

Tendering Process

Part 3

Responding to Contract Notices:

Good Practice

Never withdraw from any stage of the tendering procedure without proffering a FULL written explanation.

To do so could lead to your company being barred from future opportunities.

If you were to ask a local tradesperson to come to your home to provide an estimate and:

- a) they failed to turn up; or
- b) promised to forward an estimate but failed to do so; or
- c) provided an estimate but then failed to begin the work:
- how well would that reflect on your opinion of their worth?

Undoubtedly, in every instance, you would be unlikely to consider that company's services in the future.

So it is with public sector clients.

Should you, in response to reading a contract notice:

- a) request information, or express an interest, but then fail to notify the issuing authority that you do not intend to continue your interest; or
- b) be invited to tender but fail to do so:
- then don't be surprised if the issuing authority is inclined to dismiss your company's interest in future opportunities that may arise.

It is essential that you follow the "Best Practice" procedure of always explaining in writing why you are no longer interested in a contract opportunity.

The following letters provide you with ideas for correspondence relative to withdrawing your interest in a contract at various stages in the process and for various reasons.

Decline to Proceed

Write a formal letter to the issuing authority explaining why you feel unable to respond on this occasion, but state that you look forward to being invited to do so in the future (Example Letter A).

Decide to Request to Tender

Complete questionnaire and return. (Do not rely on details held on lists, always supply full and updated information.)

Have a database of all information that may be requested. Refer to the EC Directives as guidance for what information is required and also to the UK CCT legislation where appropriate.

KEEP YOUR DATABASE UPDATED.

Invited to Tender

Evaluate tender documentation. Refer to your initial report and make a new report again highlighting items requiring clarification or potential problems. Seek a pre-tender meeting if necessary. Often such meetings result in onerous requirements being amended.

Always record clearly the date for return of tender documentation.

If you are deterred by either the terms or specifications expressed in the tender, don't withdraw unless you consider it fully justified. Write to the issuing authority fully explaining your concerns and request clarification (Example Letter B).

Pre-Tender Meeting

- a) Do not attend a pre-tender meeting alone.
- b) Always take detailed notes and be aware of the questions of others.
- c) See and be seen.
- d) Ask only relevant questions that show your experience and knowledge.
- e) Use your company name and your own name when asking questions: make sure you are known.
- f) Be supportive of the speakers. Nod in reassurance (this will ensure he/she directs their attention towards you).
- g) After the meeting always shake hands with all issuing authority personnel, whatever their status.

Seek Clarification

If you cannot satisfy all the qualifications stated, request to be allowed to supply alternative supporting information which can give the same assurances.

Clarify whether variants will be accepted. Ask if you may supply more than one proposal if you intend offering a variant as well as a standard bid.

Discuss responses with your "think-tank".

Confirm all verbal communications in writing.

If the invitation states that your tender is restricted to a set number of words, ask if any supporting information may be sent in addition to your tender.

Decide not to Tender

If, after being invited to tender, you decline the offer, ensure you forward a full and detailed explanation with your apology (similar to Example Letter A).

Decide to Tender

Do not return documentation until you have repeatedly checked that the information supplied is correct and all supporting documentation is enclosed.

(A high percentage of all tender documents received by public authorities are found to be either incomplete or seriously and obviously flawed.) A little extra time spent in reassessing your tender is time well spent.

Get others to check before submission.

Record return of tender documentation and remember to retain a copy.

Update your tender report.

Local Government figures show that just by completing the tender process you effectively increase your chances of success by 300%.

Unsuccessful

Write to the issuing authority expressing your regret and requesting full details pertaining to your rejection (see Example Letter C). Seek a post-tender meeting.

Compile a final report detailing your considerations and all known information regarding the successful tenderer.

Keep contract completion date on file for retrieval when the contract is due to expire, in order that you have full information available to you when it becomes time for renewal.

Maintain your links with the authority throughout the term of the contract. Keep the issuing authority aware of your company, its products and developments. Monitor the successful contractor's performance and update your report when appropriate.

Cause for Complaint

If you feel you may have cause for complaint, in the first instance direct your complaint politely to the issuing authority. Do not be abrasive in the tone of your letter (Example Letter D). All your correspondence with public authorities should be professional, polite and precise. Your letter expressing concern should be compiled in the same tone as Example Letter C.

Allow time for the issuing authority's response. If satisfaction is not received, advise them that you intend to raise the matter with the relevant Government body.

