

Tenders and Contracts for the Sale of RDF

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Abstract

This article explains the issues requiring special attention by parties to contracts on the utilisation of RDF and additional issues that should be agreed upon. Since operators of MBT often act as contracting authorities, the article outlines some pertinent issues relating to public procurement rules.

Keywords

RDF, contract, duties to supply, duties to accept, contract duration, substance attributes, uncertainty as to quantity, type of procedure, alternative calls for tender, options for extending the contract.

1 Drafting of contracts

1.1 Duty to supply, duty to accept and penalties

For the operation of their plants, RDF-users depend on a regular, reliable supply depending on the plant's layout. Therefore, the RDF-user will not only agree on the bring-or-pay obligation, which is common practice in waste management, meaning that a certain amount is paid for independently of the actual delivery, but they will also insist on obligating the supplier to deliver the RDF. The suppliers in turn will indeed try to commit themselves to the delivery to an extent as low as possible, but will vice versa insist on a duty to accept the RDF largely independent of the performance of the utilisation facility.

If the supplier's plant cannot produce enough RDF, e.g. because of operational stops, a duty can be set up independently of RDF-delivery – which would have to be effected by another producer. As RDF-users are constantly on the lookout for better possibilities for the procurement of RDF because they have to ensure sufficient amounts for plant operation, it is most often more reasonable to just impose obligations of replacement in case the user can only procure the needed amounts under poorer conditions. This goes beyond mere bring-or-pay conditions because the obligations of replacement may exceed the stipulated additional payment for RDF-acceptance. The supplier will be anxious to impose obligations on the user which go as far as possible to avoid the probably poorer conditions of a replacement. In this respect, an incentive is provided when the obligation of replacement only exists for part of the damage from poorer conditions.

As with the duty to supply, arrangements have to be made for the case that the user cannot process the RDF temporarily or durably, e.g. because of an operational stop. In case of temporary reception difficulties, a regulation is reasonable from the point of view of the supplier which nevertheless forces the user to accept. Depending on the supplier's buffer capacity, this can be arranged differently by e.g. giving the user the possibility to suspend reception for a short time in such a case and accept the RDF later on. If the user does not meet the duties to accept, he should be forced to bear the additional costs incurred by an alternative utilisation of RDF.

1.2 Substance attributes

As commonly known, the specific attributes of RDF, in particular the pollutant content, are of much higher importance in connection with its usability in co-combustion than they are with any other disposal contracts for waste. Therefore, specifications regarding these attributes and sampling procedures are especially important. The supplier will be anxious to allow rejections of delivered RDF only very shortly after delivery which makes sampling impossible for the user during this period of time. Therefore, it is reasonable in such a contract to agree on consequences that go beyond a right of rejection in case of deviations from the agreed attributes, e.g. limitations regarding future deliveries or again the obligation of the supplier to bear the incurred additional costs e.g. for an alternative disposal of the delivered RDF. If it is not possible to limit the right of rejection to the moment of delivery, duties for the redemption of RDF should nevertheless be limited to only a few days.

1.3 Quantitative arrangement

Uncertainties regarding waste quantity which are common in waste management inevitably also exist in connection with refuse derived fuels. Therefore, usually only a quantity frame with a minimum and maximum supply quantity is agreed upon. To compensate calculation difficulties within different quantity frames, different prices are often agreed upon for different quantity scopes. For a better planning, it should be provided that the prospective supply quantities are stipulated annually for the respective following year and monthly for the following month. It is common to agree on supply schemes including a specification of quantities per week or day. To what extent the supplier has to commit himself in advance, should best be decided based on the fact of who – the supplier or the user – has more buffer, e.g. in the shape of storage capacities, for coping with quantity variations. The users' demand for specified quantities greatly differs in practice. This depends amongst others on the plant size and the supply contracts into which the user has already entered into.

1.4 Contract duration

Also the contract duration favoured by suppliers on the one hand and by users on the other hand depends on different factors, so that in practice agreements are made with very differing contract durations. Users sometimes want long-time commitments to create security of investment, but have to face so many uncertainties concerning a durable acceptance especially in connection with co-combustion that they often prefer short contract durations. Suppliers have similarly differing ideas. For reasons of disposal security, some prefer long-term contracts whereas others assume that, after the expected creation of larger capacities for the utilisation of RDF, they will reach better conditions, meaning that they have to make lower additional payments. This is why they rather prefer short contract durations.

