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Tender Procedure for Traditionally Procured Building Contracts in Ireland

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Introduction

A *tender* is a term used to describe a contractor's priced offer to construct the works. The Aqua Group (Hackett and Statham, 2016) describe the purpose of tendering as:

> The purpose of any tendering procedure is to select a suitable contractor, at a time appropriate to the circumstances, and to obtain from him at the proper time an acceptable tender or offer upon which a contract can be let. (p. 35)

The process of tendering for construction contracts is an expensive process, particularly where contracts are large and/or complex or involve partial, or total, contractor design. It is standard industry practice for clients to seek tenders from a number of contractors in order to obtain prices for the work. Contractors typically tender on a '*no foal no fee basis*'. The unsuccessful tendering contractors are almost never paid for their work in preparing the tender and must absorb these abortive costs. These costs are ultimately passed on to other clients in the form of higher overheads. It is considered essential, therefore, that best practice in tendering be observed in order to minimise these costs and to ensure that proper standards are maintained in this key aspect of consultant quantity surveying practice.

The underlying philosophy guiding proper tendering procedure is that of ensuring *fair play* among the tendering contractors and employer trust and confidence in the result. The principle of creating a '*level playing field*' (more formally expressed as *parity of tendering*) among the contractors is central to achieving this aim. The contract administrator must ensure that no individual contractor is afforded an unfair advantage over its competitors. Procurement and tendering are seen as areas which are susceptible to malpractice and corruption. Cartlidge (2011) identifies activities such as bid rigging through collusion, cover pricing, and providing illegal compensation payments to unsuccessful bidders as examples of malpractice in this area. He concludes that '*transparency and ethical behaviour*' are

particularly important in building trust and confidence during this stage of the procurement process.

Tenders for building contracts may be obtained using a range of approaches such as the following methods used in the public sector:

- Open competition,
- Restricted competition also known as selective tendering,
- Competitive dialogue, or
- Negotiated procedure.

This study examines best practice in tendering **procedure** for building contracts in the private and public sectors in Ireland. The study builds upon and complements a related study by the Author *Appointing Main Contractors for Construction Work in the Republic Of Ireland. – An Overview* available at http://arrow.dit.ie/beschreoth/47/ (Cunningham, 2015). That study examined various **approaches** to appointing building contractors to carry out work and which focussed the characteristics, advantages and disadvantages, and implementation issues associated with competition and negotiation noted in the bullets above. The study also examined related issues such as prequalification, two-stage selective tendering and serial tendering approaches and indicated that in most cases building contractors are selected on the basis of competitive tendering. Selective tendering is generally favoured over open tendering as the latter is considered to give rise to excessive abortive costs, which in turn, increase overhead costs throughout the industry. This study examines best practice in the **procedures** involved in obtaining competitive tenders from the industry and the procedures employed by the consultant quantity surveyor in examining, reporting on making a recommendation regarding the suitability of a particular tender to the employer/client.

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) (called 'The Liaison Committee Code' hereafter) sets out best practice guidance for private sector tendering. Compliance with the guidance, while advisable, is **discretionary** and is not mandatory for private sector employers. The Capital Works Management Framework (CWMF) *Guidance Note GN 2.3* -

Procurement Process for Works Contractors (DPER 2012a) (called GN 2.3 hereafter) sets out the corresponding **compulsory** procedures to be followed for public sector procurement.

This study does not examine procedure regarding competitive dialogue or negotiations. Both approaches are used only in 'very exceptional circumstances' on State projects where flexibility is required and, indeed, competition may be limited to three contractors if not less. Similarly these approaches are unusual on private sector projects. Fair play and transparency in these procedures, which typically involve processes of offer and counter offer until agreement is reached demands an ethical response rather than compliance with procedures to ensure parity of tendering.

Obtaining tenders for building work

> 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).

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. This process is referred to as restricted tendering on public sector projects. The Liaison Committee Code describes the purpose of selective tendering as making '*a list of firms, any one of which could be entrusted with the job*.'

Hughes, Champion and Murdoch (2015) note that employers who build regularly will usually have an approved list of contractors, from which a short list can be drawn up. 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 and with whom they completed a number of previous (successful) projects. On occasions it may be necessary to advertise for interested companies to be included in the panel. These should be vetted in order to limit the number of tenderers and exclude unsuitable applicants (Ramus, Birchall and Griffiths, 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).

