

# Procurement Brief

Autumn 2011



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## Welcome

Welcome to the Autumn edition of the Procurement Brief. In this edition Robert Winrow looks at the critical importance of the Award Decision Notice and the need to get this absolutely right. Elen Storey considers the intricacies of the competitive dialogue procedure and what contracting authorities should be focused on when considering this procurement route. Mark London looks at the vexed question of including interviews as part of the quality assessment, and the need for contracting authorities to think carefully as to what they want the contract they are procuring to achieve. Kris Kelliher, who we are pleased to welcome back to the Devonshires fold as head of non-contentious procurement, looks at abnormally low or 'suicide' bids.

As always, if there is anything you would like us to include in the next edition, please let any member of the team know.

# Award Decision Notices – The vital last hurdle

The Award Decision Notice (ADN) is a creature of the Public Contracts (Amendment) Regulations 2009 and, as such, relevant to all procurements commenced on or after 20 December 2009. It is the letter sent by a procuring contracting authority to the bidders that submitted a tender (tenderers) and, in so far as they have not already been informed of the rejection of their application and the reasons for it, the bidders that were unsuccessful at the PQQ stage (candidates), once it has decided who to award the contract to. The issue of the ADN allows for the 'standstill period' to commence, during which the procuring contracting authority must not enter into a contract or conclude a framework. It is during this period that contractors can apply to court to have the contract award decision set aside. It is therefore vital that the notices are correct so that the standstill period can be deemed to have been held and, all being well and no challenge being made, to have passed. With this in mind, what must be included in the ADNs?



*“The issue of the ADN allows for the ‘standstill period’ to commence, during which the procuring contracting authority must not enter into a contract or conclude a framework.”*

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The ADN to the **tenderers** must include:

- The name of the successful tenderer
- The contract award criteria
- The score obtained by the successful tenderer
- The score obtained by the recipient of the ADN
- The reasons for the decision, including the characteristics and relative advantages of the successful tender
- When the standstill period is expected to end

The ADN to the **candidates**, meanwhile, must include:

- The reasons why the candidate was unsuccessful
- The name of the successful tenderer
- The contract award criteria
- The score obtained by the successful tenderer
- The reasons for the decision, including the characteristics of the successful tender
- When the standstill period is expected to end

The two are broadly the same, save that there is no requirement for 'relative advantages' to be provided to the candidates (the candidates having not submitted a tender). In its place, candidates must be provided with reasons as to why they were unsuccessful (i.e. at PQQ stage).

As mentioned, failure to include the appropriate information in the ADN will render it defective, which in turn could lead to an allegation from an unsuccessful bidder that the procuring contracting authority has failed to implement a proper standstill period. The standstill period cannot begin to run until proper ADNs have been issued to bidders, so if the procuring contracting authority were to enter into the contract with the successful bidder in circumstances where it has not implemented a proper standstill period, an unsuccessful bidder may have grounds for bringing an "ineffectiveness" claim to get the contract set aside/cancelled, as well as claiming damages for its losses. Where a declaration of

ineffectiveness is made the contracting authority will be fined and, more importantly, it may necessitate re-procurement and the inevitable lag to provision of the works, supplies or services this entails.

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## HM Treasury's verdict on competitive dialogue

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In November 2010 HM Treasury (HMT) published its 'Review of Competitive Dialogue' which followed 18 months of consultation with the public and private sectors on the use of competitive dialogue in practice. Its conclusions are mixed as although it was agreed that, where used appropriately, competitive dialogue can be a valuable procurement tool, it appears that there are common misuses of the procedure leading to it becoming "burdensome and expensive".

Competitive dialogue was introduced in 2006 by the Public Contracts Regulations and more than 1,200 competitive dialogue procurements have been undertaken in the United Kingdom since its introduction. Under Regulation 18, Competitive Dialogue can be used for "particularly complex contracts" where a contracting authority is not objectively able to "define the technical means... capable of satisfying its needs... or specify either

the legal or financial make-up of a project or both". The procedure was intended to provide greater flexibility in the procurement of these complex contracts where the contracting authority considers that the open or restricted procedures would not be appropriate.