It is interesting for suppliers to include so-called contract duration options into the agreements which allow them to unilaterally demand an extension of the contract duration. This way, they can decide on a continuation of the concluded contract depending on market conditions. Especially when it comes to suppliers who are contracting entities, it is also interesting for users to agree upon contract duration options. If the client does not want to commit himself for more than the agreed basic contract duration, the contractor can, if required, make sure of an extension of the contract without having to face a further call for tenders. The exercise of extension options which have already been put out to tender, do not have to be put out to tender again.

When it comes to the formulation of rights of termination, great care should be taken. Uncertainties as to whether plants which are not yet fully operated will work properly in the future, may be reason for suppliers as well as for users to be interested in agreeing on rights of termination. The consequences of termination can be differently arranged and e.g. include payments by the terminating contract party.

1.5 Further need for provisions

In the following, some keywords will be listed, which should also be provided for in the contract:

- consequences of unforeseen changes (laws, notification of approval etc.)
- consequences of an operational stop for the supplier as well as for the user
- details of the delivery of RDF (technology, interfaces, delivery times)
- provisions regarding subcontracting
- remuneration, if required provisions for price adaptation, invoicing
- information / monitoring, storage of documents, confidentiality

2 Call for tenders

2.1 Obligatory call for tenders

Often, MBT-plant operators are contracting entities in accordance with Section 98 of the Act against Restraints on Competition (GWB). Contracts concerning the utilisation of refuse derived fuel have to be regarded as public contracts in accordance with Section 99 GWB because the MBT-operator hereby procures via the additional payment a service with pecuniary interest, the adequate utilisation of his plant output. According to the jurisdiction of the Federal Supreme Court of Justice (BGH), the same even applies to the recovery of waste for which no additional payment has to be made, but for which a “purchase price can be realised” (decision regarding the “sale” of waste paper)¹. The threshold value relevant for the application of the GWB of 211 000 € is generally surpassed, so that the contracting entities have to follow the public procurement law when choosing contractual partners for the utilisation of refuse derived secondary fuel.

2.2 Flexible determination of the refuse derived fuel quality in the public procurement procedure

2.2.1 Initial position

The attributes of the refuse derived fuel depend on the method used for its production. Processing plants have different requirements regarding the quality of the refuse derived fuel, e.g. concerning resistance, grain size, moisture content or pollutant content. This means that it is necessary to coordinate the method of fuel production and the requirements of the utilisation plant. However, the public procurement law does not easily allow contract negotiations.

With respect to the public procurement law, it is easiest when the client assumes fixed refuse derived fuel attributes. Afterwards, he specifies them in the contract documents. Only those companies whose plants process refuse derived fuel with the specified attributes can make an offer. Each specification of deviating quality requirements would lead to a stringent exclusion of the offer because of inadmissible modification of the contract documents under Section 25 N° 1 paragraph 1 d) VOL/A. In this case, the assignments could without problems be put to public tender, i.e. an unlimited number of bidders would have the possibility to react to a Europe-wide public notice in requesting the contract documents and make an offer.

¹ BGH, decision of 01 Feb. 2005, X ZB 27/04, VergabeR 2005, p. 328

However, especially when a plant is not fully finished yet, some plant operators want to make their plant configuration conditional on the concretely used utilisation method. In other words, they only want to specify the attributes of the refuse derived fuel when they have chosen a concrete contractual partner. This allows them to find the most cost-effective solution in coordination of the necessary processing steps and their costs on the one hand and the utilisation costs on the other hand. Furthermore, a higher flexibility regarding the quality of the refuse derived fuel means a greater competition because more plants would come into question for fuel utilisation. This can as well lead to a more cost-effective solution.

Flexibility regarding the fuel quality can be reached in two ways during the award procedure: either the client asks for alternative offers for a certain number of defined refuse derived fuel qualities within the frame of a public call for tenders, or he enters a negotiated procedure or a competitive dialogue during which an individual coordination of the refuse derived fuel quality and the bidder can be realised.

