

ARN2016

Procurement Regulations Utility Sectors 2016

Preamble

- Special sector companies are obliged to award assignments in accordance with the provisions of the *Aanbestedingswet 2012* (Netherlands Procurement Act).
- The *Aanbestedingswet 2012* provides for abstract and concrete rules that procurement processes must comply with.
- A large number of special sector companies complement these rules with other (whether or not own) procurement regulations, providing a more detailed description of the course of the procurement process.
- The application of generic and sufficiently flexible procurement regulations that can accommodate both European and national procurement processes enhances the focus and professionalisation of the special sector company and provides interested entrepreneurs with legal certainty in advance.
- A number of special sector companies subjected to the *Aanbestedingswet 2012* have jointly taken the initiative to produce these procurement regulations, which can be used by every special sector company
- Special sector companies are therefore invited to make use of these regulations.

The management and further development of the ARN2016 is entrusted to the ARN2016 user group. Special sector companies that wish to use the ARN2016 and contribute towards the further development thereof can participate in the user group.

Further information is available from the secretariat of the user group,

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Contents

Part I	General	3
1	Designations, definitions	3
2	Time periods	5
3	Applicability	5
4	Adoption and introduction of the procurement process	5
5	Language	5
Part II	European and national procurement processes	6
6	Application as candidate	6
7	Grounds for exclusion	6
8	(Minimum) suitability requirements	6
9	Supplementing and verification of documentation	6
10	Alliances	7
11	Appeal to natural person or legal entity	7
12	Selection criteria	7
13	Invitation	8
14	Tender	8
15	Term of validity	9
16	Procurement report	9
17	Invalidity of tenders	9
18	Award procedure and assignment	10
Part III	Restricted procurement processes	11
19	Procedure	11
Part IV	Other provisions	12
20	Applicable law	12
21	Resolution of disputes	12
22	Final provisions	12

Part I General

1 Designations, definitions

The designations and definitions below are provided supplementary to the definitions provided in Article 1.1 *Aanbestedingswet 2012*.

alliance:	a collaboration of businesses
alliance agreement	an agreement that is permitted or exempted pursuant to the <i>Beleidsregels combinatieovereenkomsten 2013</i> (Policy Rules on Combination agreements) of 31 March 2013 (Netherlands Government Gazette 2013; 9223)
alliance partner:	a business that participates in an alliance
announcement:	a call for tenders made in another manner than via the electronic system for tenders
application:	a request for participation in a procurement process
award:	the granting of a tender, as referred to in Article 6:217, Paragraph 1 Dutch Civil Code
award criteria:	the criteria on the basis of which the special sector company assesses the tenders and takes the award decision
day:	calendar day
documentation:	proof, particulars and statements (such as references, not being the own statement), on the basis of which the special sector company establishes that none of the grounds for exclusion apply, that a candidate or applicant meets the (minimum) suitability requirements and to what degree a candidate meets the selection criteria
group:	an economic entity in the sense of Article 2:24b Dutch Civil Code
information memorandum:	one or more memorandums drawn up of the information provided

member state:	a country that is a member of the European Union
(minimum) suitability requirements:	the requirements made by the special sector company, which the candidates and tenderers must comply with in order to be invited to participate in dialogue/negotiations or to submit a tender and to be eligible for the award of the assignments
national procurement process:	a non-European and non-restrictive procurement process
procurement:	the formal registration of the timely received tenders
procurement report:	a report in which the received tenders are laid down
qualification system:	a system drawn up in accordance with Article 3.66 <i>Aanbestedingswet 2012</i>
selection criteria:	the criteria, on the basis of which the special sector company selects non-excluded candidates that meet the (minimum) suitability requirements and invites them to submit a tender or participate in the dialogue/negotiations
submission:	the submission of a tender in the manner prescribed by the special sector company

2 Time periods

- 2.1 A time period referred to in these regulations commences on the first hour on the first day and ends at the end of the last hour of the last day of the time period.
- 2.2 If a time period stated in days in these regulations commences at the time at which an event or action takes place, the day of the action or event is not included in the time period.
- 2.3 If the last day of a time period referred to in these regulations falls on a public day of rest or holiday applicable generally or locally at the place of performance of the assignment, or on a day of rest, holiday or leave prescribed by law or a collective labour agreement applicable to the special sector company, the time period is extended up to and including the first following day that is not a day of rest, holiday or leave as aforementioned.

