
STATUTORY INSTRUMENTS

2011 No. 1848

The Defence and Security Public Contracts Regulations 2011

PART 7

RULES APPLICABLE TO SUB-CONTRACTING

CHAPTER 1

Sub-contracts awarded by economic operators which are not contracting authorities

Scope

40. When in accordance with regulation 37(3) this Part applies, an economic operator which is not a contracting authority must apply the rules set out in regulations 41 to 44 when it awards sub-contracts to third parties.

Principles

41. When applying the rules set out in this Part, the economic operator must act transparently and treat all potential sub-contractors in an equal and non-discriminatory way.

Thresholds and rules on advertising

42.—(1) When a successful economic operator which is not a contracting authority intends to award a sub-contract which has a value, net of value added tax, estimated not to be lower than the thresholds laid down in regulation 9, it must make known its intention by way of a sub-contract notice.

(2) Sub-contract notices must—

- (a) subject to sub-paragraph (b), contain the information referred to in Annex V 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, be in that form and contain the information therein specified,

and any other information deemed useful by the successful economic operator, if necessary with the approval of the contracting authority.

(3) Sub-contract notices must be published in accordance with regulation 48(1)(b) and (3) and the successful economic operator must not place a notice in any publication—

- (a) before the date on which the notice is despatched in accordance with regulation 48(1)(b); or
- (b) which contains any additional information to that contained in the notice despatched in accordance with regulation 48(1)(b).

(4) A sub-contract notice is not required when a sub-contract meets the conditions of regulation 43.

(5) The successful economic operator may fulfil the sub-contracting requirements in regulation 37(3) by awarding sub-contracts on the basis of a framework agreement concluded in accordance with the rules set out in regulations 41 and 44 and in paragraphs (1) to (4).

(6) Sub-contracts based on a framework agreement concluded in accordance with paragraph (5)

- (a) must be awarded within the limits of the terms laid down in the framework agreement and, when awarding sub-contracts, the parties to the framework agreement must not include terms in the sub-contract that are inconsistent with the terms laid down in that framework agreement; and
- (b) may only be awarded to sub-contractors that were originally party to the framework agreement.

(7) The term of a framework agreement concluded in accordance with paragraph (5) may not exceed seven years, except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause.

(8) A framework agreement concluded in accordance with paragraph (5) may not be used improperly or in such a way as to prevent, restrict or distort competition.

(9) For the award of sub-contracts which have a value, net of value added tax, estimated to be less than the thresholds laid down in regulation 9, successful economic operators must apply the principles of the TFEU regarding transparency and competition.

(10) Regulation 9 applies to the calculation of the estimated value of sub-contracts.

(11) In this regulation “framework agreement” means an agreement between the successful economic operator and one or more sub-contractors which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the sub-contractor will enter into one or more contracts with the successful economic operator in the period during which the framework agreement applies.

Award of a sub-contract without publication of a sub-contract notice

43.—(1) A successful economic operator may award a sub-contract without publication of a sub-contract notice in the following circumstances—

- (a) in the case of any such sub-contract—
 - (i) in the absence of tenders, suitable tenders or applications in response to the sub-contract notice issued by the successful economic operator using the procedure set out in regulation 42(1) to (3), but only if the original terms of the proposed sub-contract are not substantially altered in the new sub-contract award procedure;
 - (ii) when, for technical reasons, or for reasons connected with the protection of exclusive rights, the sub-contract may be awarded only to a particular sub-contractor;
 - (iii) where the publication of a sub-contract notice would be incompatible with the urgency resulting from a crisis;
 - (iv) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the successful economic operator, the requirement to publish a sub-contract notice cannot be met;
- (b) in the case of a supply sub-contract—
 - (i) subject to paragraph (2), when the goods to be purchased or hired under the sub-contract are required by the successful economic operator as a partial replacement for, or in addition to, existing goods or an installation and when to obtain the goods from a sub-contractor other than the sub-contractor which supplied the existing

