

ARN²⁰¹³

**Tendering Regulation for the Utilities Sectors
2013**

Considering

- The Aanbestedingswet 2012 (Tendering act 2012) came into effect on 1 April 2013;
- With effect from this date, special-sector companies in the sectors of water and power supply, transport and postal services, which have long been collectively known as 'the utilities sectors', are obliged to award contracts in accordance with the provisions of the Aanbestedingswet 2012 (Tendering act 2012).
- Abstract and specific rules are to be derived from the Aanbestedingswet 2012 (Tendering act 2012) with which the European tendering procedures falling under the scope of the Aanbestedingswet 2012 must comply;
- In addition to that sort of rules, a large number of special-sector companies use a tendering regulation (their own or otherwise), within which the tendering procedures are described more precisely;
- The application of a generic and sufficiently flexible tendering regulation including rules for both European and national tendering procedures helps the special-sector company to become more focussed and more professional and creates legal security for interested market parties in advance;
- A number of the special-sector companies subject to the Aanbestedingswet 2012 (Tendering act 2012) have collectively taken the initiative to produce this tendering regulation that can be used by any special-sector company;
- Special-sector companies are therefore invited to use this regulation.

The management and the further development of the ARN²⁰¹³ are entrusted to the ARN²⁰¹³ user group. Special-sector companies that want to use the ARN²⁰¹³ and want to contribute their thoughts regarding its further development can participate in the user group.

Further information can be obtained from the secretariat of the user group,

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Part I General

1 Designations, Definitions

In addition to the definitions in article 1.1 of the Aanbestedingswet 2012 (Tendering act 2012), the following designations and definitions apply:

Registration:	The formal recording of the tenders received on time;
Registration procedure:	A procedure as referred to in Part III;
Tender:	A quotation drawn up in accordance with the requirements of the special-sector company;
Alternative:	A variant as referred to in article 3.63 jo. 2.83 Aanbestedingswet 2012 (Tendering act 2012);
Notice:	A call for competition published in any way other than via the electronic system for registrations;
Tendering document:	A tendering document, which incorporates a description of the work to be carried out or the goods or services to be provided, including an assignment specification or a requirement specification, the associated drawings and the applicable requirements and conditions;
Syndicate member:	A contractor that participates in a syndicate;
Syndicate:	An association of contractors;
Syndicate agreement:	An agreement that is permitted or is approved on the basis of the Beleidsregels combinatieovereenkomsten 2009 (Policy rules for syndicate agreements) of 11 September 2009 (Government Gazette 2009; 14082);
Day:	Calendar day;
Subsidiary:	A subsidiary as referred to in article 2:24a BW (Civil Code);
Recognition scheme:	A qualification system set up in accordance with article 3.66 Aanbestedingswet 2012 (Tendering act 2012);
Nominated subcontractor:	Subcontractor upon whose financial and economic strength or technical and organisational competence a candidate calls in order to satisfy the minimum requirements and selection criteria;
Group:	An economic unit as referred to in article 2:24b BW (Civil Code);
Award:	The acceptance of a tender, as referred to in article 6:217, first paragraph, BW (Civil Code);
Award criteria:	The criteria, on the basis of which the special-sector company assesses the tenders and makes the award decision;
Tendering:	The submission of the tender in the manner prescribed by the special-sector company;
Member state:	A country that is a member of the European Union;
Minimum requirements:	The requirements to be imposed by the special-sector company, which candidates and tenderers must fulfil in order to be considered for the award of the contract or to be allowed to participate in a restricted procedure or a negotiated procedure;
Parent company:	A parent company as referred to in article 1 of the seventh directive no. 83/349/EEC of the Council of the European Community dated 13 June 1983 based upon article 54, paragraph 3, sub g of the Verdrag betreffende de geconsolideerde jaarrekening (PbEG L 193) (Treaty on Consolidated Annual Accounts), as well as any company that in fact exerts a dominant influence upon another company;
National tendering procedure:	A non-European tendering procedure;
Restricted procedure:	The tendering procedure referred to in Part III B;

Memorandum of explanation:	One or more memoranda drawn up of explanations provided;
Private procedure:	The tendering procedures referred to in Part III D;
Open procedure:	The tendering procedure referred to in Part III A;
Negotiated procedure:	The tendering procedure referred to in Part III C;
Report on registration:	A report in which the tenders received in response to an invitation to tender are recorded;
Report on instruction:	A report in which the information provided with an instruction is recorded;
References:	The evidence, information and declarations on the basis of which the special-sector company determines that none of the exclusion criteria are applicable, that a candidate or tenderer fulfils the minimum requirements and to what extent a candidate fulfils the selection criteria;
Selection criteria:	The criteria on the basis of which the special-sector company selects candidates who have not been excluded, who fulfil the minimum criteria and who may submit a tender in the case of a restricted procedure or may participate in negotiations in the case of a negotiated procedure;
Selection guide:	A document drawn up by the special-sector company, which is referred to as the occasion arises in the announcement and in this case constitutes an indispensable part of this and which gives a more detailed description of the contract and incorporates the minimum requirements to be imposed on the candidates and tenderers, the applicable selection criteria and the manner in which references must be presented to the special-sector company.
Exclusion criteria:	The general criteria that the special-sector company uses in the admission of candidates or tenderers to its tendering procedures;

2 Periods

- 2.1** A period stipulated in this regulation starts at the beginning of the first hour of the first day of the period and finishes at the end of the last hour of the last day of the period.
- 2.2** If a period stated in days in this regulation starts at the moment at which an event or action takes place, the day on which this event or action takes place is not included in this period.
- 2.3** If the last day of a period stated in this regulation falls on a rest or feast day, vacation or other free day recognised generally or at the place of performance of the contract, or by the government or by virtue of a collective work agreement that is important for the special-sector company, the period finishes at the end of the last hour of the next working day.