3 Applicability

- 3.1 If a procurement process must be carried out according to these regulations, such will be stated in the announcement, the tender documents or the information memorandum.
- 3.2 If the first paragraph applies, the candidates or tenderers are deemed to have agreed to the applicability of these regulations. They are also deemed to have agreed to the applicability of these regulations to the relationship between the candidates or tenderers involved in the procurement process.

4 Adoption and introduction of the procurement process

- 4.1 The procurement process to which the ARN2016 applies can take the form of a European, national or restricted procurement process.
- 4.2 The announcement or, if no announcement takes place, the invitation to participate in the procurement, states which procurement process will apply.

5 Language

The documents to be submitted within the context of the procurement process must be drawn up in Dutch, unless specifically stated otherwise by the special sector company in the procurement documents.

Part II European and national procurement processes

6 Application as candidate

- 6.1 The deadline for the receipt of applications in procurement processes with prior selection is stated by the special sector company in the announcement, the procurement documents or the information memorandum.
- 6.2 Only those applications that were received on time and comply with the requirements stated in the announcement, the procurement documents and information memorandum will be taken into account by the special sector company.

7 Grounds for exclusion

Excluded from participation in the procurement process are those candidates and tenderers that meet the grounds for exclusion as stated in the procurement documents and the information memorandum.

8 (Minimum) suitability requirements

- 8.1 In order to participate in dialogue/negotiations or to submit a tender, the candidate or tenderer must comply with the (minimum) suitability requirements stated in the announcement, the procurement documents and information memorandum.
- 8.2 The special sector company will in the announcement, the procurement documents or the information memorandum specify the documentation required in order to prove the financial and economic capacity, the technical expertise and professional skill and the necessary qualifications.

9 Supplementing and verification of documentation

- 9.1 The special sector company can demand that the candidate or tenderer further supplement or explain the submitted documentation before a certain deadline. The candidate or tenderer cannot derive any rights from this provision, nor is the special sector company obliged to supplement incorrect or incomplete references or statements or to demand further explanation thereof.
- 9.2 The parties submitting the documentation are responsible for accuracy thereof. The special sector company is entitled to verify the submitted documentation.
- 9.3 The candidate or tenderer will provide its full and unconditional cooperation in the verification of its submitted documentation. If the special sector company receives insufficient cooperation from the candidate or tenderer during the verification, the documentation will be deemed untruthful with the intention of misleading the special sector company. In that case, the candidate or tenderer can be excluded from the procurement process, unless the candidate or tenderer can plausibly argue that the insufficient cooperation was not intended to mislead the special sector company.
- 9.4 A submitted reference that appears on verification to be untruthful is regarded as a false statement. In that case, the candidate or tenderer can be excluded from the procurement process, unless the candidate or tenderer can plausibly argue that the reference was not submitted with the intention of misleading the special sector company.

10 Alliances

- 10.1 An alliance may consist of no more than five alliance partners.
- 10.2 Besides the documentation regarding technical expertise and professional skill as referred to in Article 8 Paragraph 2, the candidate or tenderer must also submit an alliance agreement with organisational chart showing at least which companies are responsible for which work, together with a statement that, if the assignment is acquired, the division of tasks as stated in the alliance agreement will be complied with.
- 10.3 As regards the grounds for exclusion stated in the announcement, the procurement documents or the information memorandum, each individual alliance partner must provide the documentation required by the special sector company.
- 10.4 Each individual alliance partner must provide a statement accepting joint and several liability towards the special sector company under the heading of any assignment granted to the alliance.

11 Appeal to natural person or legal entity

- 11.1 A candidate or tenderer can appeal to the technical expertise and professional skill of natural persons or legal entities irrespective of the legal nature of its ties with same natural person or legal entities. The candidate or tenderer will must in that case show that it will have the resources required for performance of the assignment at its disposal.
This must take the form of a statement to the special sector company that is binding upon both the candidate or tenderer and the natural person or legal entity.
- 11.2 Insofar as a candidate or tenderer wishes to appeal to the technical expertise and professional skills of a natural person or legal entity, the statement referred to in the first paragraph must be accompanied by an organisational chart, showing at least which company will be responsible for which work, as well as a statement to the effect that, if the assignment is awarded, the work division specified in the statement will be complied with.
- 11.3 Insofar as a candidate or tenderer wishes to appeal to the financial and economic standing of a natural person or legal entity, the statement referred to in the first paragraph must show that the natural person or legal entity accept several liability for the performance of the assignment, if such is granted to the relevant candidate or tenderer.

