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The Public Contracts Regulations 2015
&
The Utilities Contracts Regulations 2016
Guidance on changes to procedures

**(Competitive procedure with negotiation, competitive dialogue &
innovation partnerships)**

Overview, Key Points and Frequently Asked Questions

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Overview

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What is covered in this guidance?

This guidance covers changes to competitive dialogue and the competitive procedure with negotiation and the new innovation partnerships approach.

What has changed?

The main changes to Competitive Dialogue and Competitive Procedure with Negotiation are:

- the grounds for using the competitive procedure with negotiation and the competitive dialogue procedure have been made the same; and
- these grounds have been broadened, so that more procurements could be carried out using these procedures.

Also, innovation partnerships have been introduced to allow contracting authorities and suppliers/service providers to work together through a Partnership Agreement to develop new products, works or services, where these are not already available on the market. Following a contract notice and negotiation to choose the most suitable partner or partners, the innovation partnership will then be structured in successive phases which could eventually include the manufacturing of the product or the provision of a service.

Why is this helpful/necessary?

The UK has pressed for a long time for more flexibility to use negotiation to achieve the best commercial outcomes. The wider ability to use the competitive procedure with negotiation and competitive dialogue, together with the introduction of innovation partnerships, gives purchasers the toolbox to achieve such outcomes.

Which rules do I need to refer to?

The relevant Regulations are:

- 29 for competitive procedure with negotiation,
- 30 for competitive dialogue and
- 31 for innovation partnership.

These Regulations are attached for quick reference at **Annex A**, as is Regulation 26(4), which sets out the grounds for using the competitive procedure with negotiation and competitive dialogue.

Under the Utilities Contracts Regulations 2016, there is a free choice, as previously, between the open, restricted and negotiated procedures. Competitive dialogue (regulation 48) and innovation partnerships (regulation 49) have been added.

Key points

Competitive procedure with Negotiation (CPN) and Competitive Dialogue (CD)

The need for purchasers to be able to use a procedure which provides for negotiations is acknowledged in the recitals to the Public Sector Directive (2014/24/EU). Recital 42 comments that there is a great need for contracting authorities to have additional flexibility to choose a procurement procedure which provides for negotiations and that a greater use of these procedures is likely to increase cross border trade. The UK pressed strongly for this flexibility in the negotiations. The recital also notes that, in terms of contract values, there has been an increased use of competitive dialogue, which is helpful in cases where a contracting authority is unable to define up front the means of satisfying their needs.

The grounds for using either CD or CPN are as follows:

- Where needs cannot be met without adaptation of readily available solutions (new justification)
- Where the contract includes design or innovative solutions (new justification)
- Where the requirement is complex in nature, in its legal and financial make-up or because of its risks (extended version of the current justification for competitive dialogue)
- Where the technical specifications cannot be established with sufficient precision (as current negotiated procedure with a call for competition)
- In the case of unacceptable/irregular tenders (as current negotiated procedure with a call for competition)

These grounds offer considerable scope to use these procedures, but recital 43 comments that CPN and CD should not be used for off-the-shelf services or products, which can be provided by many different operators on the market.

Competitive procedure with negotiation.

In the previous public sector Directive (2004/18/EC,) the process set out for conducting the negotiated procedure with a call for competition was fairly minimal. As the grounds for using CPN have been broadened and as a result it is likely to be used more frequently, various safeguards concerning the conduct of the procedure have been added to ensure equal treatment and transparency.

These safeguards include;

- Setting minimum requirements at the beginning and not changing them during the negotiations (Regulation 29 (14));
- Having stable award criteria and weighting throughout the process (Regulation 29 (14));
- Informing tenderers in writing of any changes to the technical specifications (Regulation 29 (16) b);
- Not revealing confidential information from a candidate or tenderer to other participants without its specific consent (Regulation 29 (17));
- Documenting all stages of the process (Regulation 84(7)) ; and
- The submission of all tenders in writing (recital 45 of 2014/24/EU).

In terms of the process, negotiations may take place:

- On all aspects, other than the minimum requirements, such as quality, quantities, commercial clauses, social, environmental and innovative aspects (recital 45 of 2024/24/EU),
- In stages with successive elimination by applying the award criteria (Regulation 29 (19)), and
- On all tenders but the final one (Regulation 29 (13)).

Competitive dialogue

Apart from the broader grounds for its use, the competitive dialogue procedure has not changed much from the approach adopted when it was introduced in 2004/18/EC.