HMT found that where used properly, competitive dialogue maintains competition, imposes discipline on the parties to the procurement, establishes good working relationships between the public and private sectors and delivers improved solutions. However, it also identified numerous issues with how competitive dialogue is implemented and many examples of bad practice by contracting authorities. The main problems identified by HMT are set out below.

## Inappropriate use of competitive dialogue

There is widespread concern in the private sector that the competitive dialogue procedure is inappropriately used by the public sector. This concern appears to be borne out in HMT's findings which revealed that 44% of projects were for contracts for five years or less; 52% had a capital value of less than £5m; and 41% had a services value of less than £5m. The comparatively low cost and duration of these contracts would suggest that they would not necessarily meet the 'particularly complex' criteria in Regulation 18.

The review highlights the importance of the pre-procurement phase and recommends that more consultation with the market is carried out before a particular procurement route is chosen and commenced. This will enable contracting authorities to better define their requirements and thereby target their procurement process. This

concedes that inconsistent guidance from central government may have exacerbated the problem.

This is an important area as a strong leadership team within the contracting authority is invaluable – they should have the necessary technical, financial, legal and commercial awareness needed to run a successful competitive dialogue.

## The importance of down selecting and closing dialogue

HMT highlight the importance of down selecting the number of bidders participating in the Competitive Dialogue at appropriate stages. This is permitted by Regulation 18(23) as long as the 'number of economic operators to be invited to participate at the final stage is sufficient to ensure genuine competition'. The review reveals that in the past more bidders than were necessary to ensure this 'genuine competition' were kept in the process for too long - 15% of the competitive dialogues which they consulted had taken 6 or

*“The review concedes that inconsistent guidance from central government may have exacerbated the problem.”*

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will also help to address one of the key concerns of the private sector that contracting authorities use the competitive dialogue procedure as a form of free consultancy in order to tailor their requirements during the procurement process. The review recommends focusing the competitive dialogue on seeking solutions to “known unknowns” to ensure that the dialogue centres on those issues which require dialogue.

## Lack of experience and skills gap

Few contracting authorities have prior experience of competitive dialogue and therefore those leading the process are more often than not doing so for the first time. Where there is repeat experience within contracting authorities, the review found that there was limited knowledge sharing and therefore the benefits of valuable know-how were still not felt. The review

more bidders through to final bid submission. This is a cause for concern, especially when considered in conjunction with the level of abortive bid costs which have been incurred by each bidder.

In addition to identifying a reluctance to down select, the review also recognises that the close of dialogue is often delayed whilst discussions with bidders are prolonged. The Review puts this down to an 'overly prudent approach' to Regulation 18(26) which states that following the final bid submission a contracting authority may only request that a bidder 'clarify, specify or fine tune a tender' and only to the extent that this does not 'involve changes to the basic features of the tender or the call for tender when those variations are likely to distort competition or have a discriminatory effect'. The review seems to suggest that this has been interpreted too

cautiously. However, this is balanced against the review's conclusion that one of the positive outcomes of competitive dialogue is that the issue of protracted post-preferred bidder discussions has been successfully addressed. It appears therefore that this positive outcome may only have been achieved by having these protracted discussions prior to the close of dialogue.

### **Barrier to smaller enterprises?**

Due to the increased bid costs required in comparison to other procurement routes, even large, experienced companies are hesitating before entering a competitive dialogue. The review is concerned that competitive dialogue is perceived as being inaccessible for small and medium sized enterprises as they may not have the resource base or knowledge to enable them to participate successfully. The review confirms that the bid costs incurred during the procurement increase from an average of 2-3% of the

- Pre-procurement preparation should be improved by early engagement with the market and robust planning.
- Contracting authorities should be wary of requesting too much information from bidders and holding unnecessary meetings.
- Contracting authorities should seek to focus every request for information from bidders on their evaluation criteria.

For information and advice on making the best use of the competitive dialogue procedure, please contact:

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*“The review is concerned that competitive dialogue is perceived as being inaccessible for small and medium sized enterprises”*

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contract size to 5-6% in a competitive dialogue. Furthermore, all the participating bidders have been required to spend what would previously only have been required to be spent by a preferred bidder – partly perhaps due to the over cautious interpretation of ‘fine tuning’ mentioned above.

