

GUIDANCE ON THE USE OF SUPPLIER LISTS AND ACCREDITATION SERVICES IN PUBLIC PROCUREMENT

There is an increasing debate and indeed some concern amongst contracting authorities and their potential tenderers over the use by public bodies of general select or approved lists as a source from which to identify potential suppliers to invite to tender for their contracts. This concern is widespread where these lists are operated by private sector organisations and/or require a payment from potential suppliers and service providers for registration or accreditation. This guidance seeks to help clarify the application of the relevant EU and UK legislation and allied issues.

EC TREATY PRINCIPLES

There may be nothing wrong in principle with a contracting authority employing a private sector company to conduct its qualification/selection procedures against the contracting authority's predetermined criteria or with a private sector undertaking providing a service to one or more contracting authorities for the maintenance of information about suppliers for them to cite when bidding for public contracts.

However, a contracting authority using such schemes must ensure that they are conducted for an appropriate purpose and in accordance with EC Treaty principles (transparency, equality of treatment, proportionality and mutual recognition). If they discriminate between undertakings, treat them unequally or lack transparency, they will fall foul of the EC Treaty, never mind the EC Public Procurement Directives. For contracts covered by the



Procurement Directives, such schemes must also be adapted to the procedures prescribed.

Questions may also arise as to whether a contracting authority which requires potential suppliers to use such services is effectively entering into a contract with the service provider by promising exclusivity in exchange for the availability of the service. Depending on the terms, that might be a contract covered by the Services Directive as a Part A service contract or a service concession to which the Directive would not apply. Whichever may be the case, the authority will be obliged to comply with the general principles of the EC Treaty as a minimum. These Treaty principles apply even for contracts that have a value below the EC Directives thresholds or for those excluded from the full application of the procedures laid down in the Directives, such as Part B services and service concession contracts.

In the *Telaustria* concession case, for example, the European Court of Justice (ECJ) stated that “the obligation of transparency which is imposed on the contracting authority consists in ensuring for the benefit of any potential tenderer a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed”.

In its consultation paper on the setting up of Public Private Partnerships the European Commission considers that the rules resulting from the relevant provisions of the EC Treaty can be summed up in the following obligations:

- fixing of the rules applicable to the selection of the private partner;
- adequate advertising of the intention to award a contract/concession and of the rules governing selection in order

- to monitor impartiality throughout the procedure;
- introduction of genuine competition between operators with a potential interest and/or who can guarantee completion of the tasks in question;
- compliance with the principle of equality of treatment of all participants throughout the procedure, ie selection on the basis of objective, non-discriminatory criteria.

Contracting authorities should therefore carefully consider seeking competition before they enter into any agreement with a private sector company for any provision of an accreditation or supplier list service, especially one which they intend to promote as their preferred source of suppliers. As discussed later, however, authorities must not restrict tenderers to only those suppliers listed or accredited to such services.

OFFICIAL LISTS

With regards to national official list registration requirements, the ECJ has held that 'foreign' undertakings cannot be required to register on national 'official lists' whereas indigenous undertakings can be. This appears to be reflected in the new Consolidated Directive at Article 52. The principle of 'home country registration' has to be recognised and taken at face value. On the other hand, there is reason to believe that the European Commission suspects that, in one or two Member States, official lists are misused to discriminate in favour of national suppliers. This perception seems to explain why the Commission refused to bring forward proposals for extending the scope of 'qualification systems' from the utilities sector to the public sector.

Indeed, an accreditation scheme would almost certainly be vulnerable to challenge if it involved an additional hurdle or disproportionate costs for foreign suppliers. However, if the same rules are applied for registration/accreditation to both national and foreign suppliers it might be arguable on the basis of the facts that the scheme treats them equally. It might even be arguable that such a scheme could be beneficial to both national and foreign suppliers by comparison with the conventional approach envisaged in the Directives.

The conventional approach means an appropriate time limit within which to provide relevant documentary evidence, examination of the evidence to establish compliance with the contracting authority's minimum qualification requirements and, under selective procedures (restricted, negotiated, competitive dialogue), selection of the undertakings to be invited to participate.

A private accreditation scheme might well serve the purposes of establishing whether undertakings meet a contracting authority's minimum requirements but it would need to be fairly sophisticated to serve the purposes of tenderer selection as well. On the other hand, there would potentially be a problem if the accreditation scheme was disproportionate to the subject of the contract(s) or took so long so as effectively to exclude any candidate not already registered. There is no express provision to that effect, however, even where the Directives apply.