Public Sector Tendering

'*It is a basic principal of Government procurement policy that competitive tendering should always be used*'. (GN 2.3).

Public sector tendering procedure for construction work is governed by national procurement rules and also by EU procurement law where the value of the project exceeds the EU threshold[1] (currently €5,225,000). The general principle is that projects, other than small works projects, must be publicised and opened up to competition. Project values fall into three separate categories:

- Projects not exceeding €50,000 including VAT – such contracts are described as being below the 'national threshold' and are not *required* to be advertised although contracting authorities are encouraged to do so. Where the work is not publicised the contracting authority is recommended to invite five firms to tender for these 'small works' contracts.

- Projects whose value exceeds €50,000 including VAT but does not exceed €5,225,000 excluding VAT – such contracts are above the 'national threshold' of €50,000 including VAT must be advertised on the Government e-Tenders website.

- Projects exceeding €5,225,000 excluding VAT – such projects are above the EU threshold and must be advertised on the e-Tenders website **and** in the *Official Journal of the European Union (OJEU).*

The tendering process commences with the publication of an advertisement / Contract Notice which sets out specific project particulars and the arrangements relating to tendering for the project. The particular procedures depend on whether the contract is procured through an open tendering or a restricted tendering approach. There appears to be no definitive guidance regarding when a restrictive process rather than an open procedure should be used and it appears to be a matter of judgement of the particular project coordinator in the particular circumstances. The Department of Education and Skills however advises that '*In general*

[11] EU thresholds are revised every two years. The current threshold at December 2016 is €5,225,000

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).

Table 1, below identifies the various stages involved in the public sector open and restrictive tendering process. In essence both approaches are, initially, open to all interested parties. The distinction between the two approaches being that under the restricted procedure prospective tenderers must first express and interest in tendering and satisfy the contracting authority of their suitability to undertake the work before being shortlisted and invited to tender. Whereas under an open procedure tenderers must first pass the suitability assessment questionnaire included with their tender in order to have their tenders evaluated. Restricted tendering follows much the same procedure as that advocated by the Liaison Committee Code in conducting selective tendering procedures.

Open Tendering	Restricted Tendering
	Invite expressions of interest
	Assess suitability
	Debrief unsuccessful applicants
Invite tenders	Invite tenders
Assess suitability	
Evaluate tenders	
Notify intention to award	
Award contract	
Publish notice of award	
Execute contract documents	

Table 1 Key activities involved in the restricted and open procurement processes – Adapted from GN 2.3

The individual activities in the tender process include: publishing the Contract Notice on e-Tenders and where appropriate in *OJEU*; evaluating suitability of applicants; issuing tender documents to applicants/candidates; dealing with queries during the tender period; issuing supplementary information if necessary; granting an extension of time to the tender period if

necessary; recording receipt of tenders; opening tenders; evaluating tenders; documenting post tender clarifications; debriefing unsuccessful tenderers, issuing various letters and notifications to successful contractor and unsuccessful tenderers and posting the award notice in *OJEU*.

Preliminary Invitation to Tender

Section 9 of the Liaison Committee Code deals with the compilation of selective tendering panels. The Code recommends that a preliminary invitation to tender be issued to targeted contractors to establish whether they wish to tender for the project. Ideally this invitation should be issued four to six weeks before the tender documents are due to be dispatched. The Code provides a pro forma document for this purpose. Ramus et al (2006) comment that this procedure may help to avoid instances of contractors subsequently declining to tender or submitting 'cover prices' which they know would be too high to win the tender. Such actions distort the 'real' level of competition. Cover pricing is not an issue on public sector projects as only genuinely interested contractors will express an interest in tendering.

The invitation should contain sufficient details to allow prospective tenderers to form an initial appreciation of the project, to identify the employer and the design team and to form an understanding of the scope and value of the works. Of particular importance, is the identification of the form of contract, the chosen optional clauses, any amendments required to the standard form, the appendix details, particularly those relating to the project completion duration and liquidated damages, whether the contract is under seal, and whether there are additional bonding or collateral warranty requirements. The Liaison Committee Code strongly recommends that contracts are used in unamended form in the interests of achieving greater standardisation of building procurement procedures. Where amendments must be made, the Code urges clients to keep these to a minimum, and such amendments should be notified to the all prospective tenderers at this stage. The Code recommends that the RIAI with quantities 'Yellow' form be used for projects other than for 'minor' building contracts, a term which the Code, unfortunately, does not define.

