



Public Procurement - Procuring for the future

Debriefing Under Bidders

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Debriefing

Unsuccessful bidders and candidates are entitled to information to understand the outcome

- When does debriefing occur
- What information
- Cases
- Do's and Don'ts

Debriefing – Award Stage

Above EU Threshold:

- **Two step debriefing:**
 - Standstill letter (A.6 SI 30/2010)
 - Following written request (A. 55(2) SI 284/2016)

Below EU Threshold- National Procurement

- **With cross border interest – principle of transparency**
- **Voluntary debriefing or contractual commitment:**
 - Strongly encouraged to provide written feedback

What information must be given?

- Standstill letter:
 - a *summary* of the reasons for the rejection of the tender which shall comprise
 - characteristics and relative advantages of the tender selected
 - name of successful tenderer
- Article 55(2):
 - As soon as possible but no later than 15 days following receipt of written request inform
 - any unsuccessful tenderer of the reasons for the rejection of its tender
 - any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected
- Generic reasons are not sufficient
 - “Reasons must enable the court to effectively conduct a judicial review” (RPS case)

What information can be withheld?

- If the release of information
 - would impede law enforcement or would otherwise be contrary to the public interest,
 - would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or
 - might prejudice fair competition between economic operators.
- (Article 55(3))

Sufficient information – Case law

RPS v Kildare Co. Council (High Court 15 February 2016)

Considered what level of reasons is required

- Engineering consultancy services tender
- Most Economically Advantageous Tender
- RPS price was lower than the successful tenderer and scored marginally less on quality
- Brief reasons given in standstill letter, for example
 - *“Your response to this criterion was of a good standard however compared to the successful tenderer it lacked sufficient specific detail on new studies and reports that would be required going forward”*
- Sought clarification of the reasons and a debrief meeting
- Kildare County Council refused

Sufficient information – Case law

Judgment – Judge Humphreys

- Criticised the Council's failure to engage with RPS
- Found the reasons which were the same in each standstill letter were:
 - “totally inadequate”
 - “flimsy and threadbare attempt to explain the decision”
 - “extremely formulaic”
- Bespoke statement of reasons must be given
- Reasons must be sufficiently detailed to explain how the successful tenderer was advantageous by reference to particular matters
- Must at least mention the matters which should have been included in the tenderer's tender or the matters contained in the successful tenderer's tender
- Ordered the Council to provide written reasons with specific facts

Sufficient information – Case law

Judgment – Judge Humphreys

- Set out the purpose of a right to reasons:
 - Reasons must enable the tenderer to know whether it has grounds to challenge the decision by way of judicial review
 - The reasons must enable the court to effectively conduct such a review (paragraphs 53 and 54)
 - Encourages better administrative decision making
 - Requirement of reasons acts as a promotor of transparency
 - Reasons promote the acceptance of the decision
 - Helps to improve the overall quality of future submissions

Sufficient Information – Case law

Forum Connemara Limited v Galway County Local Community Development Committee (High Court 10 August 2016)

- Tender for services to implement a programme to tackle poverty and social exclusion (Part IIB services)
- Forum was unsuccessful
- Argued reasons were inadequate
- Judge noted that the obligation to give reasons did not apply to this contract but that it is accepted that there is a general requirement to give reasons
- Reasons provided went beyond any general requirement to give reasons; the letter explained in detail why the successful tender was better
- Accepted position that no information was given where the unsuccessful tenderer scored equal or higher than the successful tenderer

Records of Information

- Regulation 84 Report (public sector)
- Regulation 108 Report (utilities)
 - requires specific information to be kept including
 - documentation “to record the progress of all procurement procedures ... and to justify decisions taken”
- Evaluation team should record scores, reasons and conclusions sufficient to justify the outcome, with relative characteristics of tenders

Some Do's and Don'ts

Contracting Authority

Do	Don't
Prepare for debrief at beginning of tender process	Release confidential information
Keep sufficient records	Ignore request for explanation
Give information that allows the tender to understand the decision	Be informal
Check that the reasons are consistent with the award criteria	Delay in providing information

Some Do's and Don'ts

Unsuccessful Tenderer

Do	Don't
Check the standstill letter	Delay in reviewing the standstill letter
Check if the reasons are adequate	Delay requesting an explanation
Check if the reasons are consistent with award criteria	Forget Article 55(2) request
Check the marks	Forget to get legal advice
Request a meeting if information is unclear	

Appendix - Legislation and Guidance

Above threshold contracts:

- S.I No. 130/2010 - European Communities (Public Authorities Contract) European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010
- S.I. No. 284/2016 - European Communities (Award of Public Authorities' Contracts) Regulations 2016;
- S.I. No. 286/2016- European Union (Award of Contracts by Utility Undertakings) Regulations 2016

Below threshold contracts

- with cross border interest: EU Treaty principles of transparency, equal treatment
- no cross border interest – implied contractual obligations

Legislation and Guidance

National Guidelines

- OGP Procurement Guidelines for goods and services
- Circular 10/14
- Guidance Note 2.3- Procurement Process Works Contractors
- Guidance Note 1.6 – Procurement Process for Consultancy Services

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