

# Notifying Tenderers and Disclosure of Information

## Introduction

The purpose of this note is (1) to provide information on the obligations of contracting authorities in notifying unsuccessful tenderers and providing information on public contracts covered by the EU procurement Directives and (2) to offer general guidance on voluntary debriefing of unsuccessful tenderers.

### 1. EU Remedies Directives' and ECJ Case Law Obligations

**1.1** Unsuccessful candidates and tenderers for any public contract should be informed of the results of a tendering process without delay. Recent case law of the European Court of Justice (ECJ) has interpreted the EU Remedies Directives as requiring that unsuccessful tenderers for contracts covered by the EU procurement Directives must have the opportunity to have a contract award decision rescinded if their rights have been infringed or an award decision is deemed unlawful (Alcatel – Case C-81/98).

**1.2** This requires that unsuccessful tenderers for contracts covered by the EU Directives be notified promptly of the outcome of a tendering procedure and that a contract is not formally awarded before an interval, during which an unsuccessful tenderer can seek a review of the decision if s/he feels that the process has been unfair or unlawful, has elapsed. (*See sample notification at Appendix I which suggests a 14 calendar day interval, or seven calendar days in the case of a contract advertised under an accelerated procedure due to urgency*). This implies that any notification to the tenderer deemed successful during this interval must be provisional and not constitute a contractual arrangement (*See sample notification at Appendix II*)<sup>1</sup>. Tender documentation should include a statement indicating the need for an appropriate interval after the award decision is notified and before a formal contract is put in place.

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<sup>1</sup> Ireland's transposition of the Remedies Directives currently provides that a contract award decision may be rescinded by the Courts at any time. However, on the basis that a Court may be inhibited from rescinding a decision of a contracting authority if a formal contract is in place, the EU Commission interprets the ECJ "Alcatel" judgment as requiring a "standstill period" between the award decision and the signing of a contract.

An appropriate legal provision to this effect is currently being considered in consultation with the Office of the Attorney General. Observing the notification procedure set out here should meet the ECJ judgment and any legal provisions that might be introduced. Any substantive change will be notified in future guidance on Remedies and Infringement procedures or an updated version of these guidelines which can be accessed on [www.etenders.gov.ie](http://www.etenders.gov.ie).

## **Disclosure of Information – Other Directive and FOI Provisions**

**1.3** Proposals in a tendering process are normally submitted on a confidential basis. In order to preserve the integrity of the process and to respect the commercial and competitive positions of tenderers, details of tenders must be kept confidential at least until the evaluation process is concluded. After the award of a contract certain information must be disclosed. Under the public procurement Directives, contracting authorities are required to provide certain information on contracts above the EU thresholds. Two particular provisions on disclosure of information in the procurement Directives require that:

- any eliminated candidate or tenderer who requests it must be informed promptly (within 15 days) of the reasons for rejection and of the characteristics and relative advantages of the successful tenderer as well as the name of the successful tenderer
- certain information on the contract awarded (or framework agreement concluded), including the name of the successful contractor(s) and the price, or range of prices, paid, must be submitted for publication in the EU Journal not more than 48 calendar days after the award. The information must be set out in accordance with the relevant model notice annexed to the Directives.

However, information may be withheld from publication if release

- would impede law enforcement or would otherwise be contrary to the public interest,
- would prejudice the legitimate commercial interests of particular undertakings or
- might prejudice fair competition.

## **Report on Contracts Awarded**

**1.4** For contracts above EU thresholds a contracting authority is required to prepare a written report containing fundamental information, as outlined in Article 43 of the public sector procurement Directive 2004/18/EC, on the award procedure adopted. This report, or the main features of it, may be requested by the EU Commission at any time.

## **Freedom of Information**

**1.5** Freedom of Information (FOI) legislation applies to a wide range of public bodies and information may be requested on records relating to a tendering procedure of a contracting authority covered by the FOI Act. Certain records may be exempt from the provisions of the Act on grounds of confidentiality or commercial sensitivity. Tenderers are normally requested to indicate, with supporting reasons, any information included with their tenders which they wish to be regarded as confidential. A contracting authority's deciding officer will normally consult with a tenderer before deciding on whether to disclose such information on foot of an FOI request.

