

# **Construction Procurement Handbook**

## **Chapter 9**

### ***Feedback to Candidates***

<b>Section</b>	<b>Subject</b>	<b>Page</b>
1.	<a href="#"><u>Introduction</u></a>	3
2.	<a href="#"><u>Legislation</u></a>	3
3.	<a href="#"><u>Feedback – Contracts Regulated by the 2015 Regs</u></a>	4
4.	<a href="#"><u>Feedback– Contracts Regulated by the Act</u></a>	5
5.	<a href="#"><u>Feedback – Unregulated Contracts</u></a>	6
6.	<a href="#"><u>Objectives of Providing Feedback Information</u></a>	6
7.	<a href="#"><u>Feedback Meeting</u></a>	7

## Introduction

1.1 The Review of Scottish Public Sector Procurement in Construction noted that a source of great frustration for the construction industry is what is often perceived as a lack of meaningful feedback on the merits of tenders submitted. The Review suggested this was because contracting authorities had a general fear that any feedback provided could be used to challenge the procurement process, as well as a lack of time.

1.2 Providing meaningful feedback to both successful and unsuccessful candidates is an important element of the tendering process. Besides being a courtesy, which breeds good relationships and trust, it helps suppliers to improve their competitive performance, which in turn, improves the quality of future bids for public sector work. Moreover, participation in a feedback meeting can be useful for the contracting authority in gaining a better understanding of the marketplace and those operating within it.

1.3 Unsuccessful candidates do, in certain circumstances, have a legal right to know the reasons why their tender has not been accepted; while successful bidders can also be entitled to seek feedback in order to help them identify any improvements that could be made to future bids.

1.4 Within this chapter, reference is made to *candidates*, that is any individual or organisation that takes part in a procurement process and *bidders*, that is any individual or organisation who submits a tender within a procurement process.

## Legislation

2.1 The Procurement Reform (Scotland) Act 2014 (*The Act*) and The Public Contracts (Scotland) Regulations 2015 (*The 2015 Regs*) include provisions on giving feedback to bidders and advising them of decisions made by a contracting authority for procurements regulated by both. The legislation prescribes the minimum information that should be made available to bidders as well as the point at which any debriefing takes place.

2.2 The relevant parts are [Regulations 56](#) and [84 – 86 of the 2015 Regs](#), for contracts equal to or above the 2015 Regs thresholds, and [sections 32 – 34 of the Act](#), for contracts worth at least the Act thresholds, but less than the 2015 Regs thresholds. Thresholds are published by the Scottish Government and can be accessed at: <https://www.gov.scot/Topics/Government/Procurement/policy/10613>

2.3 The type of feedback required is dependent on the point at which a candidate leaves the selection or tender process. If a candidate is eliminated from the process prior to submitting a tender, then the level of debrief legally required can be different from what is required for a bidder who submits an unsuccessful tender. In all cases where feedback is required, this should be provided as “*soon as reasonably practicable*” after the decision to award the contract has been made, or after the point at which they were eliminated from the process, if this was prior to contract award. Any candidate can, however, request additional feedback which the contracting authority is statutorily required to provide within **15 days** for contracts regulated by the 2015

Regs and **30 days** for those regulated by the Act. This feedback is required to be of a more in depth nature than any previously given to that bidder. This will be explained in more detail in the rest of this chapter.

**2.4 Withholding Information.** Under Regulation 85(5) of the 2015 Regs and Section 34 of the Act, the contracting authority can, in giving feedback, withhold information, the release of which would:

- impede law enforcement or otherwise be contrary to the public interest;
- prejudice the commercial interests of any person; or,
- prejudice fair competition between economic operators.

**2.5** Under Regulation 85(4) of *the* 2015 Regs a **standstill notice is not legally required** in the following circumstances:

- the only bidder to submit a tender is the one awarded the contract (or to become a party to the framework agreement) and there are no remaining candidates who have not already been notified that they have been unsuccessful in the process, and the full reasons for that;
- the contract is awarded under a framework agreement or a dynamic purchasing system; or
- the contract or framework agreement is exempt from the requirement for prior publication of a contract notice.

## **Feedback – Contracts Regulated by the 2015 Regs**

**3.1** When awarding a tender for a contract regulated by the 2015 Regs, all those candidates who have taken part (but who have not been informed of the full reasons for their exclusion) in the procurement process must be notified of the outcome, as soon as reasonably practicable, by standstill notice, after the contract award decision. (This gives any unsuccessful parties sufficient time to raise a challenge before the contract is finalised) The standstill notice will contain a written summary of the award and other information as described in the following paragraphs.

**3.2 Successful bidders** are to be informed that they have won the contract, along with:

- details of the criteria for the award of the contract; and
- where practicable the score they were awarded.

**3.3 Unsuccessful bidders** are to receive:

- details of the criteria for the award of the contract;

- the name of the winning bidder;
- where practicable, the scores they and the winning bidder were awarded;
- a summary of the reasons they were unsuccessful, including reasons why they failed to meet the technical specification, or if they did not meet any performance or functional requirements; and,
- the characteristics and relative advantages of the successful tender over theirs.

3.4 **Candidates eliminated at the selection** (pre-qualification) **stage** are legally entitled to receive a standstill notice, unless they have previously been informed of the decision to remove them from the process and the reasons for this. They should, as a matter of best practice, receive the same information (where applicable) as set out for unsuccessful tenderers above.