### **Practical recommendations**

The review makes a number of practical recommendations to help improve the use of competitive dialogue in the future. In summary these are:

- It should not be considered to be the default procedure by contracting authorities.
- Contracting authorities should publish a justification document setting out why they have chosen to use competitive dialogue.



# New time limits for bringing public procurement challenges

The new Public Procurement (Miscellaneous Amendments) Regulations 2011 which come into force on 1 October will see the basic time limit for starting proceedings reduced to 30 days from the date of knowledge.

There are also other changes to the suspension regime and the mandatory grounds for rejecting a bidder (to reflect the provisions of the Bribery Act 2010).

The changes apply to all of the public sector including Local Authorities and Registered Providers.

For the Regulations in full please click here:

[http://www.legislation.gov.uk/ukxi/2011/2053/pdfs/ukxi\\_20112053\\_en.pdf](http://www.legislation.gov.uk/ukxi/2011/2053/pdfs/ukxi_20112053_en.pdf)

## Revised time limits

The new time limit for bringing procurement proceedings will be 30 days from the date on which the claimant first knew, or ought to have known, about the grounds for starting the proceedings (referred to as the “date of

1. A claim form is issued in respect of the Contracting Authority's decision to award the contract
2. The Contracting Authority is aware that the claim form has been issued
3. The contract has not been entered into

## Criteria for the rejection of bidders

The Regulations update the grounds upon which a bidder can be rejected to provide for new criminal offences such as those under the Bribery Act 2010.

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*“The changes apply to all of the public sector including Local Authorities and Registered Providers.”*

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knowledge”), though the Court has discretion to extend this period up to a maximum of three months. This will apply in all situations where the date of knowledge is 1 October 2011 or later.

Where the date of knowledge occurs before 1 October 2011, the time limit will be 3 months from the date of knowledge, with open ended discretion for the Court to extend the limit.

The amendments seek to implement the changes required by the European Court of Justice (ECJ) judgment in the “Uniplex” case, and emphasise that bidders considering a challenge to any procurement process must move quickly to act upon breaches of the Procurement Regulations.

## Criteria for suspension of contract award

The provisions relating to the automatic suspension of contract award on challenge have been amended to make it clear that the Contracting Authority must refrain from entering into the contract where:



# Interview questions – Getting it right

One of the most vulnerable areas in any procurement process is the interview/presentation section of the quality assessment. It is vulnerable not only because it can allow a significant degree of subjectivity from the assessment panel, but also because it provides a particular challenge to those setting out the characteristics and relative advantages when completing the Award Decision Notice (ADN) for the unsuccessful bidders. If there is a problem with the way in which the interview questions are described within the ITT or assessed, along with a failure to get the ADN right, then the grisly (and altogether expensive) spectre of Ineffectiveness may raise its head.

In this article we look at the issues that one should consider when focusing on interview questions within the ITT.

procured. A contracting authority may, however, take the contrasting view that ultimately whether or not a bidder does well is simply down to the presentation skills of the speaker, and does not actually demonstrate how the contractor will perform its contractual obligations if successful.

If the questions are designed to explore an important or technical area of the proposed works and services that are vital to performance then the interview stage should be given a weighting to reflect their importance. A good example would be testing the bidders' knowledge of recent changes to health and safety law or regulatory guidance affecting the proposed works/service. If, however, the interview questions are general in nature and are designed to do no more than demonstrate an understanding of the bid (by testing elements of the written submission) then the weighting should be reduced accordingly. Whatever weighting is given, it will still be of crucial importance to those bidders going into the interview stage on an equal footing.

*“It won't amount to a test other than of the individual bidder's ability to present the answers coherently and persuasively.”*

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## 1. Weighting

One of the reasons detailed consideration should be given to the interview stage is that it is often the section of the assessment where contractors win or lose the bid. In a typical framework procurement, for example, there will be a number of contractors who are neck and neck going into the interview stage, having done equally well on both price and method statements/case studies.

