

ICP – AUTORIDADE NACIONAL DE COMUNICAÇÕES

Regulation no. 474/2008

Public Tender Regulation for the Allocation a Right to Use Frequencies, on a National Basis, for the Provision of the Publicly Available Land Mobile Service

ICP - Autoridade Nacional de Comunicações (ICP-ANACOM), by determination of 17 January 2008, approved the decision on the limitation of the number of frequency usage rights to be allocated for the provision of the land mobile service (LMS) in the 450-470 MHz band and further approved the definition of the respective allocation procedure, pursuant to which it was considered appropriate to allocate, by means of public tender, a right to use frequencies, on a national basis, for the provision of the publicly available LMS.

Subsequent to this determination, it is important to initiate the tender procedure for the allocation of said frequency usage right.

In accordance with the provisions of article 11 of the Statutes of ICP-ANACOM, as approved by Decree-Law no 309/2001 of 7 December, and of article 8 of Law no 5/2004 of 10 February, the regulation, in draft form, was submitted to the respective regulatory and general consultation procedures, whereby interested parties were given a period of 30 working days to comment.

The final report, which analyses the responses received in respect of this procedure and which gives basis to the options of ICP-ANACOM, is published on the website of this Authority.

Accordingly, under the provisions of point a) of article 9 of the Statutes of ICP-ANACOM, approved in the annex to Decree-Law no 309/2001 of 7 December, and in pursuit of the objectives of regulation as set out in article 5 of Law no 5/2004 of 10 February, in particular in point a) of paragraph 1 of said article 5 and under article 15 and paragraph 5 of article 35 of said Law, the Board of Directors of ICP-ANACOM gave approval to the following regulation:

Article 1
Opening and object

1. The public tender set forth in the present regulation which has as its object the allocation a frequency usage right, on a national basis, corresponding to a block of 2x1.25 MHz in the 450-470 MHz frequency range for the provision of the publically available Land Mobile Service, is opened.
2. The allocation of the right referenced in the preceding paragraph is not restricted by the use by the tenderers of any specific technology.

Article 2
Applicable Legislation

1. The public tender is governed by the provisions of Law no 5/2004 of 10 February, the provisions of the present Regulation and by the clauses of the respective specifications, prepared by ICP - Autoridade Nacional de Comunicações (ICP-ANACOM).
2. The allocated frequency usage right is governed by the provisions of Law no 5/2004 of 10 February, the provisions of the present Regulation and of the respective specifications as approved by ICP-ANACOM, as well as by other legislation applicable to the electronic communications sector.
3. The holder of the allocated frequency usage right shall comply with any regulations which are published in the future, even where the provisions of such regulations are not envisaged on the date on which the frequency usage right is allocated, but which provisions result from needs or requirements of the public use of the service provided, in accordance with the regime set out in article 20 of Law no 5/2004 of 10 February.
4. The holder of the allocated frequency usage right shall further comply with any mandates or injunctions which, under law, are issued by the competent authorities.

Article 3

Conditions to be met by tenderers

1. Tenders for the allocation of the frequency usage right in respect of the present tender may be submitted by commercial companies which are incorporated or about to be incorporated and which fulfil the conditions set out in article 19 of Law no 5/2004 of 10 February.
2. Companies which are to be established may tender provided that they possess a temporary identification card, whereas however, the respective authorisation will only be issued, in the event of the allocation of the frequency usage right, following the presentation of proof that the necessary registrations have been performed.
3. The right to use frequencies may not be allocated to:
 - a) Undertakings which already hold frequency usage rights for the provision of the publically available Land Mobile Service;
 - b) Undertakings which already hold frequency usage rights in the 450-470 MHz band for the provision of the Mobile Service with Shared Resources;
 - c) Any undertaking which is significantly influenced or controlled, directly or indirectly, by an undertaking referred to in points a) and b) above;
 - d) Any undertaking which significantly influences or controls, directly or indirectly, an undertaking referred to in points a) and b);
 - e) Any undertaking which is controlled directly or indirectly by another undertaking which, in turn significantly influences or controls, directly or indirectly, any undertaking referred to in points a) and b).
4. The concept of 'control' referred to in the preceding paragraph is that set out in article 21 of the Securities Code, taking into account, also, the relationships which, under articles 20 et seq. of said Code, give rise to the allocation of votes, regardless of whether or not the undertakings concerned are subject to it.

