

# SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 5169 GIBRALTAR Thursday 29th August 2024

---

---

LEGAL NOTICE NO. 164 OF 2024

## **PUBLIC FINANCE (CONTROL AND AUDIT) ACT**

### **PROCUREMENT (PUBLIC SECTOR CONTRACTS) (AMENDMENT NO.2) REGULATIONS 2024**

In exercise of the powers conferred on him by section 75 of the Public Finance (Control and Audit) Act, the Minister has made the following Regulations—

#### **Title.**

1. These Regulations may be cited as the Procurement (Public Sector Contracts) (Amendment No.2) Regulations 2024.

#### **Commencement.**

2. These Regulations come into operation on the day of publication.

#### **Amendment to the Procurement (Public Sector Contracts) Regulations 2016.**

3.(1) The Procurement (Public Sector Contracts) Regulations 2016 are amended in accordance with this regulation.

(2) In regulation 2-

(a) insert the following definition after the definition of “carrying out”-

““central government authorities” means the contracting authorities listed in Annex I to the Public Sector Directive and, in so far as corrections or amendments have been made at national level, their successor entities;”;  
and

(b) in the definition of “sub-central contracting authority”, for “government contracting authorities” substitute “central government authorities”.

(3) In regulation 27-

(a) in subregulation (5), for “The call” substitute “Subject to subregulation (5A), the call”; and

(b) insert the following subregulation after subregulation (5)-

“(5A) Where the contract is awarded by restricted procedure or competitive procedure with negotiation, sub-central contracting authorities may make the call for competition by means of a prior information notice in accordance with regulation 48(5) to (7).”.

(4) Insert the following regulation after regulation 32-

**“Use of the negotiated procedure without prior publication.**

32A.(1) Contracting Authorities may award public contracts by a negotiated procedure without prior publication in accordance with this regulation.

(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases-

- (a) subject to subregulation (3), where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Minister, if the Minister so requests;
- (b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons-
  - (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
  - (ii) competition is absent for technical reasons;
  - (iii) the protection of exclusive rights, including intellectual property rights,

but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;

- (c) subjection to subregulation (4), insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

(3) For the purposes of subregulation (2)(a)-

- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority’s needs and requirements as specified in the procurement documents;

- (b) a request to participate shall be considered not to be suitable where the economic operator concerned-
  - (i) is to be or may be excluded under regulation 57, or
  - (ii) does not meet the selection criteria.
- (4) For the purposes of subregulation (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.
- (5) The negotiated procedure without prior publication may be used for public supply contracts-
  - (a) where the products involved are manufactured purely for the purpose of research, experimentation, study or development, but contracts awarded in reliance on this subregulation shall not include quantity production to establish commercial viability or to recover research and development costs;
  - (b) subject to subregulation (6), for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
  - (c) for supplies quoted and purchased on a commodity market;
  - (d) for the purchase of supplies or services on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.
- (6) In the case of subregulation (5)(b), the duration of the contract, as well as that of recurrent contracts, shall not, save in exceptional circumstances, exceed 3 years.
- (7) The negotiated procedure without prior publication may be used for public service contracts where the contract concerned-
  - (a) follows a design contest organised in accordance with Part 5, and
  - (b) is to be awarded, under the rules provided for in the design contest, to—
    - (i) the winner of the design contest, or

- (ii) subject to subregulation (8), one of the winners of the design contest.
  - (8) Where subregulation (7)(b)(ii) applies, all winners must be invited to participate in the negotiation.
  - (9) The negotiated procedure without prior publication may be used for new works and services consisting of the repetition of similar works or services entrusted to the economic operator to which the same contracting authority awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded following a procedure in accordance with regulation 27(1) and (2).
  - (10) The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded.
  - (11) As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authority when it applies regulation 7.
  - (12) This procedure may be used only during the 3 years following the conclusion of the original contract.”
- (5) Substitute the following for regulation 48-

**“Prior information notices.**

- 48.(1) Contracting authorities may make known their intentions of planned procurements through the publication of a prior information notice.
- (2) Such notices shall contain the information set out in section I of part B of Annex V to the Public Sector Directive, but as if—
    - (a) in paragraph 2, “the second and third subparagraph of Article 53(1)” were a reference to regulation 53(3) and (4) of these Regulations; and
    - (b) in paragraph 9, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations.
  - (3) A contracting authority wishing to publish a prior information notice shall—
    - (a) submit it for publication in accordance with regulation 51; or
    - (b) publish it on the contracting authority’s buyer profile in accordance with regulation 52.

