



Kilkenny Local Authorities

Briefing Note

For

Tender Evaluation Boards

May 2013

The following is an abridged extract from the Remedies Regulations SI 130/2010 re standstill notices for contracts above EU Threshold - Works €5,000,000 - Supplies and Services €200,000

- (1) The noticeshall be as set out in this Regulation.
- (2) Such a notice —
 - (a) shall inform the candidates and tenderers concerned of the decisions reached concerning the award of the contract..., including the grounds for any decision not to award a contract.....for which there has been a call for competition,
 - (b) shall state the exact standstill period applicable to the contract, and
 - (c) for each unsuccessful tenderer or candidate, shall include—
 - (i) in the case of an unsuccessful candidate, a summary of the reasons for the rejection of his or her application,
 - (ii) in the case of an unsuccessful tenderer, a summary of the reasons for the rejection of his or her tender.
- (3) In the case of a tenderer who has submitted an admissible tender (that is, a tender that qualifies for evaluation under the rules of the relevant tender process), the summary required by paragraph (2)(c)(ii) shall comprise -
 - (a) the characteristics and relative advantages of the tender selected,
 - (b) the name of the successful tenderer, or, in the case of a framework agreement, the names of the parties to it, and
 - (c) in the cases referred to in paragraphs (9) to (11) of Regulation 23 of the Public Authorities' Contracts Regulations, the reasons for the contracting authority's decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements.
- (4) In the case of an unsuccessful candidate, the information to be provided under paragraph (2)(c)(i) may be provided by setting out—
 - (a) the score obtained by the candidate concerned, and
 - (b) the score achieved by the lowest-scoring candidate who was considered to meet the pre-qualification requirements, in respect of each criterion assessed by the contracting authority.
- (5) In the case of an unsuccessful tenderer, the information to be provided under paragraph (2)(c)(ii) and subparagraphs (a) and (b) of paragraph (3) may be provided by setting out—
 - (a) the score obtained by the unsuccessful tenderer concerned, and
 - (b) the score obtained by the successful tenderer in respect of each criterion assessed by the contracting authority.
- (6) In the case of a framework agreement to which more than one tenderer has been admitted, the information to be provided to each unsuccessful tenderer under paragraph (2)(c)(ii) may be provided by setting out—

- (a) the scores obtained by the tenderer concerned in respect of each criterion assessed by the contracting authority, and
- (b) the scores obtained in respect of each criterion assessed by the contracting authority by the lowest scoring tenderer who was admitted to the framework.

From a practical perspective, one of the most important aspects of the Remedies Regulations is the nature and extent of the obligation imposed on contracting authorities to debrief candidates and tenderers.

Under the terms of the Remedies Directive, the communication of the award decision to any tenderer or candidate concerned must be accompanied by **a summary of the reasons required** pursuant to Article 41(2) of the EU Procurement Directive (Directive 2004/18), namely the **reasons for the rejection of any application or tender** and, in the case of any tenderer who has made an admissible tender, **the characteristics and relative advantages of the tender selected** as well as the name of the successful tenderer or the parties to the framework agreement.

The Irish Remedies Regulations indicate that this information “may” be provided by setting out (i) the score obtained by the unsuccessful tenderer concerned, and (ii) the score obtained by the successful tenderer in respect of each criterion assessed by the contracting authority.

The unsuccessful tenderer must be provided with *“sufficient information to seek effective review”* as required by the Remedies Directive. It is important that sufficient information is given to the unsuccessful tenderer so that it is placed in a position to decide whether or not it can, or should, seek to review the award.

KLA guidance on the summary of reasons required/reasons for the rejection of the tender/ the characteristics and relative advantages of the tender selected

KLA policy is that the pre-establishment of clear evaluation criteria for award prior to tender and the application of these criteria objectively in awarding the contract will assist the tender process and outcome.

Department of Finance Circular 10/10 says that "All contracting authorities should constructively debrief unsuccessful bidders in line with current policy and guidelines and their obligations under revised Remedies Directives."

KLA policy to constructively debrief unsuccessful bidders is that as much information as possible is provided in the standstill letter for contracts published in the OJEC. KLA policy is that no further debriefing takes place after the issue of the detailed standstill letter which will provide the unsuccessful tenderer with "*sufficient information to seek effective review*" as required by the Remedies Directive.

Summary of reasons

Case law and administrative law principles suggest that – "Reasoning must be disclosed in a clear and unequivocal fashion" and "reasons given must reflect the actual conduct of the evaluation procedure."

Therefore, for a valid standstill letter, KLA require a summary of the reasons as to why the particular tender was rejected.

The summary of reasons includes

- (1) The characteristics and relative advantages of the tender selected
- and
- (2) the scores.

The characteristics and relative advantages of the tender selected – these should be explained by way of reference to the unsuccessful tenderer.

A suitable narrative is required for each qualitative criterion. If a particular qualitative criterion attracts more marks than others (which is usually the case), more attention should be given to this criterion.

The characteristics and relative advantages of **the tender selected** have to be provided – therefore, there is no obligation to provide information on **other** unsuccessful bids.

Where the successful and unsuccessful bidders have been awarded **the same score under a particular quality criterion**, then there is **no relative advantage** and no requirement to inform the unsuccessful bidder on this aspect. However, the characteristics of the successful tenderer should still be provided.