

Tenders

How to avoid the risk of litigation

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This article outlines the most important technical and legal aspects to consider in the event of tender-related legal disputes. Bringing a case to court not only risks delaying the project, it may also have political, reputational and financial consequences. It therefore makes sense to review the most important legal aspects when the procurement authority prepares the tender.

Tender philosophy

As government entities are financed with public funds, they are by definition answerable to the general public. These days, the public procurement of goods and services is governed by the same economic adagio as private sector contracts: more value for money. Growing demand for identification solutions and broad-based technological progress have made the identity industry more competitive in recent years. One of the positive side-effects of internationalisation is that public sector entities are able to contract suppliers beyond their national borders.

The idea behind tendering is that all qualified parties have the same opportunity to pitch for contracts to supply products and services. In other words, a philosophy based on transparency and fairness. The Agreement on Government Procurement (AGP) negotiated by the World Trade Organisation (WTO) and signed in 1994 is the first document to set out international rules for public procurement. The aim of the signatory countries was to promote liberalisation and world trade by improving the international trade framework⁵. In practice, this requires government entities to refrain from discriminating third parties in favour of local providers, or to differentiate between local suppliers for that matter⁶. The principles of non-discrimination, equal treatment, transparency, mutual recognition and proportionality set out in the EU Treaty apply to all tenders within the European Union⁷. In addition, most countries have implemented international regulations in their domestic legislation. In other words, there are legal regulations in place to

assist tenderers with the successful establishment and management of tendering programmes. Readers who are unfamiliar with the legal issues involved will find a brief explanation of the crucial aspects below.

The tendering steps and strictures

The tendering strategy used can vary, depending on the type of goods or services procured. The first step therefore involves selecting an appropriate tender procedure. If the goods or services are related to classified government operations, the procurement authority may decide in favour of a negotiated procedure. The competitive dialogue procedure is used for complex procurements (in instances where open or restricted procedures are deemed ineffective). The competitive dialogue procedure allows authorities to enter into dialogue with potential bidders before requesting final tenders. In many ways, this procedure replaces the negotiation process used in the past.

As far as ID documents and related services are concerned, the restricted procedure is clearly favoured. This procedure involves selecting the companies that initially responded to the call for tenders. The key selection criterion is whether or not the contractor is able to manage a politically sensitive project. This capacity is expressed in terms of economic and financial solvability, references (experience with similar projects) and technical capabilities. To make sure that the evaluation of bidders is unambiguous, the procurement authority should carefully define the selection criteria. It is extremely important that all legal and formal conditions are met at this stage, not least because the selection of tenderers can be legally challenged. In some cases, the procurement authority may opt for the fourth procedure type: the open procedure, which allows all interested parties to obtain the tender documentation and submit a bid.

The procurement team is responsible for defining the tender documentation, which specifies the products and/or services required. Brand names and other references to existing products should be avoided as this could place competitive products and services at a disadvantage. The need for equivalence should be clearly stipulated. Under the rules of equivalence, alternative solutions must offer the functionality and features requested. An interdisciplinary team should



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Box 1

Court cases

- *Finland 2005 - biometric passport delayed*

Finnish passport manufacturer Setec initiated proceedings against the Finnish government following its decision to contract the production of the Finnish passports XponCard of Sweden and SDU of the Netherlands. Setec argued that the bids submitted by XponCard and SDU failed to comply with the regulations governing the original tender invitation. The court is expected to announce its ruling shortly.⁴

- *France 2006 - Oberthur plans to appeal in Brussels*

The Conseil d'État's ruling² to quash the Interior Ministry's decision to award the personalisation of biometric passports will probably cause Oberthur, France's largest printer, to take the issue up with the European authorities in Brussels.³

- *Italy 2008 - The Council of State accepts Finmeccanica's appeal against the National State Printer*

The Italian National State Printer (Istituto Poligrafico e Zecca dello Stato) issued public tenders for its ID card project. Selex Sema, a subsidiary of Finmeccanica, had participated in a previous ID card consortium and decided to submit an appeal to the Regional Administrative Court. The appeal was successful and the tenders were suspended.¹

review the technical documentation, avoiding any misunderstandings at a later stage

The definition phase involves a comparison and analysis of existing products with the aim of defining realistic requirements. While contacts with potential suppliers are unavoidable, they should be structured and even formalised to provide auxiliary evidence of fairness. Once the formal tender procedure has started, informal contacts with potential contractors/suppliers should be avoided at all times. As a matter of fact, any information shared with a single tenderer should be disseminated to all other tenderers. A record should be kept of the materials distributed. As details of tendering parties must remain confidential, no group emails or letters are to be distributed⁸. Clear communication during the tender procedure is essential. In turn, this requires a clear communication policy to be defined. A member of the tender team should be appointed as the central contact for potential bidders. It goes without saying that potential tenderers should be issued clear instructions and guidelines. This also helps to streamline their response.

