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APPOINTING MAIN CONTRACTORS FOR CONSTRUCTION WORK IN THE REPUBLIC OF IRELAND. – AN OVERVIEW.

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Introduction

One of the most important decisions made during the building procurement process concerns the procedures to be adopted to appoint the main contractor. Keane (2001) supports Hudson's assertion that one of the primary duties of an architect is: '*...The obtaining of a competitive price for the work from a competent contractor, and the placing of the contract accordingly in terms which afford reasonable protection to the employers interest both in regard to price and the quality of the work.*'

The construction industry has a long-established tradition of selecting contractors through a process of tendering, which may be thought of as '*the process that connects the buyer to the marketplace firms*' (Runeson and Skitmore (1998) cited in Hore and West 2007). Hughes, Champion and Murdoch (2015) explain that tendering is the means by which offers are made to carry out work. They comment that the two main purposes of tendering are to select a suitable contractor at a suitable time, and to obtain a price from the contractor at an appropriate time. They add that these two purposes are often achieved simultaneously. The Department of Public Enterprise and Reform (DPER) presents a more subjective definition: '*the purpose of tendering is to establish in a competitive environment, the market price of a works project. An acceptable tender is an affordable bona fide (authentic and genuine) competitive tender determined by the criteria of the competition, which meets the core objectives as described in the tender documents*' (DPER 2012a).

Decisions taken at this point are important, as they will determine the quality and calibre of the companies who will carry out the work and the price to be paid for it (Ramus, Birchall and Griffith, 2006). Many employers have little experience of this aspect of the construction process and depend on their advisers for sound advice in order to make the necessary appointments. Quantity surveyors are well positioned to provide such advice.

This study examines the various approaches that may be used to appoint building contractors and reviews guidance and best practice in this area. Brook (2008) notes that tendering is intended to be an unbiased means of selecting a contractor to carry out work. The Strategic Review Committee of the Forum for the Construction Industry (FCI 1999) considered that the tendering process should ‘*strike a fair balance between the employer’s desire to get a quality project built on time and within budget and the contractor’s need to secure a tender sum which covers costs and provides a reasonable profit margin.*’ In Ireland, published guidance on ‘best practice’ tendering procedure is available for both private and public sector projects. *The Liaison Committee Code of Practice for Tendering and Contractual Matters 2006* (The Liaison Committee 2006) sets out best practice guidance for private sector tendering. The Capital Works Management Framework (CWMF) *Guidance Note GN 2.3 - Procurement Process for Works Contractors* (DPER 2012a) sets out the procedures to be followed for public sector procurement.

Ramus *et al.* (2006) note that selecting a contractor is an important decision requiring careful consideration. A poor choice may result in difficult relationships, disappointment and possibly an insolvent contractor. They add that any one contractor will not be suitable for all projects. Contractors target particular types of work and may not be suitable for projects outside that range. They note that factors such as the scale of the project, the ability to provide design services and the size of the company are factors which might influence the choice of the contractor. They advise employers to appoint a contractor who is financially stable and has a reputation for delivering quality workmanship, timely completion, effective organization, and for maintaining good industrial relations.

A number of tendering procedures have evolved to enable construction work to be procured. The main distinction between the various methods is the extent, and therefore the intensity, of the competition involved. Competition ranges from unrestricted requests for tenders (open tendering) to an approach to an individual contractor to carry out the work (negotiation). The following sections examine open tendering; selective (restricted) tendering, competitive dialogue and negotiation. Private sector employers are free to appoint a contractor using whichever approach they consider to be the most suitable in the particular circumstances. Public sector employers, however, must comply with procedures set out in the CWMF Guidance Note GN 2.3. It is considered worthwhile to set out extracts from this document at this point.

‘... Sponsoring Agencies [public sector employers] are required to ensure that:

- The procedure used for the procurement of public works projects is conducted in an open, objective and transparent manner;
- Competitive tendering is used in a manner that allows quality and best value for money to be assessed; and
- The principles of all EU and national public procurement rules are adhered to; and that procedures are in place to ensure compliance with all such guidelines.’

The Guidance Note continues:

‘Under EU¹ and national procurement rules, procurement procedures may be one of the following:

- Open procedure,
- Restricted procedure,
- Competitive dialogue, or
- Negotiated procedure.

Of these, the two most commonly used under the CWMF are the open and restricted procedures which between them account for nearly all public works procurement opportunities. An Employer should choose a negotiated procedure or competitive dialogue only in very exceptional circumstances, which must be documented comprehensively’ (DPER 2012a).

Open tendering

The underlying principle of competitive bidding is that the lowest price gets the job. Open tendering is a method which permits any interested company to bid for the work. This approach is viewed as generating the greatest degree of competition and delivering ‘rock bottom’ prices.

Open tendering arrangements involve placing an advertisement in local newspapers or trade journals inviting contractors to apply for tender documents and to submit a tender for the project. A refundable deposit is usually required in order to ensure that only serious offers are

¹ Public sector procurement is ‘based on EC Directives and subject to the EU procurement rules when the contract is above the EU threshold. The current threshold (excluding VAT) above which a publicly-funded project is subject to EU procurement rules is €5,186,000. (As at January 2014).

made; the deposit being refunded on the submission of a bona fide tender. More recently, the approach has been adopted on electronic tendering websites such as e-tenders.ie where interested parties may download the tender documentation and submit bids for work advertised on the website. Of particular importance is the Government procurement website, etenders.gov.ie on which contracts above the ‘National Threshold’ of €50,000 must be advertised². Accessing this website reveals that the majority (by number) of public contracts are tendered using the open tendering approach.

