

Notification of Admittance

The contracting authority shall inform the tenderer referred to in the first subparagraph at the earliest possible opportunity of its admittance to the dynamic purchasing system or of the rejection of its indicative tender.

Each specific contract must be the subject of an Invitation to Tender. Before issuing the Invitation to Tender, contracting authorities shall publish a simplified contract notice inviting all interested economic operators to submit an indicative tender, in accordance with paragraph 4, within a time limit that may not be less than 15 days from the date on which the simplified notice was sent.

Evaluation

Contracting authorities may not proceed with tendering until they have evaluated all the indicative tenders received by that deadline.

Inviting Tenders

Contracting authorities shall invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded under the system. To that end they shall set a time limit for the submission of tenders.

Contract Award

The contracting authorities shall award the contract to the tenderer which submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the dynamic purchasing system.

Award Criteria

The award criteria may, if appropriate, be formulated more precisely in the invitation referred to in the first subparagraph.

Duration

A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases.

Improper Use

Contracting authorities may not resort to a dynamic purchasing system to prevent, restrict or distort competition. No charges may be billed to the interested economic operators or to parties to the system.

ARTICLE 42(2) TO (5)

The means of communication chosen must be generally available and thus not restrict economic operators' access to the tendering procedure.

Communication and the exchange and storage of information shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved, and that the contracting authorities examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

The tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use.

The following rules are applicable to devices for the electronic receipt of tenders and requests to participate.

Electronic Tendering Process

Devices for the electronic receipt of tenders, requests for participation and plans and projects in contests must at least guarantee, through technical means and appropriate procedures, that:

- electronic signatures relating to tenders, requests to participate and the forwarding of plans and projects comply with national provisions adopted pursuant to Directive 1999/93/EC
- the exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects can be determined precisely
- it may be reasonably ensured that, before the time limits laid down, no one can have access to data transmitted under these requirements
- if that access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable
- only authorised persons may set or change the dates for opening data received
- during the different stages of the contract award procedure or of the contest access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons
- simultaneous action by authorised persons must give access to data transmitted only after the prescribed date
- data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves therewith.

Electronic Signatures

Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') should, in the context of this Directive, apply to the transmission of information by electronic means.

The public procurement procedures and the rules applicable to service contests require a level of security and confidentiality higher than that required by these Directives. Accordingly, the devices for the electronic receipt of offers, requests to participate and plans and projects should comply with specific additional requirements. Moreover, the existence of voluntary accreditation schemes could constitute a favourable framework for enhancing the level of certification service provision for these devices.



The Application of Electronic Tendering Techniques – Electronic Auctions, Dynamic Systems and E-tendering – in Compliance with the Proposed EC Consolidated Directive

PART ONE

New electronic purchasing techniques are continually being developed. Such techniques help to increase competition and streamline public purchasing, particularly in terms of the savings in time and money which their use will allow. Under the proposed new Consolidated Public Procurement Directive, contracting authorities may make use of electronic purchasing techniques, providing such use complies with the rules drawn up under this Directive and the principles of equal treatment, non-discrimination and transparency.

To that extent, a tender submitted by a tenderer, in particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used, may take the form of that tenderer's electronic catalogue if the latter uses the means of communication chosen by the contracting authority in accordance with the Directive's related requirements.

ELECTRONIC AUCTIONS**Definition**

"An electronic auction is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods."

Electronic Auctions

Since use of electronic auctions is likely to increase, such auctions are given a European Community definition and governed by specific rules to ensure that they operate in full accordance with the principles of equal treatment, non-discrimination and transparency. To that end, provision is

made for such electronic auctions to deal only with contracts for works, supplies or services for which the specifications can be determined with precision.

With the same objective, it must also be possible to establish the respective ranking of the tenderers at any stage of the electronic auction. Recourse to electronic auctions enables contracting authorities to ask tenderers to submit new prices, revised downwards, and, when the contract is awarded to the most economically advantageous tender, also to improve elements of the tender other than price. However, to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention by the contracting authority, may be improved. To this end, such elements must be quantifiable so that they can be expressed in figures or percentages.

Authority to Use

EU Member States may provide that contracting authorities may use electronic auctions.

Procedures

With a call for competition, in open, restricted or negotiated procedures, the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction, but only when the contract specifications can be established with precision.

Framework Agreements

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in the second indent of the second subparagraph of Article 32(4) and on the opening for competition

of contracts to be awarded under the dynamic purchasing system referred to below.

The electronic auction must be based on one of two criteria:

- solely on prices when the contract is awarded to the lowest price
- on prices and/or on the new values of the features of the tenders indicated in the specification when the contract is awarded to the most economically advantageous tender

The e-Auction Notice

Contracting authorities which decide to hold an electronic auction must state that fact in the contract notice.

The specifications shall include the following details:

- the features, the values of which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages
- any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract
- 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
- the relevant information concerning the electronic auction process
- 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
- the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection

Initial Evaluation

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

Invited Tenderers

All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values; the invitation shall contain all relevant information concerning individual connection to the electronic equipment being used and shall state the date and time of the start of the electronic auction.

Phased Application

The electronic auction may take place in a number of successive phases. The electronic auction may not start sooner than two working days after the date on which invitations are sent out.

