

Competitive Dialogue and Competitive Procedure with Negotiation – Implementation

Selection of candidates

Michael Burnett and Martin Oder
29 November 2022



© EIPA 2022 - www.eipa.eu

1

Selection phase – Summary

From advertisement to dialogue/negotiation:

- Advertisement
- Information from interested parties
- Expressions of interest
- Selection of candidates



© EIPA 2022 - www.eipa.eu

2

1

Advertisement

- Preparing the OJEU notice
- Other advertisements (national, sectoral??)
- Notifying potential bidders direct?
- Information required from interested parties
- As well as being lawful the objective of advertisement should be to attract the capable and deter those not capable of delivering the contract i.e. to promote competition
- Timing of launch may influence level of interest

Expressions of interest

- 30 days minimum for expressions of interest
- Additional time may be needed to be allowed dependent on complexity of contract to optimise competition (Art. 47)

Selection of tenderers (Arts 57. to 65, Directive 2014/24/EU) – 1

- Grounds for exclusion:
 - **Mandatory exclusion** (e.g. conviction of specified offences such as corruption, fraud, money laundering etc.)
 - **Discretionary exclusion** (e.g. bankruptcy, grave professional misconduct, attempting to distort competition, significant or persistent deficiencies in prior contracts, serious misrepresentation, undue influence etc.) NB MS may make these exclusion grounds mandatory
- Exclusions should be evidence based:
 - May need to be based on court judgments or assessment of other third parties such as professional bodies, regulators etc.

Selection of tenderers (Arts 57 to 65, Directive 2014/24/EU) – 2

- Exhaustive list of criteria for assessing candidates:
 - **Suitability to pursue professional activity**
 - **Economic and financial standing**
 - **Technical and professional ability**
- Selection criteria:
 - Must be related and proportionate to subject matter of contract
 - Need to set out conditions of participation/means of proof
- Assessment linked to candidate's ability to deliver the particular contract (direct link to subject matter)

Selection of tenderers (Arts 57 to 65, Directive 2014/24/EU) – 3

- Economic and financial standing can be based on ensuring that economic operators possess the necessary economic and financial capacity to perform the contract including based on turnover, asset/liability ratios, professional risk indemnity insurance
- Technical and professional ability can be based on human and technical resources and experience including references from past projects
- Short listing of minimum of 3 selected candidates
- Means of limiting number of candidates to be invited must be disclosed
- The short listing methodology should be disclosed before interested parties start to express interest

Selection of tenderers – 4

- Different short listing methodologies are possible i.e. financial capacity then technical ability, technical ability then financial capacity, setting minimum pass scores for financial capacity/technical ability, first evaluating one or more criteria considered to be essential before assessing others etc.
- Distributing guidance to evaluators about how to apply capability criteria to offers
- Need to allow sufficient time to assess expressions of interest
- Treatment of *prima facie* non-compliant expressions, treatment of minor mistakes, corrections of obvious errors on the basis of equality of treatment

Selection of tenderers – 5

- Ensuring that interested parties can't unilaterally change their expressions of interest after submission
- Ensuring that expressions submitted late or not procedurally compliant are not eligible for assessment

Selection phase – Key issues – 1

- Requests for further information from candidates
- Interpretation of exclusion criteria
- Need for genuine competition (but avoiding “lottery effect”) - 3,4 or more?
- Capacity to sustain long term, high value, often complex, often high-profile contracts
- Consortium fit/composition (if a consortium expresses interest)
- Assessment of how likely short list is to bid/how to optimise

Selection phase – Key issues – 2

- Finalise preparations for dialogue/negotiation
- Excluding offers where interested parties have attempted to improperly influence the short-listing procedure
- Validation of candidate data e.g. including taking references, using data/text mining etc.
- Ensuring accuracy of information gained from third party sources including data/text mining
- Considering intensity of resource implications for negotiation in determining size of short list

Selection phase – Key issues – 3

- Responding to requests for further information from candidates
- Ensuring that evaluators apply short listing criteria as planned to expressions of interest
- Assessing capacity to sustain long term, high value, often complex, often high profile contracts
- Confirming that all expressions of interest are independent and not from linked entities
- Ensuring that the short list contains only entities which the Contracting Authority assesses to be capable of delivering the contract

Selection of short list – Key issues – 4

- Assessing parallel capability i.e. value of experience in similar but not identical projects
- Ensuring appropriate development of specification and contract conditions prior to issuing invitation to participate in dialogue or to negotiate or
- Finalise preparations for dialogue/negotiation i.e. determining what issues the Contracting Authority wishes to discuss, preferred outcome, acceptable outcomes etc.

Competitive Dialogue and the Competitive Procedure with Negotiation – Selection of candidates

QUESTIONS AND ANSWERS