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Act on Tender Procedures for Public Works Contracts

Act no 338 of 18 May 2005 (In force)

Later amendments to the rules and regulations

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The Rules and Regulations in full

Act on Tendering Procedures for Public Works Contracts

BE IT KNOWN that the Folketing has enacted and We Margrethe the Second, by the grace of God, Queen of Denmark, have given Our Royal Assent to the following Act:

Part 1

Scope

Section 1

This act applies to inviting tenders for carrying out or projecting and carrying out building and construction works and to the awarding of a contract.

Subsection 2. This act applies to the following awarding authorities:

- 1) Governmental, regional, and local authorities and organs pertaining to public law,
- 2) Other awarding authorities when they call for tenders for building and construction works that are publicly subsidized, including guarantees, and
- 3) Tenderers when they invite tenders from subcontractors to be used in the carrying out of a building and construction project subject to this act on an employer covered by number 1 or 2.

Subsection 3. Apart from section 3, subsection 2, and section 7 this act does not apply to invitations to tender covered by

- 1) the tender directive, including rules for part works covered by the directive's article 9 sub article 5 a,
- 2) the procurement procedures directive, including the rules for part works covered by the directive's article 17, sub article 6 a, or

3) act no. 378 of 14 June 1995 on local and county authorities' execution on projects for other public authorities with later amendments or rules issued subject to this act.

Subsection 4. The rules of this act on the procedure for inviting to tender and awarding the contract shall furthermore be applied when an awarding authority not covered by section 3 clearly states that this act or rules specifically stated in this act will be applied as basis for awarding the contract for a building and construction work.

Subsection 5. In accordance with the tender directive and the procurement procedures directive, »building and construction works« refers to the result of a set of building and construction activities determined to fill out an economical or technical function on its own. The »tender directive« refers to directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The »procurement procedures directive« refers to the directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. »Organs pertaining to public law« refer to the definition hereof in the tender directive and the procurement procedures directive.

Part 2

General principles for invitation to tender

Competition and nondiscrimination

Section 2

In the invitation to tender for the carrying out or projecting and carrying out building and construction works subject to this act, the tender procedure can be open, restricted or confidential.

Subsection 2. The awarding authority shall use the possibilities available to create adequate competition.

Subsection 3. It rests with the awarding authority to ensure through the planning and completion of the tendering procedure and the awarding of the contract that the selection of tenderers is based on objective, factual and non discriminatory criteria.

Tender time limits and tender acceptance limits

Section 3

In the tender conditions the time limit for accepting a tender shall be stated. The time limit shall allow the tenderers to have reasonable time to tender.

Subsection 2. The tenders shall be open for acceptance for a period of 40 working days, unless otherwise has been stated in the tender material.

Subsection 3. In tender negotiations according to the provisions of section 11, it shall apply that regardless of the time limit to accept a tender according to section 2, a tenderer who is not invited to negotiations or is discharged from the negotiations shall be released from his tender as soon as the relevant decision has been informed to the tenderer.

Part 3

Tender procedure

Definitions

Section 4

In this act a tendering procedure refers to the invitation to tender for a project where several tenderers are invited to submit a binding tender or to submit a tender to enter into a binding cooperation for a building or construction project before the same closing date and on the same basis or based on the same minimum requirements. The invitation to tender shall state that it is a competitive tendering.

Subsection 2. In the open procedure, the invitation to tender is appealed to an indefinite circle through an advertisement in the press or in the electronic media.

Subsection 3. In the restricted procedure, the invitation to tender is appealed directly and only to the tenderers from whom a tender is wanted.

The tender form

Section 5

The tender must be in writing. The tender can be submitted electronically unless the awarding authority has excluded this in advance. The awarding authority may decide that the tender shall be submitted electronically.

Organization of open and restricted tendering procedure

Section 6

If the awarding authority in an open tendering procedure require information on the tenderers technical and financial capability and documentation hereof in order for the tender to be considered, the nature of this information and documentation shall be stated in the advertisement. The advertisement shall also state if the contract will be awarded by the criterion lowest price or the criterion most economically advantageous tender.