3 Applicability

- 3.1** If a tendering procedure is to take place in accordance with this regulation, this shall be stated in the announcement or, if no announcement is made, in the invitation to participate in the tendering procedure.
- 3.2** If the first paragraph is applied, candidates or tenderers are deemed to have agreed with the applicability of this regulation. They are also deemed to have agreed with the applicability of this regulation in the mutual relationship between the candidates or tenderers involved in the tendering procedure.

4 Specification and Initiation of the Tendering Procedure

- 4.1** The tendering procedure to which the ARN2013 is applicable can take place in the form of a European or national tendering procedure.
- 4.2** The announcement or, if no announcement is made, the invitation to participate in the tender shall state which tendering procedure is to be used.

5 Official language

The official language and the language in which the documents that form part of the tendering procedure must be submitted is Dutch, unless the special-sector company specifically states otherwise in the registration documents.

Part II Selection and Award Procedure

6 Selection Procedure

Regarding the selection of participants in the tendering procedure:

- a. candidates and tenderers who satisfy the exclusion criteria listed in article 7 are excluded;
- b. candidates will be selected who fulfil the minimum requirements listed in article 8;
- c. in restricted procedures and in negotiated procedures, the number of candidates selected on the basis of a and b will, should the occasion arise, be limited in accordance with the selection criteria listed in article 12.

7 Exclusion Criteria

- 7.1**
- a. Every person is excluded from participation in a tender who has been convicted, in a final judgement, for one or more of the reasons listed below, of which the special-sector company is aware:
 - i. Participation in a criminal organisation in the sense of article 2, first paragraph of Gemeenschappelijk Optreden (Joint Action) 98/773/JBZ of the Council (PbEG L 351/1 dated 29 January 1998);
 - ii. Bribery in the sense of article 3 of the decree of the Council dated 26 May 1997 (PbEG C 195/1 dated 25 June 1997), or article 3, first paragraph, of Gemeenschappelijk Optreden (Joint Action) 98/742/JBZ of the Council (PbEG L 358/2 dated 31 December 1998);
 - iii. Fraud in the sense of article 1 of the agreement regarding the protection of the financial interests of the Community (PbEG C 316/48 dated 27 November 1995);
 - iv. Money laundering in the sense of article 1 of Directive 91/308/EEC of the Council dated 10 June 1991 (PbEG L 166/77 dated 28 June 1991, last modified by Directive 2001/97/EC of the European Parliament and the Council PbEG L 344/76 dated 28 December 2001);
 - b. Furthermore, the following are excluded from participation in a tender:
 - i. Anyone who is in a state of bankruptcy or liquidation, whose activities have ceased, or who is the subject of a suspension of payment or an arrangement or is in any similar state;
 - ii. Anyone against whom a bankruptcy petition has been filed or against whom a procedure for suspension of payment or an arrangement or any similar procedure has been filed;
 - iii. Anyone against whom a final judgement has been passed in accordance with the law of the land, whereby a crime has been ascertained that is in contravention of his rules of professional conduct;
 - iv. Anyone who has made a serious error in the conduct of his profession, ascertained on any grounds for which the special-sector company can make a reasonable case;
 - v. Anyone who has not fulfilled his obligations with regard to the payment of social insurance contributions in accordance with the provisions of the law applicable to him;
 - vi. Anyone who has not fulfilled his obligations with regard to the payment of his taxes in accordance with the provisions of the law applicable to him;
 - vii. Anyone who has been guilty to a serious degree of making false statements in the provision of the information and evidence that can be demanded in accordance with articles 7 to 12 inclusive;
 - c. Finally, the following are excluded from participation in a tender:
 - i. Anyone who has supported the special-sector company before or during the tendering procedure in:
 - the setting down of the (technical) specifications, estimate, minimum requirements, selection criteria or award criteria; exclusion will not take place if the candidate or tenderer demonstrates that there is no distortion of competition;
 - the selection or the award;
 - ii. Anyone who has associated himself in any manner whatsoever with a contractor who has supported the special-sector company during the tendering procedure in:
 - the setting down of the (technical) specifications, estimate, minimum requirements, selection criteria or award criteria; exclusion will not take place if the candidate or tenderer demonstrates that there is no distortion of competition;
 - the selection or the award;
 - iii. Anyone who in the last three years prior to the date of the tender has been seriously culpable in the failure to fulfil the obligations arising from one or more contracts of the special-sector company to such a degree that he has received from the special-sector company a declaration of temporary exclusion (in the duration of the exclusion);

iv. Anyone who has severely damaged the commercial interests of the special-sector company.

- 7.2** The special-sector company requires from each candidate or tenderer evidence that he is not in the circumstances described by the first paragraph sub a. and b., under i., ii., iii., v. and vi. The following is accepted as evidence:
- a. For sub a. and b., under i., ii. and iii.: a certificate of good conduct regarding tendering or, in the absence of this, an equivalent document, issued by a legal or government institution of the country of origin which shows that these requirements are fulfilled;
 - b. For sub b., under v. and vi.: a testimonial provided by a competent authority of the Member State in question.
- 7.3** If no such document or testimonial as referred to in the second paragraph sub a. is issued by the Member State in question, or not all the cases mentioned are referred to in this, it can be replaced by a declaration made by the person in question under oath – or by a solemn declaration in Member States where oaths are not provided for – in the presence of a competent legal or government institution, a notary or a competent professional organisation of the country of origin.

