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Public Procurement

Tender Evaluation and Contract Award

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Introduction

The evaluation of tenders is the phase in the procurement process during which a contracting authority identifies which of the tenders meeting its requirements is the most economically advantageous based on the pre-announced award criteria.

This procurement brief provides general guidance and examples of good practice in the evaluation of tenders.

The Public Sector Directive (the Directive)[1] provides that "contracting authorities shall base the award of public contracts on the most economically advantageous tender".

The "most economically advantageous tender" must be understood as an overriding concept. According to the Directive, the most economically advantageous tender is "identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing" and "may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject matter of the public contract".

The Directive provides various options for setting the criteria that are to serve as the basis for the award of contracts. It also specifies that the award of contracts is to take place only if the following conditions have been fulfilled:

- The tender complies with the requirements, conditions and criteria set out in the Contract Notice or in the invitation to confirm interest and in the procurement documents.
- The tender is submitted by a tenderer that is not excluded on the basis of the mandatory exclusion grounds or on the basis of non-compliance with applicable obligations in the fields of environmental, social and labour law established by European Union law, national law, collective agreements or international environmental, social and labour law provisions.
- A tenderer that meets the selection criteria set by the contracting authority submits a tender.

General notes on the evaluation of tenders

Open procedure: where the open procedure is used, the economic operators will have submitted both the selection information and their tenders at the same time. The evaluation process will therefore comprise two steps in a single evaluation process.

There are two possibilities for addressing the evaluation process where an open procedure is used:

1. The contracting authority will first examine the selection information and verify the absence of grounds for exclusion and the fulfilment of the selection criteria to ensure that the economic operators are suitably qualified, and then move straight on to the evaluation of the tenders received from suitably qualified economic operators.
2. The contracting authority may decide to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria. In that case, the tenderer to which the contracting authority has decided to award the contract must nevertheless be required to provide the relevant evidence, and the contracting authority must not conclude a contract with a tenderer that is unable to

[1] Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

do so. The contracting authority is also entitled to request all or part of the supporting documents at any moment that it considers this verification to be necessary in order to ensure the proper conduct of the procedure.

Other procedures: Where the restricted, competitive dialogue or negotiated procedures are used, the selection step and the tender evaluation step will then be undertaken as two separate processes.

General requirements: The evaluation of tenders must be carried out by a suitably competent evaluation panel and in accordance with the general law and with Treaty[2] principles of equal treatment, non-discrimination, and transparency. The confidentiality of the information acquired by those involved in the evaluation process must be preserved.

The Directive does not contain any other specific rules on how the process of evaluation of tenders should be structured or on the organisation and responsibilities of the evaluation panel. These issues are left to Member States to regulate.

Key principles governing the process of evaluation of tenders

- **Non-discrimination**: This Treaty principle means that any discrimination with regard to tenderers on the basis of nationality is forbidden and that tenderers from other Member States must not be discriminated against in favour of domestic tenderers.
- **Equal treatment**: This general law principle means that all tenders submitted within the set deadline are to be treated equally. They must be evaluated on the basis of the same terms, conditions and requirements set in the tender documents and by applying the same pre-announced award criteria.
- **Transparency**: This general law principle means that detailed written records must be kept (normally in the form of reports and minutes of the meetings held) of all actions of the evaluation panel. All decisions taken must be sufficiently justified and documented. In this way, any discriminatory behaviour can be prevented, and if not prevented, then monitored.
- **Confidentiality**: Apart from any public tender opening, the process of evaluation of tenders must be conducted in private and must be confidential. During the process of evaluation, the tenders should remain on the premises of the contracting authority and should be kept in a safe place under lock and key when not under review by the evaluation panel. This safeguard is recommended in order to avoid any leaking of information. Information concerning the process of evaluation of tenders and the award recommendation is not to be disclosed to the tenderers, or to any other person who is not officially concerned with the process, until information on the award of the contract is communicated to all tenderers.

How does an evaluation panel operate?