SETTING CRITERIA

The EC recognises that within the parameters of the evidence that may be required and the nature of the award criteria permitted by the Directives a contracting authority is free to define its selection and award criteria, provided this choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States or in breach of other Treaty principles. These Treaty principles apply to all public contracts, irrespective of whether they fall within or without the scope of application of the Public Procurement Directives. They also apply to any conditions that will apply to the performance of a contract.

EC SELECTION PROCESS

The objective of the selection process is to identify those candidates considered by the contracting authority to be capable of

executing the contract and, in selective procedures, to select those to be invited to tender. Therefore, the different requirements must have a direct link to the subject matter or the execution of the contract at stake.

The EC Service Directive (92/50/EEC) indicates expressly that evidence of the service provider's technical capacity may be furnished by various exhaustively defined means according to the nature, quantity and purpose of the services to be provided.

As stated above, it would be extremely difficult for an accreditation service to ensure that, on each occasion a contracting authority used its services to identify potential tenderers, the accredited suppliers had been assessed and approved in accordance with the subject matter of that specific contract.

EC AWARD PROCESS

The common factor shared by all award criteria used for the evaluation of tenders is that they must concern the nature of the goods or services to be provided, the work to be carried out or the manner in which it is done. The criteria applied should give the contracting authority limited discretion to compare objectively the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in the Directives.

Unless price is the sole criterion, the objective of this assessment is to establish which tender best fulfils the needs of the contracting authority in relation to the consideration payable and costs of acquisition. Therefore, the function of the award criteria is to assess the intrinsic quality of the tenders and the award criteria have to be linked to the subject matter of the contract.

RULES FOR SELECTION OF CANDIDATES

The rules laid down in the Public Procurement Directives consist of three different types. The first set of rules concerns the grounds that justify a candidate's exclusion from participating in a public contract. These relate, for example, to a state of bankruptcy, conviction for offences, grave professional misconduct, and non-payment of social security contributions or taxes.

The second set of rules concerns a candidate's financial and economic standing.

The third set of rules concerns a candidate's technical capacity. These rules also enable, to a certain extent, environmental considerations to be taken into account, by defining, for example, a minimum level of equipment or facilities guaranteeing the correct execution of the contract.

The new Consolidated Directive specifies that the information required for evidence of an operator's financial and economic standing as well as for technical capacity must be related and proportionate to the subject matter of the contract.

Accreditation service providers may accredit suppliers etc on a wider range of criteria, some of which may not be relevant to a contracting authority's specific contract or may not be appropriate to consider at the selection stage. In such instances the contracting authority cannot rely on the accreditation given and will have to disregard extraneous elements and evaluate all potential suppliers against only those elements permitted in relation to the contract; thus potentially rendering such accreditation services of limited value.

For contracts covered by the EC Procurement Directives a list provider should only provide information of a type specifically set out in the Procurement Regulations, covering personal, economic and financial standing and technical capacity. Any accreditation status should be determined by sole reference to these areas.

In the Utilities sector, contracting entities dispose of a wider margin of appreciation for the assessment of the capacity of candidates or tenderers, in so far as Directive 93/38/EEC only requires that objective rules and criteria are applied which are defined beforehand and are put at the disposal of interested candidates or tenderers.

CONTRACTS NOT COVERED BY THE PROCUREMENT DIRECTIVES

For contracts not covered by the Public Procurement Directives, the detailed rules stemming from the Directives do not apply. Indeed Community law leaves it to the Member States to decide whether or not public procurement not covered by the Community Directives should be subject to national procurement rules.

Within the limits set by the EC Treaty and Community law, Member States are free to adopt their national legislation. It will therefore depend on national legislation whether public procurement may, or even shall, be used to fulfil objectives other than 'best value for money', subject to the single market objectives of the Treaty. When defining the subject matter of such a contract, a broad range of requirements and conditions may be imposed, even if these conditions and requirements do not have a direct link to the basic subject of the contract.

Of course, these requirements and conditions must observe the rules of the EC Treaty and the principles flowing from the Treaty. Thus, the ECJ has held that inclusion of clauses referring to national standards or specific origin in an invitation to tender may cause economic operators who produce products equivalent to products certified as complying with the national standard to refrain from tendering. If measures impose more rigorous rules on a national of one Member State, or put him in law or in fact in a less favourable position compared with a national of the Member State imposing the measure, these measures could infringe the Treaty rules on free movement of goods and services.

