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FRENCH PUBLIC PROCUREMENT CONTRACTS RULES

2020



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DOCUMENT CONTROL INFORMATION

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Document Title:	French public procurement contracts rules
Project :	<p>The aim of the Regulation (EU) 2018/1724 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services is to facilitate online access to the information, key administrative procedures and assistance and problem-solving services that citizens and businesses may wish to contact if they encounter problems when exercising their internal market rights while living in or doing business in another EU country.</p> <p>In this context, this document will guide citizens and companies to information on french public procurement contracts rules and also to the websites where they can carry out these procedures online.</p> <p>In practical terms, it give access to reliable, qualitative information on EU and national rules that apply to them.</p>
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I. RULES AND PROCEDURES

1. What are the different types of public market procurement procedures ?

The French public procurement code (named as PPC hereafter) distinguishes 3 types of procedures :

- the procurement is negotiated without prior publication in the cases mentioned in PPC's article L.2122-1 ;
- the procurement is awarded using an « adapted procedure » in cases mentioned in PPC's article L. 2123-1. An adapted procedure is a procedure in which the buyer is able to define the procurement procedure features, generally a negotiated procedure, having regard to public procurement principles. Recourse to such a procedure is possible in three cases :
 - ⇒ When the procurement estimated value (without taxes) is below EU thresholds;
 - ⇒ Due to the procurement subject-matter (subject-matter concerned are those listed in PPC's article R. 2123-1, which includes social services and other specific services, and some legal advice services);
 - ⇒ Even when the estimated value is equal or above EU thresholds, if, given lots estimated value is below 80 000 € (without taxes) for supplies and services and 1 million € (WT) for works and the total these lots does not overcross 20% of all lots estimated value.
- the procurement is awarded using one of the formalised procedures if the estimated value (WT) is equal of above EU thresholds (PPC's article L. 2124-1). Three types of formalised procedures can be used by the buyer :
 - ⇒ the call for tenders, defined in PPC's article L. 2124-2, is the procedure in which the buyer chose the most economically advantageous offer, without negotiation and on the basis of objective criteria that applicants have been made aware of previously. There are, in application of PPC's article R. 2124-2, two types of call for tenders which are the open call for tenders (any economic operator can submit a bid) and restricted call for tenders (only applicants selected by the buyer can submit a bid),
 - ⇒ the negotiated procedure, defined by PPC's article L. 2124-3, is the procedure by which the buyer negotiates procurement terms with one a several economic operators. Articles R. 2124-3 and 4 precise cases where the buyer can use such a procedure,
 - ⇒ the competitive dialogue, defined by PPC's article L. 2124-4, is the procedure by which the buyer dialogues with applicants invited to participate in order to define or develop solutions able to meet needs on which applicants are invited to submit a bid.

2. Are there thresholds that determine different rules to apply ?

Formalised procedures imposed by EU legislation, are applying to procurements which amount exceeds EU thresholds. Below these thresholds, the buyer is free to organise his procedure, in compliance with constitutional principles of freedom to public procurement access, applicants treatment equality and procedures transparency.

EU thresholds are common to all member states, and are settled by EU public procurement directives. Being modified periodically by EU regulation, it must be consulted regularly for good information :

For public procurements awarded by contracting authorities :

- public works contracts : Directive 2014/24/EU, Article 4, a) ;
- public supply and service contracts awarded by central government authorities and design contests organised by such authorities: Directive 2014/24/EU, Article 4, b) ;
- public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities: Directive 2014/24/EU, Article 4, c) ;
- public service contracts for social and other specific services : Directive 2014/24/EU, Article 4, d).

For public procurements awarded by contracting entities :

- supply and service contracts as well as for design contests: Directive 2014/25/EU, Article 15, a)
- works contracts: Directive 2014/25/UE, Article 15, b)
- service contracts for social and other specific services: Directive 2014/25/EU, Article 15, c)

For defence and security contracts :

- supply and service contracts: Directive 2009/81/EC, Article 8, a)
- works contracts: Directive 2009/81/EC, Article 8, b)

Below these thresholds, the awarding procedure must be adapted to the nature and features of the needs to meet, to the potentially economic operator number and localisation and to procurement circumstances. This is the reason for calling it adapted procedure procurement.

Moreover, the 90 000 € WT threshold also make mandatory to publish a contract notice in BOAMP (the official publication support for notices in France) or in another legal announces newspaper.

3. Cases where a tenderer can be excluded from submitting a bid

PPC's article R.2151-6 states that bids must be transmitted in one-off sending.

