

**INSTRUCTIONS APPLICABLE TO  
NEGOTIATED PROCEDURE  
FOR (VERY) LOW AND MIDDLE-VALUE CONTRACTS**

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## **1. INTRODUCTION**

These instructions are applicable to negotiated procedures for (very) low and middle-value contracts provided that the tender specifications make reference to them, and are intended to cover common areas to these contracts, unless otherwise specified in the tender specifications of the relevant tender.

## **2. TYPE OF CONTRACT**

There are two types of contracts: direct contract/purchase order or framework contract. Please see the draft contract attached to the letter of invitation to see which one applies.

### **2.1. Direct Contract / Purchase order**

The subject matter, price, duration of performance and the legal conditions of the contract are defined at the outset in the contract itself. As such, a direct contract is definitive and self-sufficient in that the contract can be implemented without further formalities. A purchase order is a simplified form of direct contract.

### **2.2. Framework Contract (FWC)**

It sets out the main elements of the services and/or supplies but the precise volume (number of units) and timing of the delivery cannot be defined at its signature. It means that the framework contract does not raise direct obligations on the contracting authority. When the need arises, the framework contract is implemented through the signature of specific contracts or order forms. Each specific contract or order form is awarded within the limits of the terms laid down in the framework contract and its annexes and no substantial changes are allowed. The specific contract or order form states the services and/or supplies amongst those foreseen in the tender specifications, their volume, the corresponding total price and the time of delivery. The specific contract or order form creates a direct obligation on the contracting authority at the time of its signature.

## **3. GROUPS OF ECONOMIC OPERATORS AND SUBCONTRACTING**

Tenders can be submitted by a single economic operator or jointly by two or more economic operators.

### **3.1. Joint tender**

A joint tender is a situation where a tender is submitted by a group of economic operators; in other words, by several legal entities (natural or legal persons) regardless of the link they may have between them.

Each individual legal entity of the group shall assume joint and several liabilities with all its resources towards the contracting authority for the fulfilment of the terms and conditions of the contract.

The group shall nominate one legal entity ('the leader') who shall be granted by the other members of the group the full authority to bind the group and each of its members, and will be responsible for the administrative management of the contract (including invoicing, receiving payments, etc.) on behalf of all other entities.

The "Tender form" must be signed by the legal representative of each legal entity of the group and will identify the leader.

The tender will clearly identify the division of tasks amongst the different members.

Any change in the composition of the group during the procurement procedure or after the signature of the contract may lead to the rejection of the tender or to the termination of the contract by the contracting authority, respectively.

The group will not be required to adopt a specific legal form in order to submit a tender.

The contract shall be signed by all legal entities or, through a power of attorney to be attached to the contract, by the leader duly authorised to bind the group and each of its members.

### **3.2. Subcontracting**

"Subcontractor" means an economic operator that is designated by the tenderer/contractor to perform part of the contract.

Subcontracting is allowed but the contractor will retain full liability towards the contracting authority for the performance of the contract.

Any change in subcontracting during the procurement procedure or after the signature of the contract may lead to the rejection of the tender or to the termination of the contract, respectively. During contract execution, the change of any subcontractor identified in the tender will be subject to prior written approval of the contracting authority (see Article II.10 of the General Terms and Conditions).

## **4. ELIGIBILITY OF ECONOMIC OPERATORS**

### **4.1. Access to public procurement**

Participation in the tender procedure is open on equal terms to all natural and legal persons whose domicile (natural person) or whose registration of their headquarters (legal persons) is:

- in one of the European Union Member States;
- in a third country which has a special agreement with the European Union in the field of public procurement<sup>1</sup> on the conditions laid down in the agreement;
- For tenders launched by EU Delegations, exceptionally, in the country where the EU Delegation is located and optionally in neighbouring countries only if so mentioned in the tender specifications.

Participation is also open to international organisations.

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<sup>1</sup> **FYROM, Albania, Montenegro, Serbia and Bosnia and Herzegovina** (under the Stabilisation and Association Agreement), **Iceland, Norway and Liechtenstein** (under the EEA Agreement economic operators from these countries have full access to tendering procedures of the Union institutions, agencies and bodies)

Economic operators, including each member of a joint tender, must confirm that the legal entity's headquarters (legal persons) or domicile (natural persons) is in one of the abovementioned States and present the supporting evidence normally acceptable under their own law (for example, an extract from a trade register or companies' register). The evidence must contain the main registration number of the economic operator.