As regards the qualification of candidates, purchasing authorities are free to impose requirements and define conditions that go beyond what is possible under the Public Procurement Directives. The criteria need not be limited to the financial and economic situation of a candidate, or to his technical capacity and ability. Of course, the requirements for qualification have to be compatible with Community law and Community law principles, notably the rules and principles relating to the free provision of services, such as non-discrimination and mutual recognition.

For the evaluation of tenders, award criteria may be defined freely by a purchasing authority, as long as the Treaty rules and Community law principles are observed, and the criteria remain objective, transparent and non-discriminatory.

The question of whether the EC Treaty rules or the principles of Community law are observed depends on a case-by-case assessment.

APPROVED SUPPLIER LISTS

The UK does not have official lists, but subject to local government legislation contracting authorities may maintain lists of approved suppliers as an aid to calling for competition, approving candidates and expediting the selection of tenderers.

Questions may arise when contracting authorities insist that suppliers register on some form of supplier information database, if this is the only evidence they will accept from potential candidates and tenderers for their contract opportunities.

Two overriding principles must be applied:

1. When contracts are covered by the EC Directives inclusion on any list **MUST NOT** automatically pre-qualify any firm so that they can simply be invited to tender – firms must respond to the advertisement if they wish to be considered. Nor may a supplier be excluded from tendering because it is not registered on any list other than an official list, which does not apply in the UK.
2. Where the EC Procurement Directives do not apply then authorities may choose to use a list to help identify candidates to invite to tender. However, it should be remembered that Treaty principles of equality, transparency and freedom of movement apply even where the Directives themselves do not. The ECJ has held in a number of cases that there has to be an appropriate call

for competition in the interest of transparency to demonstrate compliance with the fundamental requirement for non-discrimination.

Accordingly, contracting authorities cannot simply select tenderers from their approved lists, even for contracts below the thresholds of the Directives.

Contracting authorities should therefore give careful consideration as to the merits of seeking to use an accreditation service to select candidates given that others must also be allowed to express their interest to tender. Tenderers may also question the worth of paying fees for accreditation if it provides little benefit. However, they may determine that, where they are repeatedly applying to tender for contracts from an authority that uses the services of an accreditation broker, pre-accreditation offers value for money.

OPEN ACCESS

Although the UK does not operate official lists, it is interesting in this context that Article 52 provides that "economic operators from other Member States may not be obliged to undergo registration [on an official list] or certification in order to participate in a public contract" and that, where official lists do exist, "economic operators may ask at any time to be registered in an official list or for a certificate to be issued. They must be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body."

It would seem, by analogy, that any delay in registration which had the effect of excluding a candidate from the contract for which accreditation was required would be unacceptable.

OTHER ANALOGIES

Article 33(4): "Contracting authorities shall give any economic operator, throughout the entire period of the dynamic purchasing system, the possibility of submitting an indicative tender and of being admitted to the system under the conditions referred to in paragraph 2. They shall complete evaluation (against both selection and award criteria) within a maximum of 15 days from the date of submission of the indicative tender. However, they may extend the evaluation period provided that no invitation to tender is issued in the meantime."

Thus evaluation of applications to participate in a dynamic system has to be undertaken quickly and before the system is used.

Similarly, the Utilities Directive provides for the establishment and operation of a system of qualification:

Article 49(3): "Contracting entities which establish and operate a system of qualification shall inform applicants of their decision as to qualification within a period of six months. If the decision will take longer than four months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused."

Article 53(1): "Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification...It shall be operated on the basis of objective criteria and rules for qualification to be established by the contracting entity."

Article 53(6): "Where a contracting entity considers that the qualification system of certain other entities or bodies meets its requirements, it shall communicate to interested economic operators the names of such other entities or bodies."

Thus, the Utilities Directive envisages:

- a. that qualification systems might be of indefinite duration (as opposed to being for the purposes of awarding a particular contract);
- b. that undertakings can apply at any time following publication of a notice; and
- c. that they must be told within two months if the contracting entity will need more than four months to reach a conclusion.

The implication is that, under the Public Procurement Directives, an accreditation system taking two or three months in relation to a specific contract would be considered to be unreasonably drawn out. It would be particularly vulnerable to challenge if that had the effect of precluding tenders and thus of favouring known undertakings.