If the buyer successively receives several bids, only the last one received must be opened. In the frame of public procurement, in order to be ranked, the bid must not present the characteristics of an irregular, unacceptable or inappropriate bid.

If, in conditions settled by PPC's articles L.2152-1 to L.2152-4, a bid can be qualified as irregular, unacceptable or inappropriate, it must be rejected by the contracting authority.

- irregular tender : a bid that does not respect requirements settled in procurement documents, in particular because it is uncomplete or does not respect social and environmental legislation. (PPC's article L. 2152-2 CCP) ;
- unacceptable tender : a bid which value exceeds budget credits allocated to this precise procurement, as determined and established before launching the procedure. (Article L. 2152-3 CCP) ;
- inappropriate tender : a bid that is irrelevant regarding the procurement because it is, obviously, not able, without a substantial modification, to meet needs and requirements expressed by the buyer into the procurement documents (Article L. 2152-4 CCP).

Namely : abnormally low tenders must always be considered as irregular and aren't regularizable. The buyer must reject it, no matter the type of procedure, in application to PPC's articles L.2152-5 and L.2152-6, R.2152-1 and R.2152-2 and R.2352-1 (for defence and security contracts). Buyer shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services. After identifying the offers likely to be abnormally low, the buyer is obliged to request explanations from their authors and to assess their relevance, in order to make a decision on admission or rejection. This adversarial procedure is not a mere option, but is an obligation. If the explanations requested do not establish the economically viable nature of the offer, the buyer is obliged to reject it by reasoned decision.

Namely : in application to PPC's article L.2141-12, when a tenderer is, during the procurement procedure, placed in one of the exclusion cases mentioned in PPC's articles L.2141-1, L.2141-2, L.2141-3, L.2141-4, L.2141-5, L.2141-6, L.2141-7, L.2141-8, L.2141-9, L.2141-10, L.2141-11, he shall immediately inform the buyer of this change of situation. In this case, the buyer excludes the candidate from the procurement procedure for this ground.

4. How much time has the tenderer to send a bid? (from the date of procurement publication)?

The buyer himself sets the time limit for tender reception, taking into account the procurement complexity and the necessary time for economic operators to prepare their bid (PPC's article R. 2151-1). Bids received after the time limit are eliminated (PPC's article 2151-5).

Various rules set a frame to limit this freedom let to the buyer in terms of setting a deadline for tender reception :

- in the case of a formalised procedure, the time limit cannot be less than the minimum delay legally set for each procedure (PPC's article R. 2151-2) ;
- when some of the procurement documents are not published on a buyer's profile for one the reasons mentioned in PPC's article R. 2132-5, the minimum tender deadline reception is postponed to five days more, except for some emergency cases, duly justified (PPC's article R. 2151-2) ;
- when bids cannot be dropped-off before a visit or an additional documentation consultation at the procurement place of performance. Bids reception deadline must

be sufficient to permit to all economic operators to take knowledge of all necessary information to elaborate their bid. (PPC's articles R. 2151-3 du CCP).

Two cases, mentioned in article R. 2151-4 CCP, justify an extension of the bid reception time limit:

- when additional information are needed to elaborate the bid, if this information is asked on time by the economic operator, and is not provided in delays as set in PPC's article R. 2132-6 ;
- when important modifications are brought into procurement documents. The extension must be proportionate to the asked information or modifications importance.

5. What document an applicant must include in his application ?

Elements to provide by the applicant are mentioned into PPC's article R. 2143-3 :

- a self-declaration to justify that he does not meet any exclusion ground to a public procurement application, as mentioned in PPC's articles L. 2141-1 to L. 2141-5 and L. 2141-7 to L. 2141-11 and that he meets with obligations concerning disabled workers employment as defined in articles L. 5212-1 to L. 5212-11 of labour code ;
- information required by the buyer in order to check the applicant's ability to perform a professional activity, his economic and financial capacities and his technical and professional abilities.

PPC's article R. 2143-4 states that any economic operator can present his application through a European Single Procurement Document (ESPD), which model is set by UE 2016/7 European Commission implementing regulation, instead of elements mentioned in PPC's articles R. 2143-3. The buyer is compelled to accept an ESPD as a way to candidate. The applicant can also reuse an ESPD from a previous application, if he can confirm that the information are still relevant.

The buyer can also require additional information or documents if these are necessary for appreciating applicants technical and professional abilities. The list of these documents is available in PPC's annex n°9, and on eCertis database, administrated by European commission.

