

Scottish Procurement

Scottish Procurement Policy Note

SPPN 2/2012

Date 31 May 2012



Evaluating bidders' economic/financial standing and considering the type and level of insurance required by the winning bidder to deliver the contract

Purpose

1. The purpose of this Scottish Procurement Policy Note (SPPN) is to highlight the need for requirements at the selection stage of a procurement exercise to be related to and proportionate to the subject matter of the particular contract, and to recommend that a company's annual turnover is only used as a minimum standard in the selection of bidders in exceptional circumstances.

Key points

2. The key points are as follows:

- public bodies should ensure that requirements at the selection stage of a procurement exercise are related to and proportionate to the subject matter of the contract;
- such requirements must therefore be considered on a case by case basis;
- in particular, requirements relating to bidders' economic/financial standing should not be used to arbitrarily reduce the number of bidders;
- public bodies should be aware that the use of unrelated and/or disproportionate selection criteria could result in legal challenge;

- public bodies should take steps to ensure that requirements do not act as a barrier to participation by small and medium-sized enterprises (SMEs)¹.

Background

3. A number of instances of poor practice in relation to the selection of bidders for competitions have been brought to our attention (primarily, but not exclusively, through the Single Point of Enquiry). A common example of such poor practice is where the public body has set a requirement that only companies which have an annual turnover in excess of ten times the estimated value of the contract will be considered for selection as a bidder. A further example relates to the level of insurance cover public bodies require a bidder to have. This SPPN is being issued to remind all public bodies in Scotland of their obligation to ensure that decisions they take at the selection stage of a tender exercise are demonstrably related to and proportionate to the subject matter of the individual contract in question.

Evaluating bidders' economic/financial standing

4. An assessment of the financial status of a bidder is normally required at the selection stage of a procurement exercise to ascertain if the bidder is able to deliver the contract requirements.

5. Regulation 24 of the Public Contracts (Scotland) Regulations 2012 sets out the information which public bodies can ask bidders to provide to demonstrate their economic/financial standing, including audited accounts, a statement of the organisation's turnover or (if neither of these is available) additional information and documentation which demonstrates the bidder's economic/financial standing. Public bodies should consider what is required on a case by case basis and must specify the information to be provided in the contract notice or in the PQQ and/or tender documentation.

6. Public bodies should be aware that not all organisations have an audited set of accounts. Regulation 24(5) makes clear that if a bidder is unable, for a valid reason, to provide the information in the format required, the public body must

¹ There are approximately 300,000 SMEs in Scotland accounting for over 99% of enterprises.

accept other information where appropriate to demonstrate the bidder's economic/financial standing.

7. Public bodies should ensure that any assessment of a bidder's financial status is conducted by suitably trained or experienced personnel.

8. It is worth noting that, for some procurement exercises, an assessment of a bidder's economic or financial standing may not be required. This may be the case where, for example, the contract is low value, low risk or payment does not occur until delivery of the goods or service is complete.

Setting minimum financial requirements

9. Public bodies should apply caution to setting minimum financial requirements as part of their PQQ or tender process. **Any such requirements should be considered on a case by case basis and must be related to and proportionate to the subject matter of the contract.** They must also be specified in the contract notice or in the PQQ and/or tender documentation².

10. It is particularly important for public bodies to apply caution if setting a minimum requirement relating to an organisation's annual turnover. This is because of the potential to penalise bidders which have a smaller or un-established turnover but who may have strength in the form of cash and a strong balance sheet. Such bidders may include SMEs, recent start-ups and special purpose vehicles. Turnover may indicate in broad terms that a bidder has the capacity to deal with the volume of work but it is rarely, if ever, a good indicator on its own and public bodies are strongly recommended to take a more rounded, commercial approach. Public bodies should therefore consider whether other information could, in the case in question, provide a better indication of bidders' ability to deliver the contract requirements. It is recommended that annual turnover is only used as a minimum standard in exceptional circumstances.

² It is important that public bodies ensure clarity and transparency when applying the open procedure to avoid situations whereby bidders prepare full tender submissions when, in fact, they are not eligible to bid because of the selection criteria.

11. Financial information should be requested solely to ascertain if the bidder is able to deliver the contract requirements. It should not be requested for any other purpose such as a means to reduce the number of bidders in a procurement exercise, for example by setting an artificially high turnover level that is designed to limit the number of bidders that will 'make the cut'. Public bodies should be aware that if they set minimum criteria, which are not related to and proportionate to the contract, this could lead to a legal challenge where they would have to defend their actions.

12. In work to modernise the European Procurement Directives, the European Commission has identified that requirements relating to turnover "are frequently a formidable obstacle to access by SMEs". The Commission is therefore proposing³ to provide that any requirement relating to annual turnover is limited to three times the estimated value of the contract, except in duly justified cases (for example where there are high risks attached to the performance of the contract or its timely and correct performance is critical). The Commission's legislative proposal underlines the need for any conditions for participation to be "appropriate" and states that "all requirements shall be related and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition". **As stated in paragraph 10 above, it is not recommended that annual turnover is used as a minimum standard other than in exceptional circumstances. However, for those instances where annual turnover is used as a minimum requirement, it is recommended that public bodies do not exceed the Commission's proposed maximum level of three times the estimated value of the contract.**

³ The European Commission's legislative proposals are expected to be finalised by December 2012. Member States will then have 18 months to make corresponding changes to their national legislation (in Scotland, the Public Contracts (Scotland) Regulations 2012).

Considering the type and level of insurance required by the winning bidder to deliver the contract

13. Public bodies are advised to indicate in the PQQ whether the winning bidder will be required to have certain insurance in place and, if so, the required level. Bidders should not be required to have the relevant insurance in place at the time of bidding but should be asked to confirm that they either have the required level or would be willing to obtain the required level if successful.

14. Public bodies should assess the type and level of insurance required on a case by case basis. In doing so, they should take account of the risks attached to the contract rather than focusing on the value of the contract. Public bodies should guard against setting requirements which act as a barrier to SME participation or cannot, on an objective basis, be deemed to be necessary for the performance of the individual contract. **The type and level of insurance required must be proportionate and commensurate with the needs of the project.** It is a legal requirement that all companies hold Employer's (Compulsory) Liability Insurance of £5m as a minimum⁴.

Action required

15. Public bodies should ensure that their internal guidelines, policies or procedures are consistent with this SPPN. In particular, public bodies should ensure, on a case by case basis, that requirements at the selection stage of a procurement exercise are related to and proportionate to the particular contract and do not act as a barrier to participation by SMEs.

⁴ not applicable to sole traders.

Dissemination

16. Please bring this SPPN to the attention of all relevant staff (particularly those with a purchasing role), including those in Agencies, Non-Departmental Public Bodies and other sponsored public bodies within your area of responsibility.

Contact

17. Enquiries about this SPPN should be addressed to spdcommunications@scotland.gsi.gov.uk.

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