- (4) Where the prior information notice is published by the contracting authority on its buyer profile-
    - (a) the prior information notice shall contain the information set out in part A of Annex V to the Public Sector Directive, but as if, in paragraph 6, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations, and
    - (b) the contracting authority shall submit for publication, in accordance with regulation 51, a notice of the publication on its buyer profile.
  - (5) Where sub-central contracting authorities use a prior information notice as a call for competition in accordance with regulation 27(5A), the notice shall fulfil all of the following conditions-
    - (a) it refers specifically to the supplies, works or services that will be the subject-matter of the contract to be awarded;
    - (b) it indicates that the contract will be awarded by restricted procedure or competitive procedure with negotiation without further publication of a call for competition and invites interested economic operators to express their interest;
    - (c) it contains, in addition to the information required by subregulation (2), the information set out in section 2 of part B of Annex 5 to the Public Sector Directive, but as if paragraph 12 of that part (financing by EU funds) were omitted;
    - (d) it has been submitted for publication between 35 days and 12 months prior to the date on which an invitation is sent for the purposes of regulation 54(1) or (2).
  - (6) Where subregulation (5) applies, subregulation (3)(b) shall not apply to the notice, but additional publication at national level under regulation 52, if any, may be made on a buyer profile.
  - (7) The period covered by the prior information notice shall be a maximum of 12 months from the date on which the notice is transmitted for publication.
  - (8) In the case of public contracts for social and other specific services, the prior information notice referred to in regulation 75(1)(b) may cover a period which is longer than 12 months.”.
- (6) Substitute the following regulation for regulation 54-

**“Invitations to candidates.**

- 54.(1) In restricted procedures, competitive dialogue procedures, innovation partnerships and competitive procedures with negotiation, contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders or, in the case of a competitive dialogue, to take part in the dialogue.
- (2) Where a prior information notice is used as a call for competition in accordance with regulation 27(5A), contracting authorities shall simultaneously and in writing invite the economic operators which have expressed their interest to confirm their continuing interest.
- (3) The invitations required by subregulations (1) and (2) shall-
- (a) include a reference to the electronic address at which the procurement documents have been made directly available by electronic means; and
  - (b) be accompanied by the procurement documents, where those documents have not been the subject of unrestricted and full direct access, free of charge, for the reasons referred to in regulation 53(3) or (4) and have not already been made otherwise available.
- (4) The invitations required by subregulation (1) shall also contain at least the following information-
- (a) a reference to the call for competition published;
  - (b) the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up;
  - (c) in the case of competitive dialogue, the date and the address set for the start of consultation and the language or languages to be used;
  - (d) a reference to any documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with regulations 59 and 60 and, where appropriate, 62 or to supplement the information referred to in those regulations, and under the conditions laid down in regulations 59, 60 and 62;
  - (e) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, where they are not given in the contract notice, in the invitation to confirm interest, in the technical specifications or the descriptive document.
- (5) But in the case of contracts awarded through a competitive dialogue or an innovation partnership, the information referred to in subregulation (4)(b) shall not appear in the invitation to participate in the dialogue or to negotiate but it shall appear in the invitation to submit a tender.

- (6) The invitations required by subregulation (2) shall also contain at least the following information-
- (a) nature and quantity, including all options concerning complementary contracts and, where possible, the estimated time available for exercising these options for renewable contracts, the nature and quantity and, where possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;
  - (b) type of procedure, namely restricted procedure or competitive procedure with negotiation;
  - (c) where applicable, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;
  - (d) where electronic access cannot be offered, the address and closing date for the submission of requests for procurement documents and the language or languages in which they are to be drawn up;
  - (e) the address of the contracting authority which is to award the contract;
  - (f) economic and technical conditions, financial guarantees and information required from economic operators;
  - (g) the form of the contract which is the subject of the invitation to tender, namely purchase, lease, hire or hire-purchase, or any combination of these; and
  - (h) the contract award criteria and their weighting or, where appropriate, the order of importance of such criteria, where this information is not given in the prior information notice or the technical specifications or in the invitation to tender or to negotiate.”.

(7) In regulation 75, insert the following subregulation after regulation (1)-

“(1A) Subregulation (1) shall not apply where a negotiated procedure without prior publication could have been used, in accordance with regulation 32A, for the award of a public service contract.”.

Dated: 29<sup>th</sup> August 2024.

F R PICARDO  
Minister with responsibility for Finance

**EXPLANATORY MEMORANDUM**

These Regulations amend the Procurement (Public Sector Contracts) Regulations 2016 to provide for the use of the negotiated procedure without prior publication.