With that in mind the first question is: what weighting should be given to the interview stage? This will largely come down to whether the contracting authority believes the interview stage will actually demonstrate who is the stronger candidate. The answer to this question is invariably yes, not least because the interview stage represents the first time a bidder is put to the test on elements of their bid submission or on a technical element of the works/services being

## 2. Should I disclose the questions?

The Regulations oblige you to act fairly and in a non-discriminatory way. Case law requires that you disclose all assessment criteria and sub-criteria along with the weightings and sub-weightings given to each. There is a marked difference between setting out the actual questions and being vague about what particular questions are to be asked. Giving the actual question is probably worthless; not least because the bidder will be given time to formulate a response. Most contractors will be able to call on the necessary expertise and experience to do so more than competently. It won't amount to a test other than of the individual bidder's ability to present the answers coherently and persuasively. If the questions are to be given in the ITT, it is difficult to see what possible benefit this will be to the contracting authority when deciding who is

better able to carry out the works and services.

If the subject matter for the questions is vague and uncertain the contracting authority is immediately in danger. Surprising the bidder with questions on a subject matter for which no (or no clear) forewarning was given is potentially unfair and discriminatory. That should be avoided at all costs. Any ambiguity at all will be pounced on by a bidder who wishes to challenge.

Where questions are to be asked the subject matter should be given, for example "The bidder will be asked a question on construction site health and safety when erecting a timber frame building". The actual question is not given and the subject matter is wide enough to at least enable the interview panel to test the contractor. It is also possible to increase the ability to test the bidder by giving a range of different subject areas, but making it clear within the ITT that the bidder will only be asked a few of them. If this route is

characteristics and relative advantages of the successful bidder's response to the questions compared to the unsuccessful bidders within the ADN. Understanding this will help to ensure that the reasons given for the interview scores will assist those responsible for drafting the ADN.

In summary, there is a great deal to think about. From the weighting and the way in which the questions are asked through to obtaining enough material to prepare a proper ADN, all of these are important issues and worthy of proper consideration. Getting the interview section right will ultimately mean fewer challenges and a much smoother selection process.

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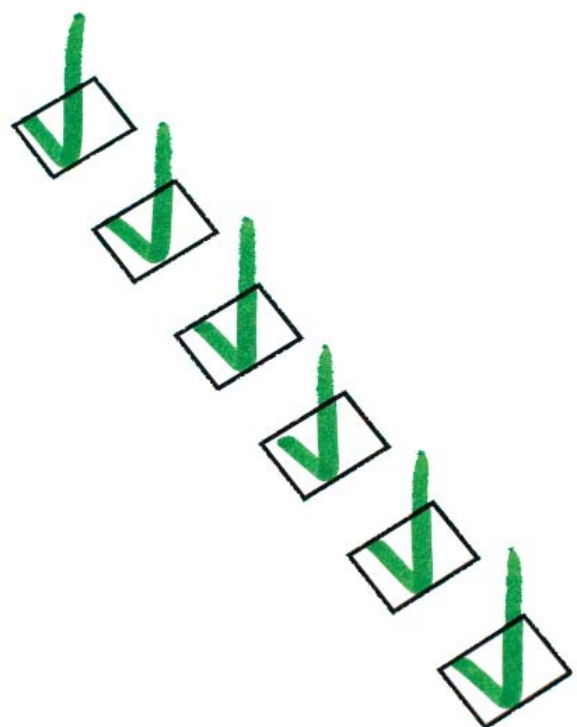
*"If the subject matter for the questions is vague and uncertain the contracting authority is immediately in danger."*

chosen then the interview panel must ensure the same questions are put to each bidder.

Having worked out the weighting to be given, the questions to be asked (and the scores allocated to each question) how should the interview panel prepare?

### 3. Preparing the interview panel

The first step is to ensure that members of the interview panel are given the scoring matrix for the questions as it is set out in the ITT (e.g. 10 being excellent 1 being poor etc). Crucially, the members of the panel should meet before the interviews take place to make sure they each have a clear understanding of both the scoring process itself and the information each question is designed to extract. In addition to these two points, the panel members should all be aware of the need in due course to set out the



# It's all in the contract

One of the significant benefits of procuring contracts through the restricted procedure is that contracting authorities have the ability to ask for any contract or contract terms they want. There is no ability to negotiate and so contractors wishing to bid must take a commercial view on whether they are prepared to do so on the terms being offered. While the contract cannot be too one sided - or no one will wish to bid - it can contain provisions that might otherwise have been exercised during a traditional negotiation along with those that oblige the contractor to do more than the standard form requires.