3.5 If any candidate who has taken part in the process makes a written request for more detailed information, then the contracting authority has to provide this within **15 days**. This should be in writing, although the contracting authority may decide that they wish to conduct a *feedback meeting* as well. (See section 7 of this guidance) The information is to include:

- **Successful bidders** – a description of any improvements that could have been made to the tender
- **Unsuccessful bidders/ candidates eliminated at the selection stage** – a detailed description of the reasons that they were unsuccessful.

## **Feedback – Contracts Regulated by the Act**

4.1 In comparison to contracts regulated under the 2015 Regs, whilst there is a requirement to notify both the successful and unsuccessful tenderers as soon as reasonably practicable after deciding to award a contract, under the Act, the level of feedback detail to bidders required is lower. Bidders can, within **30 days** of being informed that they have been either unsuccessful or successful, request additional feedback. The following paragraphs detail how to deal with each type of bidder in the process:

4.2 **Successful bidders** need only be informed that they have won the contract. Should further information be requested, then the contracting authority must, within **30 days** provide a written description of any improvements that could have been made to the tender.

4.3 **Unsuccessful bidders** are to be informed of:

- the name of the successful bidder;
- the criteria on which the contract was awarded; and,

- the scores of the both the successful bidder and the unsuccessful bidder against this criteria.

4.4 As matter of best practice, it is advised that you also provide reasons for the rejection the tender, including any decision that the goods or services do not meet the performance or functional requirements.

4.5 If further feedback is requested, then within **30 days**, they must receive a written summary of the reasons their tender was unsuccessful along with the characteristics and relative advantages of the successful tender.

4.6 Any candidate **eliminated at the selection stage** (prior to submitting a tender) must, as soon as possible following the decision to eliminate them, be informed of:

- the criteria used to exclude that candidate;
- the contracting authority's scoring of that candidate (if any), against those criteria; and
- the names of any candidates who have not been excluded.

4.7 Any written requests for further information must be answered within **30 days**, and should include a written summary of the reasons why they were excluded from the process.

## **Feedback – Unregulated Contracts**

5.1 Contracts where the value is below the thresholds set out in the Act are known as unregulated contracts. In their case, there is no legal requirement to share feedback with bidders. However, as a matter of good practice, and for the reasons already stated, feedback should still be given in accordance with the above guidance.

## **Objectives of Providing Feedback Information**

6.1 As stated in the introduction, beyond the legal requirements, the giving of feedback should be seen as advantageous to both parties. Therefore, when preparing feedback, it is highly recommended that the following objectives are considered, to ensure that any feedback given is worthwhile:

- Assisting bidders in improving their performance. Feedback should cover the positive aspects and suggest areas for improvement, which can be in terms of individual parts of the bid, or the bid as a whole. Bidders will then have the opportunity to address these issues in any future bids.
- Offering bidders the opportunity to provide feedback to the contracting authority on the tender process, to assist the authority to continually improve their process.
- Establishing and maintain a reputation as a fair, honest and ethical customer.

- Helping ensure that qualified bidders will be encouraged to submit high quality, compliant tenders in the future.

6.2 In preparing their bid, bidders, and particularly those who have submitted tenders will have spent a considerable amount of time, effort and money. It is recommended that this is reciprocated by the contracting authority investing sufficient time and resource in the feedback process.

## **Feedback Meeting**

7.1 There will be occasions where a formal feedback meeting is considered more appropriate than just written feedback. Normally this would only apply to those that have submitted a tender. **It is important to remember that this does not absolve the contracting authority of their legal responsibility to provide any written feedback, as prescribed by either the 2015 Regs or the Act.** The client team should consist of those best equipped to provide the feedback and may include procurement and technical professionals, to ensure that the feedback meeting is carried out by experienced and fully trained personnel. When holding feedback meeting, which can be either face to face or by video or teleconference, it is recommended that:

- The meeting must not be viewed as or allowed to become, a forum for debate as to the validity of the tender;
- Feedback meetings can take place either face to face or over the phone. It is advised that if choosing to conduct the meeting by phone, that as much preparation is undertaken as for a face-to-face meeting.
- It is made clear to each tenderer that only their tender will be discussed in relation to the successful tender. Under no circumstances will such things as commercial terms or innovative ideas put forward by another tenderer be disclosed.
- It may be helpful to invite the bidder to submit a list of questions that they wish to raise prior to the meeting. This may help to keep the discussion focused, allow the pre-empting of any questions that it might be inappropriate to discuss, as well as helping the contracting authority prepare for the meeting.
- If reasons that the bidder has been successful/ unsuccessful have been given in writing previously by the contracting authority, new or conflicting reasons for the decision should not be introduced as part of the de-briefing, as these should have already been part of any feedback given.
- It is possible that excluded or unsuccessful tenderers will be disappointed at their lack of success and there is potential for the meeting to become adversarial. All efforts should be made to avoid this - the meeting is about helping the bidder to improve and be successful in the future.

- At the end of the feedback meeting, bidders should be asked if they have any constructive comments on the Invitation to Tender (ITT) documentation and the tendering process generally.
- A record of the feedback meeting should be made and retained on file. The contracting authority may also wish to share this with the bidder.

7.2 The point at which a feedback meeting takes place should be determined by commercial judgement and certainly within a reasonable timescale of the award decision. If the feedback is being used in the context of providing additional feedback to a bidder in a contract regulated by the 2015 Regs, (as described in [paragraph 3.5](#) of this chapter) it **must** take place within **15 days** of the written request for feedback being received.