



## A Guide to Bidding for Public Sector Contracts

In the current economic climate supplying the public sector is becoming an increasingly attractive option for many businesses.

If this is an option that your business is considering, it is essential that you understand the rules which apply to the awarding of such contracts, particularly since your ability to negotiate the terms of a contract with a party in the public sector once it has been awarded to you may be extremely limited.

### Background

As part of its project to build the single European market, the European Union enacted legislation requiring that when public sector bodies want to buy goods or services they have to carry out a tender process in which all those businesses which are interested in providing services or supplying the goods which the authority concerned wants to buy are invited to set out how they can meet the purchasing authority's requirements.

The purchasing authority then selects the most appropriate supplier or suppliers to meet its needs, basing its selection on pre-announced criteria.

### Types of contract that can be awarded under the Regulations

A public authority seeking a supplier under the Regulations can enter into one of two types of arrangement with prospective suppliers, contracts and frameworks. From a supplier's point the main difference between these is that, if a supplier is awarded a contract, then the public authority is definitely agreeing to buy the goods or services described in the contract from the supplier whose tender is accepted.

Where a supplier is awarded a framework, this is usually a much looser arrangement, similar to being placed on an approved supplier's list, although some aspects of the contract, such as price, quality and response times may be agreed in advance. There is no guarantee that a public authority will ever actually place any orders with a supplier who is successful in a bid for a framework agreement and therefore it is difficult for the supplier to assess the value of the award of a framework to its business.

Throughout the remainder of this note the phrase contract is used to mean either a contract or a framework.

## The procedures for the award of contracts

The Regulations provide four different procedures which can be used by a public authority to award a contract. Before bidding for a public sector contract businesses need to check:

- The procedure which will be used to award the contract. This will usually be set out in the advertisement seeking bids. The implications for bidders of each of the different procedures is considered below.
- Whether variations to the specification set out in the tender documentation are permitted, and if so, the extent of the variations to its specification that the purchasing authority is prepared to consider.
- The timetable for the procedure. The public authority has to comply with any timetable set out in its advertisement otherwise the contract procedure may be challenged as unfair. The consequence of this for bidders is that they must comply with any timetable set out in the contract documentation. Public authorities should not under any circumstances consider bids which are submitted late.

## The procedures

### The open procedure

- Where a tender is advertised as being conducted under the open procedure bidders are invited to submit tenders to meet the public authority's requirements
- On receipt of those bids the public authority must consider all bids received except those from bidders who:
  - cannot show sufficient probity
  - cannot show adequate financial stability
  - cannot show sufficient technical capacity to perform the contract
- The public authority then evaluates all the bids it has received against the criteria it has set out in its advertisement and awards the contract to the bidder whose bid best meet its criteria
- The open procedure does not allow for negotiation of the terms of the supply contract between the successful bidder and the public authority following award of the contract. It is therefore essential, when bidding for such contracts, to obtain legal advice on the contract and its financial implications (including any workplace issues) before submitting a bid.

### The restricted procedure

This is a two stage procedure. At the first stage parties are invited to express their interest in bidding for the contract and to fill in a questionnaire which enables the public authority to draw up a shortlist (which must include at least five bidders) of organisations to be invited to submit bids for the contract.

Those included on the shortlist are then invited to submit tenders which are evaluated by the public authority according to the criteria specified in the invitation to tender. The party that submits the bid which best meets the public authority's criteria will be asked to sign a contract with the public authority.

As with the open procedure, the Regulations do not allow for negotiation of the terms of the contract once it has been awarded. If invited to tender for a contract which is to be awarded under the restricted procedure, it is essential to obtain legal advice on the contract and its financial implications (including any workplace issues) before submitting your bid.

## Competitive dialogue

This procedure, which can only be used by public authorities for the award of particularly complex contracts such as Private Finance Initiatives or innovative IT projects, allows for negotiations between the public authority and bidders. The Regulations require that the timetable for the conduct of the negotiations must be set out by the public authority and supplied to prospective bidders. The procedure allows a public authority to conduct negotiations in parallel with a number of prospective suppliers before finally deciding on its preferred supplier.

The disadvantage of the competitive dialogue for bidders is that it can involve considerable expense in providing information and attending meetings. Whilst the successful bidder will seek to recover the costs of tendering within the price that it quotes for performance of the contract, unsuccessful bidders will not be able to recover their bid costs in this way.

## Negotiated procedure

This procedure can only be used by public authorities in very limited circumstances. Where a public authority is seeking to award a contract using this procedure, it can negotiate the terms of that contract directly with a chosen supplier.

## Workforce Issues

The provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") may apply to contracts to supply services awarded under the Regulations. If TUPE applies at the start of the contract, the contracts of employment of all those individuals who are currently providing the services for which bids are being sought (who may be employed directly by the public authority or by another contractor who is currently providing the services) automatically become employees of the successful bidder for the contract on identical terms to those on which they are currently employed by their existing employees.

When bidding for a public sector contract it is essential to take legal advice at the bidding stage as to whether TUPE applies at the start of the contract, since this will have implications for the price you need to charge the public authority for providing the services.

In addition if you are not re-awarded the contract by the public authority when it expires, any staff who have worked on the contract may transfer to the new contractor under TUPE and be lost to your business. It is therefore essential to take legal advice on this issue prior to the end of the contract.

### Challenging the award of the contract

Once the public authority has chosen its preferred supplier, the Regulations require public authorities to notify all bidders of the details of who the contract has been awarded to, and allow ten days before signing the contract with the successful bidder. During this period an unsuccessful bidder can challenge the award of the contract if it believes that in awarding the contract the Regulations have been breached.

## Summary

If you are bidding for a public sector contract it is essential that you take legal advice on the following before submitting your bid.

- the terms of the contract
- how TUPE may impact if you are awarded the contract

If you would like further advice or training on bidding for public sector contracts, search for "public procurement" at [www.harveyingram.com](http://www.harveyingram.com)

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