economic operator of its decision in accordance with paragraph (9) shall—

- (a) include the reasons for the decision; and
- (b) provide the decision and reasons in writing if requested by the economic operator.

Grounds for withholding information

(11) A contracting authority may withhold any information to be provided in accordance with paragraph (1), (7) or (9) where the disclosure of such information—

- (a) would impede law enforcement;
- (b) would otherwise be contrary to the public interest, in particular defence or security interests;
- (c) would prejudice the legitimate commercial interests of any economic operator; or
- (d) might prejudice fair competition between economic operators.

Records and reports

(12) A contracting authority shall prepare a record in relation to each contract awarded by it or framework agreement concluded by it, specifying—

- (a) the name and address of the contracting authority;

- (b) the award procedure chosen;
 - (c) the value of the consideration to be given under the contract or framework agreement and—
 - (i) the type of goods purchased or hired;
 - (ii) the work or works to be carried out; or
 - (iii) the services to be provided;
 - (d) where offers were evaluated in accordance with regulation 31, the names of the economic operators which submitted those offers and where the contracting authority has used the restricted procedure or negotiated procedure, the reasons why those economic operators were selected;
 - (e) the name of any economic operator—
 - (i) to which the contract was awarded, or
 - (ii) with which the framework agreement was concluded,and the reasons for having awarded the contract to, or concluded the framework agreement with that economic operator;
 - (f) the names of the economic operators which were unsuccessful in the circumstances referred to in regulation 17(7), 17(8), 18(9), 18(10), 19(10), 19(11) or 31 and the reasons why they were unsuccessful;
 - (g) if known to the contracting authority, the parts and proportion of the contract or framework agreement that the economic operator to which the contract has been awarded, or with which the framework agreement has been concluded, intends to sub-contract to another economic operator;
 - (h) in the case of a contracting authority which used the negotiated procedure without the prior publication of a contract notice, which of the circumstances specified in regulation 16 constituted grounds for using that procedure;
 - (i) in the case of a contracting authority which used the negotiated procedure without the prior publication of a contract notice, if relevant, reasons for exceeding the time limits laid down in regulation 16(3);
 - (j) if relevant, the reasons for the framework agreement lasting more than seven years;
 - (k) in the case of a contracting authority which used the competitive dialogue procedure, details of the circumstances which constituted grounds for using that procedure in accordance with regulation 19(2); and
 - (l) where a contracting authority has abandoned a contract award procedure or the conclusion of a framework agreement, the reasons why the contracting authority has decided not to award the contract or conclude the framework agreement as the case may be.
- (13) A contracting authority shall keep appropriate information to document the progress of contract award procedures conducted by electronic means.
- (14) If the Commission requests a report containing the information specified in paragraph (12), the contracting authority shall send a written report containing that information, or the main features of it, to the Cabinet Office for onward transmission to the Commission, except—
- (a) where the contracting authority is the Secretary of State for Defence, in which case the Ministry of Defence must transmit the report to the Commission; or
 - (b) where the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006 or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006 and the Secretary of State for Defence is “another contracting authority” within the meaning of those provisions, in which case

the contracting authority must send the report to the Ministry of Defence for onward transmission to the Commission.

Definitions

(15) For the purposes of this regulation—

- (a) “candidate” means an economic operator (other than a tenderer) which applied—
 - (i) to be included amongst the economic operators to be selected to tender or to negotiate the contract, or
 - (ii) to be a party to the framework agreement,
 but does not include an economic operator which has been informed of the rejection of its application, and the reasons for it; and
- (b) “tenderer” means an economic operator which submitted an offer.

Standstill period

34.—(1) Where regulation 33(1) applies, the contracting authority must not enter into the contract or conclude the framework agreement before the end of the standstill period.

(2) Subject to paragraph (6), where the contracting authority sends a regulation 33(1) notice to all the relevant economic operators by facsimile or electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.

(3) Subject to paragraph (6), where the contracting authority sends a regulation 33(1) notice to all the relevant economic operators only by other means, the standstill period ends at whichever of the following occurs first—

- (a) midnight at the end of the 15th day after the relevant sending date;
- (b) midnight at the end of the 10th day after the date on which the last of the economic operators to receive such a notice receives it.

(4) In paragraphs (2) and (3), “the relevant sending date” means the date on which the regulation 33(1) notices are sent to the relevant economic operators, and if the notices are sent to different relevant economic operators on different dates, the relevant sending date is the date on which the last of the notices is sent.

(5) Subject to paragraph (6), where the contracting authority sends a regulation 33(1) notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest—

- (a) midnight at the end of the 10th day after the date on which the last notice is sent by facsimile or electronic means;
- (b) the time when whichever of the following occurs first—
 - (i) midnight at the end of the 15th day after the date on which the last notice is sent by other means;
 - (ii) midnight at the end of the 10th day after the date on which the last of the economic operators to receive a notice sent by any such other means receives it.

(6) Where the last day of the standstill period reckoned in accordance with paragraphs (2) to (5) is not a working day, the standstill period is extended to midnight at the end of the next working day.

(7) In this regulation—

- “regulation 33(1) notice” means a notice given in accordance with regulation 33(1); and
- “relevant economic operators” means economic operators to which regulation 33(1) requires information to be given.