8 Minimum Requirements

- 8.1** In order to be considered for submitting a tender the candidate or tenderer must:
- a. Possess sufficient financial and economic strength to carry out the contract properly and within the agreed timescale without financial risks for the special-sector company. The candidate or tenderer must demonstrate on the basis of references that he possesses sufficient financial and economic strength.
 - b. Possess sufficient technical and organisational competence to carry out the contract properly and within the agreed timescale. The candidate or tenderer must demonstrate on the basis of references that the following minimum requirements are fulfilled:
 - i. The candidate or tenderer has the knowledge and experience demanded by the special-sector company for the performance of the contract;
 - ii. The candidate or tenderer has sufficient knowledge of the specific environment within which the contract must be carried out and has an organisation suited to this.
 - c. Be able to act in judicial matters in a manner as envisaged for the performance of the contract. The candidate or tenderer must demonstrate the social competence on the basis of references.
- 8.2** The technical and organisational competence of a candidate or tenderer as referred to in the first paragraph under b can be demonstrated by means of the following references, amongst others:
- a. A list of similar contracts fulfilled in the last five years. The special-sector company can specify a different period in the announcement or selection guide. This list shall be laid out in accordance with any further requirements imposed in the selection guide and include a foundation, which deals with any knowledge and experience aspects imposed separately by the special-sector company. Each contract from the list should be accompanied by a declaration by the main principal regarding proper performance. These declarations, which should be signed by a competent official, should include the order value, plus time and place of execution. They must also show whether the contracts were executed in a technically competent manner and were completed properly in a regular manner. The contracts in the list that are not accompanied by a principal's declaration, or those issued by a company belonging to the same group as the candidate or tenderer, will not be considered as references;
 - b. A declaration from a chartered accountant or an authorised Account Administration Consultant (ex. article 2:393 paragraph 1 BW (Civil Code)) on the average annual turnover over the last three financial years in a field specified by the special-sector company;
 - c. A declaration stating that the responsible and executive personnel charged with the fulfilment of the contract command spoken and written Dutch or another language stipulated in the registration documents;
 - d. A declaration drawn up by an independent institution to the effect that the candidate or tenderer satisfies certain quality assurance standards. This declaration should refer to the European standard on Quality Management Systems – Requirements and its scope should relate to the activities described by the special-sector company in the registration documents. The quality control system should be certified by an institution that is recognised by a national accreditation institution. If this recognition is not present, the certifying institution in question must satisfy the European standard Algemene criteria voor certificatie-instellingen die kwaliteitssysteemcertificatie uitvoeren (General criteria for certification institutions that carry out quality system certification). The special-sector company recognises equivalent declarations by institutions based in other member states and also accepts other evidence with regard to equivalent measures in the field of quality control from tenderers or candidates who do not come into consideration for such declarations or who cannot obtain such declarations within the set periods.

- 8.3** The social competence of the candidate or tenderer as referred to in the first paragraph under c can be demonstrated by the following references, amongst others:
- a. Registration in the Register of Companies or Professional Register in accordance with the requirements of the law of the Member State in which it is established;
 - b. Evidence that any other obligations associated with the practice of his business are fulfilled, in a manner such as is envisaged in the fulfilment of the contract, in accordance with the requirements of the law of the Member State in which he is established.
- 8.4** The special-sector company shall state in the announcement or selection guide which references he requires as evidence of the financial and economic strength as referred to in the first paragraph under a, which references he prefers as evidence of the technical and organisational competence as referred to in the second paragraph or as evidence of social competence as referred to in the third paragraph, or which other references he requires.

9 Syndicates

- 9.1** A syndicate may consist of no more than five syndicate members.
- 9.2** In addition to the references referred to in article 8, fourth paragraph, regarding technical and organisational competence, the candidate or tenderer shall submit a syndicate agreement with an organisation plan, which at least shows which company will be responsible for which activities, plus a declaration stating that if the contract should be received, the work distribution specified in the syndicate agreement will actually be adhered to.
- 9.3** With regard to the exclusion criteria in article 7 and the references to be submitted on the basis of article 8, fourth paragraph, regarding financial and economic strength and the social competence, each individual syndicate member should supply the references required by the special-sector company.
- 9.4** Each individual syndicate member should issue a declaration in which he accepts joint and several liability towards the special-sector company by virtue of the contract that may be awarded to the syndicate.