Subsection 2. In the restricted tendering procedure, the awarding authority can carry out a pre-qualification round by inviting interested tenderers through the press or in the electronic media. The invitation to tender must state

- 1) a time limit of at least 15 working days to submit interest in participating,
- 2) the nature of the information on financial and technical capability to be documented in order to be pre-qualified, and documentation hereof,
- 3) if the contract will be awarded by the criterion lowest price or by the criterion most economically advantageous tender, and
- 4) how many tenderers at the most that will be requested to submit tenders.

Subsection 3. In the invitation to tender in a restricted tendering procedure without preceding pre-qualification round, the awarding authority shall state how many tenderers at the most that will be requested to submit tenders. The invitation to tender shall state if the contract will be awarded by the criterion lowest price or by the criterion most economically advantageous tender. It applies to awarding authorities covered by section 1, subsection 2, no. 1 and 2, that unless only specific companies are actually capable of carrying out the work at least one of the companies requested to submit a tender must be located in areas outside the local area, and the awarding authority cannot invite the same circle of companies at every call for tenders. The Secretary of Economic and Business Affairs can determine rules confining access to holding restricted tendering procedures without preceding pre-qualification round.

The right to be present at the opening of tenders

Section 7

In a tendering procedure, the tenders are opened at the place of the tendering procedure at a time set in advance. The tenderers are entitled to be present at the opening of tenders and to be informed of the tender sums and any reservations.

Award criteria

Section 8

Unless the awarding authority annuls the tendering procedure, the contract shall be awarded by the following criteria:

- 1) The lowest price or
- 2) The most economically advantageous tender considering different criteria that vary according to the contract concerned, e.g. quality, price, construction time, operating costs, profitability, technical value, environmental influence, architecture, and function.

Subsection 2. The tender conditions shall state which award criteria will be applied. With the award criterion most economically advantageous tender, it shall be stated as far as possible how the awarding authority relatively will weigh the criteria chosen. This weighting can be stated by the determination of frames with a suitable maximum scope. If it is not possible to state a

weighting, the awarding authority shall state a prioritized order of the criteria with the most important criterion first.

Subsection 3. The awarding authority can reject a tender if there is every probability that the tenderer will not be able to carry out the contract work in a satisfactory quality, in an appropriate manner and in due time.

Alternative tenders

Section 9

The awarding authority can consider alternative tenders from tenderers if these alternative tenders comply with the minimum requirements stated in the tender conditions.

Subsection 2. The awarding authority can state in the tender conditions that alternative tenders will not be accepted.

Negotiations

Section 10

When the award criterion of the contract is lowest price, the awarding authority can only negotiate with the lowest tenderer.

Section 11

When the award criterion of the contract is the most economically advantageous tender, the awarding authority can negotiate with three tenderers or fewer who have submitted the most economically advantageous tenders in the tendering procedure assessed on the weighted or prioritized sub-criteria unless this has been waived in the tender conditions.

Subsection 2. When the awarding authority chooses to negotiate it shall be indicated no later than at the commencement of the negotiations to the selected tenderers reserved for negotiations, which procedure will be followed if this has not been stated in the tender conditions.

Subsection 3. During the negotiations, the awarding authority shall ensure that all tenderers are treated alike. Particularly differential treatment cannot be exercised by the awarding authority by giving information, which may leave some tenderers in a better situation than other tenderers. The awarding authority can only give information to a tenderer during negotiations about other tenderers' solutions and prices to the extent that such information has already been made publicly available in accordance with section 7.

Subsection 4. The negotiations cannot result in the nature of the contract work changing fundamentally or in the award criteria including the weighting or prioritizing used as basis at the selection of the negotiation partners according to subsection 1 changing.

Part 4

Confidential tender

Section 12

Tenders not invited in a tendering procedure or not based on a framework agreement are confidential tenders.

Subsection 2. The awarding authority can at the same time invite up to three confidential tenders. However, it is possible to invite a fourth confidential tender if the awarding authority has reserved this right in the invitation to submit tenders and the fourth confidential tender is invited from a tenderer outside the local area.