5. For the purposes of the present regulation and in particular of paragraph 3 above, "significant influence" is considered as the allocation of at least 20% of the voting rights, the calculation of which is made in accordance with the criteria laid down in articles 20 et seq. of the Securities Code.
6. The prohibition set out in paragraph 3 shall remain applicable for a period of 5 years, except in the event that technological or market developments occur which give grounds to its amendment or abolition, in particular, in accordance with article 20 of Law no 5/2004 of 10 February.

Article 4

Preparation of applications

Interested parties may consult the tender specifications on the website of ICP-ANACOM at www.anacom.pt, as well as in the public attendance office of its headquarters at Avenida José Malhoa, 12, in Lisbon, on working days between 9am and 4pm, until the date of the deadline for the submission of applications.

Article 5

Provisional bond

1. To guarantee fulfilment of the obligations assumed upon the submission of proposals and the obligations of the tender, applicants shall provide a bond to a value of € 250,000 (two hundred and fifty thousand euros).
2. The bond is provided through bank guarantee or insurance bond made payable to ICP - ANACOM, in any of the duly documented cases.
3. The bond may be collected by the tenderers immediately following the expiry of the deadline for the submission of proposals where the proposal of said tenderer has not been allowed or in the event that the frequency usage right is not allocated upon conclusion of the tender.
4. For the purposes of the preceding paragraph, ICP - ANACOM shall perform the necessary diligence during the subsequent 10 working days.

Article 6

Requests for clarification

1. Tenderers may request, during the period allowed for the submission of proposals and up to 15 working days prior to the expiry of such period, the clarification of any questions which may arise with respect to the interpretation of any of the instruments of the tender process.
2. Requests for clarification must be presented in the public attendance office at the headquarters of ICP - ANACOM, in writing, in return for proof of delivery, or sent by registered letter with notice of receipt, addressed to the Chairman of the Board of Directors.
3. Clarifications are provided by ICP - ANACOM by registered letter with notice of receipt, sent up to 10 working days following the date of receipt referred to in the paragraph above.
4. Requests for clarification and their respective responses will be made available on the website of ICP-ANACOM at www.anacom.pt.
5. Companies which offer publically available electronic communications services and networks, as well as companies which use networks and electronic communications services, are required by the present regulation and for the purpose of this tender, to provide any clarification requested by ICP - ANACOM, which clarifications shall be provided prior to the deadline set therefor, particularly in order to enable compliance with the provisions set out in paragraph 3 above.

Article 7

Delays

In the situation set out in the previous article and where use is made of the postal service, any delays that occur shall be the exclusive responsibility of the tenderer, whereby no complaint may be presented in the event that a request for clarification is delivered following the expiry of the applicable deadline.

Article 8

Method and deadline for the presentation of applications

1. Applications shall be formalised by means of a written request addressed to the Chairman of the Board of Directors of ICP-ANACOM, which request shall contain the identification of the tenderer, reference to the present tender regulation, as well as the date and signature of the tenderer.
2. The request shall be written in Portuguese, without deletions, amendments, or struck out words, and employing the same type of lettering throughout.
3. Application requests must be delivered in the public attendance office at the headquarters of ICP-ANACOM, in return for proof of delivery, on working days, between 9am and 4pm.
4. The deadline for the submission of applications expires 30 working days following the entry into force of the present tender regulation, whereby no application received following the expiry of this deadline may be accepted.