10 Intra-group Relationships

- 10.1** Notwithstanding the other provisions applicable to candidates, tenderers or syndicates it is permitted for a parent company of subsidiaries working together within a group to be considered as a candidate, tenderer or syndicate member, if the conditions stated in this paragraph are fulfilled:
- a. The parent company should have a dominant position in relation to the other companies involved within the group, giving it direct access to expertise, personnel, material etc. of the subsidiaries in question;
 - b. The actual activities that are to be performed by the subsidiaries in question within the group are described for each company and are used as evidence of the technical competence of the companies with regard to the activities accompanied by references as referred to in article 8, fourth paragraph.
 - c. The parent company declares that if the contract should be received the division of work specified in sub b will actually be adhered to.
- 10.2** Notwithstanding the other provisions relating to the candidates, tenderers or syndicates, it is permitted for only one of the subsidiaries working together within a group to be considered as a candidate, tenderer or syndicate member if the conditions stated in this paragraph are fulfilled:
- a. The company that wishes to be considered as a candidate, tenderer or syndicate member performs a significant proportion of the work to be carried out within the group;
 - b. The company referred to in sub a. is in a dominant position in relation to the other companies involved within the group by virtue of an agreement confirmed by the parent company, giving the company direct access to the expertise, personnel, material, etc. of the other companies in question;
 - c. The actual activities that are to be performed by the companies in question within the group are described in the agreement referred to in sub b. and are used as evidence of the technical competence with regard to the activities accompanied by references as referred to in article 8, fourth paragraph.
 - d. The agreement referred to in sub b. contains a description of the manner in which it is guaranteed that the employees of the other companies in question are part of the company referred to in sub a. in an organisational sense, specifically with regard to the reference in article 8, second paragraph, sub d. along with an organisational structure from which this is evident;
 - e. The parent company declares that it is severally liable for the fulfilment of both the contract and the mutual co-operative agreement, including the division of work within it.

11 Nominated Subcontractors

- 11.1** If a candidate or tenderer wishes to call upon the financial or economic strength or the technical or organisational competence of a nominated subcontractor, he should demonstrate that he can in fact have access to the necessary means of the nominated subcontractor for the performance of the contract. This should be done by a declaration towards the special-sector company that binds both the contractor himself and the nominated subcontractor.
- 11.2** If a candidate or tenderer wishes to call upon the financial or organisational competence of a nominated subcontractor, the declaration referred to in the first paragraph should be accompanied by an organisation plan showing at least which company is responsible for which activities, plus a declaration stating that, should the contract actually be awarded, the work distribution in the declaration will actually be adhered to.
- 11.3** If a candidate or tenderer wishes to call upon the financial and economic strength of the nominated subcontractor, the declaration from the first paragraph should show that the nominated subcontractor accepts several liability for the performance of the contract in the event that the contract is awarded to the contractor in question.

12 Selection criteria

- 12.1** The special-sector company can rank the candidates who are not excluded and satisfy the minimum requirements in pro rata order of suitability on the basis of the selection criteria formulated in the announcement or selection guide, for the purpose of inviting a number, specified in the announcement, of the most suitable candidates to submit a tender or participate in negotiations.
- 12.2** The announcement or selection guide specifies whether and how the selection criteria are applied and which supplementary references the candidate must submit for this purpose.
- 12.3** If selection criteria are incorporated into the announcement or selection guide, the various companies that belong to one group are only permitted to register once as a candidate, syndicate member or nominated subcontractor of a candidate. If various companies belonging to one group nevertheless have registered several times as a candidate, syndicate member or subcontractor of another candidate, the special-sector company is entitled to exclude the least suitable candidate(s) from further participation in the tendering procedure.

13 Completion and Verification of References

- 13.1** The special-sector company can demand that the candidate or tenderer completes, or further explains, the references submitted before a set deadline. The candidate or tenderer cannot derive any rights whatsoever from this provision, nor does it give rise to any obligation upon the special-sector company to have incorrect or incomplete references or declarations completed or to demand their further explanation.
- 13.2** Those who submit references are responsible for their correctness. The special-sector company has the right to verify the correctness of submitted references.
- 13.3** The candidate or tenderer is obliged to co-operate fully and unconditionally in the verification of the references submitted by him. If it is found that the special-sector company is not gaining sufficient co-operation from the candidate or tenderer the references will be deemed to be not entirely accurate with the intention of misleading the special-sector company. In that case article 7, first paragraph, sub b. under vii is correspondingly applicable.
- 13.4** A submitted reference, which after verification is found to be not entirely accurate, will be deemed to be a false declaration as referred to in article 7, first paragraph, sub b. under vii, unless the candidate or tenderer demonstrates that the reference was not submitted with the intention of misleading the special-sector company.

14 Award Procedure and Contract

- 14.1** The special-sector company is always entitled – without becoming liable to pay damages – to suspend the tendering procedure and is not obliged to award the contract. The special-sector company shall notify the participating contractors as quickly as possible, and if requested in writing, of its reasons for such a decision.
- 14.2** Only tenderers who fulfil the minimum requirements stipulated in the announcement or selection guide, both on the date of registration and on the date of order placement, and who are not excluded on the basis of the provisions in articles 7, first paragraph, and 12, third paragraph, come into consideration for the contract.
- 14.3** If the special-sector company has specified a maximum order value in the registration documents, the tenders that exceed that amount will be deemed to have not been made.

14.4 If conditions are attached to a tender, including any comment or reference to documents that constitute part of the tender, from which the special-sector company may deduce that the tenderer is offering something different or under different conditions than that which he should have offered on the basis of the registration documents, or should he submit an alternative tender as referred to in article 19, the tender will be deemed to have not been made.

14.5 Without prejudice to the provisions in the previous paragraphs the contract shall be awarded to:

- a. The tenderer with the most economically advantageous tender, if the registration documents specify differing criteria, which in the case of a European tendering procedure satisfy the provisions in article 3.74 j^o article 2.115 Aanbestedingswet 2012 (Tendering act 2012), associated with the subject of the contract. If the registration documents do not specify any further award criteria than a reference to the 'most economically advantageous tender', the provisions in sub b. apply. In that event Article 19 is not applicable, or
- b. The tenderer who has quoted the lowest price if, in the case of a European tendering procedure, reasons have been given for the application of this criterion in the tendering documents.