The sample letters displayed are only a guide. They should be adapted as required for each situation. Your company's letter must be expressed in a professional, articulate manner which promotes this image to the recipient.

To Summarise:

Never withdraw from any stage of the tender process without explanation.

Always remember your competitors are being faced with the same documentation as you.

Always compile a written record.

Maintain links with the client for future opportunities.

Use legislation to improve your performance.

Identify the client's principal requirement.

FINALLY, GOOD LUCK.

"Champions keep playing
until they get it right"

– Billy Jean King.

LETTER A

1 June

Mr A N Other
Any Local Authority
High Street, Anywhere

Dear Mr Other,

RE: ANY CONTRACT.

Thank you for promptly providing full information on the above proposed contract. Having carefully considered the detailed requirements, we feel that on this occasion we must decline your invitation to tender.

Regrettably the timetable proposed conflicts with contracts we are currently undertaking. We feel it incumbent upon our company to maintain the high quality of service offered to our clients. To accept your invitation at this time may risk diluting this standard, which our clients have grown to accept and appreciate.

Obviously we are disappointed that we are unable to submit our proposal for the servicing of your stated requirements, but we are sure you will understand that, in not doing so, we not only have our current clients' best interests at heart, but also those of your authority. It is the policy of this company never to pursue interest in any contract to which it is unable to give total commitment.

I appreciate your invitation to tender and look forward to being invited to do so again in the future, when hopefully my company will be able to display the quality of its expertise.

Yours sincerely,
Eddie Regan.

LETTER B

1 June

Mr A N Other
Any Local Authority
High Street, Anywhere

Dear Mr Other,

RE: ANY CONTRACT.

Thank you for promptly providing full information on the above proposed contract. Having carefully considered the detailed requirements we feel on this occasion we may be required to decline your invitation to tender.

Regrettably the does not allow us to present our optimum tender, in that we feel it restricts our ability to offer you the best service/product at the best price.

Our concern is primarily pursuant to

I believe we can offer an alternative which will result in improved performance and allow us to offer our optimum tender. May I ask that we be permitted to discuss this alternative at a pre-tender meeting or submit it as a variant? I am sure our proposal will result in improving the service offered and possibly result in additional financial savings.

If we are unable to present such a variant and accordingly decline to tender, may I still express my company's willingness to enter into later negotiations, should you consider no other tender has satisfied your requirements.

Finally, I trust that following your consideration we will be able to respond positively to your invitation. Otherwise, I hope we may look forward to being invited to tender for future requirements when it may be possible for my company to display the quality of its expertise to your authority.

Yours sincerely,
Eddie Regan.

LETTER C

1 June

Mr A N Other
Any Local Authority
High Street, Anywhere

Dear Mr Other,

RE: ANY CONTRACT.

I am very sorry to note from your letter of that we have been unsuccessful with regards to our tender application for the above contract.

We have great pride in our company's ability to be competitive and in the quality of the products/services we provide.

You will appreciate that it is of paramount importance to us that we examine in detail the reasons for this rejection as soon as possible; thus ensuring that we may continue to offer a service of excellence to our customers.

By addressing the reasons for the loss of this contract we will hopefully prove more successful in future negotiations, to the benefit of both our organisations.

Accordingly, following receipt of your reply, I would welcome the opportunity to discuss the matter with you in detail, obviously at a time suitable to yourself.

In the meantime, I thank you for your assistance and look forward to our meeting in the near future. I will contact your office to make a mutually acceptable appointment.

Yours sincerely,
Eddie Regan.

LETTER D

1 June

Mr A N Other
Any Local Authority
High Street, Anywhere

Dear Mr Other,

TENDER NUMBER:

Further to your letter regarding the above, please inform me by return as to the reason for the rejection of my tender application. I am aware that you are required to do so under both EC and GATT regulations.

Your early reply is awaited.

Yours sincerely,
Eddie Regan.

DO NOT SEND
AS THIS IS BAD PRACTICE

The Remedies Directive

The substantive procurement rules are backed up by two directives specifically dealing with remedies (collectively "the Remedies Directives"), which are as follows:

i Council Directive 89/665/EEC of 21st December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts .

ii Council Directive 92/13/EEC of 25th February 1992 coordinating the laws, regulations and administrative provisions relating to the application of community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors .

Directive 89/665 applies in relation to public procurement covered by the Supplies Directive, Works Directive and Services Directive. Remedies Directive 92/13, on the other hand, applies to procurement by utilities under the Utilities Directive.

