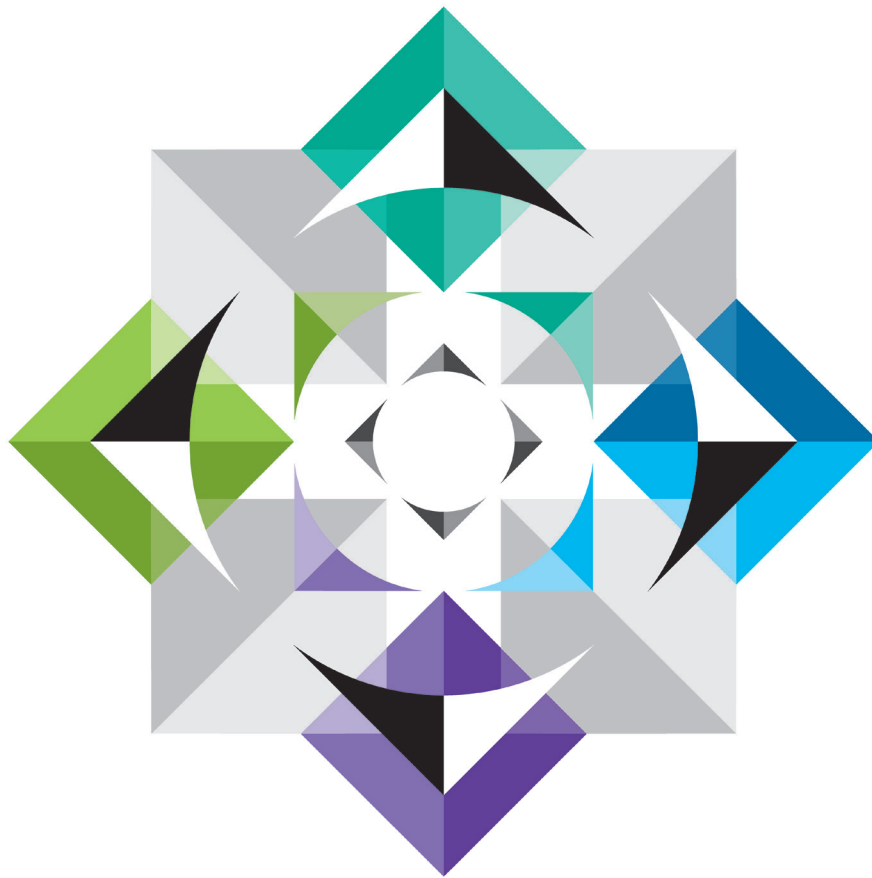


Public Procurement: Contracting Authorities as Tenderers



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Introduction

This guide looks at the issues that arise where a contracting authority is taking part as a tenderer in a procurement process run by another contracting authority.

Overview

As well as running procurement processes, contracting authorities sometimes take part as tenderers in procurement processes run by another contracting authorities. This might be on their own or as part of a consortium. For the purpose of this guide we refer to the contracting authority running the procurement process as the “lead authority”, the contracting authority taking part as the “tendering authority” and the contract being let by the lead authority as the “main contract”.

Where do public procurement issues arise?

In general there is nothing special about a contracting authority taking part as a tenderer in a public procurement process. However, problems arise when looking at how the tendering authority is going to deliver the project, and the works, services or supplies contracts it needs to enter into in order to do so.

Unfortunately this is one of those areas where procurement rules do not assist contracting authorities and can make it more difficult for them to compete with other tenderers who are not constrained by the same rules. It is often difficult to comply and in some circumstances can seem almost impossible.

Contracts let by the tendering authority

As well as running procurement processes, the tendering authority must award any contracts above the relevant thresholds that it intends to let, to deliver the obligations under the main contract, in accordance with public procurement rules. The fact that the main contract has been tendered does not remove this obligation.

This can cause an issue if, for example, the tendering authority needs to specify in its PQQ or tender which contractor it will be using or needs a contractor/consultants to help it prepare its PQQ or tender. This particularly crops up when taking part in competitive dialogue processes where some form of design input from the tenderers is often required.

Consortiums and joint ventures

Strictly speaking, public procurement issues do not directly arise when choosing a consortium or joint venture partner. However, depending on how the consortium/joint venture is structured, procurement issues may affect contracts between consortium/joint venture members or contracts entered into or let by the consortium/joint venture.

In some circumstances a joint venture entity, such as an LLP set up by a contracting authority and a private entity, may itself be a contracting authority.

Tendering for a contractor/consultant partner

The timeframe between publication of a contract notice and the deadline for submission of the completed PQQ is often very short. Many tendering authorities argue that, because of this, it is not possible for them to run a compliant procurement process to select a contractor partner for them to put forward in the PQQ. Instead, contractors/consultants are often appointed without running a procurement process.

The European Commission's view is that even in these situations, public procurement rules still need to be adhered to. Therefore, engaging a contractor or consultant in such circumstances, without carrying out any form of procurement process leaves the tendering authority at risk of ineffectiveness and/or damages claims.

