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PUBLIC PROCUREMENT TRANSPARENCY & INTEGRITY

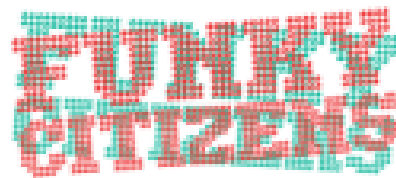
Procurement Glossary



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Procurement Glossary Terms

Abnormally Low Tenders

An abnormally low tender occurs when an economic operator offers a price that seems too low to cover the cost of the contract and therefore is doubted to be economically sustainable.

This could be caused by:

- New innovative technical solutions;
- Particular circumstances to obtain supplies or subcontract tasks at favourable conditions;
- Misunderstanding or misinterpretation of the requirements of the contracting authority;
- Underestimation of risks;
- Possibility of the tenderer to obtain state aid;
- Non-compliance with social, labour, and environmental laws;
- Deliberate strategy of an economic operator.¹

Contracting authorities must ask economic operators for an explanation of the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies, or services.²

The economic operator must have the opportunity to explain why it was able to submit such a tender and cannot be automatically excluded without having had the opportunity to explain the bid in question.³

It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed. The rejection of an abnormally low tender must be duly justified in the evaluation report.⁴

Award

The issue of a contract to a selected company or person.

¹ SIGMA, “Abnormally Low Tenders” [September 2016]

² European Commission, “Public Procurement Guidance for Practitioners” [February 2018]

³ CJEU, Cases 76/81 Transporoute, C-103/88 Fratelli Costanzo, C-599/10 SAG ELV Slovensko and Others.

⁴ European Commission, “Public Procurement Guidance for Practitioners” [February 2018]

Bid Rigging

When Bid Rigging occurs competing parties collude to submit uncompetitive bids in order to ensure that the contract is awarded to on particular bidder, often at a high price.⁵ In most or even all legal systems, this is an illegal practice.

Bidder

A bidder is an individual, organization, or entity submitting a competitive proposal to an invitation to tender.

Bidding

Bidding is when a contract is put up for auction. Whenever a public authority needs to contract, they have to start a bidding process in which they publish the conditions for contracting and economic operators can submit their proposals.

Bodies governed by public law

Public law bodies are those that have all of the following characteristics:

- they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- they have legal personality; and
- they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.⁶

⁵ Will Kenton, "Crime & Fraud" [Investopedia, 23 March 2018] <<https://www.investopedia.com/terms/b/bid-rigging.asp>> accessed 29 August 2019

⁶ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Art 2

Competitive Dialogue

The competitive dialogue procedure aims to provide a certain amount of flexibility for particularly complex purchases. As with competitive procedure with negotiation, this process is only allowed in certain circumstances and the contracting authority must justify its use.

A selection is made of those who respond to the call for tender and the contracting authority begins dialogue with potential bidders, to develop one or more suitable solutions for its requirements. Based on this, chosen bidders will be invited to tender.⁷

- Prequalification – Any economic operator may submit a request to participate in response to a call for tender by providing the information for qualitative selection that is requested by the contracting authority.⁸ At least three economic operators are shortlisted based on their capacity to perform the contract.
- Dialogue - The contracting authority then issues the invitation to participate only to the shortlisted economic operators, and enters into a competitive dialogue phase with them.
- Selection and evaluation - Once the contracting authority is confident that it will receive satisfactory proposals, it invites the economic operators to submit their tenders, which will be evaluated on the basis of the most economically advantageous.⁹

Competitive Procedure with Negotiation

The Competitive Procedure process is only allowed in certain circumstances and the contracting authority must justify its use.

It involves shortlisting at least three candidates who responded to the call for tender in the OJEU and only those shortlisted are invited to submit an initial tender and then negotiate. The contracting authority may then open negotiations with the tenderers to seek improved offers.¹⁰

- Prequalification - the contracting authority publishes a contract notice and all interested economic operators may ask to participate in the procedure. To do so, they must

⁷ Crown Commercial Service, “A Brief Guide to the 2014 EU Public Procurement Directives” [October 2016]

⁸ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Art 30

⁹ European Commission, “Public Procurement Guidance for Practitioners” [February 2018]

¹⁰ Crown Commercial Service, “A Brief Guide to the 2014 EU Public Procurement Directives” [October 2016]

demonstrate that they are qualified to perform the contract by providing the information for qualitative selection that is requested by the contracting authority.¹¹

- Evaluation - The contracting authority may then choose at least three candidates and invite them to submit an initial tender as a basis for subsequent negotiation.
- Negotiation - A negotiation phase is then organised on the basis of the initial tenders, while the evaluation will consider the final version of the tenders based on the most economically advantageous.¹²

Concession Contracts

Concessions are partnerships between the public sector and an economic operator (mostly private companies). The economic operator provides services or carries out work and is remunerated by being permitted to exploit the work or service and is exposed to a potential loss on its investment.¹³

An example of a Concession Contract would be where a private company builds and manages a motorway and is remunerated through tolls, running the risk that the revenue generated will not cover its investment and other costs incurred.