2.2.2 Negotiated procedure / competitive dialogue for the coordination of fuel quality and plant

A negotiated procedure is only possible in certain exceptional cases. Section 3 a N° 1 b VOL/A allows the negotiated procedure for service contracts which by their nature or because of the related risks do not permit the preceding determination of a total price. Possible examples are complex and novel services which are to be performed for the first time, e.g. in the context of new technologies.² Section 3 a N° 1 paragraph 4 c VOL/A allows a negotiated procedure if the service contracts are of a kind that does not permit contractual specifications which are precise enough to allow awarding the assignment by best choice in compliance with the regulations concerning open and restricted procedures. In the regulation, this is believed of the expressively mentioned financial services, but also of e.g. research and innovation services as well as management consulting and related activities.³

In some decisions of the public procurement tribunal, the exercise of negotiated procedures was declared admissible for the disposal of residual waste in general and for a call for tenders for residual waste disposal without determination of processes and locations in accordance with Section 3 a N° 1 paragraph 4 b VOL/A and Section 3 a N° 1

² FETT IN MÜLLER-WREDE, VOL/A, Section 3 a, Par. 95

³ FETT IN MÜLLER-WREDE, VOL/A, Section 3 a Par. 104

paragraph 4 c VOL/A.⁴ This understanding especially in such a general shape is questioned with good reason.⁵ However, the specialty about the call for tenders for the utilisation of refuse derived fuel is that these utilisation plants, other than waste treatment plants for residual waste, have totally different requirements regarding their quality and that especially the co-combustion of RDF produced out of municipal waste is a new kind of utilisation. Thus, in my opinion an award in the context of a negotiated procedure can in some cases be justified.

In cases in which the plant configuration is already fixed und will not be changed anymore, the above-mentioned conditions for negotiated procedures are not fulfilled. It is then possible to fix a total price in advance for the quality of the refuse derived fuel and for its disposal. However, if the plant configuration is not yet fixed, there is the possibility of an – economically reasonable – specific adaptation to the requirements of the refuse derived fuel to be produced. A contract based on such an adaptation cannot be awarded only by choosing the best offer in open or restricted procedures. In my opinion, the client cannot be forced to create the conditions of an open or restricted call for tenders by committing himself in advance to a certain plant configuration – which would be economically unwise. Thus, a negotiated procedure in accordance with Section 3 a N° 1 paragraph 4 c VOL/A is justified.

Another possibility could be to carry out a competitive dialogue in accordance with Section 6 a of the Regulation on the Award of Public Contracts (VgV) which is similar to a restricted procedure with preceding dialogue between the awarding organization and the bidder. This new procedure introduced by the PPP Acceleration Act in 2005 can be chosen when e.g. the client is objectively not able to specify the technical means which he needs to meet his requirements and aims. This kind of procedure is intended for the award of especially complex assignments. The legal grounds and comments of the European Commission indicate that the entrance requirements for this procedure are not as high as those of the negotiated procedure. In my opinion, for the reasons mentioned above concerning negotiated procedures, also an award via competitive dialogue is possible.

If a bidder wants to object to the choice of procedure during review procedure he would have to do this in accordance with Section 107 paragraph 3 GWB by the end of the pe-

⁴ Vergabekammer Sachsen, decision of 13 Mai 2004, ref. 1/SVK/029-02; Vergabeüberwachungsausschuss Baden-Württemberg [Fed. Public Procurement Awards Supervisory Board], decision of 28 Mai 1999, ref. 1 VÜ 7/99

⁵ Cf. FETT IN MÜLLER-WREDE, VOL/A, Section 3 a, Rn. 108

riod for the submission of a tender.⁶ This way, even before carrying out extensive negotiations or dialogues, the client can gain certainty as to whether he will be reproached because of his choice of procedure in the review procedure. Additionally, the bidder objecting to the choice of the wrong award method, if he has taken part in the award procedure, has to concretely declare that and in how far he would have made another offer with better prospects in an open procedure than he had in the context of the actually applied procedure.⁷ This will in any case be difficult. Therefore, the risk that a procedure once carried out, should it be considered inadmissible, will indeed be revoked remains manageable.

2.2.3 Drafting possibilities in the context of an open procedure

Those who do not want to abstain from an open procedure for lack of securing jurisdiction and still do not want to commit themselves to a certain quality of the refuse derived fuels can consider asking for different offers for different variants of refuse derived fuel qualities. To do so, either different fuel qualities are concretely specified or a range of attributes which the client can provide by using different process mechanisms. Then, the bidders have to specify which qualities are to form the basis of their offer.