When such an invitation is received, the contractor should consider it promptly. A decision should be given to the client either accepting or refusing the invitation within the stipulated timeframe. In arriving at the decision to tender the various contractors will consider the company's known workload and spare capacity. If the invitation is accepted full tender

documents will be received in due course. If the invitation is refused a letter should be sent to the client or architect explaining the reasons for not tendering. (Brook, 2008)

The Liaison Committee Code recommends that panels should comprise a minimum of six and a maximum of eight tenderers selected on the basis of the responses to the preliminary enquiry. A further two substitutes should be kept in the event that firms who were originally included in the panel withdraw. Panels for 'minor' works should be limited from four to six tenderers. If for any reason a firm which has signified its willingness to tender is not included in the final short-list of tenderers, it should be informed of the fact immediately, as they may have other tender invitations under consideration.

Public sector projects procured using a restrictive tendering procedure broadly echo this two-stage approach. The advertisement / Contract Notice published on the eTenders website and/or in the *OJEU* provides a general overview of the contract and provides sufficient information to allow contractors to decide whether to express an interest in applying for the contract. Contractors then submit evidence of their suitability to carry out the project. Applications are assessed, and where successful, the candidates are short listed and invited to tender.

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 must be stated in the Contract Notice and 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 also contains a field which permits the employer to enter the number of tenders to be sought.

Issuing of the Tender Documentation

The purpose and contents of the various tender documents has been explained in a separate study by the Author entitled '*Tender Documentation For Construction Projects – An Overview* (available at http://arrow.dit.ie/beschreoth/48/.) which argues that many of the financial problems arising on building contracts originate in inadequate or unclear tender documents, culminating in disputes between clients and builders over what is included in the

price for the work. It is therefore important that the tender documentation should be as fully developed and be as comprehensive as is practicable in order to avoid unnecessary problems at a later stage.

On private sector projects the quantity surveyor is usually responsible for assembling and issuing the tender documents. The documents together with clear instructions regarding the return of the form of tender in printed format and the bill of quantities should be issued on the date indicated in the preliminary enquiry form. Documents, in general, may be issued in either electronic or in printed format. The architect's and structural engineer's drawings relating to the **main contract**, however, shall be issued in paper format, as shall drawings specific to nominated subcontract packages. Where the documents are issued in electronic format, a printed version shall be issued to tenderers on request. It is, however, essential that all tendering contractors receive identical tender documents in order to maintain parity of tendering.

The composition of the documents depends on whether the contract is let with, or without, quantities. As noted above, The Liaison Committee Code recommends that the RIAI 'Yellow Form' of contract should be employed on projects other than 'minor' works. The Code also recommends that bills of quantities should 'always' be issued in these instances. In addition a form of tender, general arrangement drawings, the Preliminary Health and Safety Plan, drawings referred to in bill descriptions and, where appropriate, significant drawn details together with other documents such as statutory consents, should be supplied to the tendering contractors. Progress drawings should be marked 'PRELIMINARY' in order to distinguish them from working construction drawings. The tendering contractors should be informed that they can inspect the detailed drawings, if requested, at the architect's office.

The Liaison Committee Code recommends that where a 'without quantities' form of contract is used, that ideally a bill of quantities or, alternatively, a schedule of items should be supplied. Under these 'minor works' arrangements a full set of construction drawings and specifications must be issued to the tendering contractors, together with the form of tender and Preliminary Health and Safety Plan and other statutory consents.

On public sector projects the responsibility for issuing the tender documents rests with the design team, led by the 'Project Coordinator'. Tendering usually proceeds after the approval of Project Review 6 which signs off the project detailed design solution, the pre-tender cost

check and risk review. At this stage construction quality drawings are complete, allowing a comprehensive pricing document to be completed. The recent review of the operation of the public works contracts has introduced the requirement that the pricing document for PW-CF1 and PW-CF5 building contracts shall be a bill of quantities (measured in accordance with ARM4 and incorporating Department of Finance approved amendments).

A deposit may be required to cover the cost of reproducing and mailing the printed documents for both public and private sector. Deposits should returned in full to the unsuccessful tenderers that have submitted *bona fide* tenders and which are not subsequently withdrawn.