In deviation from the provisions above, the tenderer whose tender comes into consideration for award on the basis of sub a. or b., but whose tender according to a statement by the special-sector company, is substantially higher than the cost estimate will be invited by the special-sector company to explain his tender and to compare it with the cost estimate of the special-sector company. If the comparison has not, in the reasonable judgement of the special-sector company, supplied a satisfactory result, the special-sector company shall declare the tendering procedure to have 'failed'. If the special-sector company has declared a tendering procedure to have failed no contract will be awarded as a result of the tendering procedure in question.

14.6 If two or more tenderers come into consideration equally for the contract award on the basis of the fifth paragraph, lots shall be drawn to decide to whom the contract shall be awarded. The tenderers in question will be notified in good time that a lot will be drawn and where and when lots will be drawn and by whom. They are entitled to attend.

14.7 The special-sector company shall notify the affected candidates and tenderers of the award decision in writing. This notification shall contain the reasons for the award decision. The notification will be sent to all affected candidates and the affected tenderers simultaneously.

14.8 An affected candidate or tenderer who does not agree with the award decision is entitled to notify the special-sector company of this in writing, giving reasons, within five days after the despatch of the notification referred to in the seventh paragraph. The special-sector company shall immediately notify the tenderer to whom he intends to award the contract of the notification referred to in this paragraph.

14.9 As soon as possible after the receipt of the notification referred to in the eighth paragraph, the special-sector company shall notify the candidate in question or the tenderer in question who has complained and the tenderer to whom he intended to award the contract of his standpoint. If the standpoint implies that the special-sector company stands by the award decision, the candidate or tenderer who had stated that he was in disagreement with this is entitled to commence summary proceedings regarding the award decision before the competent provisional judge by virtue of article 34, first paragraph, within the period referred to in paragraph 1 at the latest. If the standpoint implies that the award decision has been adjusted in favour of the candidate or tenderer in question, the party to whom the special-sector company originally intended to award the contract is entitled to commence summary proceedings before the competent provisional judge within the period referred to in paragraph 11 at the latest.

14.10 If summary proceedings are commenced, the other candidates or tenderers in question shall comply with the proceedings upon the first request of the special-sector company – under penalty of losing any claim to the performance of the contract.

14.11 Without prejudice to the provisions in the first paragraph, any claim to the performance of the contract shall lapse if summary proceedings under the competent provisional judge by virtue of article 34, first paragraph, are not commenced within the following period:

In the case of a European tendering procedure:

- a. twenty days after the notification of the standpoint referred to in the ninth paragraph if the notice as referred to in the eighth paragraph was received within the above-mentioned period of five days, or
- b. twenty days after the notification referred to in the seventh paragraph if the notice as referred to in the eighth paragraph is not received within the above-mentioned period of five days.

In the case of a national tendering procedure:

- a. ten days after the notification of the standpoint referred to in the ninth paragraph if the notice as referred to in the eighth paragraph is received within the above-mentioned period of five days, or

- b. ten days after the notification referred to in the seventh paragraph if the notice as referred to in the eighth paragraph is not received within the above-mentioned period of five days.

14.12 The contract is awarded by the special-sector company by means of a written notification or another legal act indicating the acceptance of the tender. In the case of a European tender this notification or act will not take place until the following periods have elapsed except in the case of urgency not caused by the special-sector company:

- a. twenty days after the despatch of the notification referred to in the seventh paragraph if no notice as referred to in the eighth paragraph has been received, or
- b. twenty days after the standpoint referred to in the ninth paragraph if no summary proceedings have been commenced, or
- c. after a decision has been reached in the summary proceedings that leaves room for the award.

If a notification is made or an act for the purpose of acceptance is performed before the expiry of this period, the notification or act shall be deemed to have been made or performed under the deferred condition that none of the tenderers performs a notification as referred to in the eighth paragraph, or that no summary proceedings are commenced within the period set in the eleventh paragraph.

14.13 If the tenderer who comes into consideration for the contract is a syndicate, the tenderer must reform into a syndicate of jointly and severally liable contractors immediately after the notification or other legal act referred to in the twelfth paragraph.

14.14 If the contract is awarded as the result of a European tendering procedure, the special-sector company shall announce the award in accordance with the provisions of article 3.78 Aanbestedingswet 2012 (Tendering act 2012).

15 Electronic Auction

15.1 The special-sector company can state in the announcement or invitation to participate in a private procedure that the award procedure in article 14 will be preceded by an electronic auction.

15.2 If the electronic auction takes place in the framework of a European tendering procedure the special-sector company shall apply the provisions in article 3.74 j^o § 2.3.8.6 Aanbestedingswet 2012 (Tendering act 2012).

15.3 After the electronic auction has closed, the contract shall be awarded in accordance with the provisions in article 14, on the basis of the results of the electronic auction.

Part III Tendering Procedures

A Open Procedure

16 Requesting Tendering Documents

The announcement shall state where the tendering documents can be obtained from.