When the contract is to be awarded on the basis of the most economically advantageous tender, the invitation shall be accompanied by the outcome of the full evaluation of the relevant tenderer, carried out in accordance with the weighting provided for in the first subparagraph of Article 53(2).

Automatic Ranking

The invitation shall also state the mathematical formula to be used in the electronic auction to determine automatic rerankings on the basis of the new prices and/or new values submitted. That formula shall incorporate the weighting of all the criteria fixed to determine the most economically advantageous tender, as

indicated in the contract notice or in the specifications; for that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Variants

Where variants are authorised, a separate formula shall be provided for each variant.

Instantaneous Ranking Notification

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. They may also communicate other information concerning other prices or values submitted, provided that this is stated in the specifications.

Phases

The contracting authorities may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.

Auction Closure

The contracting authorities shall close an electronic auction in one or more of the following manners:

- in the invitation to take part in the auction they shall indicate the date and time fixed in advance
- when they receive no more new prices or new values which meet the requirements concerning minimum differences. In that event, the contracting authorities shall state in the invitation to take part in the auction the time which they will allow to elapse after receiving the last submission before they close the electronic auction
- when the number of phases in the auction, fixed in the invitation to take part in the auction, has been completed
- When the contracting authorities have decided to close an electronic auction in accordance with subparagraph
- possibly in combination with the arrangements laid down in subparagraph
- the invitation to take part in the auction shall indicate the timetable for each phase of the auction

Award

When the contracting authorities have closed an electronic auction they shall award the contract in accordance with Article 53 on the basis of the results of the electronic auction.

Improper Use

The contracting authorities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject of the contract, as put up for tender in the published contract notice and defined in the specification. (Article 53 prescribes 'most economically advantageous tender' and 'lowest price' as the only permissible award criteria.)

Application

Before undertaking the actual e-auction the contracting authorities must have invested in substantial planning. They must ensure the auction process is fully compliant with the process outlined in the proposed new Consolidated EU Public Procurement Directive as outlined above.

Secondly, contracting authorities should address the following issues early, by ensuring:

- they have established effective criteria to pre-qualify suppliers
- the procurement can be accurately specified
- there is a confirmed commitment to purchase
- the value is high enough to make it commercially viable
- there is a competitive supplier base
- key suppliers are willing to participate
- selected suppliers possess similar processes, procedures and capabilities
- award will not distort the marketplace in future
- availability of good intelligence on past transactions within the market

Contracting authorities should not proceed until all of the above have been completed. Suppliers should seek information from the contracting authority relative to the process as outlined above.

ARTICLE 32 – FRAMEWORK AGREEMENTS

Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria.

Contracts based on framework agreements concluded with several economic operators may be awarded either:

- by application of the terms laid down in the framework agreement without reopening competition
- or where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure
 - for every contract to be awarded, contracting authorities should invite the economic operators capable of executing the subject of the contract in writing
 - 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 of the contract and the time needed to send in tenders
 - tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired
 - contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement

ARTICLE 53(2) – CRITERIA

Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a), the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

DYNAMIC PURCHASING SYSTEMS

Electronic (Dynamic) Purchasing Systems

In view of the rapid expansion of electronic purchasing systems, appropriate rules are now introduced to enable contracting authorities to take full advantage of the possibilities afforded by these systems. Against this background, it is necessary to define a

completely electronic dynamic purchasing system for commonly used purchases, and to lay down specific rules for setting up and operating such a system to ensure the fair treatment of any economic operator who wishes to take part therein. Any economic operator which submits an indicative tender in accordance with the specification and meets the selection criteria should be allowed to join such a system. This purchasing technique allows the contracting authority, through the establishment of a list of tenderers already selected and the opportunity given to new tenderers to take part, to receive a particularly broad range of tenders as a result of the electronic facilities available, and hence to ensure optimum use of public funds through broad competition. A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases.

Definition

“A dynamic purchasing system is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.”

Authority to Use

European Union Member States may provide that contracting authorities may use dynamic purchasing systems.

Procedures

To set up a dynamic purchasing system, contracting authorities must follow the rules of the open procedure in all its phases up to the award of the contracts to be concluded under this system.

Criteria

All the tenderers satisfying the selection criteria and having submitted an indicative tender which complies with the specification and any possible additional documents shall be admitted to the system; indicative tenders may be improved at any time provided that they continue to comply with the specification. With a view to setting up the system and to the award of contracts under that system, contracting authorities shall use solely electronic means in accordance with Article 42(2) to (5).

Notice Publication

For the purposes of setting up the dynamic purchasing system, contracting authorities shall:

- publish a contract notice making it clear that a dynamic purchasing system is involved
- indicate in the specification the nature of the purchases envisaged under that system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications
- offer by electronic means, on publication of the notice and up to the expiry of the system, unrestricted, direct and full access to the specification and to any additional documents, and shall indicate in the notice the internet address at which such documents may be consulted

Submission of Tenders

Contracting authorities shall give any economic operator, throughout the entire period of the dynamic purchasing system, the possibility of submitting an indicative tender and of being admitted to the system under the conditions referred to in paragraph 2. They shall complete evaluation within a maximum of 15 days from the date of submission of the indicative tender. However, they may extend the evaluation period provided that no invitation to tender is issued in the meantime.