Open tendering tends to be associated more with public sector procurement than with private sector projects. The Department of Public Enterprise and Reform (2012) states: ‘*it is a basic principal of Government procurement policy that competitive tendering should always be used,*’ and this is overwhelmingly implemented through open and restricted tendering strategies.

The procedure to be adopted in open tendering involves publishing an Invitation to Tender concurrently with the advertisement / Contract Notice. ... Tender submissions are first evaluated under the suitability assessment criteria included in the questionnaire issued with tender documents to ascertain whether or not the tenderers meet the minimum pass/fail standards. Tenderers who pass the suitability assessment may then have their tenders evaluated under the tender evaluation criteria.’

It should be noted, that Guidance Note GN 2.3 is not prescriptive as to when the open tendering approach should be preferred over restricted tendering. In this regard the Department of Education and Skills (DOES) Building Unit *DTP Practice Note 7 – Open Tendering for Construction Contracts* sets out the following procedure.

For projects with a construction value of greater than €500,000 (including VAT) but less than €2,500,000 (including VAT) without particular complexity ... the open procedure ... should be used. ... For projects with a construction value of greater than €2,500,000 (including VAT) contracting authorities may use either the Open or Restricted Procedure. In general principle the Restricted Procedure should be used for larger and more complex projects. For smaller straight forward projects where the cost of tendering will not be an undue burden on contractors the Open procedure ... can be used (DOES 2011).

² Projects exceeding the EU Threshold must be advertised in the Official Journal of the European Union (OJEU).

It should be noted, that the Department of Education and Skills is a very experienced public sector building employer. Other departments and local authorities who are less experienced in the building procurement process may be more of the view that open tendering is the more 'politic' option in the particular circumstances. It should also be noted that the Department of Public Enterprise and Reform (2014a) advises

Buyers should use open tendering for contracts below €134,000 (exclusive of VAT) in the case of advertised contracts for general goods and services. In the case of advertised contracts for works and works related services, separate guidance in relation to thresholds will issue shortly. Above these levels buyers should decide which tendering procedure is most appropriate in each case. ...

Advantages

The use of open tendering may be justified on the basis of transparency and equality of opportunity. Ramus *et al.* (2006) describe various beneficial aspects of this approach including: securing the maximum benefit from competition, removing the charge of favouritism that might be brought against public sector contracting authorities where a selected list is drawn up, and providing opportunities for firms to submit tenders, who might otherwise be excluded from selected lists.

Disadvantages

On the other hand, open tendering is associated with long tender lists. The Latham Report (1994) commented that the '*length of tender lists has been a contentious matter for decades. The public interest must be defended through real competition. But the costs of tendering (to employers and industry) must also be kept to a sensible level.*' In this regard, Hughes *et al.* (2015) argue that open tendering imposes unnecessary costs on the industry which are ultimately passed on to industry employers. They claim that in the UK only about one in twenty bids using this approach are successful. Abortive costs may therefore be substantial. Evidence presented in the Latham Report (1994, Table 10 p.59 – see Appendix A) indicated that tendering costs on a traditionally procured project valued at £5 million were approximately £13,000, this equated to one quarter of one percent of the cost of the project. The Report also identifies one particular instance where 38 firms were invited to go on 'a short list'.

The approach may be seen as a race to the bottom. Hughes *et al.* (2015) describe open tendering ‘*as an indiscriminate request for tenders*’. They argue that open tendering does not ensure high quality building and may result in unsuitable contractors being awarded work. They note that while employers are not bound to accept the lowest bid, that:

‘A committee in charge of public expenditure is under a lot of pressure to accept the lowest. When the lowest bid is accepted, this can easily result in the employer awarding the contract to the builder who has the least appreciation of the complexities of the projects; or the greatest willingness to take risks; or the lowest current workload of all the bidders. It would be unusual, or even lucky, if these factors resulted in the best value for money for the employer.’

A contributors to the Latham Report (1994) made a similar comment

‘Local authorities are severely hampered by being forced to accept the lowest tender. I know that we are not so forced but the overpowering attitude of local authority officers is that for all intents and purposes we are.’

Major difficulties are likely to arise where tenders are priced too low in order to secure work; where they contain serious pricing errors, and/or where a subcontractor fails. It is suggested here, that due to the intensity of the competition normally encountered in open tendering, that it becomes more likely that the lowest tender will be below cost. Where this occurs contractors are likely to adopt aggressive recovery tactics from the employer by way of variations and claims, cut corners on the projects resulting in more defects, and/or to attempt to drive down prices within the supply chain. Resulting difficulties can have disastrous knock-on effects for downstream subcontractors and suppliers and may, in turn, have equally catastrophic rebound consequences for upstream contractors who remain ultimately responsible for delivering the works at the originally agreed price. Employers should be made aware of their statutory duties under health and safety and building control legislation in this regard.