Time for Tendering

Contractors must be given sufficient time to prepare their estimates, obtain and select quotations from suppliers/sub-contractors, and finalise their tenders. The Liaison Committee Code recommends that this period should be a minimum of 20 working days. The Code advises a longer period may be required for 'without quantities' contracts or for major projects, or for projects involving special circumstances. The Code recommends that where major amendments have been made to standard form contracts that a further 10 days, or longer if the amendments are extensive, should be added to the time for tendering. Where this guidance has been followed no further extensions to the tendering deadlines should normally be considered.

Where a tender is being submitted on a design and build basis, a contractor will have to carry out considerably more work in the preparation of its tender submission and this fact should be reflected in the time allowed to return the tender. Ramus et al (2006) suggest a minimum period of twelve weeks in these cases.

On public sector projects contracting authorities must allow tenderers adequate time to submit their bids and must have regard for the EU Directives and the complexities of the project when determining the timeframe for submitting tenders. These requirements, set out in Appendix A, are 'somewhat elaborate' and depend on various factors including: the contract value; whether the project is procured through open or restricted procedures; whether a Prior Information Notice (PIN) has been issued; whether the contract notice has been communicated electronically; whether the project is urgent, and whether the project's complexity justifies additional time. The latest date for receipt of tenders is stated in the invitation to tender. The various permutations vary from a minimum of 52 days for open

tendering on projects above the European threshold without a PIN to 15 days for 'emergency' works. Projects under the EU threshold of €5.225 million typically will have a tender period of 21 days which may be reduced if justified in the particular circumstances.

McDonagh (2009) comments a PIN is essential if the contracting authority intends to reduce the deadline for the receipt of tenders above the EU threshold. He adds that PINs, are often published at the beginning of the financial year, in order to inform prospective tenderers of forthcoming contracts. The PIN should be published as soon as possible after the planning decision to approve the contract has been reached and contain the prescribed information outlining the essential characteristics and details of the particular contract. McDonagh explains that when a prior information notice has been published the contracting authority can reduce the deadline for receipt of tenders from no less than 52 days to no less than 22 days when awarding a contract by the open procedure.

Queries during the Tendering Period

Architects and quantity surveyors almost invariably receive queries from contractors during the tendering period. These typically relate to items such as specific employer's requirements, the practicality of a detail, the availability of a specified material or queries regarding inconsistent, inaccurate, or under-measured quantities. Such queries must be dealt with promptly and if the response alters the information in the tender documents in any way, it must be communicated immediately to all tenderers in order to maintain parity of tendering. This communication should be mailed in writing or electronically (previously was called a 'round robin' letter) and tenderers should be asked to confirm its receipt immediately. Similarly when pricing the tender documents contractors should avoid the temptation to price alternative equivalent (cheaper) materials or different methods of construction, or vary the length of the construction period. The recommended procedure in these instances is to price the tender documents as printed and to submit, in an accompanying letter details of the alternative option with the consequential effect on the tender sum. (Ramus et al. 2006)

On public sector projects tenderers can raise *written* queries before a deadline stated in the instructions to tenderers; the default period is 14 days before submission of the tender. The design team is not obliged to respond to queries but may choose to do so in which case they must follow the defined procedures set out in section 2 of the instructions to tenderers. All queries must be managed in the same way and all tenderers must be given the same

supplementary documentation and replies and access to further information. Section 4.2 of GN 2.3 contains provisions for tenderers to raise 'confidential' queries where the response is intended to be sent to the particular applicant alone. In these instances the project co-ordinator has the discretion to allow or refuse the request. The co-ordinator may seek the applicant's permission to respond to all the tenderers, failing which, the co-ordinator may request the applicant to withdraw the query. In these instances the project coordinator may, in any event, issue the information *'if considered important enough*' to all tenderers.

Tender Submission and Assessment

Return and Opening of the Tenders

Tenders must be returned on or before the deadline stated in the instructions to the tenderers. The Liaison Committee Code recommends that the forms of tender be returned as a sealed bid in **printed** format in a separate sealed and endorsed envelope to prevent inadvertent opening. Priced bills of quantities may be submitted in either printed or electronic format. Where the tenders are returned to the architect or QS, it is usual practice to arrange a formal meeting, usually attended by the client, to open the tenders and record the results. Ramus et al (2006) note that the purpose of this procedure is to '*eliminate any suspicion of irregularities*'. They stress that tenders must not be opened before the submission deadline. They also stress that the possibility of divulging or revealing a tender result to competitors must be eliminated. Public sector tender openings must be witnessed by at least two officials.