This differs to a public contract where a company is paid a fixed amount for completing the required work or providing a service. For example, a private company builds and manages a motorway for a fixed price.¹⁴

There are two types of concession contracts:

- Works - the economic operator carries out the development of infrastructure (e.g. ports, water distribution, parking garages, toll roads)

¹¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Art 29

¹² European Commission, "Public Procurement Guidance for Practitioners" [February 2018]

¹³ European commission , 'Concession contracts - partnerships between the public sector and a private company' [Internal Market, Industry, Entrepreneurship and SMEs - European Commission]
<https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/concessions_en>
accessed 29 August 2019

¹⁴ European commission , 'Concession contracts - partnerships between the public sector and a private company' [Internal Market, Industry, Entrepreneurship and SMEs - European Commission]
<https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/concessions_en>
accessed 29 August 2019

- Services - the economic operator provide services of general economic interest (e.g. energy, water distribution and waste disposal).¹⁵

Contracting Authorities

The body that issues a contract is known as the contracting authority. This will be a national, regional, or local authority, a body governed by public law, or an association formed by bodies governed by public law.¹⁶

Two categories of Contracting Authorities have been introduced into Directive 2014/24/EU:

- central government authorities (national public bodies)
- sub-central contracting authorities (operating at regional and local level)

A main difference is that the threshold is higher for sub-central contracting authorities in the cases of supply contracts and most service contracts.¹⁷

Economic operator

Any person or public entity that offers the execution of works, the supply of products or the provision of services on the market.¹⁸

Innovation

Innovation is the implementation of a new or significantly improved product, service, or process with the purpose of helping to solve societal challenges or to support, sustainable, and inclusive growth.¹⁹

¹⁵ European commission , “Directive of the European Parliament and of the Council on the award of Concession Contracts – Frequently Asked Questions” [Press Release Database, 15 January 2014]

<https://europa.eu/rapid/press-release_MEMO-14-19_en.htm?locale=en> accessed 29 August 2019

¹⁶ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Art 2

¹⁷ European Commission, “Public Procurement Guidance for Practitioners” [February 2018]

¹⁸ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Art 2

¹⁹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Art 2

Innovation Partnerships

The aim of the innovation partnership is for the contracting authority to purchase research and development services to develop an innovative product, service, or works that cannot be met by purchasing products, services, or works already available on the market.

The contracting authority may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.

The contracting authority will then purchase the created innovative supplies, services, or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants involved in the innovation partnership.²⁰

Life cycle

The life cycle of a public contract comprises all the consecutive and/or interlinked stages throughout the existence of the product or the works or the provision of the service.

Lots

Lots are the lawful divisions of a large contract into smaller contracts, which may be awarded and performed by different economic operators. Article 46 of Directive 2014/24/EU allows these divisions as a way to encourage SMEs entering public procurement.

However, it constitutes a risk for corruption since in some cases contracting authorities will artificially divide contracts in order to decrease their value and curb European rules.

Modifications to the Contract

A contract can be modified without a new procurement procedure when “the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses”.²¹

²⁰ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Art 31

²¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Art 72 1(a)

If it is not in the contract, they can only be modified in the following exceptional circumstances, with the additional conditions that the modifications have an objective cause and that they do not alter the contract's nature:

- Modifications are not considered to be “substantial”. The following are considered to be substantial modifications:
 - a. the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
 - b. the modification changes the economic balance of the contract. For example, when the new works would cost more than 50% of the original budget;
 - c. the scope of the contract is significantly extended. This happens whenever the total budget is increased by more than 15% in public works or 10% in the rest. This is also the case when after making the modifications a contract not previously under the Directives reaches the thresholds.
- For additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor cannot be made for economic or technical reasons or would cause significant inconvenience or substantial duplication of costs.
- The need of modification has been brought about by a change of circumstances, which a diligent contracting authority could not have foreseen.