The public procurement tribunals and senates are critical of the call for tenders of alternative variants. If the call for tenders of different variants serves the goal of first identifying the economic overall concept for the client and hereby compensating planning deficits, it can be assumed that the call for tenders is intended for other purposes than actual awarding, i.e. for market surveys. According to e.g. the OLG Celle and the OLG Saarbrücken, this would infringe Section 16 N° 2 VOL/A.⁸

In my opinion, this reproach does not hold true for the call for tenders of the utilisation of several variants of fuel qualities. Such a call for tenders does not merely aim at market survey or at finding the most appropriate procedure but already at the determination of the most economical offer. This becomes obvious when looking at the fact that the client would not reach his objective of an economical award by conducting a market survey and a following call for tenders for a certain fuel quality. If the client orientates his plant on a certain fuel quality because of mere information, he would already make a decision on a limited number of bidders without a preceding competition. This would mean that a

⁶ OLG Dresden, decision of 11 Sept. 2003, ref. WVerG 0007/03; VK Thüringen, decision of 17 Feb. 2006, ref. 001/06-G-S

⁷ OLG Düsseldorf, decision of 26 July 2002, Verg 22/02

⁸ OLG Saarbrücken, NZBau 2000, p. 158, p. 162; OLG Celle, decision of 08 Nov. 2001, ref. 13 Verg 9/01 and Vergabekammer Thüringen, decision of 20 March 2001, ref. 216-4003.20-001/01-SHL-S

number of potential bidders, who cannot process the thereby determined fuel qualities in their plants, is already in advance excluded from competition which cannot be desirable in terms of a greatest possible competition. This consideration is confirmed by a decision of the OLG Düsseldorf: with reference to the substantially necessary call for tenders free from technical determination for guaranteeing a greatest possible competition, the court judged it admissible that a client simultaneously puts all identified technically feasible variants out for tender in the context of a uniform participation competition.⁹ Also in the present context, the call for tenders for variants of refuse derived fuel qualities allows maximum technical openness and consequently greatest possible competition. The OLG Celle emphasized in its above-mentioned decision that it does not hold each alternative or parallel call for tenders for inadmissible as long as justified interests of the bidders are not violated with respect to an unreasonable effort.

The invitation of alternative offers is often considered problematic against the background of the duty to submit a unique and exhaustive specification for tenders (Section 8 VOL/A) and to ensure transparency in the award process.¹⁰ If alternative positions are put out to tender, there is the risk that the bidders face an uncertainty as to which performances they have to calculate in the end on the one hand and on the other hand as to which criteria the client will apply in deciding for an alternative and thus for the offer to be awarded. However, like the individual criticism of the taken decisions concerning the call for tenders for alternative performances shows, both duties can be fulfilled if the contract documents are accordingly formulated:

All criticized decisions have in common that either a very high number of different variants and options had been put out to tender or that the manner in which the services are to be performed was completely subject to negotiations or that none of criteria were given which the client applied for the decision for one of the variants.¹¹ This means that

⁹ OLG Düsseldorf, decision of 26 July 2006, Verg 19/06

¹⁰ OLG Celle, decision of 08 Nov. 2001, ref. 13 Verg 9/01; OLG Düsseldorf, decision of 02 Aug. 2002, Verg 25/02 and decision of 24 March 2004, IVV Verg 7/04

¹¹ OLG Celle, decision of 08 Nov. 2001, ref. 13 Verg 9/01: call for tenders for six totally different variants of wastewater treatment for which amongst others remained open whether services or construction work will actually be assigned without indicating criteria for the choice of the variant to be awarded; OLG Saarbrücken, NZBau 2000, p. 158, p. 162: all in all 50 lots with numerous options of similar importance as the principal performance which in turn also contained alternatives; OLG Düsseldorf, decision of 02 Aug. 2002, VII Verg 25/02: alternative call for tenders for a mobile online and offline collection of a warning fine by electronic cash declared inadmissible because in this case the technical overall performance remains unclear; OLG Düsseldorf, decision of 24 March 2004, VII Verg 7/04: call for tenders of three different façade variants with again five different sun screen variants without indication of the criteria which were applied for the choice of one variant

the criticism predominantly aimed at a missing unique and exhaustive specification for tenders and a lacking transparency of the award decision. This criticism can be avoided in call for tenders for different refuse derived fuel qualities.

The OLG Düsseldorf has declared the call for tenders of alternative positions for admissible when and as long as a justified need of the contracting entity exists to keep open the assigned performances in the concerned aspects and when the contracting entity preserves the transparency of the award procedure as far as possible in drafting the call for tenders conditions and prevents the manipulation of award decisions. To do so, the client has to indicate particularly the criteria which are substantial for the award of an alternative put out to tender. Already in 2001, the public procurement tribunal Lüneburg (Vergabekammer Lüneburg) decided that a call for tenders for alternative variants is admissible if the reasons for it are comprehensible and the procedure is transparent (for the alternative two-week or four-week domestic waste collection).¹²

Thus, the client should confine himself to some clearly described variants of refuse derived fuel in the specification for tenders for which the bidder can according to his own choice make an offer. In this case, a unique specification for tenders would be guaranteed. To ensure transparency of the award process, the total cost of treatment on the one hand and utilisation on the other hand and detailed information about the costs of production of the different refuse derived fuels would have to be indicated. When these are then subject of an evaluation of economic viability, each bidder can himself estimate the chances he has in the award procedure on the basis of this information and the price offered by him. Thus, transparency is ensured and manipulations are prevented.