The results of the tender opening are typically recorded on a tender opening form containing the names of the various contractors, their tender amounts excluding or including VAT as instructed, bond amounts and details, and remarks such as qualifications or programme options. Tenders received after the deadline should be disqualified and under no circumstances should a firm, which has failed to submit a tender, be contacted after the tenders have been opened. The tender opening form should record the action taken in respect of late tenders.

Examination / Evaluation of Bill of Quantities

'*Good tendering procedure demands that the Contractor's tendered price should not be altered*' (Liaison Committee Code p.4).

The Liaison Committee Code advises that the bills of quantities supporting the lowest tender should be opened as soon as possible in order to check them for errors, to ensure their compliance with the tender instructions, and to ensure that alterations and/or additional information issued during the tender period have been properly included in the tender. It is not necessary to obtain the prior permission to open the lowest tenderer's bills. Where the bills have been submitted electronically the winning contractor must provide a 'priced hard copy' within two days. Tenders from other than the lowest tenderer should not be opened. But, where a decision has been taken to open other tenders, permission should first be obtained from the other contractor(s) to do so.

The Liaison Committee Code recommends that examination of the priced bill should be carried out by the QS who should treat the document as confidential. The checks on the bill are aimed at 'detecting errors' however the QS will be mindful of detecting anomalies and 'irregular' pricing strategies within the tender, which may expose the client to undue risk if ignored. The checks aim to detect: arithmetical errors; unexpectedly high or discounted rates for individual work items; unbalanced pricing of particular work sections; extensive instances of unpriced items being 'bracketed' within an overall total; and/or unauthorised amendments to document.

The arithmetical check should reveal incorrect cash extensions, incorrect page and work section summaries and the posting of incorrect totals to the general summary and the form of tender. The rate review attempts to discover **obvious** mistakes in the individual prices. These errors should be **notable and significant** within the overall tender context. Rate differences may be due to efficient working or buying or to the method of allowing for plant or scaffolding. Items priced using incorrect unit of measurement are likely culprits. In addition the misplacing of a decimal point in the rate or price is another common error. Where arithmetical errors are discovered these should be reported to the architect who in conjunction with the employer who will determine the action to be taken.

The contractor is entitled, of course, to build up its tender as it thinks fit and cannot be required unilaterally to change any of the rates or prices. However, contractors usually recognize and accept the need to correct obvious errors and would be imprudent not to do so. As regards pricing strategy, this is usually considered to be a matter for the contractor's

decision, the remedy being that if the QS has genuine grounds for concern about the tender, he/she may recommend the client not to accept it.

The Liaison Committee Code recommends that the tenderer should be given details of such errors and be offered the opportunity of confirming the original tendered amount failing which the offer should be withdrawn. If an error results in the tender being overpriced; the tenderer is not obliged to correct it. If an error results in the tender being overpriced; the tenderer is not obliged to correct it. If the tenderer withdraws, the priced bill of quantities of the next lowest tenderer should be opened and examined in the same way, and if mistakes are discovered in this tender the tenderer should be given a similar opportunity to confirm or withdraw the tender.

A dilemma may arise where errors result in an under-priced the tender and the contractor seeks to correct the errors. The Liaison Committee Code recommends rejection of the offer in these instances. Similar difficulties arise where a tender appears to be abnormally low in comparison to the forecasted result, or contains unauthorised amendments and/or irregular pricing strategies. Likewise, in open tendering competitions, the lowest tenderer may be considered to be unsuitable. In these situations the client, particularly a one-off client may have deep reservations about rejecting the tender and having to pay more to secure a *'bona-fide'* tender.

Unscrupulous contractors may use 'mistakes' as a means of 'getting to the table' and attempt to narrow the gap between their tender and the next lowest tender by correcting the 'mistake'. This opens up the possibility of abuse of the system. Opinions are divided on what is the best thing to do. Some say that such corrections should never be considered on the grounds that correct tendering procedure and discipline ought to be maintained and that the tender should be rejected. This point of view may appeal to large clients conducting frequent dealings with the same group of firms. The more common position, however, is for the client undertaking a once-off investment to take the commercial approach and amend the tender amount. In this instance the lowest tenderer may know the difference between his tender and the next lowest tender leaving it in a strong position to insist on the correction. It is this very situation that The Liaison Committee's guidance sets out to avoid.