For all these cases, the sum of all modifications cannot be higher than 50% of the value of the original contract.²²

OJEU

Official Journal of the European Union, commonly known as “the OJ”, is the official gazette of the EU and is the formal source of EU legislative information. It is published daily in all the official languages of the EU.

All tenders from the public sector which are valued above a certain financial threshold according to EU legislation must be published in the OJEU.²³

²² CIVIO, “*Contratopedia: Guía básica de la Ley de Contratos del Sector Público para principiantes*”

²³ Ojeu.eu, “Welcome to OJEU.eu” [OJEU] <<https://www.ojeu.eu/>> accessed 29 August 2019

There are three main notices that must be advertised in the OJEU for above the threshold procurement projects:

- Prior Information Notice (PIN) – while not mandatory, this notice allows contracting authorities to inform the market of its upcoming contracts within the year.
- Contract Notice (CN) – this is a mandatory notice which is used to launch a procurement procedure containing fundamental information about the contract.
- Contract Award Notice (CAN) – also mandatory, this notice informs the market of the outcome of the procurement procedure.²⁴

Open Procedure

In Open Procedures, tendering is public, therefore any interested economic operator may submit a tender in response to a call for competition within the Official Journal of the European Union (OJEU) by submitting a tender for the contract.²⁵

The selection and evaluation is carried out after the tenders have been submitted. All tenders must be considered without any form of prior selection process.²⁶

This process is also known as open tendering, competitive bidding, open competition, or open solicitation.

Preliminary Market Consultations

Before launching a procurement procedure, contracting authorities may conduct market consultations in order to prepare the procurement and inform economic operators of their procurement plans and requirements.²⁷

A preliminary market consultation involves interviewing market stakeholders or contacting experts within the field.²⁸

²⁴ European Commission, “Public Procurement Guidance for Practitioners” [February 2018]

²⁵ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Art 27

²⁶ European Commission, “Public Procurement Guidance for Practitioners” [February 2018]

²⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

²⁸ European Commission, “Public Procurement Guidance for Practitioners” [February 2018]

Public Contracts

A written contract for pecuniary interest (the exchange of services²⁹) between one or more economic operators and one or more contracting authorities. The object of the contract is the execution of works, the supply of products or the provision of services.³⁰

- Works contracts - either solely the execution, or both the design and execution of works e.g. building or civil engineering.
- Supply contracts - the purchase, lease, rental or hire purchase of products e.g. computers.
- Service contracts - the provision of services e.g. consultancy.³¹

Restricted Procedure

The restricted procedure is a two-stage process where a selection is made of those who respond to the call for tender and only pre-selected tenderers may submit tenders.³²

- Prequalification - a contract notice is published inviting potential tenderers to present expressions of interest. Any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting authority.³³ The contract notice may indicate the relevant information to be submitted via a detailed European single procurement document.
- Selection and Evaluation – those who submitted an expression of interest are then evaluated and the invitation to tender is issued to at least five pre-selected tenderers.³⁴

²⁹ Nathan Holden, 'What constitutes a "contract for pecuniary interest" under the Public Contracts Regulations (PCR) 2015?' [Freeths, 6 November 2018] <<https://business.freeths.co.uk/post/102f5cg/what-constitutes-a-contract-for-pecuniary-interest-under-the-public-contracts-r>> accessed 29 August 2019

³⁰ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Art 2

³¹ European Commission, "Public Procurement Guidance for Practitioners" [February 2018]

³² European Commission, "Public Procurement Guidance for Practitioners" [February 2018]

³³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Art 28

³⁴ European Commission, "Public Procurement Guidance for Practitioners" [February 2018]

TED

TED stands for “Tenders Electronic Daily”. It is the online version of the 'Supplement to the Official Journal' of the EU, dedicated to European public procurement. In this platform 520 thousand procurement notices are published a year, including 210 thousand calls for tenders which are worth approximately €420 billion.³⁵

The Public Procurement Directives have made it compulsory for contracting authorities to publish all notices for those contracts above the EU threshold in this platform, in order to ensure fair competition and the correct functioning of the single market.

Tenderer

An economic operator that has submitted a tender.

Tendering

To tender is to invite bids for a project or accept a formal offer.³⁶

³⁵ Europa.eu, “About TED” [TED] <<https://ted.europa.eu/TED/misc/aboutTed.do>> accessed 29 August 2019

³⁶ Will Kenton, “Mergers & Acquisitions” [Investopedia, 9 April 2019]
<<https://www.investopedia.com/terms/t/tender.asp>> accessed 29 August 2019