- goods or installation would oblige the successful economic operator to acquire goods having different technical characteristics which would result in—
- (aa) incompatibility between the existing goods or the installation and the goods to be purchased or hired under the sub-contract; or
 - (bb) disproportionate technical difficulties in the operation and maintenance of the existing goods or the installation;
- (ii) for the purchase or hire of goods quoted and purchased on a commodity market;
- (iii) to take advantage of particularly advantageous terms for the purchase of goods in a closing down sale or in a sale brought about because a sub-contractor is subject to a procedure referred to in regulation 23(4)(a), (b) or (c);
- (c) in the case of a services sub-contract or a supply sub-contract—
- (i) for research and development services;
 - (ii) when the goods to be purchased or hired under the sub-contract are to be manufactured solely for the purpose of research or development but not when the goods are to be purchased or hired for quantity production to establish commercial viability or to recover research and development costs;
- (d) in the case of a works sub-contract or a services sub-contract—
- (i) subject to paragraph (4), when the successful economic operator wants the sub-contractor to carry out additional work or works or provide additional services which were not included in the project initially considered or in the original works sub-contract or services sub-contract but which through unforeseen circumstances have become necessary, and such work, works or services—
 - (aa) cannot for technical or economic reasons be carried out or provided separately from those under the original sub-contract without major inconvenience to the successful economic operator; or
 - (bb) can be carried out or provided separately from those under the original sub-contract but are strictly necessary to the later stages of the performance of that sub-contract;
 - (ii) subject to paragraph (5), when a successful economic operator wants a sub-contractor which has entered into a works sub-contract or a services sub-contract with that successful economic operator to carry out a new work or works or provide new services which are a repetition of the work or works carried out or the services provided under the original sub-contract and which are in accordance with the project for the purpose of which the first sub-contract was entered into;
- (e) in the case of a sub-contract related to the provision of air and maritime transport services for the armed forces of a member State deployed or to be deployed abroad, when the successful economic operator has to procure such services from sub-contractors that guarantee the validity of their tenders only for such short periods that the requirement to publish the sub-contract notice cannot be met;
- (f) in the event of irregular tenders or the submission of tenders which are unacceptable under the conditions relating to the performance of a sub-contract or the criteria for qualitative selection prescribed by the contracting authority under regulation 44, but only if—
- (i) the original terms of the proposed sub-contract are not substantially altered; and
 - (ii) the successful economic operator includes in the new sub-contract award procedure all of, and only, those tenderers which satisfy all the criteria for the qualitative selection of sub-contracts and which, during the prior sub-contract award procedure, submitted a tender.

(2) A successful economic operator must not award a sub-contract without publication of a sub-contract notice in accordance with paragraph (1)(b)(i) if the term of the proposed sub-contract, or the term of that sub-contract and of any other sub-contract entered into for the same purposes, is more than five years, unless there are exceptional circumstances which require that this period should be exceeded.

(3) For the purposes of paragraphs (2) and (5)(c), exceptional circumstances are to be determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of sub-contractor may cause.

(4) A successful economic operator must not award a sub-contract without publication of a sub-contract notice in accordance with paragraph (1)(d)(i), where the aggregate value of consideration to be given under the sub-contract for the additional work, works or services exceeds 50% of the value of the consideration payable under the original sub-contract.

(5) A successful economic operator must not award a sub-contract without publication of a sub-contract notice in accordance with paragraph 1(d)(ii) unless—

- (a) the sub-contract notice relating to the original sub-contract stated that a works sub-contract or a services sub-contract for new work, works or services which would be a repetition of the work or works carried out or the services provided under the original sub-contract might be awarded in accordance with paragraph (1)(d)(ii);
- (b) in determining the estimated value of the original sub-contract for the purposes of regulations 9 and 42(1), the successful economic operator took into account the value of the consideration which it expected to be payable for the new work, works or services; and
- (c) the procedure for the award of the new sub-contract is commenced within five years of the original sub-contract being entered into, unless there are exceptional circumstances which require that the procedure for the award of the new sub-contract be commenced outside this period.

Criteria for qualitative selection of sub-contractors

44.—(1) In the sub-contract notice, the successful economic operator must indicate the criteria for qualitative selection prescribed by the contracting authority, as well as any other criteria it will apply for the qualitative selection of sub-contractors.

(2) All the criteria for qualitative selection prescribed must be objective, non-discriminatory and consistent with the criteria applied by the contracting authority for the selection of the economic operators for the main contract and the capabilities required must be directly related to the subject of the sub-contract, and the levels of ability required must be commensurate with it.

(3) The successful economic operator is not to be required to sub-contract if it proves to the satisfaction of the contracting authority that—

- (a) none of the sub-contractors participating in the competition or their proposed bids meets the criteria indicated in the sub-contract notice; and
- (b) the failure to meet the criteria would prevent the successful economic operator from fulfilling the requirements set out in the main contract.