In all cases, therefore, it is prudent to notify the client of the full facts and provide advice on the action to be taken but letting the client come to a decision. In no case is the architect or the

QS entitled to reject the tender on their own authority. What must be looked for is that any major error in the tender is genuine and must be shown to be *bona-fide* beyond all doubt. If any doubt remains rejection should be advised. If in the end the client accepts a spurious tender against the advice given, the architect can always exercise the sanction of omitting the dubious firm from future selected lists.

The Liaison Committee Code recommends the following procedure where a tenderer confirms its offer despite the discovery of errors.

> an endorsement should be added to the priced bill of quantities indicating that all rates or unit prices (excluding preliminaries, contingency, prime costs and provisional sums) are to be considered as reduced or in increased in the same proportion as the corrected of the priced items exceed or fall short respectively of the total before correction.

This percentage is applied to measured builder's work when producing any interim valuations, final accounts and variations. While this method of absorbing a discrepancy is recommended for large errors it is often felt to be impractical for dealing with small corrections. It is common practice to make a lump sum adjustment in a priced preliminaries item; site hoarding for example, to deal with this discrepancy. Any gross distortion of the price should, however, be avoided. Whatever method is employed the tenderer's agreement will be required.

Similarly, good practice requires that contractors submit unconditional or unqualified tenders in accordance with the issued instructions. The Aqua Group (1996) warn that qualified tenders may be disallowed, on the basis that the tenderer had the opportunity to clarify matters '*and, not having done so, displays some ulterior motive*'. The Group add that contractors sometimes submit qualified or alternative tenders, despite instructions to the contrary, incorporating amended contract conditions or proposing alternative forms of construction or specifications which offer cost savings or schedule reductions. The Group condemn such submissions as contrary to good practice and urge that they should not be entertained. They explain that such submissions are usually disruptive and time-consuming during a stage which usually requires a tender report to be produced within a tight time frame.

The examination and reporting on tenders based on multiple evaluation criteria (MEAT) or for design and build contracts is less straightforward. There will be a number of variables, making comparison between tenders more complicated. Apart from price differences, tenders

may vary in the construction time, constructional form, quality of finishes, the likely degree and cost of maintenance and perhaps the anticipated cost of running and maintaining specialist installations. In the tender report, the surveyor will need to consider all the tenders as there may not be an immediately obvious most economically advantageous tender. The QS will need to set out in a clear and easily assimilated form the relative savings, benefits, merits and disadvantages between the packages offered. The QS should, nevertheless, make a recommendation as to which tender, if any, the client should accept.

Examining Public Sector Tenders

On public sector contracts GN 2.3 requires a 'tender evaluation team' to consider and evaluate all tenders that have been submitted on time. The team check all tenders to determine whether they compliant with the instructions or not; they determine whether the contractor is suitable in the case of open tendering procedures, and they evaluate the tenders to determine the most economically advantageous tender (MEAT). This MEAT determination is assessed using the criteria and weightings set out in the instructions to tenderers.

GN 2.3 states that where tenderers have made unapproved qualifications to tender documents or to any pricing document or bill of quantities that these should not be accepted '*under any circumstances*'. Where tenders are qualified the employer *may* require the tenderer to withdraw the qualification, and if the tenderer refuses to do so the tender *must* be rejected. If all tenderers have qualified their tender the employer may abandon the procurement procedure.

The tender checking process is similar to that carried out in the private sector. The governing principle is that the tendered contract sum shall not be adjusted for arithmetical mistakes or rebalancing measures. Individual rates may be adjusted to correct incorrect rate extensions and/or totals so that the arithmetic ultimately balances with the tendered amount. The employer may either adjust the affected rates pro-rata, or adjust a particular rate as an 'adjustment item'. Similarly, if the employer is of the opinion that the pricing is 'unbalanced', it may seek rate breakdowns from the tenderer to justify the pricing, or invite the contractor to adjust the particular rates without affecting the overall tendered amount. In any case the employer reserves the right to reject 'unbalanced' tenders.

Section 9.1.1 of the Instructions to Tenderers (DPER, 2016) indicates that contract must be awarded on the basis of the offer which either: (i) is the most economically advantageous from the point of view of the contracting authority or (ii) offers the lowest price. Bowsher (2016) notes that in the UK, '*the lowest price criteria is hardly ever used in the construction sector, despite what is sometimes said by commentators*'.