These problems are particularly evident during the ‘bust’ stage of the economic cycle when below cost tendering and contractor insolvency become more common within the sector. In this regard, a survey carried out by the Society of Chartered Surveyors Ireland in 2011 revealed that 55% of (the responding) quantity surveyors had experienced contracts which were terminated due to below cost tendering. Despite the recovery in the economy, the recent Report on the Review of the Performance of the Public Works Contract (DPER 2014b) has identified that the problem of low cost tendering remains and, that in particular, contractors

are not pricing risk. The Report also revealed that several of the stakeholder bodies called for action to be taken to eliminate abnormally low tenders (ALTs).

The SCSI survey also confirmed Hughes *et al.*'s (2015) observation, quoted on page 4 above, that employers are reluctant to reject what appears to be a 'bargain' lowest tender. It found that 83% of the surveyors had experienced cases of employers accepting tenders despite having been advised that the tenders were below cost (SCSI 2011). In this respect it is as well to remember John Ruskin's (a celebrated Victorian draftsman and critic) advice and warning in relation to judgement by price only, which remains valid to this day. ... *'It is unwise to pay too much but it is worse to pay too little. When you pay too much you lose a little money that is all. When you pay too little you sometimes lose everything because the thing you bought is incapable of doing what it is bought to do. If you deal with the lowest bidders it is well to add something for the risks you run. And if you do that you will have enough money to pay for something better. . . . There is hardly anything in this world that some men cannot sell a little cheaper and make a little worse. Those who consider price only are this man's prey'* (John Ruskin 1819–1900).

A related issue arises from the need to vet the lowest tendering contractor *after* the tenders have been submitted. It is possible, that the lowest tender will have been submitted by a contractor who is unknown to employer and/or the design team. In these cases the 'successful' contractor must be rigorously vetted to ensure that they are suitable to carry out the contract (see pre-qualification, below). This process may take a considerable amount of time, particularly where the lowest tenderer is found to be unsuitable, or the tender contains errors that result in the contractor's withdrawal. Occasionally it may be necessary to vet a number of contractors before being able to recommend one that is suitable for the project.

On public sector projects involving open tendering competitions, candidates are required to complete a suitability assessment questionnaire QW-2 which must accompany their tender. The Department of Public Enterprise and Reform require that *'tender submissions are first evaluated under the suitability assessment criteria included in the questionnaire issued with tender documents to ascertain whether or not the tenderers meet the minimum pass/fail standards. ... Tenderers who pass the suitability assessment may then have their tenders evaluated under the tender evaluation criteria'* (DPER 2012b). It may be pointed out that the questionnaire QW-2 extends to 21 pages and is likely to take some time to examine. The

criticism that traditional procurement involving competitive tendering holds up the process and takes too long is likely to be strongly voiced.

The above criticisms of the approach support Ashworth Hogg and Higgs' (2013) assessment that open tendering '*is not an efficient practice, and ... is not a recommended practice.*' They also note that '*some very reputable contractors may not be interested in tendering in such conditions.*'

Selective / restricted tendering.

Selective tendering involves compiling a short list or panel of suitable contractors favoured by the employer or design team who are invited to tender for the project. The process is referred to as restricted tendering on public sector projects. The Liaison Committee, (2006) describe the purpose of selective tendering as making '*a list of firms, any one of which could be entrusted with the job.*' The Committee has published a *Code of Practice for Tendering and Contractual Matters*, which states:

This Code has been prepared for all who commission privately funded projects. Tenders for public sector construction contracts above a specified value must be invited and contracts awarded in accordance with the European Union Directives and Public Sector procurement procedures. The Liaison Committee believes that selective tendering will be found to be the most appropriate method of obtaining tenders for the majority of building contracts. If the procedure advocated in this Code is followed, the successful tenderer should be the one offering the lowest price (The Liaison Committee 2006).

Many of the problems associated with open tendering can be reduced or eliminated by limiting the number of contractors tendering for the project through a process of selection. Hughes *et al.* note that employers who build regularly will usually have an approved list of contractors, from which a short list can be drawn up (2015). Occasional or one-off employers, however, will have to rely on the advice of their consultants to formulate a panel. The 'usual suspects' will typically be contractors known to the design team with whom they have successfully completed a number of previous projects. Alternatively companies may be specially chosen for the particular project where the employer/design team advertise for interested companies to be included on the tender list (an ad hoc tender list). This enables the employer to limit the number of tenderers and exclude unsuitable applicants. (Ramus *et al.* 2006). Ideally, the short list will consist of *contractors of established skill, integrity, responsibility and proven competence for work of the character and size contemplated*

(Hughes *et al.* 2015). On public sector projects it is likely that lists will be restricted to candidates who have prequalified (see below). The Liaison Committee recommend that there should a minimum of six and a maximum of eight on the list all of whom are acceptable to the employer. The Committee recommends that one or two substitutes should be kept in reserve (The Liaison Committee 2006). It is particularly important that sensible sized lists should be compiled for design and build tenders where abortive costs are significantly greater for the unsuccessful tenderers.

The CWMF Guidance Note GN 2.3.1 *Suitability Assessment of Works Contractors, Restricted Procedure* (DPER 2012b) contains guidance on the number of candidates to be shortlisted. The minimum number of candidates to be shortlisted must be stated in the Contract Notice should be no less than five. If no number is stated all qualifying candidates must be invited to tender. 'If appropriate, the Contracting Authority can state a maximum number of candidates to be shortlisted, in the Contract Notice' Note, however, that there is no restriction on the candidate numbers when the Pass/Fail Only method of assessment is used. The pre-qualification questionnaire published by the Liaison Committee also contains a field which permits the employer to enter the number of tenders to be sought.

