

Procedural guide:
Negotiated procedure with
prior call for competition
pursuant to Section 13 para. 1 and 15 para.1 of the German Sector
Ordinance (SektVO)



Procedural guide

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(SektVO)**

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1. PRELIMINARY REMARKS

1.1 EU-wide contract notice

TenneT, hereinafter also referred to as the “client” (the specific company can be found in the details of the EU notification) has communicated its intention to award the contract for the relevant services throughout the EU. Based on this contract notice, all interested economic operators (interested parties) are requested to submit an application for participation pursuant to Section 15 para. 1 of the German Sector Ordinance (SektVO).

1.2 Allocation procedure

The objective of the allocation procedure is to award the relevant services to the appropriate economic operator that submits the most economical tender based on the published award criteria.

The allocation procedure will take place in the form of a negotiated procedure with prior call for competition (cf. Section 119 (5) GWB (law against the restriction of competition) and Sections 13 para. 1 and 15 para. 1 of the German Sector Ordinance (SektVO)).

The call for competition is intended to identify suitable economic operators. Only suitable economic operators will be asked to submit a tender.

1.3 Obligation to enquire

Interested economic operators are obliged to register on Negometrix in order to receive regular information on updated responses to applicant questions as well as client notifications.

1.4 Tender documents

The tender documents include all documents prepared by the client or which are referenced by the client in order to define parts of the allocation procedure. They contain all the necessary information to allow interested companies to reach a decision on participation in the allocation procedure as well as to define the tendered service and the framework conditions for the performance of the contract.

The interested parties must check the tender documents for completeness immediately after they are accessed and immediately inform the client of any missing docu-

ments. If the bidder believes that ambiguities exist, especially ambiguities that could influence the pricing and/or the content of the tender, the bidder must inform the client immediately after they become aware of such issues, before submitting their tender.

1.5 Guarantee, assurance, warranty

The client assumes no guarantees, assurances or warranties for the information contained in the tender documents. The scope of guarantees, representations and warranties, as well as other rights and obligations with respect to the subject matter of the project, and any legal consequences arising out of breach of such guarantees, representations, and warranties, shall be governed solely by the draft agreements provided as part of the tender documents. By submitting a tender to the client, the client incurs no obligations whatsoever.

1.6 Notification obligation in case of ambiguities or errors

If the applicant is of the opinion that the tender documents contain ambiguities or errors, they must immediately inform the client, prior to submitting its application for participation, via the e-award platform www.negometrix.com ("Negometrix") in the "Question & Answer" (Q&A) area.

1.7 Information

The information provided has been compiled to the best of our knowledge and belief. However, it cannot be ruled out that not all information relevant to the decision of the individual participant is contained in the tender documents. The information about the project is not intended to completely replace the participant's own economic, technical and legal assessments. Before making an offer, participants are therefore expressly requested to carry out, as far as possible, further in-house investigations and reviews of the economic, technical, financial and legal situation and requirements for the services to be provided.

1.8 Division of lots

Any division of the lots of the tender object can be found in the EU notification. As part of the application for participation, the bidder must clearly indicate the lots that they are applying for, the lots that it can provide in combination, or the maximum number of lots it can take on.

1.9 Language

The language for the procedure is English. All correspondence from the client will be sent in English. The client reserves the right to provide German versions of the documents. In case of contradictions or ambiguities, the German version shall be authoritative.

All of the applicant's or bidder's documents must be drafted in English or German. The comments on the contract draft must be made in German or English. For information and verifications that are not drafted in English or German (e.g. certifications by foreign authorities), copies of the foreign originals must be accompanied by certified translations in English or German.

The language of negotiations is English and/or German.

1.10 Definitions for the designation of economic operators as part of the allocation procedure

- **Economic operator:** A company or a consortium as a group of several companies
- **Interested party:** An economic operator that has signalled its interest in participating in the tender to the client.
- **Applicant:** An interested party who participates in the call for competition and submits an application for participation on time.
- **Bidder:** An applicant that has proven themselves to be suitable as part of the call for competition and receives a request to submit a tender.
- **Contractor:** The bidder(s) that was/were able to emerge victorious against their competitors by submitting the most economical tender and were awarded the contract as part of this allocation procedure.
- **Consortium:** A consortium is a group of several companies. A consortium is treated as a single applicant (Section 50 (2) SektVO). Where the tender documents refer to the applicant, this also always refers to the collective form of participation of a consortium. Regulations that specifically relate to a consortium exclusively use the references "bidding consortium" or "consortium".