However, no category of tender related records is subject to either release or exemption as a class. Therefore each record must be examined on its own merits. A general summary of the Information Commissioner's views on the treatment of tender related records is given at Appendix III for information.

## **2. Voluntary Debriefing of Unsuccessful Tenderers**

**2.1** Apart from observing legal obligations where the provisions of the procurement Directives apply, where contracts are awarded on the basis of the most economically advantageous tender it is good practice to adopt a voluntary constructive policy on debriefing unsuccessful candidates. It is recommended that unsuccessful tenderers be given an objective assessment of the comparative strengths and weaknesses of their tenders having due regard to commercial sensitivity and the need to avoid compromising the rights or competitive situation of other tenderers. There are important benefits from giving constructive feedback to unsuccessful bidders.

For contracting authorities it can

- identify ways of improving the process for the future
- encourage better bids in the future
- help establish the public sector as a fair, open and ethical buyer and
- encourage continued participation by suppliers which promotes competition.

For tenderers it can

- generate confidence and reassurance about the integrity of the process
- help improve future performance
- help them understand and operate the different procedures and practices that might apply in the public sector.

It should also be borne in mind that voluntary disclosure of information can avoid the need for recourse to formal measures such as the Freedom of Information Act or EU Remedies Directives.

### **Smaller Procurements**

**2.2** At a minimum, unsuccessful candidates and tenderers should be informed of the outcome of their application or tender. It is good practice to give tenderers the reason for the unsuccessful bid by reference to their relative performance under the relevant evaluation criteria used in the competition, for example, uncompetitive on price. Subject to being satisfied as to the identity of the tenderer, an offer of feedback by telephone should normally be sufficient for smaller procurements.

### **Larger Procurements**

**2.3** For larger contracts, for example contracts above €50,000 for services or supplies (the value above which a more formal tendering process is recommended), contracting authorities should offer unsuccessful tenderers an opportunity of a debriefing meeting. The time and resources to be devoted to debriefing is likely to be reduced if contracting authorities provide as much information as possible in the notification of the award decision. The sample notice at Appendix I, or an adapted version of it, may be suitable. The notification should include the name and details of the person to be contacted about debriefing. In practice, subject to being satisfied as to the identity of the tenderer, many requests may be satisfied by telephone feedback.

**2.4** Where a more formal or personal debriefing is required, a structured approach for the debriefing should be adopted. It would be prudent to have at least two officers from the contracting authority in attendance and a note of the proceedings kept for the records. The process should address the supplier's offer against the evaluation criteria. It should focus on the relevant strengths and weaknesses of the tender without being an explicit comparison between the supplier's offer and the successful offer, or any other offer.

**2.5** Care should be taken to ensure that information such as the identity of other tenderers, the prices or pricing strategies of other tenderers or information that could compromise the competitive situation or infringe the intellectual property rights of others, is not disclosed. However, in this regard it should be borne in mind that certain information about the successful tender, the price for example, may be in the public domain. The Freedom of Information principles on the disclosure of records relating to

a tender competition summarised by the Information Commissioner, reproduced at Appendix III, may also be relevant.

**2.6** The debriefing should not be a forum to debate the process of how tenders were evaluated or discuss the merits of the award decision. Constructive and effective debriefing will be very much assisted if clear, objective criteria for qualification and award of the contract have been pre – established and applied objectively. In general if there has been an objective and properly conducted tendering process, an open constructive debriefing should provide reassurance to unsuccessful tenderers.

July 2004

**Appendix I**

[Contracts covered by EU Directives - sample notification and offer of debriefing to unsuccessful tenderers].

Date.....

**Tender for .....**

Dear .....

I refer to your tender in respect of the above and (*if applicable*) your presentation of (*date*). The evaluation process has been completed and I regret to inform you that on this occasion your tender has not been successful.