Please be aware that after the UK's withdrawal from the EU, the rules of access to EU procurement procedures of economic operators established in third countries will apply to tenderers from the UK depending on the outcome of the negotiations. In such case, access is not provided by legal provisions in force, tenderers from the UK could be rejected from procurement procedures.

#### **4.2. Non-exclusion of economic operators**

Economic operators must not be in any of the exclusion situations described in Articles 136 to 140 of the Financial Regulation.<sup>2</sup>

Economic operators are evaluated on the basis of the "declaration on honour on exclusion and selection criteria" if requested in the tender specifications.

Upon request by the contracting authority, the tenderer, as well as the other entities which provided the abovementioned declaration on honour, shall provide within a time limit defined by the contracting authority the evidence referred to in paragraph "Evidence upon request" to support the declaration before the signature of the contract.

#### **4.3. Selection of economic operators**

Tenderers must comply with the legal, regulatory, economic, financial, technical and professional capacity required to perform the services and/or deliver supplies subject to the call for tender by meeting the selection criteria and the minimum requirements specific for each selection criteria.

If a tenderer is relying on the capacities of other entities (e.g. parent company, other company in the same group, or third party) in order to achieve the required level of economic, financial, technical and professional capacity, its tender must contain a signed and dated statement by the concerned entity declaring firmly which relevant resources shall be placed at the disposal of the tenderer for the performance of this contract. The contracting authority will verify whether the entities on whose capacity the tenderer intends to rely fulfil the relevant selection criteria. The tenderer may only rely on the technical and professional capacities of other entities where the latter will perform the services/deliver the supplied for which these capacities are required.

If an entity provides the whole or a very large part of the financial capacity to the tenderer, the contracting authority may demand that the said entity be jointly liable for the performance of the contract in case of award. It may require that it signs the contract or that it provides a joint and several first-demand guarantee, should that tenderer be awarded the contract. If this entity is required to sign the contract, it has to have access to

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<sup>2</sup> Regulation (EU, EURATOM) No 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, repealing Regulation (EU, Euratom) No 966/2012 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2018:193:TOC>

public procurement and shall not be in an exclusion situation as indicated in point 4.2 of this document and 4.2 of the tender specifications.

In case the tenderer is a group of economic operators, a consolidated assessment of the minimum capacity levels of all the members together will be made, where appropriate.

## **5. EVALUATION OF TENDERS ON THE BASIS OF THE AWARD CRITERIA**

The tender specifications will determine the award method applicable to each tender amongst the lowest price (the contract is awarded to the tender offering the lowest price that satisfies the minimum requirements set in the technical specifications), the lowest cost (the contract is awarded based on a cost-effectiveness approach including life-cycle costing) or the best price quality ratio.

### **5.1. Technical compliance**

Prior to the evaluation of the technical and financial tenders, the compliance with the minimum requirements set in the procurement documents is checked. After negotiation phase (if any) as referred to in point 6, a non-compliance with those requirements leads to a rejection of the tender. The proof of compliance will be requested as a "table of compliance with the requirements in the procurement documents" or as a "statement".

### **5.2. Technical tender**

In case of award based on the best price quality ratio, the technical quality of the tenders is evaluated on the basis of the documents provided by the tenderers in the technical tender with regard to the award criteria described in the tender specifications.

### **5.3. Financial tender**

During the validity of the tender, prices can be revised only at the written request of the contracting authority during the negotiations (please see point 6 below for more details about the negotiation). Once the contract has been awarded, prices cannot be revised. During the implementation of the contract, they can however be indexed if so foreseen in the contract.

Financial tenders will be checked for arithmetical accuracy. Where arithmetical errors are found, tenderers will be requested to correct them.

The price schedule, or the unit price schedule for framework contracts, is binding during implementation of the contract.

For framework contracts, the price "scenario" is an estimate by the contracting authority of the quantities of the services and/or supplies over the duration of the contract in order to compare the financial tenders.

When completing the scenario, tenderers will specify the same unit prices tendered for in the unit price schedule, will multiply them by the quantities indicated by the contracting authority for each item and will calculate the total price.

The total amount of the successful tender's scenario will be taken into account for setting the maximum ceiling of the framework contract. Moreover, the contracting authority may add a security margin of 10% and, where applicable, an estimation of the future price

indexation. The framework contract can then be "consumed" up to that ceiling through specific contracts or order forms.