- **Consortium leader:** The sole authorised representative of the consortium. The consortium must nominate an authorised representative (consortium leader) for the conclusion and execution of the contract. The authorised representative is the bidding consortium's contact partner for the client in this allocation procedure and after any awarding of contracts and is the consortium's sole representative. A replacement of the consortium leader is not accepted.
- **Bidding consortium:** See consortium
- **Bidder group:** See consortium
- **Representative of the bidding consortium:** See consortium leader

1.11 Suspension of the process

Pursuant to Section 57 SektVO, the client is entitled to suspend the allocation procedure at any time. The period stipulated in Section 160 (3) no. 4 GWB is expressly noted in this respect.

The bidders will be notified of any cancellation of the tender (in full or in part) in writing.

1.12 Participation criteria

The criteria to participate in the tender, which must be fulfilled as part of the call for competition, are indicated in section III.1.1 to III.1.3 of the EU notification or an accessible link is provided.

1.13 Award criteria

The award criteria are either disclosed in section II.2.5 of the EU notice or in Negometrix.

2. **COMMUNICATION WITH THE CLIENT**

2.1 General rules of communication

The client has announced its intention to award the relevant services throughout the EU and publicly published the call for tender in the TED (Tenders Electronic Daily), the online version of the "Supplement to the Official Journal of the European Union" for European public tendering as well as the tendering platform Negometrix.

Pursuant to Section 9 (3) p. 2 SektVO, registration is not required to access the EU notice and the additional tender documents.

However, the client may exercise the right granted pursuant to Section 9 (3) s. 1 SektVO and oblige the interested economic operators to register with the client by email after requesting the contract notice in order to obtain a countersigned non-disclosure agreement (NDA). Access to the additional tender documents is provided after submission of the signed non-disclosure agreement and a plausibility check by the client. The interested party transmits the NDA provided by the client in Negometrix, which has been completed and signed by the interested party, to the contact specified in Negometrix by email.

After receipt of the NDA and registration in Negometrix, further communication with the applicant or bidder during the tender process exclusively takes place via Negometrix.

2.2 Enquiries

(a) Deadline for enquiries and requests for information

Any enquiries or requests for additional information must **exclusively** be submitted via Negometrix in the “Question and Answer” (Q&A) area (communication by phone, fax and email is prohibited). The final date for the receipt of these enquiries or the requests for additional information is disclosed under “Schedule” in Negometrix.

(b) Responding to applicant enquiries and other client notifications

Questions as well as answers are simultaneously made available to all applicants in anonymised form in Negometrix provided that the client is of the opinion that they contain important information.

3. THE CALL FOR COMPETITION

3.1 Sequence of the call for competition

This call for competition will proceed as follows:

(a) Preparation and submission of the application for participation

Interested parties are asked to prepare an application for participation based on the information provided, especially the participation criteria, and submit these to the client in the appropriate form and on time via the Negometrix platform. Postal as well as digital submissions are not permitted and may lead to exclusion from the tender process. The application for participation must be submitted together with the information to review your suitability as requested by the client.

(b) Opening of the applications for participation

The applications for participation of all applicants are opened after the expiration of the deadline for the applications for participation. Applicants are not permitted to the opening the applications for participation.

(c) Conducting the suitability test

The course of the suitability testing is described in chapter 3.4 in this document.

3.2 Submission deadline and timeframe for the call for competition

The planning published in the EU notification and in Negometrix applies. In case of contradictions between the submission date specified in the EU notification and the date mentioned in Negometrix, the deadline indicated in the EU notification shall take precedence.

The client reserves the right to modify this timetable in the course of the procedure, in particular to extend the deadlines provided that this proves necessary for a proper procedure.

The application for participation must have been received on time via Negometrix (**application deadline**). Individual deadline extensions are not granted.

Applications for participation that are not received on time will be excluded from the process, unless the delayed receipt was caused by circumstances for which the applicant is not responsible. These kinds of reasons must be substantiated by the applicant. In case of technical problems, the applicant can consult the Negometrix Helpdesk.

3.3 Form of the application for participation

The application for participation must be submitted in electronic form, together with all necessary information and verifications, via Negometrix in the “call for competition” questionnaire.

Submission of the application for participation in writing by post, email or fax is prohibited.

3.4 Sequence of the suitability test

The applicant suitability test takes place in a two-stage procedure:

(i) Formal verification of the applications for participation

The client first checks the timely submission, completeness and accuracy of the applications for participation.

(1) Exclusion of applications for participation

The following applications for participation from applicants will be excluded:

- those that are not received on time or in proper format, unless the applicant is not responsible for this
- those that do not contain the requested or subsequently requested documents or the minimum criteria,

(2) Reservation of the right to request additional information

In compliance with the principles of transparency and equal treatment, the client may ask the applicant to subsequently submit missing, incomplete or incorrect company documents, especially self-declarations, information, certifications or other verifications, or request the completion or correction of such documents (Section 51 (2) SektVO).