The formal award of the contract to the successful tenderer is expected to take place on or after ... (*14 calendar days from date of notification – or seven days in the case of an urgent or accelerated procedure*).

\* Relevant marks awarded against each of the award criteria are as follows:

	<b>Award Criteria</b>	<b>Maximum marks available</b>	<b>Marks awarded to your tender</b>	<b>Marks awarded to successful tenderer</b>
A	Quality of proposal for providing service detailed at ? [Section 2 (?)] of RFT	70	60	60
B	The management and service structure proposed	30	24	30
C	Expertise and skills of personnel proposed for providing the service required	30	22	27
D	Timeframe for delivery	20	12	15
E	Proposed cost of providing service	50	30	45
	<b>Totals</b>	<b>200</b>	<b>148</b>	<b>177</b>

\* [As an alternative to providing marks awarded, a contracting authority may consider it more appropriate to give reason(s) why a tender was unsuccessful].

If you are interested in further feedback as to why your tender was unsuccessful, you may contact the undersigned. I would like to take this opportunity to thank you for responding to the request for tenders and wish you success in the future.

Yours sincerely

\_\_\_\_\_  
**Name**

**Title**

Telephone:

e-mail:

**Appendix II**

[Contracts covered by EU Directives - Provisional notification to successful tenderer].

Date .....

**Tender for .....**

Dear .....

I refer to your tender in respect of the above. We have now conducted our evaluation of tenders and, at this stage, I am pleased to inform you that your company appears to have presented the most economically advantageous bid for this project.

**Please note that this letter is issued without prejudice; it does not purport to create binding legal relations and no legitimate expectation shall arise therefrom. A formal contract will not be put in place before ....(14 days / seven days, as appropriate, from date of notification).**

At this stage I would appreciate if you forward .... (*documentary or other evidence, where applicable*), and your firm's Tax Clearance Certificate from the Irish Revenue Commissioners. Details on the procedure for obtaining Tax Clearance Certificates are available at <http://www.revenue.ie> .

(*I enclose a draft contract document and*) I would be obliged if we could arrange a meeting at your earliest convenience in order to advance the process of discussing formal contractual matters.

Yours sincerely,

\_\_\_\_\_  
**Name**

**Title**

Telephone:

e-mail:

### Appendix III

*Summary of the Information Commissioner views regarding disclosure of records relating to a tender competition given at conclusion of a ruling under Section 34(2)m of the Freedom of Information Act 1997 in Case 98188.*

- First, public bodies are obliged to treat all tenders as confidential at least until the time that the contract is awarded.
- Second, tender prices may be trade secrets during the currency of a tender competition, but only in exceptional circumstances, would historic prices remain trade secrets, As a general proposition, however, I accept that tender documents which “would reveal detailed information about a company's current pricing strategy” or about otherwise unavailable product information could fall within the scope of Section 27(I)(a) of the FOI Act even following the conclusion of a tender competition.
- Third, tender prices generally qualify as commercially sensitive information for the purposes of Sections 27(I)(b) and (c) of the FOI Act, Depending on the circumstances, product information can also be considered commercially sensitive under Section 27(I)(b).
- Fourth, when a contract is awarded, successful tender information loses confidentiality with respect to price and the type and quantity of the goods supplied. The public interest also favours the release of such information, but exceptions may arise (see *Telecom Eireann and Mr. Mark Henry, Case Number 98114*, to be published (13 Jan 2000)).
- Fifth, other successful tender information which is commercially sensitive (for example, details of the internal organisation of a tenderer's business, analysis of the requirements of the public body, or detailed explanations as to how the tenderer proposed to meet these requirements) may remain confidential. Disclosure in the public interest ordinarily would not be required, unless it were necessary to explain the nature of goods or services purchased by the public body.
- Sixth, unsuccessful tender information which is commercially sensitive generally remains confidential after the award of a contract, and the public interest lies in protecting that information from disclosure.

I must stress, however, that no tender-related records are subject to either release or exemption as a class. Therefore each record must be examined on its own merits in light of the relevant circumstances.