The changes include:

- An obligation to set out an indicative time frame for the dialogue (Regulation 30 (7))
- Not revealing confidential information from a candidate or tenderer to other participants without its specific consent (Regulation 30 (10));

- More flexibility following the submission of the final tenders, which may be clarified, specified and optimised (Regulation 30 (17)); and
- More flexibility to negotiate with the winning tenderer to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract (Regulation 30 (20)).

Timescales

As for the other procedures, the applicable time limits for CPN and CD have been shortened. The timescales are set out at page 15 of “A brief guide to the EU Public Contracts Directive (2014)”.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407236/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Feb_2015_update.pdf.

Innovation partnerships

This new procedure is aimed at encouraging the development of innovative products, services or works, which are not already available on the market. A problem for companies which want to provide such new approaches, is the cost of investing in the development of innovative products or services, without any likelihood that these could be taken through to final production or delivery unless there were further procurement processes after an initial R&D services contract.

The process of awarding a partnership agreement is set out in Regulation 31. The procurement process largely follows the competitive procedure with negotiation. Following a contract notice, the contracting authority receives expressions of interest and negotiates with the potential partner(s) it has selected. The partnership agreement is then awarded to one or more partners on the basis of the best price quality ratio.

Following the award, the structure of the process covers two parts, firstly the development of the innovative product, service or works and then the purchase of the resulting supplies, services or works.

The development phase should:

- Be structured in successive phases following the sequence of steps in the R & D process (Regulation 31(10));
- Set intermediate targets and provide for payment in appropriate instalments (Regulation 31 (11)); and on the basis of these targets,
- Provide an option to terminate after each phase, or where there are several partners, allow for competitive development with the reduction of the number of solutions (Regulation 31 (12)).

The subsequent purchase of the resulting innovative product, service or works can then take place provide that they correspond to the performance levels and maximum costs agreed between the contracting authority and the participants (Regulation 31 (9)).

Q&A

As the grounds for using the competitive negotiated procedure and competitive dialogue are the same, why would one choose one procedure rather than the other?

This will need to be considered on a case by case basis, but some comments can be made about the respective advantages and disadvantages.

Competitive dialogue was designed for complex projects, where one was not sure of the best way to meet a particular need. In certain cases, this uncertainty could be addressed by pre-market engagement. Recital 42 gives examples of where the use of CD could be 'beneficial'. These include: the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing. Competitive dialogue has flexibility for addressing issues arising from final tenders, whereas there are no provisions relating to post tender negotiation in the competitive procedure with negotiation.

As set out in the main body of the guidance above, the competitive procedure with negotiation is available in a broad range of cases, which will help to get the best commercial outcome, but as for competitive dialogue, it should not be used for off the shelf products or services.

How are Innovation Partnerships different from pre-commercial procurement?

The innovation partnerships approach has been introduced to allow contracting to establish a long-term innovation partnership for the development **and subsequent purchase** of a new, innovative product, service or works. Where the development is successful in terms of delivery to agreed performance and costs, there will not be a need for a separate procurement procedure for the purchase.

What is the situation regarding intellectual property rights under Innovation Partnerships?

One of the problems for contracting authorities under pre-commercial procurement was the difficulty of purchasing the final product at the end of the R&D phase, without either giving the developer an incumbent advantage or inadvertently disclosing their intellectual property. As the innovation partnerships approach can cover the whole process, this problem is alleviated. Regulation 31(22) states that the arrangements applicable to intellectual property rights should be set out in the procurement documents.

ANNEX A – Regulations

Choice of procedures

26 (4) Contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue in the following situations:—

- (a) with regard to works, supplies or services fulfilling one or more of the following criteria:—
 - (i) the needs of the contracting authority cannot be met without adaptation of readily available solutions;
 - (ii) they include design or innovative solutions;
 - (iii) the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risks attaching to them;
 - (iv) the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference;
- (b) with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted.

Competitive procedure with negotiation

29.—(1) In competitive procedures with negotiation, 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 authority.

- (2) In the procurement documents, contracting authorities shall—
 - (a) identify the subject-matter of the procurement by providing a description of their needs and the characteristics required of the supplies, works or services to be procured,
 - (b) indicate which elements of the description define the minimum requirements to be met by all tenders, and
 - (c) specify the contract award criteria.