The applicant must submit the documents within an appropriate period to be defined upon the client's request.

The applicant has no right to object to a request for additional documents. Applications for participation, which do not contain the requested document, including after the aforementioned option has been exercised, will be excluded.

(ii) Review of the content of the applications for participation

After the formal review of the applications for participation, the client will check the suitability of the applicants for the tendered services; Sections 142, 122 GWB in conjunction with Section 46 (2) SektVO. The client uses the submitted proof of suitability to assess whether the applicant is likely to be able to provide the tendered services. The lack of a specifically requested declaration or specific verification may lead to the exclusion of the application for participation. A reference to previous applications is not accepted. The review of suitability takes place in consideration of all of the documents submitted by the bidding consortium.

The client may ask the applicant to provide an explanation of the submitted documents.

Applicant entries must be clear and unambiguous. The applicant bears the risk of unclear and ambiguous entries. The applicant is not entitled to expect the client to clarify unclear or ambiguous entries. Any changes by the applicant to its entries must be unequivocal.

(iii) Request to submit a tender

The client subsequently asks suitable applicants to submit an initial tender. The client is entitled to limit the number of applicants that are asked to submit a tender. The public client indicates their objective and non-discriminatory suitability criteria for limiting the number, the expected minimum number and, where applicable, also the maximum number of applicants to be invited to submit tenders in the contract notice or the invitation to confirm interest.

4. THE NEGOTIATION PROCEDURE

4.1 Request to submit a tender and an initial tender

All applicants that successfully qualified for participation in the tender are requested to submit a tender.

All the information provided must be taken into account when preparing a tender.

The client will only consider tenders that are submitted complete and on time via Ne-gometrix. Postal as well as digital submissions are not permitted and may lead to ex-clusion from the tender process.

All tender documents (legal, commercial, technical) should not be changed.

4.2 Mark-up

The attachments contain our non-binding proposal for a possible contract. We kindly ask you to revise this extensively in Track Change mode with regard to all points rele-vant to you and, in particular, to insert all your own required/desired alternative text suggestions (mark-up) or submit them separately. You (like all bidders) have the ef-fective opportunity to change the attached draft contract and all its provisions. Even if, on the basis above, in our opinion the attached proposal of a possible contract cannot constitute general terms and conditions in the sense of Section 305 Paragraph 1 Sen-tence 1 of the German Civil Code (BGB) from the outset, it is pointed out as a precau-tion that we are already seriously putting the non-statutory core of all contractual pro-visions of the proposal for the contract at your disposal and thus granting you free-dom of choice to safeguard your own interests, with the real possibility of being able to influence the content of the contractual conditions. We will also conduct the con-tract negotiations in such a way that even then the non-statutory core of all clauses genuinely remains at your disposal. You can (and should) exercise your freedom of design both in the creation of your mark-up and in the contract negotiations in order to protect your own interests and influence the content of all contract terms of the at-tached proposal of a contract Information and clarification meeting prior to the sub-mission of the initial tenders.

4.3 Information and clarification talks before submission of the initial offers

As part of complex tender items, the client may invite bidders to information meetings or on-site inspections before submitting the tender in order to improve the quality of the tender and provide more detailed information on the required content.

4.4 Prior examination of the tenders

The tender must meet all formal and substantive minimum requirements in order to be subsequently assessed on the basis of the published award criteria.

The formal examination excludes in particular:

- Tenders which have not been received in good time or in proper format, unless the bidder is not responsible,
- Tenders that do not contain the requested or subsequently demanded explanations and verifications,
- Tenders that do not contain the requested price information
- Tenders in which amendments or additions have been made to the tender documents, which were not disclosed,
- Tenders submitted by bidders who have reached an inadmissible, anti-competitive arrangement regarding the contract award.
- Tenders that do not contain a legally binding signature of a properly authorised representative of the bidder and
- Tenders that represent prohibited alternative tenders.

The client reserves the right to demand additional documents as per Section 51 SektVO.

4.5 Binding period

If a binding period for the tenders has been indicated in the EU notice, this shall apply. Otherwise the binding period will be indicated in the invitation to submit a tender or will be agreed in the negotiations.

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4.6 Direct award of contract

The client reserves the right to award a contract for the first or initial tender without negotiations based on the disclosed assessment procedure (Section 15 (4) SektVO).

4.7 Submission deadline for the initial tender and timeframe for the negotiation procedure

The planning published in Negometrix essentially applies. Additional periods and deadlines can also be defined in the invitation to submit a tender or are agreed in the negotiations. Tenders submitted too late are excluded from the allocation procedure. The bidder may only change or withdraw their tender until the expiration of the set deadline.

