

DELAYED VERIFICATION OF PRE-QUALIFICATION AND EXCLUSION CRITERIA

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INTRODUCTION

The assessment of the capability and reliability of tenderers in any tender procedure is an important step – typically, the first step in the procedure under the 2004 Directives. However, with the introduction of the European Single Procurement Document (ESPD) and the objective under Directive 2014/24/EU on Public Procurement (the 2014

the ESPD which is effectively a self-declaration that the tenderer meets the exclusionary criteria and the selection criteria, and it fulfils any objective rules and criteria for shortlisting. When evaluating suitability of the tenderer on the basis of an ESPD, a contracting authority may only request all or part of the supporting documents underlying the self-declaration “where this is necessary

has been made. These consequences are outlined in further detail below.

DELAYED VERIFICATION UNDER THE IRISH REGULATIONS IMPLEMENTING THE 2014 DIRECTIVE

Under the Irish implementing Regulations (European Union (Award of Public Authority Contracts) Regulations 2016, S.I. 284 of 2016), Ireland has opted to permit contracting authorities to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria. The Office of Government Procurement (the entity responsible for centralised procurement of goods and services in Ireland) has indicated that:

the documents required by the Contracting Authority to provide evidence that the tenderer is not affected by any exclusion grounds... and that the bidder meets the selection criteria (eg, financial information, details of previous projects, references, etc) are not required to be provided with the tender and will normally be requested from the preferred bidder only prior to contract award.

There are conceivably a number of consequences that may arise in practice from delaying verification of suitability until after a contract award decision has been made

Directive) of reducing burdens on SMEs in the production of large quantities of pre-qualification documentation, the initial suitability assessment can now be relatively cursory. Indeed, under Article 56(2) of the 2014 Directive, contracting authorities may delay verification of suitability in an open procedure until after tenders have been evaluated. Member states have the option in their implementing measures not to permit such delayed verification or at least to restrict it to certain types of procurement or specific circumstances.

The 2014 Directive introduced

to ensure the proper conduct of the procedure”. Recital 84 of the 2014 Directive does appear to suggest that it would be good practice to request supporting documents at selection stage in a multi-stage procedure (ie, a restricted procedure, competitive procedure with negotiation, competitive dialogue and innovation partnership) so as not to deprive otherwise-qualified candidates from participating at the tender stage.

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This suggests that the ESPD will be taken at face value as initial confirmation of suitability and that tender evaluation will generally proceed without suitability verification. While from an SME perspective the policy is laudable and should assist in reducing documentary burdens on SMEs, it does raise potential issues.

DELAYED VERIFICATION – POTENTIAL ISSUES

Unnecessary evaluation of unsuitable tenders?

Delaying verification of suitability until the end of the process potentially places a greater burden on contracting authorities to evaluate tenders that would otherwise have been excluded on grounds that the tenderer was unsuitable or lacks the necessary capability to meet the selection criteria. In particular, issues may arise where a tenderer provides a global confirmation by ticking a box in the ESPD that it satisfies the required selection criteria for the competition without having to provide any detail in relation to the basis for its self-declaration. It may be the case, however, that the tenderer's view of comparable projects or references may not correspond with the contracting authority's view and yet the contracting authority will only become aware of this difference in opinion when it seeks the supporting documents at the end of the process.

Additional time at end of the process for suitability verification?

The decision not to seek supporting documents or carry out verification at the initial stage of a tender process may save time in the initial stages but is likely to extend time at the latter stage of the process. While this should not impact on the proper conduct of the process, it is often a factor for a contracting authority seeking to award a contract as soon as possible following conclusion of the evaluation. Moreover, contracting authorities are obliged to inform candidates and tenderers as soon as possible of decisions reached concerning the award of the contract and this, coupled with potential expiry of tender validity periods, may lead to some haste in progressing through the verification stage at the end of the procedure.

Greater potential to overlook issues in suitability check of most economically advantageous tenderer?

When verification is delayed until the end of the process, it is conducted in circumstances where the contracting authority has full knowledge of the content of all tenders. Assuming that it is only verifying the supporting documentation of the most economically advantageous tenderer, there may be a greater potential to exercise discretion not to exclude the most economically advantageous tender on tenderer suitability grounds. A contracting authority may be more willing to give the benefit of the doubt to the tenderer in relation to issues concerning selection criteria and comparable reference projects or experience particularly when it knows that the second ranked tenderer is not as advantageous.

Greater potential for dispute on exclusion if tenderer knows it is the winning tenderer?

If the contracting authority has indicated (or tenderers are aware) that the contracting authority will only verify the suitability of the winning tenderer, there is a greater likelihood for a dispute if the contracting authority decides to exclude the winning tenderer on the basis of its suitability. The tenderer will be aware that but for its exclusion it would have been awarded the contract. This is likely to increase the incentive for a challenge to the contracting authority's decision that the tenderer does not satisfy the exclusionary or selection criteria.

Lack of suitability of the lowest priced tenderer who is not the winning tenderer

Many contracting authorities conduct their price evaluation on the basis of allocation of scores relative to the lowest-priced tenderer. The lowest-priced tenderer may not be the most economically advantageous tender (eg, while it may achieve top marks on price it may lose on the basis of the score obtained under the qualitative criteria). If the contracting authority's decision is to only verify the suitability of the most economically advantageous tenderer, there is a potential that the lowest-priced

tenderer is not a suitable tender and if its suitability had been checked it would have been excluded from the process. In those circumstances, all of the price scores may have been allocated against a tender that should not have been part of the tender process in the first instance. It is conceivable in those circumstances that the outcome of the tender process could have changed if the lowest-priced tenderer had been eliminated (particularly if the most economically advantageous tender is not the second-lowest priced tender).

AWARDING LOTS

The process for awarding lots is often a complex and iterative process, particularly in circumstances where the contracting authority has permitted tenderers to tender for combined lots or has limited the number of lots to be awarded. If the suitability check is delayed until after completion of the evaluation and the identification of the most economically advantageous tender for each lot, a contracting authority may be faced with the difficult task of having to exclude a tenderer for a particular lot (or combination of lots) and then having to redo its entire evaluation and lot allocation again.

For the reasons outlined above, there are conceivably several scenarios where the proper conduct of the process may in fact require the submission of supporting documents and verification of suitability at an early stage of the process. It should be a matter for each contracting authority to decide whether, in relation to a particular tender process, it requires supporting documents at an early stage to avoid these scenarios arising. In particular, it may be prudent to consider verifying the suitability of the lowest priced tenderer at an early stage of the evaluation procedure and to carry out suitability verification of all tenderers in an evaluation which involves a methodology for awarding lots.