In our experience clients do not always consider the form of contract in any great detail. It is usually an afterthought, put into the ITT along with standard form amendments to be completed at a later date. While that may suffice for the majority of works or services contracts procured, it is not always the best solution.

Here's another example. You may have had a bad experience with a maintenance contractor overcharging or using the wrong SOR items. In that context you may have found yourself questioning whether you had paid the contractor 20% more than it should have received over the life of the contract. Don't give yourself that particular headache again. Why not include a mechanism within the contract that allows you to run a sample check across a particular batch of invoices and then depending on the outcome – which may demonstrate a 15% overcharge - apply that overcharge against the whole of the batch and deduct 15% across the board. It is unlikely you will ever be faced with an undercharge.

There are a myriad of issues that can be the subject matter of bespoke terms within an otherwise standard form contract. Make sure you tell your advisors what it is you would like to include, think about what benefits you administratively and what has gone wrong in the

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The starting point is to look at those aspects of the contract that have caused difficulty in the past. An example might be invoicing. Are you going to be happy with batches of invoices received on an ad hoc basis from contractors without the necessary supporting documentation? If it makes life easier for you to receive the previous months invoices in a chronological bundle of no more than, say, one hundred at a time, each accompanied by the relevant works order clearly showing all authorised variations, then ask for it. If you do not want to pay the contractor until and unless this is done then make sure the contract says so. Make sure the contract also gives you a reasonable time to consider and certify the invoices – none of this five day nonsense. Standard form contracts are not written in stone. They are entirely pliable.

past. Remember, the restricted procedure may have increased competition, but that competition has no ability to negotiate the form of contract. Think about it, make it work for you.

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# Dealing with ‘suicide’ bids: What’s the best approach?

Suicide bidding is the practice whereby contractors attempt to win contracts that are the subject of a competitive tender by submitting an abnormally low price for the contract that does not cover the cost of carrying out the work. The practice can lead to poor quality service and was partly blamed for the collapse of contractors Connaught and Rok last year.

So what can Registered Providers and other contracting authorities do to try and prevent contractors from winning their contracts with abnormally low, ‘suicide’ bids?

## Rely on the rights in the Procurement Regulations?

The Procurement Regulations (Regulations) give a contracting authority the right to reject a bid that it considers to be “abnormally low”. Before rejecting the bid the contracting authority must write to the contractor to ask them to provide it with an



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explanation as to why their bid is so low. If on receiving that explanation the contracting authority still has genuine concerns that the contractor will not be able to deliver the contract to the required standard at the price they have tendered, the contracting authority can reject their bid.

## Include additional provisions in the Invitation to Tender?

Notwithstanding the fact that the Regulations give a contracting authority the right to reject a bid that it considers to be abnormally low, a number of contracting authorities have started to include provisions in the Invitation to Tender which not only make this clear, but also set out in what circumstances a bid will be deemed to be “abnormally low”. For example, an increasingly common approach is to say that if a bid is more than X% below the average bid it will on the face of it be considered to be abnormally low and the

authority will ask the contractor to provide it with an explanation as to why this is the case together with evidence that it can deliver the contract to the required standard.

## What is the best approach?

The Regulations do not provide a definition of “abnormally low” for these purposes, so including provisions in the ITT which set out the circumstances in which a bid will be considered abnormally low does provide some certainty on this front.

By taking this approach is the contracting authority ‘tying its hands’ to a certain extent and fettering the discretion it has under the Regulations to determine when a bid should be considered abnormally low (and thus requires an explanation from the contractor)? For example, a bid may be X% below the average not because it is

abnormally low, but because the average is unusually high as a result of a one or more very high bids. What should the contracting authority do in this type of situation? The problem is not necessarily insurmountable because the authority could seek an explanation from the contractor and then come to conclusion that the bid is in fact realistic. To avoid this type of issue arising it may be better to stay silent on the circumstances in which a bid will, on the face of it, be considered abnormally low and leave it for the contracting authority to determine on a case by case basis, as envisaged by the Regulations.

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