4.8 Alternative tenders

If permitted in the EU notice, alternative tenders are expressly requested as long as innovative concepts are described which promise both technical and commercial benefits. Alternative tenders must be prepared and submitted in the same manner as the main offer. Alternative tenders must meet the same requirements as main offers. If alternative tenders can be considered, they flow into the tender evaluation in accordance with the published award criteria.

4.9 Subcontractors

If the bidder engages subcontractors, they shall be offered as general contractors. When engaging subcontractors, the contractor is liable for the proper completion of the order.

If the bidder commits subcontractors for the provision of services, these must be listed in the tender, in particular with the tasks to be performed in terms of type and scope.

A missing subcontractors' list may lead to the exclusion of the tender.

The client reserves the right to reject subcontractors if there are justified doubts about their reliability (grounds for exclusion as per Sections 123, 124 GWB).

The list of subcontractors becomes an integral part of the contract in the event that one is awarded.

4.10 Award of contract

The contract is awarded to the most economical tender (per lot if necessary), which has achieved the best result according to the award criteria.

5. NOTES ON THE ALLOCATION PROCEDURE

5.1 No reimbursement of costs

Any costs that arise for the applicants for the processing and preparation of the application for participation as well as for taking part in the call for competition will not be reimbursed. This also applies for any preparation of a tender or the subsequent participation in the negotiation phase.

5.2 Competition guarantee

Agreements between companies, decisions by associations of undertakings and coordinated behaviour, which are intended to effect the prevention, restriction or distortion of competition are prohibited pursuant to Section 1 GWB. This behaviour can lead to exclusion from the allocation procedure pursuant to Section 124 (1) no. 4 GWB.

In particular, the applicants must ensure that hidden competition is not influenced by a prohibited multiple participation. In case of doubt, the client will request evidence from the applicants to verify that hidden competition has been ensured.

6. CONFIDENTIALITY

6.1 Bidder's non-disclosure obligation

By submitting an application to participate, the applicants are obliged to ensure the confidential treatment of all information and documents provided as part of the allocation procedure. This also applies after the conclusion of the allocation procedure. The tender documents remain the client's property. They may only be used to prepare the tender. Applicants may not disclose the award documents to third parties.

Only consultants and the applicants' subcontractors are excluded from this non-disclosure requirements, provided that they are verifiably committed to non-disclosure in the same manner and within the same scope. The award documents remain the client's property.

Applicants may only disclose publications on the project or parts thereof as well as additional information of which they become aware as part of the allocation procedure with the client's written consent.

These documents and associated information may only be used for the purposes of this allocation procedure. If a participant does not submit a tender, they must immediately destroy or delete the tender documents received.

Any non-disclosure agreement (NDA) signed by the bidder remains unaffected.

6.2 Client's non-disclosure obligation

The client shall ensure that the bidders are treated equally as part of the procedure. The client shall not forward tenders or confidential information of a negotiation partner to the other negotiation partners and shall only use this information as part of the allocation procedure. This shall only not apply, if the relevant bidder has granted their consent to disclose or otherwise use tenders or confidential information in advance.

6.3 Copyright and marking of secrets

The bidders' copyright to the submitted documents will be respected. The submitted tenders will be retained by the client. If the bidder intends to use information from their tender for the registration of a commercial copyright, they must point this out in the tender. The same applies if property rights exist in the tender or third-party property rights were used in the preparation or use of the tender. The client is not entitled to publish tenders in whole or in part or to pass on information about their contents to third parties not involved in the audit and selection without the consent of the bidder.

Bidders are requested to clearly mark all parts of their tenders containing manufacturing, trade or business secrets as confidential on each page concerned.

6.4 Storage and processing of personal data

Personal information requested as part of the allocation procedure will be stored and processed for the purposes of executing the allocation procedure. The contact data will also be stored and processed for the purposes of initiating future business transactions, unless an express objection is received.

7. OBLIGATION TO GIVE NOTICE OF DEFECTS AND REVIEW PROCEDURE

7.1 Obligation to give notice of defects and time limit for filing a review procedure

Complaints for identified infringements of procurement rules must be lodged with the contact specified in Negometrix within a period of ten calendar days. (cf. § 160 Section 3 No. 1 S. 1 GWB).

Infringements of contract award rules which are apparent from the contract notice must be notified to the contracting entity via the contact specified in Negometrix before the expiry of the time limit for application specified in the contract notice., § 160 Abs. 3 S. 1 Nr. 2 GWB.

Please note explicitly the deadline in accordance with § 160 paragraph 3 No. 4 GWB (Act against Restraints of Competition). Thereafter, a request to initiate a review procedure is ineligible, if more than 15 calendar days after receiving notification from the client of not wanting to remedy a complaint have passed.

7.2 Competent body for review procedures

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