

12. EU Procurement Directives

Brief

Local Authorities in the United Kingdom are subject to the United Kingdom Public Procurement Regulations, which implement relevant European Directives. The purpose of the Directives is to stop discrimination between suppliers.

All contracts for services, supplies or works which meet or exceed the defined thresholds will have to be advertised in the Official Journal of European Union through the Council's eSourcing Portal The Chest.

The Public Procurement Regulations apply in respect of contracts for the purchase of goods, services or works which, over the lifetime of the contract, are expected to require that payments are made to the contractor in excess of the relevant threshold. In this context, the contract value will include the cost of consumables and/or maintenance if these are explicitly included in the contract or if, in practice, there is no real alternative supplier. There are provisions prohibiting the sub-division of contracts into smaller lots in order to avoid the Regulations.

When applying the thresholds, the regulations for estimating the value must be observed :

- Estimate the value of an individual contract or, in the case of a series, the total value over a period of 12 months
- Estimate the value including all options. Where a contract does not include an option to extend, the contract must cease on the due date and cannot be renewed without applying the directive
- Estimate 48 x the monthly value for term contracts

Aggregation

The aim of the commission is to ensure that purchasers do not break down requirements into smaller quantities or let contracts for shorter periods to avoid the regulations.

Where a contracting authority is letting a number of short term regular contracts which are to be renewed within a given period, the value must be aggregated over a 12 month period or for the period of the contract if longer.

If letting a series of contracts, the aggregated value must be calculated to establish if the thresholds are exceeded, in which case the contracts must be advertised even if individually they are below the threshold.

Procedures

PIN (Prior Information Notice)

The issue of a PIN is not a mandatory process but provides for reduced process timescales if applied. This provides advanced notice of a requirement but does not include the same detail of a contract notice.

OPEN PROCEDURE

This procedure is a single stage process and has the shortest timescales from the published notice to the return of tenders (47 or 31 days) leading to the award of a contract

whereby all interested tenderers may tender for the contract. It is Generally used for tenders when a low number of responses are expected.

Regardless of the number of companies who have submitted a tender, provided the qualification and selection criteria have been met, each company is legally entitled to have their submission evaluated.

RESTRICTED PROCEDURE

This procedure is a two stage process which allows the shortlisting of companies from the Expression of Interest (EOI) stage to the Invitation to Tender (ITT) stage.

The first stage (35 or 31 days) allows all interested parties to submit an expression of interest by completing and submitting a Prequalification Questionnaire (PQQ)

The second stage allows the qualified parties to submit a tender. The directives indicate that the contract notice must contain details of the expected minimum and maximum number of companies to be invited to this stage.

This process is used for tenders when a high number of responses are expected. The shortlisting method ensures that the number of companies invited to tender are kept to a manageable level and that only companies who have met a pre-determined qualification and selection criteria are invited to tender

Other Procedures

In the event that the open or restricted procedures are not suitable for the selection of a contractor, there are other procedures available within the directives. These procedures are subject to strict controls and may only be applied if the appropriate criteria has been fulfilled. These procedures include

- Competitive Dialogue
- Competitive Procedure with Negotiation
- Innovation Partnership

Remedies Directive

The Remedies Directive provides legal remedies to aggrieved bidders for breaches of EU procurement law by public bodies or utilities. The current directive came into force on 20 December 2009 and introduced changes to:

- A prohibition on entering into a contract or concluding a framework agreement if a notice of court proceedings have been issued and served
- new remedies/penalties for the most serious breaches of the procurement rules, including ineffectiveness orders (orders which have the effect of cancelling a contract or framework agreement), orders shortening the duration of a contract or framework agreement and the imposition of a financial penalty on the public body concerned
- changes to the time limits for bringing court proceedings

Standstill Period

The standstill period is a defined period of time between the contract award decision and the award of the contract. The purpose of the standstill period is to provide unsuccessful tenderers and candidates concerned (Candidates concerned - candidates who were not notified of the outcome of the PQQ stage) with feedback on their submission). If unsuccessful tenderers have any concerns with regards to the process and/or its outcome, they should be raised during this period. A supplier should inform the contracting authority before approaching the court seeking any legal remedies, explaining the basis for its application to the court. Therefore the contracting authority should be aware of any legal challenge prior to the end of the mandatory standstill period.

The mandatory standstill period means that a period of not less than 10 calendar days must elapse between the written communication of the award decision to all tenderers and contract commencement where communication has been issued by e-mail otherwise duration increases to 15 days.

The mandatory standstill period does not apply to below threshold procurements, to procurements otherwise outside the full scope of the Directives (e.g. Part B services) or where there is only one tenderer including those following the urgency provision under the negotiated procedure where single tendering takes place.

