Public Procurement World - United Kingdom

4. Bidder Selection

| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# a. Are there any rules on the selection criteria?

Under the PCR 2015, selection criteria may be related to (a) suitability to pursue a professional activity; (b) economic and financial standing; and (c) technical and professional ability. Contracting authorities shall limit the criteria to those which are appropriate to ensure that a candidate has the technical and professional abilities and the legal and financial capacities to perform the contract to be awarded. All requirements should be proportionate and relate to the subject-matter of the contract.

# b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Except for the open procedure, all of the procurement procedures include a pre-qualification stage. During this stage, the contracting authority will send out a pre-qualification questionnaire (a "PQQ") containing the qualification eligibility and selection criteria, being the methodology used to assess whether bidders are qualified to bid. These criteria must be transparent and non-discriminatory. Pre-qualification is not allowed for below-threshold procurements, except pre-qualification based on mandatory exclusion grounds (see below for further information).

# d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

Regulation 57 of the PCR 2015 sets out the various mandatory and discretionary exclusion grounds for contracting authorities to exclude prospective bidders. Blacklisting an entity prevents such entities competing for public contracts for a period specified in the PCR 2015, if that entity falls within one or more of the exclusion grounds. Similar provisions apply under the UCR 2016.

Any economic operator which falls within the exclusion ground(s) may supply evidence proving that measures implemented by the economic operator are sufficient to demonstrate its reliability in spite of the existence of a relevant ground for exclusion. If the contracting authority considers such evidence to be sufficient, the economic operator shall not be excluded from the procurement procedure.

# e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

No. The PCR 2015 do not prevent companies from being involved in the preparation of the procurement procedure or engaging in preliminary market consultations with the contracting authority. However, the contracting authority must take appropriate measures to ensure that competition is not distorted by the participation of that company. A company can be excluded from the procedure because of their prior participation, but only where there are no other means to ensure the contracting authority's compliance with its duty to treat economic operators equally. Before being excluded, a company will be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

# f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

Groups of economic operators may take part in procurement procedures. Contracting authorities may specify how groups of economic operators are to meet the selection criteria in the procurement documents, provided that this is proportionate and justified by objective reasons. Conditions for the performance of a contract by groups of economic operators which are different from those for individual participants must be proportionate and justified by objective reasons as well. To the extent necessary for the satisfactory performance of the contract, once groups of economic operators have been awarded the contract, contracting authorities may require the group to assume a specific legal form.

Bidder consortia may be excluded from the competitive procedure if the formation of the bidder consortium itself is considered to have the aim of distorting competition. This is a particular risk if the participating companies are competitors on the same market. However, even in such circumstances, it may be possible to justify entering into a consortium if:

the individual members of the consortium are not able to submit a bid on their own because they lack the required capabilities;

the members of the consortium are otherwise engaged in a way that prevents them from making use of their capabilities; or

only the association of the companies enables them to submit a promising bid (i.e. they would not have been able to submit a bid with a chance of receiving the award on their own).

It is up to the participants of a bidding consortium to convince the contracting authority that their association does not present grounds for exclusion.

In contrast, non-competitors that form a bidder consortium are less likely to be deemed to have entered into an agreement to distort competition.

# g. Can members of a bidder consortium be changed during a procurement procedure?

This issue is not specifically prohibited in the PCR 2015. As noted above, contracting authorities are permitted to impose additional conditions for the performance of a contract by such groups of economic operators which are different from those imposed on individual bidders, but the conditions must be proportionate and justified by objective reasons. Further, contracting authorities must ensure that they comply with their general obligations to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner. Additionally, the rules in respect of modifications to contracts must be adhered to (see the answer to question 2e above).

# h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

The PCR 2015 do not address the issue of restrictions upon the participation of related bidders in the same procedure. However, this has been the subject of EU case law. For example, in *Assitur* (C-538/07), the CJEU held that exclusion of related bidders was permitted. Nevertheless, the court noted that contracting authorities should not adopt blanket prohibitions; related bidders must be given the opportunity to demonstrate that their conduct has not been influenced by their relationship.

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