Article 9

Examination of requests

1. Tenderers shall present, with the respective application requests as set out in the previous article, the following items and documents:
 - a) Declaration by the entity with powers to legally bind the tenderer, recognised in this quality under legally admissible terms, where there shall be express acceptance of the conditions of the tender and submission to the obligations arising from the act of tender and respective proposals in the event of allocation of the frequency usage right;
 - b) Certificate of registration and prevailing inscriptions issued by the competent Companies Registry or access code to the permanent certificate of the tendering entity under terms that allow verification of said items;

- c) Photocopy of the respective articles of association;
- d) Documentary proof that a provisional bond has been provided under the terms of article 5;
- e) Document setting out the direct and indirect share capital; enabling verification of the criteria specified in paragraph 3 of article 3 of the present regulation;
- f) Document providing proof of compliant status with regard to social security and to payment of taxes, under legally defined terms, in order for ICP-ANACOM to consult the tax and contribution payment status of the tenderer;
- g) Declaration of organised accounting conformity under the terms of the Official Chart of Accounts;
- h) Document which outlines the organisational structure of the tendering entity, identifying the persons in main positions of responsibility;
- i) Detailed proposal on the installation and operation of the network to be developed in accordance with the technical plan and fulfilling the legal requirements, which proposal shall be drawn up in accordance with the tender specifications and shall include the characterisation of the technological system to be implemented, as well as the guarantee of co-existence with other electronic communications services and systems, reasoned planning of the development of the system and consequent coverage plan, the management and operation of the system and the levels of quality to be provided;
- j) Economic and financial plan drawn up in accordance with the structure of the tender specifications, which plan shall contain, market forecasts, the commercial strategy setting out the range of services, economic-financial documentation demonstrating the implementation of the project and the operation of the system giving evidence of financing sources;

- k) Document containing the conditions for wholesale access to the network of the applicant, where offered, as referenced in article 14;
 - l) Plan which identifies, for each of the projects proposed for the development of the information society, the respective objective, the recipients, amounts, timetables for execution and the responsible entity;
 - m) Declaration by the entity with powers to legally bind the tenderer that all copies presented, irrespective of their format, conform to the originals thereof and that it is accepted that such prevail for all purposes;
 - n) Any other items which the tenderer considers relevant to the assessment of the application,
2. For the purposes of point e) of paragraph 1, the tenders shall, in particular, identify the holders, natural or legal persons, of the share capital of the tendering entity, the amount of their participation, as well as, where one or more of the shareholders is a legal person, provide, with respect to these, the same specified indication.
 3. The entities referred to in paragraph 2 of article 3 shall be exempt from the delivery of the documents referred to in points a), b), c), f) and g) of paragraph 1 and shall submit:
 - a) A binding protocol made between the incorporating persons, with the respective signatures recognised under legally accepted terms, providing express declaration of acceptance of the conditions of the public tender and submission to the obligations arising from the act of tender and respective proposals, in the event of the allocation of the usage right;
 - b) Draft articles of association to which the constituents are bound;
 - c) Provisional identification card.
 4. The entities referred to in paragraph 2 of article 3 shall provide express indication of the address to which they wish all correspondence in respect of the tender to be sent.

5. The companies whose incorporation occurred in the 90 days preceding the date of the tender application are exempt from the requirements referred to in points f) and g) of paragraph 1.
6. Documents submitted by tenderers whose registered office is outside the national territory must be issued and authenticated by the competent authorities of the country of origin, and where no document identical to those requested is available, such can be substituted by a declaration made under oath by the tenderer before a legal or administrative authority, notary or other competent authority of the country of origin.
7. All documents accompanying the application must be written in Portuguese or, if not, be accompanied by a duly legalised translation regarding which the tenderer states that for all purposes, it is agreed that the latter shall prevail over the original.
8. All documents comprising the application submitted by tenderers will remain in the possession of ICP- ANACOM and will not be returned.