The criteria against which the contracting authority evaluates the relative economic advantage of one tender against another is set out in the particulars section of the Instructions to Tenderers. The criteria relate to various aspects of price and technical merit. Where technical merit criteria are stipulated, the formulae used to arrive at the scores must be entered; and the particular weightings applied to each criterion must be identified. Bowsher (2016) notes that on particular occasions the weightings may be expressed as a range, or in order of descending importance. Thus, the winning contractor may be determined by the relative importance attached to particular client priorities rather than by lowest price alone.

The project coordinator may seek clarifications from the prospective contractor in order to avoid rejecting a tender *'on matters which can be easily clarified*'. In exceptional cases tenderers may be interviewed in order to clarify particular aspects of their tender.

Post Tender Negotiations

It is not uncommon for tenders to exceed the client's budget. In these situations it will become necessary to negotiate the required savings with the tenderer(s). The Liaison Committee Code recommends that negotiations should be conducted with the tenderer in the event that the tender exceeds the client's budget. It also advises that the basis of the negotiations and any agreements made should be fully documented. Should these negotiations fail the contractor should be notified of the fact and negotiations may then proceed with the next lowest tenderer(s). If all negotiations fail new tenders may be called for. If the project is abandoned the tenderers should be notified as soon as that decision has been taken.

The public sector procurement regulations prohibit discussions regarding substantive matters contained in the tender which go beyond simple clarifications. GN 2.3 quotes EU directives '*...all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, in particular on prices, shall be ruled out'*. This regulation can lead to particular complications where public sector tenders exceed

their budgets. The procedure to be followed in such instances is included in Section 4.8 of GN 2.3. The most straightforward, although heavily discouraged, solution is to secure additional funding from the Sanctioning Authority where the project is seen as still offering value for money. Where funds are not forthcoming, the proposal must be re-examined to identify whether there are non-essential works which can be omitted in order to correct the cost over-run without materially affecting the nature of the project. GN 2.3 warns against omitting work that may need to be reintroduced during the post-contract project as this tactic may be challenged as contravening national and EU procurement rules.

Reporting and Recommendation

It should be clearly noted that the client is, in the absence of express wording to the contrary, under no general obligation to accept the lowest, or indeed any tender, regardless of a recommendation being proposed in the tender report.

One of the most important services the QS provides to the design team and to clients focusses on the decision to recommend the appointment of a particular contractor to carry out the works. This recommendation is the primary purpose of the tender report which presents the results of the tendering process. The QS must be satisfied that the tender, and the documentation on which it is based, together with any subsequent negotiations will form a satisfactory and unambiguous basis for entering into a contract.

Ramus et al (2006) comment that the QS must report to the contract administrator and the client as soon as the tender examination has been completed. They remind us that the purpose of the report is to enable the client to decide whether to accept any of the tenders and, if so, which one. They recommend that the report should concentrate on important matters and that minor matters should be excluded. The report format will typically include the following information:

- The identities of the tenderers and their tendered amounts arranged in ascending order of cost. The tender results are often presented in index form.
- A review of the tender examination process which includes:
    - the opinion of the surveyor as to the price level, for example that the tender is considered to be high, low, or is as expected;

    - the quality of the pricing, indicating any detectable pricing strategies;
    - the extent of errors, and inconsistencies in pricing and the action taken in regard to them;
    - the details of any qualifications to the tender;
- The likely total cost of the project, if not a lump sum contract; and
- A recommendation as to acceptance or otherwise.
- Further recommendations for action.

The AQUA Group (1996) comment that if no serious errors have been found in the bills of the lowest tenderer, the design team's report will normally recommend acceptance of that tender. They advise that a recommendation to accept a tender other than the lowest tender should only be considered in the '*most exceptional circumstances*' and a full justification for such a recommendation should be given.

The QS will frequently be asked to prepare a tender analysis which can be required for a number of purposes. Traditionally, the tender analysis compares tendered prices against the cost plan, and allows the QS to update his figures and establish a proper basis for cost control during construction. (The AQUA Group, 1996). GN 2.3 requires the QS to provide a tender cost analysis on public sector contracts, describing it as a '*key document in the Design Team's tender report*'.