6. Where procurement can be found (including below thresholds value procurement) ?

Concerning contract notices, it can be found on various publication supports depending on the procurement value :

- for above thresholds value procurements, contract notices are available on « TED », the electronic version of the supplement to the official journal of the EU, in charge of the public procurement legal announces, available at this URL address : <https://ted.europa.eu/TED/search/searchResult.do>. It is also published on BOAMP (the official publication support for notices in France), <https://www.boamp.fr/recherche/avancee> ;

- for procurements which value is estimated between 90 000 € WT and EU thresholds, contract notices are published on BOAMP, or in one of the legal announces newspapers ;
- for below 90 000 € WT value procurements, the buyer freely adapt advertising features for the procurement.

Concerning procurement documents, which include all documents provided by the buyer and to which he refers to define his needs and describe procedure features (see PPC's article R. 2132-1), The buyer must make them available on his buyer's profile for every procurement whose value is estimated equal or above 40 000 € WT (PPC's article R. 2132-2). These documents must be available in an open and free way. If a contract notice has been published, it must contain the buyer's profile's URL address on which documents are available.

7. How electronic invoices (eInvoices) must be sent ?

In application of PPC's articles L. 2191-5 and R. 2192-3, a mutualised solution, provided by French state and named « public invoice portal », permit to drop-off, receipt and transmit eInvoices. Awarded economic operators in the frame of a french public procurement must use this portal to transmit their invoices.

In France, this public portal is named « Chorus Pro », and must be used by any firm for sending invoices, no matter its size. This portal, as well as the explanation documentation for using it are available at the following address : <https://communaute.chorus-pro.gouv.fr/>

Moreover, PPC's article D. 2192-2 specify mandatory mentions that must appear on any eInvoice.

8. Is there a national information source to help better understand public procurement ?

In addition to point n°1, some information concerning public procurement regulation, and especially related to procurement procedures, is available on economic and financial french ministry's directorate of legal affairs website, presented through explanation sheets : <https://www.economie.gouv.fr/daj/conseil-acheteurs-fiches-techniques>

On how to drop-off a bid, an eInvoice or an ESPD, the « practical guide of eProcurement », also proposed by the directorate of legal affairs, can be usefully consulted, especially for its economic operator dedicated version : https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/dematerialisation/Guide_OE_DEF28052020.pdf

9. Any source of information on the pre-award phase ?

The explanation sheets proposed on the directorate of legal affairs website and mentioned in point n°9, even if they are principally dedicated to buyers, can provide information to economic operators willing to know how pre-award phase in conducted.

There also is, a state unique central one-stop, aiming at facilitating contacts between economic operators and french buyers.

To be contacted by a central service buyer a form must be filled-in :
<https://www.economie.gouv.fr/dae/guichet-unique-achats-letat>

State procurement program is also available and it includes all french state planned procurement (except from defence and security contracts). It is updated each year :

<https://www.economie.gouv.fr/dae/programmation-des-achats-letat>

10. Is there an information source concerning the procurement procedure, including award phase and its implementation ?

The explanation sheets proposed on the directorate of legal affairs website and mentioned in point n°9, even if they are principally dedicated to buyers, can provide information to economic operators willing to know how pre-award phase is conducted.

II. SUBMITTING A DIGITALIZED BID IN RESPONSE TO A CALL FOR TENDER

11. Are there technical requirements to submit a bid ?

Technical requirements can be different from one buyer's profile to another. It is important to check those of the buyer's profile on which you will drop-off your bid. Most commonly used operating systems and browsers are available and usable (Microsoft Windows, Apple Mac OS, Linux). You may be compelled to download specific softwares (These are freely put at your disposal). Informatics configurations are, by nature, subject to evolutions. A successful drop-off does not guarantee a success for the following ones. It is more careful to regularly test your workstation features. Buyer's profiles must propose you to test your workstation configuration before any drop-off. Buyer's profile using rules must be transparent (for instance : terms of service, legal mentions, technical requirements, etc.). These rules shall permit you to find the information on a potential information concerning the files size, the accepted formats, etc.

In application of PPC's annex n°7, buyer's profile must propose a testing space, allowing economic operators to simulate a bid drop-off and check that the equipment used performances are sufficient.

12. Is electronic signature mandatory? If yes, which are its requirements ?

In application of the french legislation, eSignature is not mandatory for awarding a procurement, except from the cases where the buyer himself made it mandatory within his procurement documents.

