

Notes on the General Conditions and Special Conditions

Datacenter 2019

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KAMMARKOLLEGIET

Notes

The task of the National Procurement Services at Kammarkollegiet is specified in the Swedish ordinance on coordinated public procurement (1998:796). In the area of ICT, the task is to offer local and regional authorities as well as central government authorities coordinated framework agreements. Although the National Procurement Services and a limited number of framework agreement contractors are party to each framework agreement, it is the wider circle of local and regional authorities as well as central government authorities, who will enter into specific contracts. Each authority entering into a contract is called a contracting authority.

A framework agreement is thus not a contract for the supply of goods and services in a specific case. The framework agreement establishes the terms governing contracts to be awarded in the future, in the present case for a number of years starting in 2021. Some of the contract terms in the General Conditions and Special Conditions are non-optional while some are optional. Thus, when requesting bids a contracting authority can adapt some of the terms for the envisaged contract, for instance in order to better adapt to market conventions. A specific contract is always awarded following a mini-competition among the framework agreement contractors party to the framework agreement.

The mini-competition and award of a contract follows roughly these steps:

- The contracting authority sends a request for bids to all the framework agreement contractors, including a description of the contracting authority's needs.
- The framework agreement contractors create bids and send them to the contracting authority.
- The contracting authority evaluates the bids, selects one of the framework contractors and enters into a contract with it.
- The selected framework agreement contractor is responsible towards the contracting authority for supplying the agreed upon goods and services.

Due to each framework agreement's wide scope of included types of goods and services, a framework agreement contractor may wish to use subcontractors, for instance in order to supply various public cloud computing services. Subcontractors do not place bids and do not enter into commercial contracts directly with contracting authorities.

Any company can choose freely which framework agreement contractors to do business with and which bids, and thus contracts, to be a part of as a subcontractor. If a contracting authority sends a request for bids and wishes to use certain contract terms, it is the sole responsibility of the framework agreement contractor to find subcontractors, if applicable, to work with as part of the bid to the contracting authority.



For instance, if a framework agreement contractor asks a provider of public cloud computing services if it wishes to be a part of the framework agreement contractor's bid for a particular contract, the provider of public cloud computing services should review the contract terms that will apply. In accordance with the framework agreement between each framework agreement contractor and the National Procurement Services, when a framework agreement contractor fulfills its contractual obligations to a contracting authority using a subcontractor, the framework agreement contractor must ensure the subcontractor accepts all General Conditions and Special Conditions, including non-optional terms. This applies regardless of any other (commercial) agreement between the framework agreement contractor and the subcontractor.

It is important to note that a subcontractor's acceptance of the General Conditions and Special Conditions does not mean that the status of the subcontractor changes to take the place of the framework agreement contractor. The obligations of the framework agreement contractor towards the contracting authority according to the General Conditions and Special Conditions, as well as obligations according to the framework agreement between the framework agreement contractor and the National Procurement Services, remain. For instance, if the General Conditions and Special Conditions specify that the framework agreement contractor has to compensate the contracting authority for delays, and the stipulated compensation is in excess of the compensation in the subcontractor's public cloud computing service standard clauses for delays, it remains the framework agreement contractor's obligation to compensate the contracting authority. Whether the framework agreement contractor and the subcontractor have a commercial agreement between them regarding compensation and risk allocation in such a scenario, as well as the substance of such an agreement, is not regulated by the framework agreement. There are also clauses that due to their nature cannot be mitigated through risk allocation or monetary compensation between the subcontractor and the framework agreement contractor. Examples are Special Conditions for Proprietary Software chapter 9 regarding license audits, and General Conditions clause 27.3 regarding governing law.

Taking into account the commercial agreement between the subcontractor and the framework agreement contractor, as well as the terms that will apply directly to the subcontractor, a provider of public cloud computing services decides whether terms in a bid are deemed acceptable. They may always, for any reason, decline to be a part of a bid.

The National Procurement Services publishes the translation of the General Conditions and Special Conditions as a service to interested persons but takes no legal responsibility for the translation or for any consequences arising from its use. Only the Swedish-language contract terms are valid.

Public procurement in Sweden is regulated by the Swedish Public Procurement Act. While only the Swedish version is authentic, an English-language translation is available here: <http://www.konkurrensverket.se/en/publications-and-decisions/swedish-public-procurement-act/>