If a Contracting Authority decides to follow the standstill period on a voluntary basis, they should state that they are doing so on a voluntary basis and not because they believe that they are required to under the 2012 Regulations. If this is not made clear, it may create a legitimate expectation on the part of challengers that the full procedural requirements of the Regulations should apply to the procurement.

Debrief

Debriefing is a way of helping suppliers to improve their competitive performance, which in turn produces benefits to procuring organisations. Unsuccessful suppliers and tenderers have a right to know the reasons for their rejection. It should be ensured that enough time and resource is given to completion of the debriefing process.

Objectives

- To assist suppliers to improve their performance. A debriefing should cover the positive aspects and suggest areas for improvement of the unsuccessful bid. Suppliers will then have the opportunity to address these issues and improve their competitiveness in any future bids.
- To offer unsuccessful tenderers the opportunity to provide feedback to the Public Body on the tender process and to help with continuous improvement of the process.
- To establish and maintain a reputation as a fair, honest and ethical customer. This will help to ensure that high quality suppliers will be encouraged to submit tenders.

Debriefing will also be necessary for unsuccessful candidates at the Pre-Qualification Stage of the Restricted Procedure

Candidates eliminated at the PQQ stage

- Legal requirement to notify candidates eliminated at the PQQ stage "as soon as reasonably practicable" (based on commercial judgement);
- Provision of de-brief information is not required, but should be done as a matter of best practice;

Unsuccessful tenderers

- All tenderers must receive a standstill notice with the required information "as soon as possible" after the contract award decision has been made, including a summary of the reasons why they were unsuccessful;

For requirements where the value is below the EU threshold, debriefing should take place at a mutually convenient time within a reasonable period

The contract documentation should be collated and finalised to reflect the successful tenderers submission and agreed terms and conditions.

- Tenderers are entitled to a written explanation of the reasons why their tender was unsuccessful
- Debriefings may be undertaken over the telephone, by letter, or meeting. Which of these methods is the most appropriate is dependent on the complexity and value of the contract
- Care must be taken to ensure that all information provided to a supplier can be justified in the event of a formal complaint and/or legal action being made against the procuring organisation
- Prior to the meeting, it is essential that the tenderer understands that the discussion is being carried out with the object of mutual longer term benefits and that the company will be told honestly of strengths and areas for improvement contained in their tender/quotation. The meeting must not be viewed as a forum for debate as to the validity of a tender
- The tenderer should be informed at the start of the briefing that the evaluation was carried out by a multi-skilled tender evaluation team
- It must be made clear to each tenderer that only their own tender will be discussed in relation to the successful tender. Under no circumstances will such things as commercial terms, innovative ideas put forward by another tenderer etc. be disclosed
- The briefing must be accurate and factual
- Debriefing meetings must be carefully planned and executed and only carried out by experienced personnel
- At the end of the interview, suppliers should be asked if they have any constructive comments on the Invitation to Tender (ITT) documentation and the tendering process generally

- A record of the debriefing meeting must be made and placed on the appropriate registered file.

Challenges

If court proceedings are served on a Public Body during the standstill period for procurements falling under the new remedy rules, then the organisation cannot enter into the contract.

Public Bodies must ensure that a process is in place to make sure that all relevant staff are informed when proceedings are served and that appropriate action is taken.

Award

Once the standstill period has elapsed with no challenge from unsuccessful the award can proceed providing any CPR approval procedures have been observed.

The notification to unsuccessful bidders of the award decision must contain:

- The contract award criteria;
- The score the tenderer obtained against those award criteria;
- The score the winning tenderer obtained; and
- The name of the winning tenderer.

Notice

The Contract Award Notice is a public announcement of the outcome of a public procurement exercise in the Official Journal of the European Union (OJEU).

The publication of a Contract Award Notice is mandatory for ALL procurement exercises exceeding the value of the EU advertising threshold, including those that did not require full advertising at the outset of the process e.g. Part B service contracts. The notice must be published within 48 days of the contract award date.

The notice will include the following details:

- The successful contractor(s) or supplier(s)
- The overall value of the contract
- The length of contract including any extension periods.

The notice should not include any commercially confidential information such as pricing.

Annual Returns

The Council is required to gather statistical information on procurement contracts awarded in each calendar year where the estimated value is above the relevant threshold (or is otherwise caught by the aggregation rules).

There is a legal requirement to submit this information to The Department of Communities and Local Government. There is no discretion in this matter. Information must be provided

according the DCLG Template and is usually submitted each July for the previous calendar year.

EU Notice Publishing

All Prior Information Notices (PIN), Contract Notices and Award Notices subject to EU Procurement Directives must be submitted by Corporate Procurement and will issued using the eSourcing Portal, The Chest