When electronic signature is used in the frame of public procurement, this signature must respect minimum technical requirements set by PPC's annexe n°12 (<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000038318621/2020-12-02/>): an advanced

eSignature is a minimum, and its user must have a qualified certificate, in compliance with n°910/2014 « eIDAS » EU Regulation [EUR-Lex - 32014R0910 - EN - EUR-Lex \(europa.eu\)](#).

Namely : Unless the buyer explicitly made it mandatory, it is useless to sign, electronically or not, all exchanged documents between economic operators and buyers (bid, applications...). Only the final bid from the awarded applicant, that has the legal value of the procurement itself, must be signed.

13. Do specific portals to drop-off a bid for a public procurement exist ?

As mentioned in point n°12, dropping-off a bid can be done :

- On the buyer's profile (see PPC's annex n°7 of public procurement code for a complete list of buyer's profiles functionalities and minimum requirements <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000038318516?r=cSeRoiQfAk>) ;
- On an electronic storage space, guaranteeing data integrity, bid confidentiality, and the fact that the buyer does not take note of the bids before the end of their presentation's deadline (see PPC's annex n°8 for a precise list of minimum requirements of the electronic means used in public procurement).
<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000038318542?r=Hcknbw19fj>)

Warning : The buyer can mandate the place where the bids must be dropped-off by writing it into the procurements documents. In this case, the economic operator must comply with this obligation.

14. Does a tutorial to submit a bid exist ?

In application of PPC's annex 7, buyers profiles must permit economic operators to access a space permitting to simulate to drop-off the documents, even before the effective drop-off of an application or a bid. Moreover, buyer's profile editors are proposing « hotlines » providing help on how to drop-off a bid.

As mentioned on point n°9, a « practical guide », dedicated to economic operators, allows to get familiar with the way of submitting a bid (see pages 21 to 25 : https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/dematerialisation/Guide_OE_DEF28052020.pdf).

State buyer's profile proposes tests :

<https://www.marches-publics.gouv.fr/index.php?page=entreprise.EntrepriseAdvancedSearch&AllCons=&orgTest=&lang=en>

III. SIGNALLING IRREGULARITIES RELATED TO PROCUREMENT AWARDING PHASE

15. What are the rules concerning making a complaint against a public procurement procedure ?

During a public procurement award phase, communications and information exchanges between buyers and economic operators are made, respecting precise conditions. Candidates can ask for information, in addition to what is included into procurement documents. Communications and exchanges can be digitalized, in this case, there will take place on the buyer's profile.

Public procurement procedures can also be disputed before an administrative court. Administrative judge ensures the respect of public procurement constitutional principles, particularly related to equality of access and procedures transparency.

Before the procurement signature

⇒ pre-contractual referral.

This is about bringing the case to an administrative court even before the procurement signature. This action is possible in application of articles L. 551-1 à 12 and R. 551-1 to 6 of administrative justice code.

It aims at preventing awarding a procurement that would ignore advertising and concurrency rules. It permits to applicants contacting a breach to these rules to obtain from the judge that he pronounces the necessary measures to change it before the procurement signature.

A pre-contractual referral is possible until procurement signature. If the judge is seized after this, the request is inadmissible.

After the procurement signature

⇒ The contractual referral

Its rules are defined in administrative justice code articles L.551-13 à L.551-23, and R.551-7 to R. 551-10. It allows to sanction breaches toward advertising and concurrency obligations after the procurement signature.

Persons that can engage a contractual referral are the same as the ones admitted to a pre-contractual referral, which «have an interest to conclude the procurement and are potentially aggrieved by breaches toward advertising and concurrency obligations». An economic operator is admissible for a contractual referral when he was not able to do a pre-contractual referral.

The contractual referral deadline is as follows:

- 31 days, from the publication of a contract award notice in TED for this precise procurement or, for procurements based on a framework-agreement or a purchasing dynamic system, from the procurement conclusion notification ;
- 6 months, from the day after the procurement conclusion, if no contract award notice was published or if no notification of the contract conclusion was done. The

buyer then has an interest in publishing a contract award notice, as soon as possible after the procurement notification.

Furthermore, the decision to give up the procedure by declaring it infructuous can also be disputed by a recourse for excess of power. The applicant can make such a recourse against this decision before the administrative court. The judge must be ^{seized} within a two months deadline from the mail notification reception.

Various ways of recourses and corresponding time limits are available into the contract notices.

Detailed information on these recourses is available on the economic and financial ministry directorate of legal affairs website :
https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/conseil_acheteurs/fiches-techniques/mise-en-oeuvre-procedure/recours-contentieux-2019.pdf