17 Explanations

- 17.1** A memorandum of explanation shall be drawn up by or on behalf of the special-sector company containing explanations provided – insofar as they serve to add to or alter the tendering document or could influence the costs, duration or manner of performance of the contract. The memorandum of explanation shall also include the answers that are applicable to every tenderer to questions posed by those who have indicated to special-sector company that they intend to submit a tender. Insofar as explanations relate to individual tenders, the information exchange relating to this will be set down by the special-sector company in a report concerning exclusively the candidate in question. The discussions that take place with the candidates in this case are limited to a clarification or supplementing of the requirements of the special-sector company, insofar as this does not contravene the principle of fairness.
- 17.2** A report on instruction shall be drawn up of information provided by or on behalf of the special-sector company.
- 17.3** The memorandum of explanation and the report on instruction shall be available for inspection for at least seven days prior to the date of registration at the place or places stated in the announcement. At most six days prior to the date of registration, copies of the memorandum of explanation and the report on instruction will be provided by or on behalf of the special-sector company to everyone who has requested the provision of a copy whether or not against payment of the costs of a copy. The individual report, on the other hand, will only be available to and provided to the candidate in question.
- 17.4** All explanations or instructions provided as referred to in this article, insofar as those explanations or instructions are incorporated into the memorandum of explanation or the report on instruction, are binding for every tenderer. Furthermore, the individual report concerning his tender is binding for the tenderer in question.

18 Tendering

- 18.1** The tender form stipulated by the special-sector company should be used without modification to submit a tender and, if the tender is to be valid, this should be filled in completely and unconditionally and signed by an authorised representative.
- 18.2** A tenderer is entitled to submit the tender form himself to the address stated in the announcement by the date stated in the registration documents. The tenderer shall receive a proof of receipt for this upon request.
- 18.3** If a tenderer does not make use of his entitlement referred to in the second paragraph, the tender form, after receipt on time at the address stated in the announcement, will be registered by or on behalf of the special-sector company and stored until the moment that the tenders are announced.
- 18.4** Until the moment in time referred to in the second paragraph, a tenderer is entitled to withdraw his original tender or, as the case may be, to submit a new tender in the prescribed manner. If a tenderer has submitted more than one tender form for the same tender, the latest will be viewed as the definitive tender. Withdrawal without submitting a new tender takes place by expressly withdrawing the submitted tender form before the moment in time referred to in the second paragraph, by notifying the special-sector company in such a manner that it can be proven that this has been done.
- 18.5** If the tendering document or the memorandum of explanation stipulate more information that can be submitted using the tender form, the tenderer is obliged to submit the information as quickly as possible, but at the latest two days after a request to this effect from the special-sector company. The tenderer cannot derive any right to the contract from such a request. The request to submit the information referred to in this paragraph will not be made to a tenderer who, in the opinion of the special-sector company, will very probably not be considered for the contract.

19 Tendering for Alternatives

- 19.1** If the criterion of the most economically advantageous tender is used for the award of a contract in accordance with the provision of article 14, fifth paragraph, a tenderer is free to submit a maximum of two alternative tenders, in addition to a tender in accordance with the tendering document, the memorandum of explanation and the report on instruction, unless explicitly stated otherwise in the announcement or selection guide.
- 19.2** An alternative tender will only be considered by the special-sector company if this:
- relates to a substantial change to the requirements and specifications in the tendering document and
 - fulfils the minimum requirements listed in the tendering document and
 - gives the special-sector company enough confidence in the realisability of the alternative and in the associated risks and incurred costs,
- all to the extent that the special-sector company states that it is capable of assessing this. If the special-sector company states that it is not reasonably in a position to do this, it has the right to disregard the alternative tender.
- 19.3** An alternative tender must be marked as such on the tender form. To be considered for assessment, the tender should contain the following information:
- a clear description of which substantial change will be made, and
 - a justification showing that the alternative satisfies the minimum requirements listed in the tendering document, and
 - a risk analysis showing that the risks associated with the alternative have been investigated and stating the measures to be taken by the tenderer for the effective management of the risks.
- 19.4** The special-sector company is entitled to demand further information for the assessment of the alternative tender.
- 19.5** An alternative tender submitted without the submission of a valid tender in accordance with the tendering document will be deemed to have not been made.

20 Period of Fulfilment

- 20.1** The tenderer shall fulfil his tender in the 60 days following the date on which registration has taken place, unless a different date is specified in the registration documents.
- 20.2** The special-sector company can ask to extend the period of fulfilment. The tenderer cannot derive any right to the contract from such a request.

21 Registration

- 21.1** Whoever performs the registration shall publicise the tenders at the place and time of registration, as stated in the registration documents.
- 21.2** He shall clearly read out the names of the tenderers and, if the lowest price has been stipulated as the only criterion, the amounts for which the tenderers offer to execute the contract. The amounts to be read out shall be exclusive of turnover tax.
- 21.3** Obvious irregularities in the tender form will be noted. Whoever performs the registration shall not make any statement about the validity or invalidity of the tenders.
- 21.4** The provisions in the preceding paragraphs are not applicable if the tender takes place electronically. In that case the special-sector company shall notify the respective tenderers of the tenders received with all due speed after the registration.
- 21.5** If a price is quoted on a tender form in both letters and numbers and they do not match, the price in letters applies.

22 Report on Registration

- 22.1** A report on the registration can be drawn up.
- 22.2** If the first paragraph is applied, the tenderers shall receive the report on registration with all due despatch upon their request.