Subsection 3. Awarding authorities covered by section 1, subsection 2, no. 1 and 2, cannot call for tenders for building and construction works of a total estimated value of the work of more than DKK 3 mio. VAT exclusive, unless

- 1) it involves part works with an estimated value of DKK 500,000 or less VAT exclusive, and the total value of these part works do not exceed 20 percent of the total works' value,
- 2) the building and construction work's extent, quality, or time lapse can only be determined with great difficulty in the tender basis such as certain research and developmental works or restoration, repair and rebuilding projects or that the contract work for compelling safety reasons cannot be postponed,
- 3) no usable tenders or tenders that comply with the specifications have been submitted in the tendering procedure or that no applications have been received provided that the original tender conditions have not been changed considerably,
- 4) only one specific company can carry out the work or
- 5) the building and construction work supplements a work where there has been called for tenders and the work due to unforeseen circumstances has become necessary to the completion of the work where there has been called for tenders and the contract is awarded to the company that is carrying out the original work unless the awarding authority can demonstrate particular conditions giving the grounds for the awarding authority to let others carry out the work.

Subsection 4. When the total estimated value, VAT exclusive, of a building and construction work exceeds DKK 300,000, the awarding authority covered by section 1, subsection 2, no. 1 and 2, shall invite at least two tenderers to submit a confidential tender. These awarding authorities cannot invite the same circle of companies at every call for tenders.

Subsection 5. The awarding authority shall in the invitation to submit a confidential tender state whether the contract will be awarded based on the criterion lowest tender or the criterion most economically advantageous tender.

Subsection 6. The awarding authority can reject a tender if there is every probability that the tenderer will not be able to carry out the contract work in a satisfactory quality, in an appropriate manner and in due time.

Subsection 7. The Secretary of Economic and Business Affairs can exclude specific categories of awarding authorities from the rules in subsections 2 and 3.

Part 5

Framework agreements

Section 13

Framework agreements refer to agreements that have been entered according to the rules of this act, about the conditions, e.g. with regard to quality, price, and quantity or extent, of a possible completion of building and construction works of the same nature during a period.

Subsection 2. A framework agreement is only binding on the relation between the direct parties to the agreement. A framework agreement can only be entered between one awarding authority and one company. The awarding authority can if necessary request the company to supplement its tender used at the formation of contract. However, this cannot involve considerable changes in the contract terms.

Subsection 3. A framework agreement can be in force for a period of no more than 4 years.

Part 6

Notification to applicants and tenderers

Section 14

The awarding authority shall as soon as possible notify all tenderers who have submitted a tender about the decision that has been reached as regards the contract award including an explanatory statement in the event that the tendering procedure is annulled or that there is called for confidential tenders.

Subsection 2. In a restricted tendering procedure with pre-qualification, the awarding authority will notify the applicants as soon as possible if they have been pre-qualified. On request, the awarding authority will furthermore notify an applicant who has been rejected about the reasons for the application's rejection.

Subsection 3. On request, the awarding authority will notify affected tenderers stating the reasons for rejection of the tender, cf. section 8, subsection 3 and section 12 subsection 6 provided that such a statement has not already been given pursuant to section 15 subsection 2.

Section 15

When the criterion is the most economically advantageous tender, the rules in subsections 2 to 4 shall furthermore apply.

Subsection 2. No later than at the same time as negotiations are initiated according to section 11, the awarding authority will notify the affected tenderers about the decision not to invite them to the negotiations and an explanatory statement.

Subsection 3. After the negotiations have been completed according to section 11, the awarding authority will notify the tenderers selected by the awarding authority for negotiations about the accepted tender's characteristics and relative advantages.

Stk. 4. If no negotiations have been held according to section 11, or there has been called for confidential tenders, the awarding authority will notify on request the tenderers in compliance with tender conditions about the accepted tender's characteristics and relative advantages.

Part 7

Complaint about tendering procedure, etc.

Section 16

Anyone with a cause of action herein or who has otherwise been awarded the right to complain according to the Act on the Complaints Board for Public Procurement can bring a query of violation of the provisions and rules issued pursuant to this act before the Complaints Board for Public Procurement.

Part 8

Effective date, etc.

Section 17

This act will come into force on 1 September 2005 and is effective for contracts awarded by tendering procedure from this date.

Subsection 2. At the same time act no. 450 of 7 June 2001 on invitation to tender in the building and construction sector is repealed.

Section 18

This act does not extend to the Faroe Islands and Greenland.

Given at Christiansborg Castle 18 May 2005

Under Our Royal Hand and Seal

MARGRETHE R.

/Bendt Bendtsen