



EUROPEAN COMMISSION'S STATEMENT ON THE USE OF THE ACCELERATED RESTRICTED PROCUREMENT PROCEDURE

Purpose

1. To provide advice on a statement by the European Commission regarding the use of the Accelerated Restricted Procedure in public procurement activities.

Background

2. The European Commission has issued the following statement as part of a package of measures in response to the current financial climate:-

"The public procurement Directive 2004/18/EC allows recourse to accelerated procedures where justified on the grounds of urgency. The Commission recognises that the exceptional nature of the current economic situation can justify the use of the accelerated procedure reducing considerably the overall time limit of the procedure from 87 days to 30 days. Such presumption of urgency should apply throughout 2009 and 2010 for all major public projects.

The Commission considers that speeding up procurement procedures can significantly support Member State action to foster their economies through rapid execution of major public investment projects. Such action should be based on the existing internal market acquis.

The time limits set out by the public procurement Directive 2004/18/EC include a certain time frame for potential bidders to decide whether to participate and to draw up their tenders. Furthermore the Remedies Directive 2007/66/EC provides for a standstill period between the award decision and the conclusion of the contract to allow for review of the award decisions. In the restricted procedure, bidders first have to request to

participate. Subsequently, selected candidates are invited to submit their tenders.

The regular regime for the restricted procedure, leading to the above time limit of 87 days, provides for minimum 37 days from the date on which the contract notice is sent for lodging requests to participate as well as for another minimum 40 days for the selected candidates to submit their tenders. After the award decision, the above-mentioned "standstill period" of 10 days applies before the contract can be concluded.

Under the accelerated restricted procedure, which the Commission considers justified in the light of the financial crisis, contracting authorities can shorten the time limit for requests to participate from 37 to 10 days if the contract notice was sent by electronic means and the subsequent time limit for the selected candidates to submit their tenders from 40 to 10 days. With the remaining standstill period of 10 days, time limits for the restricted procedure can therefore be ultimately shortened to 30 days all in all."

Observations on the Commission's Statement

3. Under current legislation, where justified on grounds of urgency and where it is not possible to adhere to normal timescales, timescales can be reduced to an absolute minimum of 35 days (30 days if the notice is sent electronically in a manner consistent with the legislation):-

- 15 full days from despatch of the notice for expressions of interest (10 full days if sent electronically);
- 10 full days from issue of ITTs for tender preparation and submission; and
- 10 full days for the 'standstill' stage after the contract award decision has been taken and communicated to participants.

The Commission's statement does not alter the legal obligations on public bodies and great care should be taken before using reduced timescales (the accelerated restricted procedure). Notwithstanding the Commission's statement, an aggrieved supplier will still be entitled to challenge a contract award procedure if, in its view, the timescales adopted for a procurement process distorted competition unfairly, or were applied unreasonably (i.e. were not proportionate or reasonable in the context of the specific procurement or project the award process was connected with).

4. Contracting authorities should be mindful of the requirement of regulation 16(4) of the Public Contracts (Scotland) Regulations 2006 which states that they “shall take account of all the circumstances, in particular, the complexity of the contract and the time required for drawing up tenders when fixing time limits for the receipt of requests to be selected to tender and for receipt by it of tenders”. In SPD’s view, any authority seeking to rely on the Commission’s statement should be able to demonstrate that the reduction of timescales is linked to and proportionate with earlier delivery of a project or form of public investment. If reducing the timescales for the competition will have no bearing on earlier delivery (e.g. because the project plans and date for project completion are unaffected, or because the timescales for other aspects of the project can comfortably accommodate normal procurement procedures) then SPD’s advice is that normal procurement procedures should be followed.

5. The Commission has not attempted to define what is referred to as “major public projects”. It seems reasonable to assume, therefore, that in order to invoke the accelerated restricted procedure under the justification of “exceptional nature of the current economic situation”, a contracting authority will have to demonstrate the contract relates to a particular project or some form of public investment. This may mean that the accelerated procedure is less likely to be available for supply contracts.

6. Contracting authorities will still have to ensure that the obligations of equal treatment and non-discrimination are complied with and that the accelerated timescales are not applied in a way that acts to a particular company's disadvantage.

7. Contracting authorities will also need to consider whether it would be reasonable, realistic and practical for any project which can be defined as a “major public project” to be tendered using the accelerated restricted procedure. For example, if tender evaluation is likely to take a considerable amount of time, would it be reasonable to expect tenders to be submitted in 10 days?

8. In light of the above, contracting authorities are advised to exercise caution when considering applying the accelerated restricted procedure and, if the accelerated procedure is used, should ensure that the reasons for invoking it are fully documented and retained on file.

Dissemination

9. Please bring this SPPN to the attention of all relevant staff, including those in Agencies, Non-Departmental Public Bodies and other sponsored public bodies within your area of responsibility.

Contact

10. Enquiries about this SPPN should be addressed to Iain Moore, Scottish Procurement Directorate, telephone 0141 242 5596 or e-mail iain.moore@scotland.gsi.gov.uk.

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