23 Invalidity of Tenders

- 23.1** Tenders that do not satisfy the requirements of this regulation and/or the registration documents are invalid and will be deemed not to have been made.
- 23.2** Tenders by the following are invalid and will be deemed not to have been made by a tenderer:
- i. Anyone who has supported the ****contracting entity**** before or during the tendering procedure in:
 - the setting down of the (technical) specifications, the estimate, the minimum requirements, the selection criteria or the award criteria; the tender is not invalid if the tenderer demonstrates that there has been no distortion of competition;
 - the selection or the award;
 - ii. Anyone who has associated himself in any manner whatsoever with a contractor who has supported the ****contracting entity**** during the tendering procedure in:
 - the setting down of the (technical) specifications, the estimate, the minimum requirements, the selection criteria or the award criteria; the tender is not invalid if the tenderer demonstrates that there has been no distortion of competition;
 - the selection or the award.

B Restricted procedure

24 Requesting the Selection Guide

- 24.1** The announcement states how the selection guide can be requested.
- 24.2** The special-sector company will send the selection guide within six days at the latest after he has received a request to this effect, provided that this request is made on time before the latest date for the receipt of applications.

25 Application to Become a Candidate

- 25.1** The latest date for receipt of applications will be stipulated by the special-sector company in the announcement or selection guide.
- 25.2** If a call for competition is made on the basis of a periodic indicative notice, the special-sector company shall after this ask all candidates to confirm their interest on the basis of further details regarding the contract in question, before beginning the selection of candidates. The invitation to do this takes place in accordance with the provisions in article 3.73, second paragraph of the Aanbestedingswet 2012 (Tendering act 2012).
- 25.3** Only those applications that are received on time and satisfy the requirements in the selection guide will be taken into consideration by the special-sector company.

26 Invitation to Submit a Tender

- 26.1** Only candidates who satisfy the minimum requirements in the announcement or selection guide and are not excluded on the basis of the provisions in articles 7, first paragraph, and 12, third paragraph, will be considered for an invitation to tender.
- 26.2** If the special-sector company has specified a maximum number of tenderers in the notice or announcement, this will be assessed on the basis of the provisions in article 12. Up to the specified maximum number of the most suitable candidates will be invited to tender. The special-sector company is entitled to increase the maximum number it specified in the notice or announcement for its own reasons. Candidates cannot derive any right whatsoever from this entitlement.
- 26.3** The invitations to submit a tender will be sent to the selected candidates simultaneously. The tendering document and supplementary documents will either be enclosed with the invitation or, if these can be directly accessed electronically, a statement will be included on how to access them.
- 26.4** The invitation to submit a tender states:
- a. the latest date upon which any supplementary documents can be requested plus any sum that must be paid for these documents and the manner in which this must be paid;
 - b. the latest date and time for the receipt of the tenders and the address to which these must be submitted;
 - c. a reference to each notice of the contract published;
 - d. an indication of any documents that should be appended to the tender;
 - e. (if applicable) the award criteria, if these are not stated in the announcement, regarding a recognition scheme that is used as a call for competition;
 - f. the relative weighting of the award criteria or, as the occasion arises, the ranking of the criteria by importance, if the details are not stated in the announcement, selection guide or the tendering document and supplementary documents.
- 26.5** The special-sector company shall send, at the latest at the same time as the invitations referred to in the third paragraph, a written notification to a candidate who has not been selected to submit a tender stating that he will not be invited. The written notification shall contain a statement of the reasons for the rejection.
- 26.6** A rejected candidate who is not in agreement with his rejection is entitled to notify the special-sector company of this in writing, giving reasons, at the latest within five days after the despatch of the notification referred to in the fifth paragraph.
- 26.7** As soon as possible after the receipt of the notification referred to in the sixth paragraph, the special-sector company should inform the candidate in question of his standpoint. If the standpoint implies that the special-sector company stands by the rejection, the rejected candidate is entitled to commence summary proceedings

before the competent provisional judge by virtue of article 34, first paragraph, within ten days at the latest after the notification.

- 26.8** Any claim to participate in the tendering procedure shall lapse if summary proceedings before the competent provisional judge by virtue of article 34, first paragraph, are not commenced within the period below:
- a. ten days after the notification of the standpoint referred to in the seventh paragraph if the notice as referred to in the sixth paragraph was received within the above-mentioned period of five days, or
 - b. ten days after the notification referred to in the fifth paragraph if the notice as referred to in the sixth paragraph is not received within the above-mentioned period of five days.

27 Tendering and Registration

Articles 17 to 23 inclusive are equally applicable to the tendering and registration, providing that:

- a. The memorandum of explanation and report on instruction referred to in article 17, third paragraph, will only be sent by or on behalf of the special-sector company to a candidate who is invited to submit a tender;
- b. Article 18, fifth paragraph, is only applicable if the invitation does not state otherwise;
- c. Only tenderers, either in person or represented by a proxy, may be present at the announcement of the tenders referred to in article 21, first paragraph.

C Negotiated Procedure

28 Requesting the Selection Guide; Application to Become a Candidate

Articles 24 and 25 are equally applicable to the requesting of the selection guide and the application to become a candidate.