Article 10

Distribution of tender documents

1. The tender application shall be submitted in a sealed envelope that is separate from the other elements of the tender, on the face of which envelope the name of tenderer shall be identified.
2. Documents and items accompanying the tender application shall be submitted in sealed volumes in order that the non-violation of the contents is guaranteed, which volumes shall be numbered by reference to their total number and duly identified in accordance with the structure demanded in the tender specifications, thereby giving distinction to the identification of the tenderer, the technical plan, the economic-financial plan, the wholesale offer of access to the network of the tenderer, where offered, and the plan for the development of the information society.

3. The original documents in respect of the chapter of identification of the tenderer shall be sequentially numbered on all pages, which shall be initialled by one of the legal representatives of the tenderer and contain the indication that the document is an original copy.
4. A copy of all documents referred to in the previous paragraph shall be submitted and shall be duly identified as such.
5. The items in respect of the chapters on the technical plan and the chapter on the economic-financial plan, the wholesale offer of access to the network of the tenderer and the plan for the development of the information society shall be contained in plain folders, with sequential numbering of pages per chapter, which shall be initialled on the first page of each folder by one of the representatives of the tenderer and contain the indication that the document is an original copy.
6. Five copies of the items referred to in the previous paragraph shall be presented on non re-recordable CD-ROM, with the respective files in PDF format (*Adobe Acrobat*), which shall maintain the same sequential numbering of pages by chapter.
7. Geographical maps referring to radio coverage are exempt from the provisions of paragraphs 5 and 6, which maps shall respect the requisites of submission set out in the tender specifications, including an original, initialled by one of the representatives of the tenderer, as well as a duly identified copy.
8. The parameterisation of access to the files referred to in paragraph 6 shall ensure that such access may only be achieved by means of permission through the use of a password, which, in this case, shall be indicated to the Committee alluded to in paragraph 3 of article 11 by way of a declaration in a sealed envelope.
9. The content of said files may further be encrypted, in which case the tenderers shall supply the keys or certificates necessary for their consultation under the terms set out in the previous paragraph.

10. The envelopes with the declarations referred to in paragraphs 8 and 9 shall be duly identified and enclosed in the envelope which contains the tender application.
11. The parameterisation inherent to the registry of the files in the format set out in paragraph 6 shall guarantee that their content may not be altered and that no other record be made, by any means.

Article 11

Public act of tender

1. The public act of tender to open tender applications shall take place at 10 am on the 1st working day following the expiry of the deadline for the delivery of tenders stated in paragraph 8, in conformity with an announcement to be published in the press by ICP-ANACOM and made available on their website, whereby notification will also be given of the location where the public act of tender will take place.
2. Only representatives of the tenderers, up to a maximum of three persons per tenderer, may be present at the public act of the tender, provided that such persons are duly empowered to represent the tenderers in said act.
3. The public act of the tender shall be performed a committee which shall be appointed by determination of the Board of Directors of ICP-ANACOM within a period of 5 working days following the date on which the present tender regulation enters into force and which shall consist of three individuals, hereinafter the Committee, which in this respect is charged with:
 - a) Confirming reception of the envelope containing the tender applications, as well as the packages containing accompanying documents and items;
 - b) Opening the envelopes containing the tender applications, including the envelopes cited in paragraph 10 of the previous article, where such exist, as well as the packages containing the documents and items pertaining to identification of the tenderer, the technical plan and the economic-financial plan;

- c) Initialling the tender applications and declarations referred to in paragraphs 8 and 9 of the previous article, where such exist, simultaneously ensuring the seal of the original documents in respect of the chapter of identification of the tenderer, of the first pages of the folders in respect of the technical plan and of the economic-financial plan and of the geographical maps, as well as fixing a limit of time for consultation of the application processes by the tenderers;
 - d) Whenever so required, checking the capacity of the persons intervening in the act;
 - e) Granting tenderers a maximum time limit of 2 working days in order to rectify any omissions or errors found in the application process, where such rectification is considered feasible;
 - f) Drawing up a proposed and reasoned list of admissible or rejected tenders for submission to Board of Directors of ICP-ANACOM;
 - g) Accepting and deciding on all complaints submitted during the public act by the representatives of the tenderers, suspending the act where necessary.
4. In respect of the decisions referred to in point g) of the previous paragraph, appeals shall be heard by the Board of Directors of ICP-ANACOM, as superior body, having devolutive effect only.