(3) The information provided under paragraph (2) shall be sufficiently precise to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the procedure.

Time limits

(4) The minimum time limit for receipt of requests to participate shall, subject to paragraph (6), be 30 days from—

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

(5) The minimum time limit for the receipt of initial tenders shall, subject to paragraphs (6) to (10), be 30 days from the date on which the invitation is sent.

(6) Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of initial tenders as laid down in paragraph (5) may be shortened to 10 days, provided that both of the following conditions are fulfilled:—

(a) the prior information notice included all the information required in section 1 of part B of Annex V to the Public Contracts Directive, insofar as that information was available at the time the prior information notice was published;

(b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(7) Sub-central contracting authorities may set the time limit for the receipt of initial 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.

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

(9) The time limit for receipt of initial tenders provided for by paragraph (5) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 22.

(10) Where a state of urgency duly substantiated by the contracting authorities renders impracticable the time limits laid down in this regulation, they may fix—

(a) a time limit for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice is sent, and

(b) a time limit for the receipt of initial tenders which shall not be less than 10 days from the date on which the invitation to tender is sent.

Tenders and negotiations

(11) Only those economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender which shall be the basis for the subsequent negotiations.

(12) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(13) Subject to paragraphs (15) and (19), contracting authorities 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 negotiation.

(15) Contracting authorities may award contracts on the basis of the initial tenders without negotiation where they have indicated, in the contract notice or in the invitation to confirm interest, that they reserve the possibility of doing so.

(16) During the negotiations, contracting authorities shall ensure 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 (19), 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, they shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

(17) In accordance with regulation 21, contracting authorities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

(18) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(19) Competitive procedures with negotiation 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 another procurement document.

(20) In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority shall indicate whether it will use the option described in paragraph (19).

Concluding the procedure

(21) Where the contracting authority intends to conclude the negotiations, it shall—

(a) inform the remaining tenderers and set a common deadline to submit any new or revised tenders,

(b) verify that the final tenders are in conformity with the minimum requirements and comply with regulation 56(1),

(c) assess the final tenders on the basis of the award criteria, and

(d) award the contract in accordance with regulations 66 to 69.

Competitive dialogue

30.—(1) In competitive dialogues, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.

(2) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent.

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

(4) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(5) The contract shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with regulation 67.

(6) Contracting authorities shall set out their needs and requirements in the contract notice and they shall define those needs and requirements in that notice or in a descriptive document, or in both.

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

Conduct of the dialogue

(8) Contracting authorities—

(a) shall open, with the participants selected in accordance with the relevant provisions of regulations 56 to 66, 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, contracting authorities 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 21, contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or tenderer participating 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 contract notice or in the descriptive document.

(13) In the contract notice or the descriptive document, the contracting authority shall indicate whether it will use the option described in paragraph (12).

(14) The contracting authority 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, contracting authorities shall ask each of 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 contracting authority.

(18) But such clarifications, specification or optimisation, or any additional information, may not involve changes to the essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

(19) Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document.

(20) At the request of the contracting authority, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 67 may be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract, provided this—

(a) does not have the effect of materially modifying essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document, and

(b) does not risk distorting competition or causing discrimination.

Prizes and payments

(21) Contracting authorities may specify prizes or payments to the participants in the dialogue.

Innovation Partnership

31.—(1) In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.

(2) In the procurement documents, the contracting authority 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 contracting authority 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 be 30 days from the date on which the contract notice is sent.

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

(7) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(8) The contracts shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with regulation 67.

(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 contracting authority 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 the 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 contracting authority may decide after each phase to—

(a) terminate the innovation partnership, or

(b) in the case of an innovation partnership with several partners, reduce the number of partners by terminating individual contracts,

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

(13) Subject to the following provisions of this regulation, contracting authorities 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 negotiation.

(15) During the negotiations, contracting authorities shall ensure 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, contracting authorities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

(16) In accordance with regulation 21, contracting authorities 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 contract notice, in the invitation to confirm interest or in another procurement document.

(19) In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority shall indicate whether it will use the option described in paragraph (18).

(20) In selecting candidates, contracting authorities 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 contracting authority following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions.

(22) In the procurement documents, the contracting authority shall define the arrangements applicable to intellectual property rights.

(23) In the case of an innovation partnership with several partners, the contracting authority shall not, in accordance with regulation 21, 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 contracting authority 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 shall not be disproportionate in relation to the investment required for their development.