29 Invitation to participate in the tendering procedure

- 29.1** Only candidates who satisfy the minimum requirements in the announcement or selection guide and who have not been excluded on the basis of the provisions in articles 7, first paragraph, and 12, third paragraph, come into consideration for an invitation to conduct negotiations.
- 29.2** If the special-sector company has specified a maximum number of tenderers in the announcement, this will be assessed on the basis of the provisions in Article 12. Up to the specified maximum number of the most suitable candidates will be invited to tender. The special-sector company is entitled to increase the maximum number it specified in the (notice or) announcement for its own reasons. Candidates cannot derive any right whatsoever from this entitlement.
- 29.3** The invitations to participate in the tendering procedure will be sent to the selected candidates simultaneously.
- 29.4** The special-sector company shall send, at the latest at the same time as the invitations referred to in the third paragraph, a written notification to the candidates who are not selected to participate in the tendering procedure stating that they will not be invited. The written notification shall contain a statement of the reasons for the rejection.
- 29.5** A rejected candidate who is not in agreement with his rejection is entitled to notify the special-sector company of this in writing, giving reasons, at the latest within five days after the despatch of the notification referred to in the fourth paragraph.
- 29.6** As soon as possible after the receipt of the notification referred to in the fifth paragraph, the special-sector company should inform the candidate in question of his standpoint. If the standpoint implies that the special-sector company stands by the rejection, the rejected candidate is entitled to commence summary proceedings before the competent provisional judge by virtue of article 34, first paragraph, within ten days at the latest after the notification.
- 29.7** Any claim to participate in the tendering procedure shall lapse if summary proceedings before the competent provisional judge by virtue of article 34, first paragraph, are not commenced within the period below:
- ten days after the notification of the standpoint referred to in the sixth paragraph if the notice as referred to in the fifth paragraph was received within the above-mentioned period of five days, or
 - ten days after the notification referred to in the fourth paragraph if the notice as referred to in the fifth paragraph is not received within the above-mentioned period of five days.

30 Consultation and Negotiations

- 30.1** The special-sector company sends a document stating in detail how the process of consultation and negotiation, which can include several phases, is structured at the same time as the invitation referred to in article 29, third paragraph, or as soon as possible afterwards, to the candidates being considered for participation. Either a tendering document and the supplementary documents, or a statement regarding access to the tendering document and supplementary documents, if they are accessed electronically, is appended to the invitation.
- 30.2** The document referred to in the previous paragraph states at least:
- the applicable periods and decision moments;
 - (if applicable) the award criteria, if these are not stated in the announcement, regarding a recognition scheme that is used as a call for competition;
 - the relative weighting of the award criteria or, where applicable, the order of the criteria in importance if this information is not stated in the announcement, the selection guide or the tendering document and the supplementary documents;
 - how and when the tenders must be submitted to the special-sector company.
- 30.3** The tenderer shall draw up a report on the consultation or negotiations that will be signed by both parties.

- 30.4** The proposals made by candidates during the consultation or negotiations shall not be disclosed to the other candidates either by the special-sector company or by the candidates until the time of order placement.
- 30.5** Article 27 is equally applicable.

D Private procedures

31 General

31.1 The provisions in article 6 and in articles 8 to 13 inclusive are not applicable to a private procedure.

31.2 The special-sector company shall directly invite one or more candidates to either:

- a. submit a tender in a restricted procedure,
- b. participate in a negotiated procedure, or
- c. participate in a further selection, prior to a procedure as referred to under a. or b.

32 Invitation, Tendering and Registration

32.1 If the special-sector company adopts the procedure referred to in article 31, second paragraph under a., the provisions in article 26 third and fourth paragraphs and article 27 are correspondingly applicable with regard to the invitation, tendering and registration, on the understanding that 'announcement' and 'selection guide' must be read as 'invitation to tender'.

32.2 If the special-sector company adopts the procedure referred to in article 31, second paragraph under b., the provisions in article 30 are correspondingly applicable.

32.3 If the special-sector company adopts the procedure referred to in article 31, second paragraph under c., the invitation contains

- a. the further criteria on the basis of which the selection will take place;
- b. an indication of whether the procedure in accordance with the provisions in the first or second paragraph of this article will be followed.

At the same time as the invitations are sent to candidates who have been selected to take part in the further procedure, at the latest, the special-sector company shall send out notifications to the other candidates to the effect that they will not be invited. In the event that the rejected candidate disagrees with the rejection, the provisions in article 26, sixth to eighth paragraphs inclusive are correspondingly applicable.

Part IV Other Conditions

33 Applicable Law

Exclusively Dutch law is applicable to a tendering procedure that takes place in accordance with this regulation.

34 Settlement of Disputes

- 34.1** A dispute between the parties involved in the tendering procedure, including a dispute that is viewed as such by only one of the parties involved, that arises as a result of the tendering procedure to which this regulation is applicable, will be settled by the competent civil judge in the place where the special-sector company is based.
- 34.2** Parties involved, as referred to in the first paragraph, are also taken to mean an association with full legal competence, the objective of which is to protect the collective and individual interests of its members, insofar as at least one or more of these members are actually involved in the tendering procedure.

35 Final Provision

- 35.1** Candidates or tenderers shall ensure that money, goods or services are not offered or provided to personnel of the special-sector company or advisers employed by the special-sector company in any form whatsoever. They are obliged to report any form of inducement to the special-sector company's board of directors immediately. In the event of the infringement of this provision, article 7, first paragraph, sub c. under iv. is applicable.
- 35.2** Candidates and tenderers shall ensure that the competition between them proceeds freely and honestly. Mutual agreement – either direct or indirect – in the framework of a specific tendering procedure is forbidden. In the event of the infringement of this provision, article 7, first paragraph, sub c under iv. is applicable.
- 35.3** This regulation can be quoted as "Tendering Regulation for the Utilities Sector 2013", under abbreviation "ARN²⁰¹³".