Advantages

Selective tendering should ensure that only capable and/or approved firms are invited to submit tenders. Such firms are normally considered to be technically suitable, sound and capable of effectively carrying out projects. Limited competition reduces the waste of estimating resources and consequently reduces the general overhead incurred by tenderers (Ramus *et al.* 2006). This is particularly important in the case of projects procured under design and build arrangements.

Although it is likely that the lowest price is *not* obtained under this approach, restricted competition nevertheless delivers a keen price. Ideally competition is among firms of comparable standing who are genuinely interested in winning. In these situations, a price approaching what might have been achieved under open tendering is possible. In most cases this should also satisfy accountability concerns.

Nevertheless selective tendering is not a panacea for the industry's ills. Lists *ought* to be carefully compiled. It appears, however, that many tender lists are compiled without any

systematic assessment of the candidates' capabilities or financial stability. The composition of many 'informal' lists is likely to be heavily influenced by the experiences of the design team and/or employer of previous projects with the prospective tenderers. The list is likely to contain contractors they know, who have previously delivered projects safely, on time, without defects and on budget (from a satisfactory to an excellent extent). In these situations previous experience of the listed contractors will lead the employer/design team to view the panel as trustworthy, reliable and capable of getting the job done. These perceptions often outweigh other important criteria such as qualifications, resources and financial stability which may be overlooked as a result.

Disadvantages

The degree of competition in restricted tendering may be more apparent than real. Inertia may result in poor performers being left on lists, thereby distorting actual competition. The Chartered Institute of Building (2009) refer to the need of employers and their representatives to *monitor and regularly update their lists of contractors to: exclude companies whose performance has been unsatisfactory and to introduce suitable new companies that can demonstrate the required qualities and abilities.* Hughes *et al.* (2015) refer to the 'myth of tendering' and the practice of 'cover pricing'. They comment that contractors '*almost never decline to tender, for fear of not being asked to tender again in the future. ... if the job was not wanted a contractor might submit an inflated tender, called a cover bid.*' This practice results in a tender which is too high to win. More serious again is the possibility of collusion between the tendering contractors in an attempt to increase prices. Adam Smith, (1723-1790) 'The Father of Economics' observed: '*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public.*' (*The Wealth of Nations*). It may be that little has changed in the interim. Employers and design teams should introduce 'fresh blood' into tender lists to reduce or avoid the temptation for listed contractors to become over-familiar with each other.

Short listing often means that suitable contractors interested in tendering are excluded. This is a common criticism particularly among contractors who are attempting to expand their operations or gain a foothold in a particular sector. A 'chicken and egg' or 'banding' situation may develop where interested contractors cannot get onto tender lists because they have insufficient experience of carrying out projects in the specified price range.

While selective or restricted tendering should reduce the probability of employing a contractor who is experiencing financial difficulties it does not necessarily eliminate this risk. The SCSI (2011) survey revealed that of the *'projects failing to be completed because they were below-cost, 68% ... were public projects'*. Public projects are characterised, in theory at least, by rigorous suitability assessment and prequalification procedures which are largely focused on preventing unsuitable contractors from being awarded contracts. These procedures appear not to have operated very effectively on numerous occasions. It must be stated nevertheless that one third of the failures occurred on private sector projects indicating failings in detecting financially unstable contractors in this sector also.

Pre- selection / pre-qualification

The Code of Estimating Practice (CIOB 2009) describes pre-qualification as being *'concerned with the establishment by the client of a list of contractors or specialist trade contractors with the necessary skills, experience, resources, previous tender performance and desire to carry out the works, bearing in mind the character, size, location and timing of the project.'* The Latham Report adds: *'strictly speaking, this is a two stage procedure. "Qualification" means a contractor getting on to an approved list at all. "Prequalification" means drawing up a list of firms which are suitable for a particular project. The first stage is the necessary gateway to the second'* (Latham 1994).

Pre-qualification usually occurs before tender documents are despatched to tendering contractors. On private sector projects, for example The Liaison Committee recommends that a preliminary enquiry should be sent to contractors four to six weeks in advance of the dispatch of the tender documents in order to establish whether they are willing to tender (Liaison Committee 2006).

Criteria for selecting a panel of contractors

Ideally, tender lists will comprise of reputable contractors of sound financial standing with good track records of delivering successful projects. A good reputation is earned by completing projects on time, delivering high standards of workmanship, paying prompt attention to requests and complaints, providing good after contract service, providing good technical advice and displaying a commitment to continuing professional development.

Brook (2009) lists the following qualities which contractors should display in order to be included on employers' panels:

- 'A reputation for good quality workmanship and efficient organization.
- The ability to complete on time.
- A strong financial standing with a good business record.
- The expertise suited to the size and type of project.
- An understanding of the requirements of the scheme in terms of the type of work, the quality expected and the need to achieve target completion dates'.

Ramus *et al.* (2006) comment that the client/design team may consider the following additional factors when choosing contractors

- Whether the company has had recent experience of similar projects of a similar standard and completed within the envisaged time scale.
- Whether the company has the skills necessary for the delivery of the project.
- The quality of the company management structure and personnel employed by the company.
- Whether the company has the spare capacity to carry out the work within the proposed time scale.