A suitably competent evaluation panel generally carries out the process of evaluation of tenders. A chairperson is usually appointed to lead, co-ordinate, give guidance and control the process of evaluation of tenders. The chairperson is responsible, among other tasks, for ensuring that the process of evaluation of tenders is carried out in accordance with the general law and Treaty principles as well as with local requirements. A secretary to the evaluation

[2] Treaty on the Functioning of the European Union – consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union (OJEU)*, C 326, 26 October 2012. The Treaty is referred to in the Procurement Brief as "TFEU" or "Treaty".

panel, generally without voting powers, is often appointed for the purpose of providing support to the chairperson, carrying out the administrative tasks linked to the evaluation process and keeping the minutes of each meeting.

The way in which the members of the evaluation panel operate – for example, whether they assess the tenders independently or jointly – depends on local legislation or local practice.

In principle, the evaluation panel normally only has the mandate to identify the best tender and to make a recommendation to the contracting authority as to the award of the contract.

Good practice note

It is good practice for all of the evaluation panel members, including the chairperson and the secretary, to sign a declaration of impartiality and confidentiality or a similar kind of declaration before the panel starts to evaluate the tenders.

By signing such a declaration, each evaluation panel member:

- declares in an explicit way that he/she is not associated in any way with any of the tenderers (or their proposed sub-contractors, for example) that have submitted a tender;
- commits himself/herself in an explicit way to not disclose any information acquired during the process of evaluation of tenders to tenderers or to other persons who are not officially involved in the evaluation process.

Preparatory and planning work: Preparatory work and advance planning are very important for the timely and proper conduct of the evaluation process. It is recommended that the evaluation panel hold a preparatory/planning meeting before tenders are received so as to ensure that all of the members understand the process to be followed, how criteria are applied, what their responsibilities are, and the timescales for the process. The panel then agrees on a work plan, including the schedule of panel meetings.

Process of evaluation of tenders: There are two key stages in the evaluation process:

- receipt and opening of tenders
- evaluation of tenders – which normally results in the evaluation panel's recommendation to the contracting authority concerning the contract award.

Receipt and opening: On receiving the tenders, the contracting authority must register them, and it is common practice to record the names of the tenderers as well as the exact date and time of reception of the tenders. The summary of tenders received is then annexed to the tender opening report.

The envelopes containing the tenders must remain sealed and must be kept in a safe place under lock and key until they are opened, and afterwards they must be kept in a safe place under lock and key until the contract award.

Normally, late tenders are rejected and then returned to the tenderers concerned unopened, unless provided otherwise by national legislation. A record should be made of this decision.

The opening of tenders may be either public or non-public:

- **public tender opening** (recommended) – Tenders are opened publicly in the presence of authorised persons and at the time and place indicated by the contracting authority. In the case of open procedures, the persons authorised to be present at the opening of tenders and the time and place for such an opening must be indicated in the Contract Notice.

- **non-public tender opening** – Tenders are opened *in camera* in the presence of the evaluation panel members only.

Electronic receipt and opening of tenders: The Directive requires tenders to be submitted using electronic means, with a few exceptions. A delayed period for implementation of this requirement for electronic submission of tenders is allowed by the Directive, which sets the date of 18 October 2018 as the final date on which other means of submission will be acceptable. After that date all tenders must be submitted electronically. The natural consequence of this change is that the electronic receipt and opening of tenders must be technically possible. The main requirements relating to tools and devices for the electronic receipt of tenders are set out in the Directive. They must at least guarantee, through technical means and appropriate procedures, the following:

- The exact time and date of receipt of tenders can be determined precisely.
- Prior to the time limit, no person can have access to the data transmitted under these requirements.
- Only authorised persons may set or change the dates for the opening of the data received.
- During the various stages of the procurement procedure, access to all data submitted, or to any part thereof, must be possible for authorised persons only.
- Only authorised persons may grant access to the data submitted and only after the prescribed date.
- Data received and opened must remain accessible only to persons authorised to acquaint themselves with such data.
- Where the access prohibitions or conditions referred to above are infringed or where there is an attempt to do so, the infringements or infringement attempts are clearly detectable.
- The tender opening process is to be recorded and any actions taken are to be included in that report.

For further information, see SIGMA Public Procurement Brief 17, *e-Procurement.*

How does an evaluation panel evaluate tenders?

The evaluation panel must ensure that the tenders received are complete and that they comply with all of the requirements set by the contracting authority in the tender documents. The evaluation panel can then apply the pre-announced award criteria to evaluate the tenders.

