



Safe Procurement - Top Tips for Effective EU Procurement

It may not have gone unnoticed that we are currently in difficult times, particularly the construction sector where competition is 'hotting up' as fewer contractors seek that elusive contract. As a result we are experiencing some unusual behaviours in the market place including a return to very low tender prices and increasing challenges from unsuccessful bidders, particularly on EU procured contracts. Where contracts are procured in accordance with EU Procurement Rules and this only applies to public sector bodies and for works/services/supplies over a certain value, then tendering must be undertaken in accordance with these Regulations. For the time being, any unsuccessful bidder who considers there to be a breach in the Regulations during the process may bring a challenge, although the only remedy at the moment is damages. This won't necessarily mean that an unsuccessful bidder gets the opportunity to tender again, since the client may have already entered into contract. The new EU Remedies Directive, which is likely to come in around December 2009, will seek to address this under a new 'ineffectiveness' provision. This will place far greater importance in getting the process right from the start.

EU Procurement is complex and ever changing. There are significant challenges both for purchasing and bidding organisations and therefore up to date knowledge is essential in understanding the Rules and in adopting safe and ethical practices. To this end, we have set out below our top tips for effective EU Procurement which we hope you will find both interesting and useful. Whilst our 'top tips' relate mainly to the 'Restricted Procedure', these can be equally applied to other forms of EU Procurement, including the 'Competitive Dialogue Procedure although some of the terminology and process is slightly different.

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get it right from the start;

One of the most important things is to make sure that the client is very clear about what they want to purchase. Once the decision to purchase is made and the EU process starts, the inflexibility within the Regulations often makes it difficult to amend the procurement needs without starting the process all over again. Therefore we would always recommend quality time spent with the client at the outset in helping them develop their procurement strategy. This will also shape how the final contracts will look, whether you are looking at term contracts or frameworks for example.



Top Tip: Develop a clear Procurement Strategy.

the Contract Notice;

This is the single most important document in the EU Procurement process that effectively sets out the client requirements. There are of course a number of elements to the Contract Notice, which would be an 'article' in itself. Suffice to say, every section of the Notice needs to be completed including the estimated contract value, description of the works and the type of works (using the right CPV (Common Procurement Vocabulary) codes). At this stage, we would strongly recommend specialist advice from a procurement adviser or solicitor since failure to comply with Regulations may result in recommencing the process and the impact of such delay on the commercial objectives of the client.



Top Tip: Seek advice when preparing the Contract Notice.

the Pre-Qualification Questionnaire (PQQ);

Increasingly, PQQ's are used (in two stage tendering) to establish the financial, economic and technical capacity of a bidder. PQQ's must only be used to assess bidders previous experience and therefore suitability to tender. In addition, the criteria for assessment at this stage must be clearly set out including whether assessment criteria is 'pass/fail' or 'scored', together with the relative importance of 'scored' criteria in terms of 'evaluation weightings'. It should be borne in mind that the purpose of the PQQ is to use it as a tool for shortlisting suitable bidders. Therefore the quality of what you ask for and how you assess it are critical in determining the right bidders for your project.



Top Tip: Design PQQ's that give you the right shortlist of bidders.

the Invitation to Tender (ITT);

The ITT is the all-encompassing process of the second stage of the tender and will typically include the client's requirements (both strategic and technical). Where tenders are assessed in terms of MEAT (Most Economically Advantageous Tender) criteria this will invariably require a qualitative as well as quantitative response. The key to successfully ensuring that you end up with the right partner is in the quality of the ITT. The ITT is an opportunity to assess the bidders specific proposals (N.B. not previous experience which is requested at PQQ stage) to the client requirements. Furthermore, all of the criteria and sub-criteria for assessment must be clearly set out including how responses will be evaluated. Equally, on the quantitative side, clear cost models and price frameworks should enable 'like for like' assessments to be made. The quality of the ITT is crucial in 'staving off' potential challenges.