Other factors such as standard of workmanship, positive labour relations, trades within organisation and reputation for cooperation may also be taken into account. It is also useful to take references and visit completed works before including firms on the selected list. Registration with the Construction Industry Register Ireland (CIRI) which seeks to promote competent contracting would also be beneficial.

Completing questionnaires

The prequalification process often requires prospective tenderers to answer a standard questionnaire and perhaps attend a formal interview and make a presentation. Guidance Note GN 2.3 describes the purpose of the questionnaire:

The suitability assessment procedure, including the suitability assessment questionnaire, involves inviting applicants or tenderers to submit information about themselves (and their named specialists if requested) by responding to a questionnaire. The Employer should then use this information to determine which applicants (under a

restricted procedure) or which tenderers (under an open procedure) meet the suitability standards and which do not (DPER 2012b).

The questionnaire, such as the public sector AQ1 for example, may contain indicative project details, identify the client, design team, quantity surveyor and project supervisor for the design phase, set out insurance and bonding requirements. It may also indicate the form of contract to be used, and whether a bill of quantities will be provided and the number of tenderers to be included on the panel. Contractors will be asked to provide company details such as their organisational structure, qualifications, special expertise and resources and also to set out their experience of recent comparable projects. Many companies will attach their company brochures containing key statistics, personnel résumés and current projects.

On most projects, the main contractor will be appointed as the Project Supervisor for the Construction Phase under the Construction Regulation 2013, and therefore prequalification will include questions about their health and safety record, health and safety training and the qualifications and experience of their staff and operatives. Contractors must be able to demonstrate that they are competent to carry out this role and have the appropriate resources and procedures in place to comply with health and safety law.

Consideration of the contractor's financial status involves scrutiny of the contractor's accounts to determine profitability, solvency, liquidity, asset strength and payment record as well as taking out references from previous clients, bankers and the trade (Cooke and Williams, 2012).

The Liaison Committee have published a model form pre-qualification questionnaire for private sector projects. It contains fourteen requests for information. Employers' representatives may delete any of these information requirements if not required or may add project specific technical information. The fourteen items are:

1. 'A list of comparable projects of similar size, complexity and value completed in the past 5 years.
2. Details of turnover for the past 3 years, per annum.
3. A funder confirmation letter stating the applicant's ability to fund the project (very large projects only).
4. Applicant's management structure (organisation chart).

5. Management and technical resources.
6. Plant and equipment resources.
7. Applicant's safety policy.
8. Applicant's quality policy.
9. Trade Register Certificate, e.g. CIF membership or CIRI registration .
10. (C2) Tax Certificate.
11. Statement from insurers that applicant can meet insurance requirements.
12. Statement from a bondsman that applicant can meet bond requirements.
13. Statement from an operatives' pension scheme regarding the applicant's status.
14. Applicant to confirm that firm has a Safety Statement.'(Liaison Committee, 2006)

Public sector pre-qualification

For public sector projects, The Department of Public Enterprise and Reform have published guidance relating to prequalification in CWMF Guidance Note GN 2.3.1 *Suitability Assessment of Works Contractors, Restricted Procedure*. This 126 page long document sets out the criteria which may be employed to evaluate whether a contractor may prequalify for inclusion on a restricted tendering list.

A contractor's suitability is assessed by requiring them to submit information and complete a Suitability Assessment Questionnaire (referred to as 'Questionnaire) which contains various criteria with predetermined minimum requirements set out by the contracting authority. The purpose of the Questionnaire is to ensure that only contractors with adequate financial and technical expertise, among other requirements are awarded public contracts. Separate Questionnaires are published for use in open tendering (AQ2) and restricted tendering (AQ1) approaches. The Questionnaire used for restricted tendering AQ1 runs to 21 pages and contains three sections:

1. Section 1 **Project Particulars** (pages 2 to 5) gives details of the project and the requirements. This section is completed by the Contracting Authority. It sets out basic project information including number of contractors to be shortlisted, contracting authority information, contractor's role in respect of health and safety, health and

safety particulars, procedure regarding specialists and other works to be carried out by independent contractors. This information is tailored to the particular project.

2. Section 2 **Applicant Details** (Pages 6 and 7) is used to collect basic information about the applicant. The applicant must provide specific company details relating to the nature of the company and its authorised representative and additional company details if required by the contracting authority.
3. Section 3 **Contracting Authority Assessment Scheme and Applicant Summary** details the assessment criteria that will be used to evaluate the application. 16 criteria are assessed under the four subheadings set out in Table 1 below. Two of the criteria relate to the personal situation of candidate, eight relate to economic and financial standing and six relate to technical and/or professional ability. (DPER 2012b)

GENERAL SUITABILITY CRITERIA	
Criterion 3.1	Applicant personal situation.
Criterion 3.2	Professional or trade register.
3.3 FINANCIAL AND ECONOMIC STANDING	
Criterion 3.3 a	Evidence of turnover.
Criterion 3.3.b	Balance sheet or extract from a balance sheet.
Criterion 3.3.c	Banker's letter.
Criterion 3.3.d	Other financial / economic information / references.
Criterion 3.3.e	Professional indemnity insurance.
Criterion 3.3.f	Public liability insurance.
Criterion 3.3.g	Employer's liability insurance.
Criterion 3.3. h	Performance bond.
3.4 TECHNICAL CAPABILITY (Contractor Competence)	
Criterion 3.4.a	Educational and professional qualifications (managerial).
Criterion 3.4.b	Educational and professional qualifications (personnel).
Criterion 3.4.c	List works carried out over the last (5) years.