Notifying Results to Tenderers

The employer should be encouraged to make a decision on the report as the contractors will be anxious to know whether or not their tenders have been successful. The Liaison Committee Code recommends that a tender result list should be produced and sent to all tenderers within two days of concluding the decision on the contract award. The results should set out all the tender sums in ascending order. This notification informs each contractor whether its tender was successful or not, and provides valuable feedback regarding its tender performance. Ramus et al. (2006) note that individual practices may include the names of the tendering contractors arranged in alphabetical order in order to avoid disclosure of which tenderer submitted which amount but, of course, each will be able to identify the position of its own

tender in relation to the lowest. The QS typically performs this duty. The bills supporting unsuccessful tenders should also be returned to the contractors unopened.

It should be remembered, however, that while it is made clear to tenderers when tendering that the client is not obliged to accept the lowest or indeed any tender, contractors naturally expect that there will be sound reasons for rejecting the lowest tender. The surveyor must therefore be able to provide those reasons in the event of the lowest tender not being accepted.

On public sector projects, Section 4.9 of GN 2.3 recommends that contracting authorities adopt a voluntary policy on debriefing unsuccessful tenderers regarding the strengths and weaknesses of their tenders particularly where a MEAT evaluation has been carried out. The Guidance notes that the debriefing should take place after the contract award. The Guidance adds that this approach may help to avoid instances of unsuccessful tenderers pursuing formal measures such as disclosure under the Freedom of Information Act or EU Remedies Directives to obtain information regarding their tenders to which they are entitled.

GN 2.3 requires contracting authorities to issue a number of standard letters at the contract award stage to the tendering contractors. A letter of intent, (MF 1.3) is issued to the *winning tenderer* not earlier than 14 days before the issue of the Letter of Acceptance (MF 1.4), which forms the contract. Unsuccessful tenderers are advised by a 'letter to apparently *unsuccessful tenderers* **(**MF 1.2) at the same time as the issue of the letter of intent. Finally, *all* tenderers should be notified by post of the award of the contract using the model form MF1.5.

Conclusion

The process of tendering for construction contracts is an expensive process, particularly where contracts are large and/or complex or involve partial, or total, contractor design. The underlying philosophy guiding best practice in tendering procedure is that of ensuring *fair play* among the tendering contractors. Tenders for building contracts may be obtained using a range of approaches. This study examines best practice in tendering procedure for building contracts in the private and public sectors in Ireland and focuses in particular on the procedures to be carried out under open and selective/restricted tendering approaches.

The study identifies where open tendering and selective tendering should be used. It deals with procedures regarding compiling a list of tendering contractors in response to a private

preliminary invitation to tender or public published contract notice. Guidance is provided regarding the number of contractors that should be invited to tender where a selective/restricted procedure is adopted. The amount of time contractors should be allowed in order to submit their tenders is also considered. The study outlines procedures regarding issuing tender documentation and dealing with queries and clarifications during the tendering period. Procedures for returning and opening tender submissions are investigated. Best practice in examining bills of quantities and evaluating economic advantage is also set out. The study outlines the process of reporting the tender results and of making recommendations to clients regarding the appointment of contractors. The study concludes with the procedures for notifying the successful tenderer and unsuccessful contractors of the results of the tender competition.

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APPENDIX A

Tendering Time Periods for Public Sector Construction Projects

Type of Procedure	Time Limits
Open	▪ For receipt of tender, 52 days; or If a Prior Information Notice (PIN) has been published, this may be reduced to 22 days in particular circumstances[5]; or ▪ If the notice is transmitted electronically time for receipt of tenders may be reduced to 45 days, or where a PIN ▪ has been published the time may be reduced to 15 days. ▪ Where unrestricted and full direct access by electronic means is provided to all tender and supplementary documents the tender time may be reduced by a further 5 days.
Restricted	▪ For receipt of expressions of interest / requests to participate, 37 days (with no allowable reduction); or ▪ If the notice is transmitted electronically the time for receipt of expressions of interest may be reduced to 30 days. or ▪ In cases of genuine urgency[6], 15 days, or ▪ If a notice is transmitted electronically the time for receipt of expressions of interest may be reduced to 30 days.
Type of Procedure	**Time Limits**
Restricted (Continued)	▪ For receipt of tenders under restricted procedure, 40 days from date invitation to tender is sent; or If a Prior Information Notice has been published, this may be reduced to 36 days and under no circumstances be less than 22 days in particular circumstances. ▪ In cases of genuine urgency, 10 days. ▪ Where unrestricted and full direct access by electronic means is provided to all tender and supplementary documents the tender time may be reduced by a further 5 days.
Negotiated and Competitive Dialogue	▪ For receipt of tenders, time to be agreed between the parties.