The evaluation panel will usually carry out the following activities:

- formal compliance check
- technical and substantive compliance check
- choice of the best tender on the basis of the pre-announced award criteria
- recommendation for the award of the contract.

Formal compliance check: The formal compliance check consists of establishing which tenders are compliant with the procedural requirements and formalities set out by the contracting authority in the tender documents. These procedural requirements could include, for example, the submission of tenders in the specified language, with the correct number of copies and including all documents requested.

Good practice note

It is good practice to clearly indicate in the tender documents the procedural requirements and formalities that are mandatory and those that are not. A procedural requirement/formality compliance grid (checklist) could also be included in the tender documents, which would then have to be used by the evaluation panel during the formal compliance check.

This good practice enhances legal certainty, reduces the number of tenders that are non-compliant with the procedural requirements and formalities set out in the tender documents, and facilitates the process of evaluation of tenders.

It is rare that tenders comply with *all* of the procedural requirements and formalities set out in the tender documents. Tenders may present mistakes and omissions. Sound judgement must be used when deciding whether or not to reject a tender because it fails to comply with the procedural requirements and formalities.

Technical and substantive compliance check: The technical and substantive compliance check consists of identifying the tenders that are compliant with:

- the specifications
- the contract conditions and other fundamental substantive requirements.

Non-compliance with fundamental requirements: Non-compliance with fundamental procedural requirements, specifications and other fundamental substantive requirements must entail, as a general rule, the rejection of the non-compliant tenders. It is against the principle of equal treatment to accept tenders that do not comply with such requirements.

Some examples of non-compliance with fundamental requirements

- offer of a delivery date that is later than the mandatory maximum delivery date specified in the tender documents;
- refusal to bear important responsibilities and liabilities set out in the tender documents (for example, performance guarantees and insurance coverage);
- submission of partial tenders by offering, for example, only selected items or only partial quantities of a particular item or only part of the works or services required, where this is not allowed by the tender documents.

The reasons for rejecting a tender for non-compliance with specifications and other substantive requirements must be clearly and exhaustively explained and documented in the evaluation report.

Non-compliance with non-fundamental requirements: Generally speaking, non-compliance with non-fundamental procedural requirements and specifications and other non-fundamental substantive requirements would not constitute a reason for the rejection of a tender, but it would lead instead to a request to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit.

Examples of non-compliance with non-fundamental requirements

- The tender is submitted in a number of copies that is fewer than the required copies.
- The tendered price is quoted in Danish kroner (DKK) instead of euro (EUR), as required in the tender documents.

In principle, the correction of non-compliant tenders in these instances would not give rise to abuse. On the contrary, it would be wasteful for a contracting authority and contrary to the principle of effective procurement to reject an advantageous tender only because it had failed to meet some minor specifications or other minor substantive requirements.

When a tenderer, following a request for clarification, is allowed to bring its tender into compliance, this correction must be made in accordance with the principle of equal treatment. Therefore, any other tenderers that had also failed to comply with the same requirement or with other non-fundamental specifications or non-fundamental substantive requirements must be treated equally and must also be allowed to bring their tenders into compliance.

The clarification process

The evaluation panel may, at its discretion and at any time during the process of evaluation of tenders, ask a tenderer for clarification of its tender.

A request for clarification may be needed, for example, when a tender:

- contains inconsistent or contradictory information about the specific aspect of the tender;
- is not clear when describing what it is offering;
- contains minor mistakes or omissions;
- is non-compliant with the non-fundamental formal and/or substantive requirements set out in the tender documents.

In accordance with the principle of equal treatment, no substantial alterations to a tender are to be sought or accepted through a request for clarification. Therefore, a request for clarification cannot, for example:

- allow a non-compliant tender to be brought into compliance with the fundamental, mandatory specifications that have been set;
- allow a change in the tendered price (except for the correction of arithmetical errors discovered in the evaluation of the tender, if applicable).

Some important points to keep in mind:

- A request for clarification does not imply negotiations.
- Any request for clarification and the corresponding response must be in writing.
- The evaluation panel must agree on any request for clarification before it is sent to the tenderer concerned.
- Any agreed request for clarification must be sent to the tenderer exclusively through the chairperson of the evaluation panel. Individual members of the evaluation panel are not to be allowed to contact tenderers directly in order to seek clarifications of their tenders.
- The clarification correspondence exchanged must be summarised in detail in the evaluation report, with a clear indication of whether the answers received are satisfactory to the evaluation panel, and if they are not acceptable, of the reasons why. For the purpose of transparency, the exchanged correspondence must also be annexed to the evaluation report.
- Any clarification submitted by a tenderer with regard to its tender that is not provided in response to a request by the evaluation panel is not to be considered.