If a transparent cost structure is required, the tender needs to be designed with this objective in mind. The use of cost categories makes it easy to compare prices. Where possible, all-in prices (including maintenance, for example) should be avoided; staggered pricing is preferred. For development projects, it may be advisable to stipulate a renewal schedule for the goods and/or services procured. Before the tender is issued, award criteria and calculation methods are defined and included in the documentation. The next step is to publish the call for tenders. As the evaluation of

offers is somewhat sensitive from a legal perspective, the utmost care should be taken when staffing the technical content evaluation committee. The committee's remit is to apply the award criteria without any partiality. To this end, a clear, report-based audit trail should be established.

Key considerations for contractors and suppliers

All aspects of the bidding process reflect on the professionalism of the tendering party or company. This being the case, the description of the proposed solution must meet all requirements defined by the tendering party. Tenderers are also expected to demonstrate their economic and financial capabilities, as well as their technical know-how and experience. Should a tenderer deviate from the standard template, evaluation points may be lost (or worse, the party in question may be disqualified). The quality of the text is also important. In other words, the offer document should be transparent and clearly legible. As indicated, informal contact between the contractor and the tendering party should be avoided during the formal phase of the tender. Competitors could refer to informal communications when challenging a decision to award a tender to a given party.

Potential bidders should read the requirements carefully and ask for any ambiguities to be clarified (while observing the communication procedure). Consultations within the bidding team should result in a detailed analysis of the tender specifications and a clear definition of the product and/or services to be offered. The next step is to cover each point in accordance with the tender documentation structure.



A technical evaluation will highlight whether all requirements have been met. Not observing the tender structure would be counterproductive. Any offer for an alternative product/service or a product/service that deviates from the requirements should be substantiated. If products and/or services are supplied by subcontractors, their role should be defined in detail. A transparent cost structure would permit a careful comparison of prices.

Additional information on public procurement in Europe

The SIMAP portal established by the European Commission provides access to relevant information on the subject of public procurement within Europe (including forms, explanatory notes to existing legislation and useful links). Readers may also wish to consult the PLAN (Procurement Law Academic) Network, a permanent global network of academics interested in public procurement law and regulatory policy. The PLAN website includes details of public procurement related events.

Conclusion

The rules and regulations governing public procurement were drawn up to allow government entities to invite tenders from international parties while guaranteeing equal rights to potential bidders. Tenders for ID documents and peripheral products and services are challenging from a technical, economic and political perspective. The market is extremely competitive and tender decisions can be challenged in a court of law. All the more reason for government entities and industry participants to be familiar with the legal regulations and antecedents.

- 1 <http://archivio-radiocor.ilssole24ore.com/articolo-611695/finmeccanica-ok-cstato-ricorso/>
- 2 République Française, Conseil d'État, 3 mars 2006, Oberthur et autres, no.287960, Paris, France.
- 3 <http://www.graphiline.com/article/7673/Oberthur-va-deposer-un-recours-a-Bruxelles-contre-l-Imprimerie-Nationale>.
- 4 HELSINGIN SANOMAT, International edition, Helsinki, Finland. <http://www.hs.fi/english/article/Finlands+issuing+of+biometric+passports+delayed/1101978984487>
- 5 Fons Knopjes, Diana Ombelli, *The Developer's toolkit: Ch. 3 Producer*, Via Occidentalis, IOM, Lisbon, Portugal 2008.
- 6 World Trade Organization, *Agreement on Procurement*, art. III (2), 1994, www.wto.org/english/docs_e/legal_e/final_e.htm
- 7 Office of Government Commerce, *Introduction to EU procurement rules*, Norwich, United Kingdom, 2008.
- 8 D. G. Carmichael, *Disputes and International Projects*, Zwets & Zeitlinger B.V., Lisse, The Netherlands, 2002.

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