FEES

Another even greater problem, however, might be the disproportionate cost for new undertakings seeking qualification for a particular contract by comparison with the spread cost for repetitive candidates. Much might depend therefore on whether the cost of accreditation for a series of contracts significantly exceeds the normal cost of qualifying for one of them. There would be another cause for concern if a company offering accreditation services to undertakings purported to secure favoured treatment from contracting authorities rather than acting as a means of securing equal treatment.

Do remember that the Local Government Act 1988 precludes authorities covered by the Act charging for inclusion on a select list.

The Office of the Deputy Prime Minister has issued guidance stating that where an authority contributes to the design or contents of such a list, for example by contributing to the decision as to who is to be registered on the list or to the criteria determining registration, then there is a possibility that this could be construed as 'maintaining' a list and so fall within the scope of Part II of the 1988 Local Government Act. In these latter circumstances, where local authorities have required contractors to appear on such a list, it will not be appropriate for a charge to be made for inclusion on such a list.

Notwithstanding the above, guidance and rulings on the interpretation of the Directives and the EC Treaty are continually being developed by the Commission and ECJ. Therefore, on the issues raised herein, both the Commission and the Court might take a more restrictive view.

SUMMARY

1. The use of an accreditation service by a contracting authority to help identify potential suppliers is permitted provided accreditation is set against criteria specific to the contract opportunity.
2. Any contract, concession or other agreement entered into by a contracting authority with a select list or accreditation service provider should first be subject to competition in accordance with the EC Treaty and, where applicable, the EC Directives.
3. Local authorities must not directly contribute to the content, operation, design or management of fee-based selection or accreditation services. Nor may they charge for inclusion in their supplier lists.
4. The presence of a firm on a list or a supplier accreditation database must not automatically mean that it should be invited to tender.
5. The absence of a contractor from a list or a supplier accreditation database must not preclude that potential contractor from consideration.
6. The ability to seek accreditation must constantly be open to all.
7. The time taken to process accreditation must not preclude suppliers from any tender opportunity.
8. For contracts covered by the EC Procurement Directives, all elements of accreditation must be relevant to the specific contract matter on each occasion and both selection and award criteria must be linked to the subject matter of the contract.
9. Contracting authorities should not effectively delegate the selection of tenderers to list/accreditation service providers.
10. Payment must not be disproportionate for new undertakings

seeking qualification for a particular contract by comparison with the spread cost for repetitive tenderers.

Caution: The above is meant as general guidance only and should not be used as the basis for any decision without first seeking legal advice.

The Office of Government Commerce has recently released a guidance, Points for Purchasers to consider in relation to Supplier Accreditation Services, which highlights the following points:

1. Public bodies considering using a commercial accreditation service should be clear on their reasons for doing so, and should assess the potential impact on their SME supply base in coming to a decision as to whether or not to proceed. In this respect, they should consider contacting existing users of the service and other authorities that have considered use. They should also be aware of the legal context, and the ongoing debate as to the compliance of such a service with S22 of the 1988 Local Government Act.
2. In order to minimise the financial and administrative burden on suppliers through duplication of effort, purchasers may wish to ascertain whether suppliers have already undertaken accreditation in order to compete for other public bodies' business.
3. Users of commercial supplier accreditation services should be cognisant of the need to avoid creating a 'closed market' by unnecessarily restricting tendering opportunities to suppliers on the accreditation service provider's database. Purchasers should be conscious of the benefits of open competition in terms of securing VFM, and accessing a diverse supplier base. Accreditation should not be a prerequisite for competing for a purchaser's business.
4. Purchasers using a commercial accreditation service should ensure that the level of assessment to which suppliers are subject is in proportion to the level of risk associated with the business the suppliers are seeking. Assessment should not impose a disproportionate burden on suppliers.
5. Users of commercial supplier accreditation services should ensure that they monitor the impact of the service upon suppliers, and should offer suppliers a recognised channel for raising concerns over the service - at the very least suppliers should be made aware of the mechanism for reporting non-compliance with OGC's 'Government Procurement Code of Practice'. The purchaser's contract with the accreditation service provider should ideally contain a specified process for addressing issues raised by suppliers to the satisfaction of the purchaser.
6. With specific reference to the construction sector, purchasers should note that Constructionline is the government-endorsed supplier pre-qualification service for public works contracts, established in response to the Latham Report, provided under contract to DTI, and providing significant benefits to both purchasers and suppliers through the maintenance of a single central repository of supplier pre-qualification data.
7. Before making the decision whether or not to use a commercial accreditation service to source suppliers it may be worth waiting to consider the OGC report due to be published in late 2005.

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