12 Selection criteria

- 12.1 The special sector company can, based on the selection area stated in the announcement, the procurement documents or the information memorandum, apply a suitability ranking to the candidates that are not excluded and those that meet the (minimum) suitability requirements with the view of inviting the most suitable candidates, up to a number stated in the announcement, the procurement documents or the information memorandum, to submit a tender or participate in dialogue/negotiations.
- 12.2 The announcement, the procurement documents or the information memorandum will state whether and how the selection criteria will be applied and what supplementary documentation must be submitted by the candidates in this respect.
- 12.3 If selection criteria have been included, the various businesses forming a single group are permitted to apply once only as a candidate, alliance partner or legal entity to which a candidate appeals in its application. If various businesses forming part of a single group have, nevertheless, applied several times as a candidate or legal entity to which a candidate appeals, the special sector company is entitled to exclude the least suitable candidates(s) from further participation in the procurement process.

13 Invitation

- 13.1 Eligible for an invitation to submit a tender or participate in dialogue/negotiation are only those candidates that comply with the (minimum) requirements stated in the announcement, the procurement documents or the information memorandum, on condition that they are not excluded on grounds of the grounds for exclusion.
- 13.2 If the special sector company has established a maximum number of tenderers in the announcement, the procurement documents or the information memorandum, these will be assessed on the basis of the provisions of Article 12. The most suitable candidates, up to the stated maximum, will be invited to submit a tender or participate in dialogue/negotiations. The special sector company is entitled for reasons of its own choosing to expand the maximum number. The candidates cannot derive any right from nor file any objection against this entitlement.
- 13.3 The special sector company will, by no later than the invitations as referred to in the first paragraph, provide every candidate not invited to submit a tender or participate in dialogue/negotiations with a written notification to such effect. The written notification will state the reasons for the rejection.
- 13.4 Any rejected candidate that disagrees with the rejection is entitled to submit a written objection to the special sector company within five days after the sending of the notification with reasons stated in paragraph 3.
- 13.5 The special sector company will provide the rejected candidate with its opinion as soon as possible following receipt of the objection referred to in paragraph 4. If the opinion of the special sector

company confirms the rejection, the rejected candidate is entitled within ten days of receiving the opinion to submit the dispute to the preliminary relief judge, who has competence pursuant to Article 21, paragraph 1.

- 13.6 Any claim to participation in the procurement process will lapse if the dispute is not submitted to the preliminary relief judge, who has competence pursuant to Article 21, paragraph 1, within the following time periods :
- a. ten days following receipt of the opinion referred to in paragraph 5 if the objection as referred to in paragraph 4 was received within five days, or
 - b. ten days following receipt of the objection referred to in paragraph 3 if the notice referred to in paragraph 4 was not received within five days.

14 Tender

- 14.1 The tender must be submitted in the manner described in the announcement, the procurement documents and the information memorandum, by no later than the deadline for the receipt of tenders. Tenders will not be opened before the deadline for the receipt of tenders has expired.
- 14.2 A tenderer is up to the time referred to in paragraph 1 entitled to retract its original tender and/or submit a new tender in the prescribed manner. If a tenderer has submitted more than one tender for the same procurement, the latter will be regarded as the final tender. Withdrawal before making a new tender is effected by means of an explicit notification, with proof of receipt, addressed to the special sector company before the time referred to in paragraph 1.
- 14.3 If the procurement documents or an information memorandum prescribes the submission of more particulars than can be submitted by means of the tender form, and these particulars need not according to the procurement documents be submitted together with the tender, the tenderer will provide said particulars as promptly as possible, yet by no later than two days after receiving a request to this effect from the special sector company. The tenderer cannot derive any rights to the assignment from such a request. The request to submit the particulars referred to in this paragraph will not be made of a tenderer who in the opinion of the special sector company will most probably not be eligible for the assignment.
- 14.4 By submitting a tender, the tenderer integrally accepts the provisions of the announcement, the procurement documents and the information memorandum as well as other provisions applicable to the procurement process.
- 14.5 If a price quoted in both words and figures in a tender do not correspond, the price in words will apply, unless it can be deduced from the tender that the amount in figures is valid.