Criterion 3.4.d	List technicians or technical bodies involved especially those responsible for quality control and those whom the contractor can call on in order to carry out work.
Criterion 3.4.e	A statement of the average annual numbers of persons employed by the contractor and those in a managerial position over the past 3 years
Criterion 3.4.f	A statement of technical equipment available.

Table 1 Assessment Criteria in Assessment Questionnaire AQ1 (p.8 & 9) Restricted Tendering)

‘The various criteria may be assessed on a pass/fail basis or alternatively may be qualitatively evaluated. Pass/fail criteria are requirements that must be met in full. ... If failed, the applicant is eliminated from the competition. Some criteria have minimum pass/fail requirements, beyond which they are qualitatively evaluated, each such criterion is given an allocation of marks (weighting) to be used to calculate the applicants overall score.

Candidates who pass all the required pass/fail criteria are shortlisted and assessed qualitatively and those with the highest scores will be invited to tender.

Contractors are also required to complete a separate supplemental technical capability assessment of their health and safety competence. The Technical Capability criteria (3.4 a to 3.4.f in Table 1 above) are repeated to form this assessment. Where the candidate is to be appointed as Project Supervisor for the Construction Phase, as would normally be the case, a further assessment must be made for this position. Likewise where the contract is procured through a design and build arrangement the candidates must also complete a similar supplementary questionnaire examining their competence as designers and Project Supervisors for the Design Phase.

Completing prequalification questionnaires and making strong submissions can be a time-consuming and therefore an expensive process, especially on public sector projects. A particular criticism of public sector prequalification is that the current process is overly complicated thereby favouring large contractors and preventing small and medium enterprises (SME) from obtaining public sector work. Doherty (2012) investigated the experiences of SMEs of the public sector prequalification process and suggests that ‘*the prequalification process is, in general, having an adverse effect on SMEs success rate in prequalifying for public projects.*’ He gives the following reasons for this view:

- The increased administration involved in the process and the large quantity of paperwork

is overwhelming SMEs. Larger firms are more likely to have specialised sections dealing with completing Questionnaires. ‘*Small contractors have poor paper handling skills so they are overwhelmed by the process*’.

- SMEs cannot demonstrate sufficient turnover and relevant past experience.
- There is a lack of consistency across contracting authorities in the documentation and assessment procedures.

Two-stage selective tendering

Selective tendering may be either single or two-stage. In Ireland the term two stage tendering is generally used in the sense of requiring a contractor to prequalify before being invited to tender. In the UK the term single stage tendering includes the prequalification process. Two stage selective tendering, on the other hand, refers to a arrangement where a selected list of contractors tender for work on the basis of an approximate bill of quantities (stage 1) and this is followed by a negotiation process with the lowest tenderer(s) to determine who will be appointed as contractor (stage 2). This arrangement is confined to the private sector as post-tender negotiations are prohibited by EU procurement law.

Guidance relating to this approach is contained in the UK National Joint Consultative Committee for Building (NJCC³) *Code of Procedure for Two-Stage Selective Tendering* (1994). The first stage aims to select a suitable contractor by means of limited competition. The second stage is a process of negotiation with the selected contractor on the basis of the rates contained in the first-stage tender.

The first stage involves preparing and inviting a short list of contractors to price the stage one tender. The NJCC Code recommended a maximum of six firms on the list and also suggests matters for consideration when drawing up the list. Invited tenderers are informed of the second- stage intentions, including any special requirements of the client and the nature and extent of the contractor’s participation during the second stage (Ramus *et al.* 2006).

Stage one tender documents are typically based on outline designs and an assumed contract period. Ideally a bill of approximate quantities based on a previous similar project can be produced quickly for tendering purposes. This will establish a level of pricing on which

³ The NJCC was disbanded in 1996, but its codes of practice are still used in the UK.

subsequent negotiations can be based. Hughes *et al.* (2015) explain that *'the intention, after this, is that the design team works with the chosen contractor to complete pricing concurrently with the ongoing completion with the design.'* Ramus *et al.* (2006) note that discussions may take place with the individual tenderers in order to develop proposals or to take up particular suggestions regarding the design and/or construction methods. It is at this stage that the competitive selection takes place.

In the second stage the pre-contract process is completed. The design team collaborates with the selected contractor to complete the design and develop the working drawings. 'Full' bills of quantities are finalised and priced on the basis of rates in the first stage tender. Rates for work items not included in the stage one bills are resolved through negotiation, resulting ultimately in an agreed contract sum (Ramus *et al.* 2006, Hughes *et al.* 2015).

Advantages

Two stage tendering has been referred to as an 'accelerated' tendering process. Advocates of the approach argue that the process is competitive, fast-track in its operation, and facilitates contractor involvement in planning and buildability issues relating to the project. The approach enables design, tendering and site operations to progress in parallel this may allow an earlier start / completion on site (Ramus *et al.* 2006, Cartlidge, 2009). Cartlidge (2009) adds that documentation is based upon [approximate] bills of quantities and should therefore be familiar to tenderers.