Alternative means to procure a contractor/consultant partner

There are three alternative routes to procure a contractor or consultant in circumstances where a contracting authority needs to act quickly and does not have time to go through a normal tender process.

These are:

- using an existing framework arrangement;
- using the accelerated restricted procedure;
- using the negotiated procedure without publishing a contract notice.



Framework agreements

If the tendering authority has a framework agreement in place then it may be able to directly call-off under that agreement. It may find that, due to the value of the contracts, it still has to carry out a mini-competition.

Alternatively there may be framework agreements set up by other contracting authorities which the tendering authority can use.

Accelerated restricted procedure

The accelerated restricted procedure can be used where compliance with the normal timescales is rendered impractical for reasons of urgency.

Under the accelerated restricted procedure the tendering authority still has to advertise, issue a PQQ and invitation to tender but it can dramatically shorten the timescales so that, in theory, the whole process could be completed in about 20-25 days.

The difficulty is likely to be resourcing this process. It will end up being a very intensive with a lot of work to be done by the tendering authority in preparing all the tender documents, assessing and scoring the PQQ and tender returns and selecting the successful tenderer.

The Regulations do not state what urgency means but the case law supports the use of this procedure in circumstances such as where a contracting authority is taking part in a tender process and needs to identify the contractor that it will be using in the PQQ.

Negotiated procedure without publication of a contract notice

A contracting authority can use the negotiated procedure without publication of a contract notice (i.e. negotiating with one party only) where:

- there is extreme urgency;
- the urgency is due to unforeseen events not caused by the contracting authority; and
- it is not possible for the contracting authority to comply with the usual time limits.

At first glance this may look helpful. Unfortunately the application of this procedure is very limited as all three of the above criteria need to apply.

The main difficulty is satisfying the third criterion. There are very few circumstances where a contracting authority would not be able to comply with the reduced time limits of the accelerated restricted procedure. In practice, this procedure is unlikely to be of much practical use.

This has been reinforced by the Courts in a case involving a German contracting authority, the contracting authority tried to argue it was entitled to use this procedure where it needed to name the contractor it would be using to deliver the services in the PQQ. This was challenged and the challenge upheld. The Court found that there was sufficient time between the lead authority publishing its contract notice and the date that PQQs had to be returned, for the tendering authority to have carried out a tender procedure under the accelerated restricted procedure.

Practical difficulties

A further practical difficulty that arises, is that, before the tendering authority has been awarded the main contract, it doesn't actually have any work to award down the line to a contractor or consultant. Therefore it is not clear what contract the tendering contracting authority would advertise if it sought to use the accelerated restricted procedure.

In practice, it might seek to award a two stage contract to the contractor/consultant to cover work during the tendering process, followed by the main contract work if the tendering authority is successful.

Alternatively, it may conditionally select the winning contractor/consultant making clear that the ultimate award of the contract is dependent on the tendering authority being awarded the main contract. With this approach, the parties still need to deal with how work to be carried out during the tender process is to be governed.

Other options

Some parties argue that where a tendering authority and a contractor jointly take part (as

tenderers) in the procurement process, any contract between the tendering authority and the contractor to deliver the project does not need to be awarded following public procurement rules.

The basis for this argument is that it is all part and parcel of the procurement process run by the lead authority and is just an arrangement as to how the two successful parties, the tendering authority and the contractor, are to deliver the main contract. While there is some logic to this argument, so far the Courts have not endorsed this and given the strict approach that the European Commission tends to take, there is a strong possibility that this argument will not stand up. Rely on it at your peril.

The final option is to enter into the contract in breach and accept the risk of a challenge. A claim for ineffectiveness has to be brought within 6 months from the date of the contract and a damages claim must be brought within 30 days (subject to extension to a maximum of 3 months) from when the challenging party knew or ought to have known of the breach. On that basis, the tendering authority may decide, having assessed the commercial risks, that this is the least of several evils.

Putting this into practice

At the moment, although the accelerated restricted procedure is often used by contracting authorities, we have not seen it used in situations such as this. It appears that most tendering authorities are either calling off under frameworks or simply entering into direct contracts and taking the risk of a challenge.

So far there haven't been any challenges from aggrieved contractors or consultants, which might be because everyone is doing the same thing and bringing a challenge may mean losing out on other opportunities or it could just be that parties are not yet fully aware of the issues.

Changes to the Procurement Regulations

New EU procurement directives came into force on 17 April 2014. The UK has until April 2016 to implement them into UK law but the UK

government is aiming to implement the directives quickly so that the UK can benefit from the improved flexibility that they offer. It is anticipated that the UK Regulations could change towards the end of 2014. Keep an eye on our website for further details.

For more information on public procurement challenges and steps that can be taken to mitigate the risks please see our separate guides.

**For further information
on this subject please contact:**

Clare Reddy

Partner

T + 44 (0) 20 7074 8095

clare.reddy@lewissilkin.com

Owen Williams

Managing Associate

T + 44 (0) 20 7074 8218

owen.williams@lewissilkin.com