Article 12

Admission and exclusion of tenderers

1. The Board of Directors of ICP-ANACOM is charged with admitting or excluding the tenders, according to a reasoned proposal from the Committee on the allowance or exclusion of tenderers.
2. Conditional proposals shall not be allowed, such being considered as proposals in which the tenderer makes the validity thereof dependent on the occurrence of a future or uncertain event.

3. Applications may be rejected at any stage of the tender proceedings in the event of any of the following situations:
 - a) Non compliance with the provisions of articles 8, 9, 10 and 16;
 - b) Non compliance with the requisites and conditions of the tender.

Article 13

Assessment of Applications

1. The Committee is charged with assessing the tenders.
2. The assessment of applications is based, in order of priority and successively, on the following selection criteria:
 - a) Contribution to the conditions of effective competition;
 - b) Contribution to the development of new and innovative projects for the information society;
 - c) Quality of the technical plan, including the promotion of interoperability;
 - d) Quality of the economic-financial plan.
3. In case of a tie between applications, the following criteria will be applied successively:
 - a) The candidate with the highest score with respect to the criteria set out in point a) of paragraph 2;
 - b) The candidate with the highest score in with respect to the criteria referred to in point b) of paragraph 2.
4. The services of the ICP-ANACOM shall carry out the technical analysis of applications, as well as any other activity that may be requested by the Committee.

Article 14

Wholesale access offer to the network

For the purposes of point a) of paragraph 2 of article 13 and without prejudice to the other requirements set out in the tender specifications, particular value will be given to the offer of access to the mobile network of the tenderer by mobile virtual operators (MVNOs), which offer shall include, at a minimum, the following items:

- a) Provision for various forms of MVNOs;
- b) Identification of services covered;
- c) The remuneration conditions of access;
- d) The duration of commitments to be made in this area.

Article 15

Projects for the information society

1. For the purposes of point b) of paragraph 2 of article 13 and to guarantee the completion of the projects it proposes to develop for the information society, the undertaking to which the frequency usage right is awarded shall provide a bond to an amount corresponding to the sum of their value.
2. The bond referenced in the preceding paragraph shall be made payable to ICP-ANACOM through one of the methods set out in paragraph 2 of article 5
3. The minimum amount associated with the implementation of the projects to be carried out is €5,000,000 (five million euros).

Article 16

Provision of information by the tenderers

1. The tenderers, by delegates qualified for such purpose, shall undertake to provide, before the Committee, all clarifications which are requested, within

a period and in a form determined by the Committee, in order to complete assessment of the applications.

2. Failure to comply with the provisions of the previous paragraph shall determine the exclusion of the tenderer from the tender process, except in cases which are duly justified and accepted by the Committee.

Article 17

Hearings of interested parties

The Committee is charged with conducting the prior hearing of tenderers under the terms of articles 100 et seq. of the Code of Administrative Procedure.

Article 18

Final decision

1. The Committee shall draw up a final report, containing a list classifying the tenders, with due reasoning, proposing to the Board of Directors of ICP-ANACOM within a time limit of 20 working days following the closure of the public act of the tender, or from the period of rectifying possible insufficiencies, the allocation of the right to use frequencies to the tenderer which, satisfying the conditions of the tender and the selection criteria, has earned the best classification.
2. The period set in the previous paragraph may exceptionally be extended, on the reasoned proposal of the Committee, by decision of the Board of Directors of ICP-ANACOM.
3. The Board of Directors of ICP-ANACOM is charged with the ratification, within a maximum period of 3 days, of the proposal submitted to the Board by the Chair of the Committee for the allocation of the right to use frequencies.
4. The right is reserved to not proceed with said ratification in the event that it is deemed that the proposal does not suitably satisfy the selection criteria set out in paragraph 2 of article 13.