Disadvantages

Cartlidge (2009) argues that two-stage tendering may pressurise designers into making decisions concerning major elements of the project at an earlier stage than normally, resulting in a truncated design development period which may produce buildings lacking 'architectural merit'. He also notes that the approach lacks early price certainty and that clients can be vulnerable to any changes in level in the contractor's pricing between the first and second stages. Hughes *et al.* (2015) add that second stage negotiations may become protracted. The employer is essentially negotiating with one contractor only and the original price may increase steadily. They state that the *'worst position, which is all too common, is that the contractor commences work based on a letter of intent and then, with work progressing on*

site, the contractor's price negotiation position becomes even stronger.' In this regard Cartlidge (2009) identifies trust between the parties as critical to the success of the approach.

Competitive dialogue

Guidance Note GN 2.3 contains two paragraphs relating to the use of competitive dialogue indicating that it is unlikely that this approach will be widely used in practice.

‘Competitive dialogue procedures are used in exceptional circumstances, such as very complex projects that demand more flexibility in the procurement process than in either the restricted or open procedure – for example, those that involve public–private partnerships.

In a competitive dialogue, the Employer enters into dialogue with a number of suitable candidates with a view to establishing what is the best way to meet its requirements. Once this has been established, the Employer may invite candidates (at least three) to make tender submissions. This procedure also involves the publication of a Contract Notice on eTenders or where appropriate in the OJEU.’ (DPER 2012a)

Keystone Procurement (2015) comment that this process is used for complex contracts where a Contracting Authority has difficulty defining the technical solution it is seeking to go to market on. Typically, this is used for large infrastructural projects like PPPs but this is not always the case. Complexity is the key word. They add that the Contracting Authority must invite at least three candidates to conduct a dialogue. A discussion ensues with the selected candidates until all technical, economic, legal and other requirements to define a solution have been determined. Once the dialogue is concluded, the selected candidates can submit their tenders. Contracts are awarded in accordance with the award criteria and on a MEAT basis.

Mason Hayes and Curran Solicitors (2006) comment that the competitive dialogue procedure allows a contracting authority a greater degree of flexibility than is present in an open or restricted procedure. ... Under the competitive dialogue, any interested party may request to participate. The contracting authority then conducts a dialogue with the admitted candidates with the aim of developing one or more suitable solutions capable of meeting its requirements. The contracting authority then invites the chosen candidates to submit a tender on the basis of the developed solutions.

Negotiation

Among the chief criticisms of the traditional procurement approach is that it takes too long and lacks contractor input. In the UK such criticisms have led to the development of the two stage tendering approach described above. An alternative option which overcomes these two drawbacks involves negotiating directly with the intended contractor without the need for competitive tendering.

It is suggested that this approach is more widely favoured in Ireland than in the UK where Cartledge (2009) alludes to the approach '*as a strategy of the last resort*'. He notes that negotiated contracts will almost [always] result in a higher price than competitive tendering.

The approach is usually entered into for specific reasons other than price. It may be that an immediate start is required, for example, in an emergency situation or where an early start on site is required. Negotiation may be appropriate for specialised or complex projects where there are a limited number of firms with the necessary skill and experience capable of carrying out the project. In such cases the contractor's expertise may greatly assist the design team. Negotiation is often chosen for extension projects where the existing building was constructed by the selected contractor. The approach may be used where the extent or magnitude of works cannot be assessed before contract. There may also, of course, be a special business or personal relationship between the employer and the contractor.

Hughes *et al.* (2015) suggest that negotiation is one of the most effective ways of selecting a contractor for 'non-traditional' approaches such as Construction Management and Management Contracting. They add that these approaches demand flexibility and a less adversarial approach at all levels and all stages in the building process.

The contract sum is arrived at by negotiating and agreeing the rates and prices in a bill of quantities. Typically one party prices the bill to provide a basis for the negotiation. The other party then goes through the rates agreeing those which are acceptable. The two negotiators / surveyors then resolve the remaining rates through consensus. When agreement on the whole is reached, a contract will be entered into between the client and the contractor (Ramus *et al.* 2006). The essential basis of the agreement should be fixed before either party is induced into contract as there is little point in leaving out material facts which will have to be agreed at a later stage.

Negotiation results in the employer getting the contractor he/she wants. The approach, as noted above, is often used because the contractor has done satisfactory work for the employer before. It may also be used where the design team recommends a particular contractor as being ideal to carry out the contract. Hughes *et al.* (2015) note that the single most important factor of such a relationship is familiarity. They have worked together before, and they expect to work together again in the future. The preservation of a continuing commercial relationship is more important than simply securing the lowest price for the employer or the highest profit for the contractor. The approach may be suitable in situations where the employer has an ongoing programme of work (see serial tendering, below) or where the employer seeks to establish a partnering arrangement with a particular contractor. Nevertheless negotiation with a particular contractor should not become the rule and prices should be tested regularly through competition.

Advantages

Cartlidge lists several potential advantages associated with negotiation. These are an earlier start on site than other strategies; the opportunity to get the contractor involved at an early stage, and reputable organisations with a proven track record and the appropriate management expertise are typically chosen (Cartlidge 2009).

Negotiation offers a shorter lead-in time than traditional selective tendering. Overlapping of design and construction is possible, reducing the development period and allowing an earlier return on investment.

The employer secures a contractor of his own preference who may be particularly suited to carrying a specific project. The most suitable contractor can be selected. Key personnel from the contractor's staff can also be selected for the project.

Negotiating a fair price indicates that the construction phase relationships should be less confrontational with better on site working relationships. All important details of the project; construction programme; methods and procedure will have been discussed during the negotiations.