Choice of the most economically advantageous tender on the basis of price alone

If the sole contract award criterion is the price, the tenders submitted by qualified tenderers that meet (1) the set procedural requirements and formalities, and (2) the set specifications and other substantive requirements are to be compared on the basis of the tendered prices.

Some important issues to keep in mind before comparing tendered prices:

- Tendered prices must include all price elements, in accordance with the requirements set in the tender documents.
- Any arithmetical error must be corrected and recorded.
- Any discount must be applied.
- Tenders that appear to be abnormally low must be duly investigated.

Choice of the most economically advantageous tender on the basis of cost, using a cost-effectiveness approach, such as life-cycle costing

Where a cost-effectiveness approach is used, the tenders submitted by qualified tenderers that meet (1) the set procedural requirements and formalities, and (2) the set specifications and other substantive requirements, are to be evaluated by applying the pre-announced method for calculating the costs over the life cycle of a product, services or works.

Life-cycle costing may cover a part or all of the following costs:

- costs borne by the contracting authority or other users, such as:
    - costs relating to acquisition;
    - costs of use, such as consumption of energy and other resources;
    - maintenance costs;
    - end-of-life costs, such as collection and recycling costs.
- costs imputed to environmental externalities linked to the product, services or works during its life cycle, provided their monetary value can be determined and verified. Such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions as well as other climate change mitigation costs.

Some important issues to keep in mind:

- Tenderers must include in their tenders the data that has been indicated in the procurement documents as a basis for applying the method to determine the life-cycle costs.
- The pre-announced method to determine the life-cycle costs cannot be changed or waived during the process of evaluation of tenders. The same method is to be used for each tender.
- Before evaluating and scoring the financial aspects of the tenders, the evaluation panel must:
    - make sure that all costs are included;
    - correct any arithmetical errors;
    - apply any discount;
    - investigate any tender that appears to be abnormally low.

Choice of the most economically advantageous tender on the basis of the best price/quality ratio

Where the best price/quality ratio approach is used, the tenders submitted by qualified tenderers that meet (1) the set procedural requirements and formalities, and (2) the set mandatory specifications and other set mandatory substantive requirements, are to be evaluated by applying the pre-announced specific criteria and their relative weighting. If a more detailed evaluation methodology was disclosed in the tender documents, this methodology must be followed.

Some important issues to keep in mind**:**

- The pre-announced criteria should always include a price or cost element.
- The pre-announced criteria and weightings, any pre-announced sub-criteria and weightings, as well as any pre-announced evaluation methodology, cannot be changed or waived during the process of evaluation of tenders. Any criteria and methodology must be applied as they stand.
- To obtain a meaningful evaluation, the members of the evaluation panel must take a consistent approach when scoring the tenders, and the same scoring rationale must be used.
- Before evaluating and scoring the financial aspects of the tenders, the evaluation panel must:
    - make sure that all costs are included;
    - correct any arithmetical errors;
    - apply any discount;
    - investigate any tender that appears to be abnormally low.
- Evaluation grids/matrices should be used to score the tenders. For the purpose of transparency, these grids/matrices must then be attached to the evaluation report.

Finalising the process of evaluation

Moderation meeting of the evaluation panel: A moderation meeting is normally held once all members of the evaluation panel have completed their independent review and scoring of the tenders, if that approach has been adopted.

At the moderation meeting, the panel members consider the scores allocated and comments provided by each member of the evaluation panel, in order to establish the ranking of the evaluated tenders and to agree on the recommendation of the award to be included in the evaluation report.

In the event of significant differences in the scores given by members of the evaluation panel, a mechanism to deal with this issue should be agreed in advance. Such a mechanism, which must be in line with national legislation, could include, for example, the requests for clarification from tenderers or the engagement of expert advice. In that event, more than one moderation meeting would have to be held.

The evaluation panel may also use the moderation meeting to consider other issues, such as the evaluation of variants, the action to be taken if only one tender or one admissible tender is received, the way of responding to abnormally low tenders, or the action to be taken if there are several equally-ranked tenders.