5. Notification of the decision on awarding the frequency usage right shall be made by ICP - ANACOM to all tenderers by registered letter with notice of receipt.
6. In the case of the entity to which the right to use frequencies is allocated, the notification cited in the previous paragraph shall make express reference to the obligation to raise the bond set out in the following article and the provision of the bond alluded to in paragraph 1 of article 15.

Article 19

Bonds

1. The entity to which the frequency usage right is awarded shall undertake, within a period of 5 days following receipt of the notification referenced in paragraph 6 of the previous article, to increase the value of bond to €1,000,000 (one million euros).
2. The entity to which the frequency usage right is awarded further undertakes, within a period of 5 days following receipt of the notification referenced in paragraph 6 of the previous article, to provide the bond as set out in paragraph 1 of article 15.
3. The bond provided for in paragraph 1 shall apply for a period of five years counted from the date of notification to ICP-ANACOM of the commencement of service provision, whereby up to a fifth of its value shall be released insofar as it is deemed that the obligations set out in the tender specifications are fulfilled.
4. The bond referenced in paragraph 2 shall be released on request of the holder of the frequency usage right, insofar as and when the conclusion of each project is recognised by ICP-ANACOM and to the value corresponding to that allocated to the concluded project.

Article 20

Issue of the title

1. The title of allocation of the right to use frequencies shall be issued by ICP-ANACOM, within a period of 3 working days following compliance with the provisions of paragraph 1 of the previous article, which title shall contain the conditions associated with the respective exercise under the terms of articles 27 and 32 of Law 5/2004 of 10 February.
2. For the purposes of the provisions of the previous paragraphs ICP-ANACOM shall conduct, the prior hearing of the title holder of the usage rights under the terms of articles 100 et seq. of the Code of Administrative Procedure.
3. Whenever, without grounds, the tenderer to whom the right to use frequencies is allocated fails to comply with the provisions of paragraph 1 of the previous article, the Board of Directors of ICP-ANACOM shall give approval to the proposal classified in subsequent place according to the classification list of tenderers, presented by the Committee under the terms of paragraph 1 of article 18, provided that said tender fulfils the conditions of the tender and selection criteria.
4. The approval of the new proposal determines the revocation of the previous acts of allocation of the right to use frequencies.

Article 21

Obligations of the holder of the frequency usage right

1. The obligations arising from the terms of the tender and the commitments assumed in the winning proposal shall form an integral part of the title of allocation of the right to use frequencies, constituting, for all purposes, one of the conditions associated with the allocated rights, under the terms of article 32, paragraph 1, point g) of Law no 5/2004 of 10 February.
2. The allocation of the rights to use the frequencies does not confer on its holder any other rights which do not result from the exact terms contained in

the allocation title, whereas no facts arising from the allocation, in any way, of other frequency usage rights or incidental modification of circumstances may be cited.

3. For the purposes of paragraph 6 of article 3, the entity to which the frequency usage right is awarded may only alter the composition and ownership of its social capital with the prior authorisation of the Board of Directors of ICP-ANACOM.
4. Without prejudice to other applicable sanctioning mechanisms, failure to comply with the conditions associated with the exercise of the activity may determine the total or partial revocation by ICP-ANACOM of the respective right to use frequencies under the terms of article 110 of Law no 5/2004 of 10 February.

Article 22

Period of the right to use frequencies

The frequency usage right shall be allocated for a period of 15 years and may be renewed under the terms of article 36 of Law no 5/2004 of 10 February.

Article 23

Counting the time limits

The method for counting the time limits set out in the present Regulations shall be governed by the rules of article 72 of the Code of Administrative Procedure.

Article 24

Entry into force

The present regulation shall enter into force on the day following that of its publication.

7 of August 2008 - O Presidente do Conselho de Administração, José Manuel Amado da Silva.