Top Tip: Design bespoke ITT's that reflect the client need and ensure that evaluation criteria is clearly set out and transparent.

develop Robust Evaluation Strategies;

With an increasing litigious market due partly to an uncertain economic climate and also bad procurement practices it is absolutely essential that first class evaluation strategies are developed that set out the process for evaluating bidders at each stage in the procurement process. In the case of two stage tendering, such as the Restricted Procedure or the Competitive Dialogue Procedure, this entails evaluating bidders at both pre-qualification stage and then at tender stage (Invitation to Tender or Invitation to Participate in Dialogue). However, translating criteria into a methodology for evaluating bidders' proposals is a skill that requires a good understanding of the type of procurement being undertaken, aligned with scoring systems that are robust, fair and transparent. We always prepare 'Evaluation Methodologies' for each stage of the process, that combine details of how the evaluation will be undertaken, who will be involved in the evaluation process and above all, scoring templates for assessment. In addition, we recognise the need to engage stakeholders in selection processes and to that end, we also provide training for evaluators and above all, 'Prompt Sheets' and/or 'Model Responses' to support the evaluation team understand how to assess responses.



Top Tip: Develop Robust Evaluation Strategies.

the 'Alcatel' Statutory Standstill Period;

Following the case of Alcatel Austria and Others -v- Bundesministerium für Wissenschaft und Verkehr, the European Commission ruled that all EU Procurement should be 'open to review before conclusion'. The impact of this being that an aggrieved bidder can have an opportunity to challenge the award of contract if there has been a breach in the Rules, resulting in the setting aside of the contract or where a contract has been awarded, a claim for damages. Therefore the Public Contract Regulations 2006 into which EU Law is enshrined in the UK now includes for a 10-day mandatory standstill period prior to award of contract. The standstill period has significant implications for both purchaser and bidder. In the case of the purchaser, the notification of results must contain details of the award criteria, the score obtained by the economic operator and the score obtained by the winning operator and finally, the name of the winning tenderer. From a practical perspective, purchasers must ensure that their evaluation strategies have been properly followed including adopting correct procedures around post tender clarifications. For example, purchasers cannot introduce new evaluation criteria post tender or negotiate with bidders. In addition, under the Regulations, bidders have a right to request a 'de-brief'. Purchasers should therefore prepare themselves for such requests by making available all relevant information to feedback to unsuccessful bidders. It is also recommended that these de-briefs are formally recorded in the event that an aggrieved bidder may take further action. From a bidder's perspective, it is important to know your rights under the Regulations and in this regard, timing is critical. Once the Alcatel period has passed, bidders have little recourse other than damages.



In fact, if an aggrieved bidder considers a breach in the Rules, they can take out an injunction preventing the award of contract, the result of which may result in the 'setting aside' of the award and potentially the re-commencement of the tender process. Once the Alcatel period has passed without challenge, and assuming a contract is awarded and there is a breach in the Rules, then an aggrieved bidder may apply to the Courts for damages which could include loss of profit, tender costs and legal costs. However, under the present rules, what this doesn't mean is that the award of contract can be set aside and therefore, no opportunity for an aggrieved bidder to be awarded the contract.

Top Tip: Understand the Rules; Know your Rights.

the EU Remedies Directive;

In late 2009, the EU Remedies Directive is likely to come into force (it is currently under consultation via OGC). The main impact of the new directive is the introduction of 'ineffectiveness' as a remedy for illegal award of contracts. Effectively the new Directive is pretty much the same as the current Mandatory standstill period discussed above, with the exception that the standstill period may be increased to 15 days. However, the most significant difference is that no contract award can be made before the court has made a decision either on the outcome of the review itself or on interim measures, or before the end of the standstill period. The significance of this is that unsuccessful bidders who make a challenge outside the Alcatel period can apply to the Courts to have the contract 'set aside'. This supersedes the current ruling whereby after the award of contract, only damages can be sought. The practical implications of this are such that if an unsuccessful bidder is successful in having a contract set aside, this could be well into the contract placed by the client. The client may have to terminate the current contract and start a new procurement process, notwithstanding the recovery of mobilisation costs incurred by the appointed bidder. Clearly any successful challenge could be costly, therefore reinforcing the absolute importance of good procurement practice.

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Top Tip: Make sure evaluation criteria and strategies are well defined and administered during the selection process.

Finally, we are delighted to offer training seminars on the EU Procurement Regulations. Our training sessions can be tailored to your specific needs whether you are a purchasing organisation undertaking an EU procurement process or a bidding organisation seeking a greater understanding of the process and want to learn how to respond to EU contracts. If you are interested, in any of the training we have to offer, then please contact Neil Thody on 01732 897766 or neil.thody@cameron-consulting.co.uk.