Variants: When a Contract Notice or a Prior Information Notice used as a call for competition permits variants, such variants must be scored separately. The contracting authority must ensure that the award criteria that have been set can be applied to variants as well as to conforming tenders that are not variants.

Only variants that meet the minimum requirements set by the contracting authority are to be taken into consideration. In procedures awarding public supplies or services contracts, a variant may not be rejected on the sole grounds that it would lead, if successful, to either a services contract rather than a supplies contract or vice versa.

Recommendation for the award of the contract: The evaluation panel normally only has the mandate to issue a recommendation to the contracting authority regarding the award of the contract and not to make the final award decision. This arrangement depends, however, on the provisions of national legislation. The recommendation for the award of the contract is generally contained in the evaluation report.

Evaluation report: The recommendation for the award of the contract is contained in the evaluation report, which is normally prepared by the chairperson of the evaluation panel, with the support of the secretary and the members of the panel.

Information that should be contained in the evaluation report: In broad terms, the evaluation report must confirm the appointment of the members of the panel, describe the contract that is the subject of the evaluation process, confirm the recommendation of the panel for the award of the contract, and name the proposed tenderer as well as the unsuccessful tenderers. The report should summarise in a clear way the activities carried out by the evaluation panel during the process of evaluation of tenders and provide a clear and detailed analysis of those activities and their results. Clear justification should be provided for any recommendation that has been made.

All of the documentation drawn up by the evaluation panel in the performance of its tasks should be attached to the evaluation report.

Recommendation or obligation to cancel the tender process: There are a number of situations in which the evaluation panel may not make a recommendation for the award of a contract. National legislation may also specify grounds for mandatory cancellation. Examples of such situations are as follows:

- No tenders have been received at all.
- None of the tenders received has been found to be compliant.
- All admissible tenders exceed the budget available.
- None of the tenderers satisfies the set selection criteria.
- The circumstances of the contract have been fundamentally altered.
- Irregularities occurred during the process of evaluation of tenders.

In that event, the evaluation panel, in the evaluation report, either recommends the cancellation of the tender process or sets out the mandatory grounds for cancellation. It will then be up to the contracting authority to decide how to proceed, on the basis of the circumstances of the case and the applicable national legislation (for example, by entering into a negotiated procedure or by re-advertising the tender process).

Award approval: The chairperson of the evaluation panel normally submits the evaluation report to the contracting authority for approval. It is often the case that the evaluation report is provided to the authorised officer of the contracting authority, who is responsible for:

- verifying that the process of evaluation of tenders was conducted properly and requesting any additional clarification or evidence;
- ensuring that the recommendation of the award is sound and correct;
- making the final award decision or making the final recommendation.

It is of utmost importance for the authorised officer of the contracting authority to be knowledgeable about the rules governing the process of evaluation of tenders and more generally about the applicable public procurement rules.

Contract award: Once the award approval has been given, the contracting authority notifies the successful tenderer in writing that its tender has been accepted for the contract award.

Notification of contract award decision and the standstill period: In most cases, as soon as the contracting authority has made the award decision it must send a written notification of this decision to all tenderers or candidates (where relevant), including the unsuccessful ones. It must then allow a certain number of days to pass before it concludes the contract. These days are referred to as the "standstill period". The notification must include a summary of the reasons for the decision, as set out in the Remedies Directive[3], and in particular the name of the successful tenderer and the characteristics and relative advantages of the tender selected. Certain information may be withheld. The exact duration of the standstill period must also be mentioned in the notification, so that tenderers/candidates are aware of the amount of time available to them for challenging the award decision, if they wish to do so.

For further information, see SIGMA Public Procurement Brief 12, *Remedies.*

Contract conclusion: Once the mandatory standstill period has expired, and provided that no complaint has been received, the contracting authority may proceed (subject to any national requirements) to conclude the contract. The contract is to be concluded by using the contract template, in accordance with the contract conditions included in the tender documents and accepted by the successful tenderer with its tender.

The contracting authority must also remember, where relevant, to publish a Contract Award Notice in the *OJEU* within 30 days of the contract award.

[3] Directive 89/665/EEC on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, 21 December 1989, as amended.

Further information

Publications

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