Term of validity

- 15.1 The tenderer will provide its tender with a term of validity of 60 days after the tender deadline, unless a different term is specified in the procurement documents.
- 15.2 The special sector company may request that the term of validity be extended. The tenderer cannot derive any rights to the assignment from such a request.

16 Procurement report

- 16.1 A report can be drawn up of the procurement process.
- 16.2 If paragraph 1 applies, the tenderers will at their request promptly receive the procurement report.

17 Invalidity of tenders

- 17.1 Tenders that do not meet the requirements made in these regulations, the procurement documents and the information memorandum are invalid, unless correction of a defect in the tender is permitted. If the special sector company has determined a maximum contract sum in the announcement, the procurement documents or the information memorandum, any tenders that exceed that amount will be invalid
- 17.2 Tenders are invalid unless submitted by a tenderer:
- i. that has supported or is supporting the special sector company during the procurement process with the selection, answering of questions by candidates, assessment of tenders or the award;

- ii. that appeals to a natural person or legal entity or has any way attached itself to a business that has supported or is supporting the special sector company during the procurement process with the selection, answering of questions by candidates, assessment of tenders or the award.
- 17.3 If the special sector company may deduce from any comment or reference in a tender, including the documents forming part thereof, that the tenderer offers something different or under different conditions than prescribed by the procurement documents and the information memorandum, the tender will be invalid.

18 Award procedure and assignment

- 18.1 The special sector company is at all times entitled – without being liable for compensation - to cease the procurement process and is under no obligation to award the assignment. The special sector company will promptly inform the participating businesses in writing of such a decision, together with the reasons therefore.
- 18.2 Eligible for the assignment are only those tenderers that both on the date of the tender submission deadline and on the day of award comply with the (minimum) suitability requirements made in the announcement, the procurement documents or the information memorandum, and which are not excluded due to the grounds of exclusion.
- 18.3 The tenderer whose tender is eligible for award, but according to the special sector company is significantly higher than the cost estimate of the special sector company, will be invited by the special sector company to explain its tender and compare this with the cost estimate of the special sector company. If the comparison does not, according to the reasonable opinion of the special sector company, yield a satisfactory result, the special sector company will refrain from award. If the special sector company refrains from award, no assignment will be granted as a result of the procurement process.
- 18.4 If two or more tenderers are equally eligible for the award of the assignment, the choice will be made by the drawing of lots. The tenderers involved will be timely notified of the lottery, including where, when, by whom and how the lottery will be held. They are entitled to be present at the lottery.
- 18.5 The special sector company will communicate the award decision by means of a written notification to the candidates and tenderers involved. That notification will state the grounds of the award decision. The notification will be sent simultaneously to all candidates and tenderers involved.
- 18.6 Any involved candidate or tenderer who disagrees with the award decision is entitled to submit a written objection to the special sector company within five days after the sending of the notification with reasons stated in paragraph 5. The special sector company will forthwith provide the tenderer to which it intends to award the assignment with the notification referred to in this paragraph.
- 18.7 The special sector company will provide the involved candidate or tenderer with its opinion as soon as possible following receipt of the objection referred to in paragraph 6. That opinion can be communicated either verbally or in writing. The tenderer to whom the special sector company intends to award the assignment will be informed of the conclusion of the opinion. If the opinion confirms the award decision by the special sector company, the objecting candidate or tenderer is entitled within the period referred to in paragraph 9 to submit the award decision to the preliminary relief judge, who has competence pursuant to Article 21, paragraph 1. If the opinion alters the award decision in favour of the objecting candidate or tenderer, the party to whom the special sector company originally intended to award the assignment is entitled within the period referred to in paragraph 9 to submit the case to the preliminary relief judge, who has competence pursuant to Article 21, paragraph 1.
- 18.8 If preliminary relief proceedings are filed, the other involved candidates or tenderers will at the first request of the special sector company join in the proceedings, on penalty of loss of any claim to performance of the assignment.
- 18.9 Without prejudice to the provisions of paragraph 1, any claim to performance of the assignment will lapse if the case is not, within the following time periods, submitted to the preliminary relief judge, who has competence pursuant to Article 21, paragraph 1 :
- In case of a European procurement process:
- a. twenty days following the opinion referred to in paragraph 7 if the objection as referred to in paragraph 6 was received within the aforementioned period of five days, or
 - b. twenty days following receipt of the notification referred to in paragraph 5 if the objection referred to in paragraph 6 was not received within the aforementioned period of five days.
- In case of a national procurement process:

- a. ten days following receipt of the opinion referred to in paragraph 7 if the request as referred to in paragraph 8 was received within the aforementioned period of five days, or
 - b. ten days following receipt of the notification referred to in paragraph 5 if the objection referred to in paragraph 6 was not received within the aforementioned period of five days.
- 18.10 The special sector company will award the assignment by means of a written notice or other legal act reflecting the acceptance of the tender, which notice or act will in case of a European procurement process – except in case of urgency not caused by the special sector company - not take place earlier than on expiry of the following time periods:
- a. twenty days after the sending of the notification referred to in paragraph 5 if no objection as referred to in paragraph 6 is received, or
 - b. twenty days after the notice referred to in paragraph 7 if no preliminary relief proceedings are filed, or
 - c. following a decision in preliminary relief proceedings that allows room for the award.
- If a notice or act of acceptance is made before expiry of the aforementioned time periods, the notice or act is deemed to have been made subject to the condition precedent that none of the tenderers file an objection as referred to in paragraph 6, and that no preliminary relief proceedings will be filed within the time period referred to in paragraph 9.
- 18.11 If the tenderer eligible for the assignment is an alliance, the tenderer will immediately after the notice or act referred to in paragraph 10 convert itself into an alliance of jointly and severally reliable partners.

Part III Restricted procurement processes

19 Procedure

- 19.1 Articles 14 up to and including 18, with the exception of Article 18, paragraphs 4 up to and including 11, apply mutatis mutandis to a restricted procedure involving a single candidate.
- 19.2 Articles 14 up to and including 18 apply mutatis mutandis to restricted processes involving multiple parties. Restricted processes involving multiple parties are subject to the time periods for national procurement processes as referred to in Article 18, paragraphs 9 and 10.
- 19.3 The special sector company will directly invite one or more businesses for participation in the procurement process.
- 19.4 The special sector company can in case of restricted processes apply grounds for exclusion and (minimum) stability requirements. If that case, the special sector company will in its invitation specify the documentation to be submitted.
- 19.5 The special sector company will in the invitation state how and when tenders must be submitted to the special sector company and, in case of a restricted procedure involving multiple parties, the award criterion.

Part IV Other provisions

20 Applicable law

Any procurement process performed in accordance with these regulations is exclusively governed by Dutch law.

21 Resolution of disputes

- 21.1 Any dispute between the parties involved in the procurement process, including any dispute that is only regarded as such by one of the parties, ensuing from the procurement process to which these regulations apply, will be resolved by the competent civil court in the district where the special sector company has its registered office.
- 21.2 Parties involved, as referred to in paragraph 1, also includes an association with full legal competence that strives to represent both the collective and individual interests of its members, insofar at least one or more of these members are actually involved the procurement process.

22 Final provisions

- 22.1 Candidates or tenderers will not in any form whatsoever offer or provide money or services to personnel of the special sector company or businesses engaged by the latter. They are obliged to immediately report any form of attempted bribery to the board of the special sector company. On infringement of this provision, the relevant candidate or tenderer can be excluded from the procurement process.
- 22.2 Candidates and tenderers will ensure that the competition between them is transparent and fair. Internal coordination - whether directly or indirectly - within the context of a specific procurement process is prohibited. On infringement of this provision, the relevant candidate or tenderer can be excluded from the procurement process.
- 22.3 If any provision of the ARN2016 proves to be void or voidable owing to infringement of (European) laws and regulations, such will not infringe upon the validity of the other provisions of the ARN 2016.
- 22.4 These regulations can be referred to as the "Procurement Regulations Utility Sectors 2016", abbreviated as "ARN 2016".