To sum it all up, it is in my opinion possible to justify the call for tenders for several material qualities in the context of the public procurement law when the specifications for tender are transparently drafted. It should also be added that also in this regard, the bidder has to object to the call for tenders for different variants in due time to be later on able to bring forward his reproach in the review procedure.

2.3 Flexibility regarding contract duration

As it is still not predictable how the price capacities for the utilisation of refuse derived fuels will develop, it is especially important for the client to largely keep open the duration of the utilisation assignments. It is then possible to flexibly decide according to the agreed conditions and the market situation whether the concluded contracts will be continued or whether the assignment will be awarded anew.

¹² Vergabekammer Lüneburg of 12 Nov. 2001, ref. 203-VgK-19/2001

For reasons of risk spreading, it is possible to create several (bundled) lots (Section 5 VOL/A) with different contract durations. At the same time, this includes the advantage that depending on the existing capacities and the quantities put out to tender, a larger number of bidders can take part in the award procedure.

It is also possible to unilaterally provide for the option of an extended duration in favour of the client. However, the call for tenders for options is only admissible to a limited extent. As with the call for tenders for different variants, there are concerns because of the obligation of ensuring a unique and exhaustive specification for tenders (Section 8 VOL/A) and regarding the imperative transparency and the prevention of manipulations in the award decision. There is a tendency towards assuming that options can amount to 10 % of the total value.¹³ The public procurement tribunal Lüneburg (Vergabekammer Lüneburg) has applied a more generous standard for contract duration options and has declared an option for admissible which extended the contract duration by more than 50 %.¹⁴ However, probably with respect to the calculability of performances, the public procurement tribunal stressed that the contractor has to be notified about the exercise of the option in good time so that he can accordingly plan with regard to the workload of his plant. When following these conditions, the duration can be rendered more flexible through contract duration options. The same must be valid for termination possibilities of the client. Of course, the client has to verify – e.g. through market survey – prior to the call for tenders whether the market is ready to agree to the according uncertainties regarding contract duration.

Furthermore, future trade possibilities can be kept open by agreeing on low minimum supply quantities. Of course, this is only helpful if no agreement has been made according to which all quantities produced by the client have to be supplied to the contractor. All in all, the range of quantities should not be too widely chosen with regard to the public procurement law and for economic reasons, because the contractor might include those capacities into his prices which are reserved for the client but which he might not make use of later on. Afterwards, the client can decide whether he will deliver the amount exceeding the minimum quantity to the contractor or whether he will deliver it to someone else. In any case, different prices should be agreed on for different price scopes. The public procurement interdicts the call for tenders for uniform prices for a range of quantities that is too broad.¹⁵ For the delivery of high quantities, the bidders will

¹³ OLG Saarbrücken, NZBau 2000, p. 158 ff.

¹⁴ Vergabekammer Lüneburg, decision of 12 Nov. 2001, ref. 203-VergK 19/01

¹⁵ Vergabekammer Lüneburg, decision of 12 Nov. 2001, ref. 203 VergK 19/01

generally calculate lower prices. Thus, the expected calculation surcharges are only then payable when really only low quantities were supplied.

3 Summary

When concluding contracts about the utilisation of refuse derived fuel, the specification of substance attributes and the consequences of deviations are of integral importance. Different from other contracts about waste acceptance, the acceptor of refuse derived fuel is dependent on the actual supply, so that the common bring-or-pay obligations alone often do not serve him. After all, the current market uncertainties create a considerable interest in flexible regulations concerning supply quantities and contract durations.

Contracts of contracting entities about the utilisation of high calorific fractions or the utilisation of refuse derived fuels produced by the operator have to be considered as public assignments and thus put out to tender Europe-wide. In my opinion, the means of negotiated procedure or competitive dialogue can be chosen to individually coordinate the refuse derived fuel attributes between client and bidder. The demand of the contractual partners for the greatest possible flexibility regarding amounts and contract durations can to a certain extent be responded to without violating the duties set forth in the public procurement law.

4 Literature

Müller-Wrede 2001 Kommentar zur VOL/A, 1. Auflage

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