## **6. WHAT DOES NEGOTIATION MEAN?**

The contracting authority may negotiate the tenders in order to improve their content or to adapt them to the requirements set out in the procurement documents.

The negotiation may not modify the minimum requirements nor the criteria specified in the procurement documents, especially the clauses of the contract. A contrario, what is not defined as minimum requirements in the tender specifications may be negotiated. Similarly, the contracting authority may negotiate the requirements for which it is specifically indicated that they are open to negotiation.

In practice, the negotiation consists in providing feedback in writing to each tenderer on the evaluation of its initial tender, indicating elements not compliant with the minimum requirements and other aspects which should or could be improved, including the prices.

The tenderer may of course improve aspects not addressed in the feedback when submitting a revised tender.

During the negotiation the contracting authority must ensure that tenderers are treated equally.

The contracting authority reserves the right not to negotiate and to award the contract on the basis of the tenders initially received.

## **7. GENERAL INSTRUCTIONS ON SUBMISSION OF TENDERS**

1. Only economic operators invited to tender by the contracting authority may submit a tender.
2. The method of submission and the applicable deadline are established in the letter of invitation to tender. In case of paper submission, the tender must be placed inside two closed envelopes. The inner envelope should be marked as follows: "CALL FOR TENDERS – NOT TO BE OPENED BY THE INTERNAL MAIL DEPARTMENT".
3. Tenders must be:
  - perfectly legible so that there can be no doubt as to words and figures;
  - drawn up using the model reply forms in the tender specifications, where applicable.
4. Submission of a tender implies acceptance of all the terms and conditions set out in the procurement documents and, where appropriate, waiver of the tenderer's own general or specific terms and conditions. The submitted tender is binding on the tenderer to whom the contract is awarded for the duration of the contract.
5. All costs incurred for the preparation and submission of tenders are to be borne by the tenderers and will not be reimbursed.

6. Contacts between the contracting authority and tenderers are prohibited throughout the procedure save in exceptional circumstances and under the following conditions only:

Before the date of receipt indicated at point 3 of the letter of invitation:

Upon request, the contracting authority may provide additional information solely for the purpose of clarifying the procurement documents.

The contracting authority may, on its own initiative, inform interested parties of any error, inaccuracy, omission or any other type of clerical error in the text of the procurement documents.

After the date of receipt or submission indicated at point 3 of the invitation to tender:

If obvious clerical errors in the tender need to be corrected or confirmation of a specific or technical element is necessary, the contracting authority will contact the tenderer.

The contracting authority may negotiate with tenderers in compliance with the terms set out under point 6. "What does negotiation mean?" above.

7. The invitation to tender is in no way binding on the contracting authority. The contracting authority's contractual obligation commences only upon signature of the contract with the successful tenderer.
8. Up to the point of signature, the contracting authority may cancel the procurement procedure without the tenderers being entitled to claim any compensation. This decision must be substantiated and the tenderers notified.
9. Once the contracting authority has opened the tender, it becomes its property and it shall be treated confidentially.
10. You will be informed of the outcome of this procurement procedure by letter signed by the Contracting Authority and sent by e-mail only. It is your responsibility to provide a valid e-mail address together with your contact details in your tender and to check this e-mail address regularly.
11. If processing your reply to the invitation to tender involves the recording and processing of personal data (such as your name, address and CV), such data will be processed pursuant to Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC. Unless indicated otherwise, your replies to the questions and any personal data requested are required to evaluate your tender in accordance with the specifications of the invitation to tender and will be processed solely for that purpose by the contracting authority. Details concerning the processing of your personal data are available on the privacy statement at [https://eeas.europa.eu/sites/eeas/files/procurement\\_-\\_privacy\\_statement.pdf](https://eeas.europa.eu/sites/eeas/files/procurement_-_privacy_statement.pdf).

12. Your personal data may be registered in the Early Detection and Exclusion System (EDES) if you are in one of the situations mentioned in Article 136 of the Financial Regulation<sup>3</sup>. For more information, see the Privacy Statement on [http://ec.europa.eu/budget/explained/management/protecting/protect\\_en.cfm](http://ec.europa.eu/budget/explained/management/protecting/protect_en.cfm)

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<sup>3</sup> Regulation (EU, EURATOM) No 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, repealing Regulation (EU, Euratom) No 966/2012.