Disadvantages

Obviously, if only one firm tenders for a job, competition is eliminated and that will, almost inevitably, lead to a higher price. The aim should be to secure a fair price. The employer may believe it is worthwhile paying more for a quicker or better quality job. Quantity surveyors must be convinced that it is more beneficial to negotiate than go out to competitive tender before advising the client to use this approach (Ramus *et al.* 2006). Although the negotiations will be conducted within the framework of market rates the eventual offer will not be truly competitive; and does not reflect what the market will bear. However the final cost may not be significantly more than traditional tendering.

This procedure is successful only where there is an option to break off negotiations. In the event that negotiations prove unsuccessful a significant amount of time may have been lost.

Negotiation on public sector projects

Negotiation typically does not satisfy the requirements of transparency and accountability for projects in the public sector. It may be, however, be used in very exceptional circumstances which are set on in Guidance Note GN 2.3.

- Cases of extreme urgency (not caused by the Contracting Authority);
- cases where for artistic or technical reasons only one possible supplier is available;
- cases where an open or restricted procedure cannot attract appropriate tenders, and
- extensions to existing contracts, and repeat contracts (subject to certain conditions).

In a negotiated procedure, the employer negotiates with a number of contractors (usually at least three) – where, for instance, it would not otherwise be possible to price a particular project accurately or where specifications cannot be developed with sufficient accuracy to enable tenderers to provide fixed-price lump sum tenders. This would only happen on very rare occasions with the approval of the Sanctioning Authority. The employer must be entirely certain that the circumstances warrant proceeding with a negotiated procedure. For example, a case of extreme urgency must be one that could not have been reasonably expected and is not as a result of any fault on the part of the Contracting Authority. (DPER 2012a)

Serial tendering

Hughes *et al.* (2015) point out that there are two different kinds of tender. Firstly, ‘standing offers’ which are associated with term contracts and maintenance work where the contractor tenders for work to be carried out over a specified period, this arrangement is comparatively rare. Secondly, and by far the more usual arrangement, is to tender for individual projects which has been described above.

Where an employer has an ongoing works programme to be carried out in successive phases, a combination of selective tendering and negotiation may be employed. This is sometimes called ‘serial tendering’ or ‘continuity contracting’. The contractor is initially appointed through competitive tendering in the normal way. The original tender, however, is then also used as the basis for the negotiating the rates for subsequent phases. Serial tendering provides the benefits of continuity. The contractor will have the site organization already established on site, thereby allowing a smoother and cheaper transition than if another contractor were to be employed. The workforce will also be familiar with the construction details thus reducing the learning curve and increasing productivity (Ramus *et al.* 2006).

Conclusion

This study has examined the various options available for a client to appoint a contractor. In most building contracts the contractor is selected on the basis of competitive tendering. The price which the contractor quotes for the job is heavily influenced by both the amount and intensity of the competition. Even in the case of negotiated tenders there is implicit competition, as the employer can break off negotiations. If there is no competition the contractor can, in effect, ‘name his price’. This study examines the factors which influence one of the most cost significant decisions a client will make in the course of a building contract. It explains the characteristics, advantages and disadvantages of the various tender options and seeks to inform decision making concerning selecting a suitable tender arrangement to achieve the client’s objectives.

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APPENDIX A Indicative tendering costs prepared for the Latham Report (1994)

TABLE 10: AN ANALYSIS OF THE COST OF TENDERING

	£5M		£10M		£15M		£25M		£40M		£60M		£80M		
	D&B	Trad	D&B	Trad	D&B	Trad	D&B	Trad	D&B	Trad	D&B	Trad	D&B	Trad	
Design fees	Nil	Nil	3,000	Nil	Nil	Nil	9,000	Nil	3,000	12,000	Nil	5,000	15,000	Nil	7,000
Presentation brochures	2,500	Nil	2,000	3,500	Nil	3,000	5,000	1,500	4,500	10,000	1,500	6,000	10,000	1,500	8,000
Quantities	4,000	Nil	7,000	Nil	10,000	Nil	15,000	Nil	Nil	20,000	Nil	Nil	25,000	Nil	Nil
Enquiries	3,500	3,000	2,500	4,000	4,000	5,000	7,000	6,000	5,000	8,000	7,000	6,000	10,000	8,500	10,000
Estimating	5,000	4,000	3,000	6,000	4,000	9,000	7,500	12,000	5,000	15,000	12,000	7,500	20,000	15,000	20,000
Tender planning	4,000	4,000	2,500	4,500	3,000	5,000	6,000	5,500	4,000	8,000	7,000	5,000	12,000	9,000	6,500
Legal, insure commercial	2,000	2,000	1,000	3,000	2,000	3,500	4,000	4,000	3,000	5,500	5,500	4,000	7,000	7,000	8,000
D&B management	4,000	Nil	3,000	4,000	Nil	5,000	6,000	Nil	4,500	7,500	Nil	6,000	8,500	Nil	7,500
Total	25,000	13,000	14,000	36,000	16,500	19,000	49,500	22,500	30,000	86,000	33,000	39,500	107,500	41,000	52,000
Factor			1.79		1.89		2.11		2.18		2.18		2.18		2.26
Tender value %	0.50	0.26	0.28	0.36	0.17	0.19	0.33	0.15	0.16	0.26	0.11	0.12	0.22	0.08	0.16

Source: CIEC, February 1994.