The Remedies Directives have required each Member State to ensure effective remedies and means of enforcement are made available to suppliers, contractors and service providers who believe that they have been harmed by an infringement of the substantive procurement rules. This has usually been achieved through the enactment of legislation at national level, incorporating into national law the rights and remedies of complainants under the procurement rules. The provisions in each Member State are considered further in Chapters 2 to 16 of this guide.

Remedies Available in

National Courts and Tribunals

Interim measures

The Remedies Directives require Member States to ensure that interim measures are available. In particular, complainants must have the possibility of obtaining an interim suspension order which suspends the contested award procedure in question. The rapid availability of such interim orders is critical because, in almost all Member States, an award decision cannot be set aside once the resulting contract has been entered into. Hence, without interim orders, the complainant would be powerless to stop the relevant contract being entered into, leaving damages as his only possible remedy.

In general, interim suspension orders may not be granted after the contract in question has been entered into. It is therefore essential for complainants to seek such orders without delay as soon as they become aware of the alleged infringement of the procurement rules.

In order to obtain an interim order, the complainant may first have to establish that he has at least a prima facie arguable case. More importantly, the courts in most Member States apply some form of "balance of interests" test. Thus, the complainant may have to show that he is likely to suffer serious and possibly irreparable harm if the interim order is not granted. Furthermore, that harm must outweigh the inconvenience which the interim order would cause both to the awarding authority and to the public interest at large. The complainant might also have to show that the harm which he is likely to suffer, if the interim order is not granted, could not be adequately compensated through financial damages.

Set aside and amendment orders

The Remedies Directives also stipulate that national courts or tribunals must be given the power to lay down set aside orders and orders for the amendment of documents. As for interim measures, Member States are entitled to stipulate that set aside and amendment orders can only be requested prior to the date on which the contract in question is entered into. In deciding whether or not to grant such orders, national courts and tribunals generally apply a balance of interests test similar to the one which governs the grant of interim orders.

Damages

The Remedies Directives require the remedy of damages to be available to a complainant, regardless of whether or not the contract in question has been entered into. In all Member States, damages may only be granted in the ordinary civil courts, even though the complainant typically has to apply to an administrative court or tribunal in order to obtain interim or set aside orders. The Remedies Directives do not expand upon the principles governing the availability and measure of damages. Nevertheless, these matters are subject to the general principle that there must be effective remedies for breaches of Community law. This wider principle was underlined by the European Court of Justice in the Joined Cases C-46/93, *Brasserie de Pêcheur* and C-48/93, *Factortame*. In its judgment of 5th March 1996, the Court stated that:

"Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damages sustained so as to ensure the effective protection for their rights". Subject to this general principle, damages largely remain to be determined by national law and practice.

Typically, a complainant seeking damages must prove that:

i the awarding authority has committed an infringement of the procurement rules; ii the complainant has suffered some harm or loss; and iii there is a direct causal link between the said breach and the damage suffered.

In some Member States, the complainant is not obliged to prove the fact of the breach if it brings a claim for damages in the civil courts after the contested decision in question has already been declared unlawful and set aside by an administrative court or tribunal.

In most Member States, it appears that an aggrieved tenderer should in principle be entitled to recover (all or in part) one or both of the following:

i the costs he incurred in preparing his tender and participating in the award procedure ("bid costs");
ii loss of the profit he would have derived if awarded the contract.

One recurring issue is whether, in order to recover damages, (or at least loss of profit) a complainant needs to prove that, in the absence of the alleged breach, he would have been awarded the contract in question. Alternatively, is it sufficient for the plaintiff to establish only that he had a real chance of winning the contract?

Remedies Directive 89/665 is silent on this question, whereas Directive 92/13 provides some clarification as regards the recovery of bid costs as against utilities. Directive 92/13 provides that where an aggrieved tenderer establishes that an infringement deprived him of a "real chance" of winning the contract, he is entitled (at least) to damages covering his bid costs. General principles and relevant case law in a significant number of Member States suggest that this "real chance" test would apply more generally to any claim for damages under either Remedies Directive.

Dissuasive penalty payments

Under Article 2(1) of Remedies Directive 92/13, applicable to utilities, Member States were given the option of introducing an alternative remedy to the usual combination of interim measures and set aside orders which must be made available, at least prior to the conclusion of the contract. Instead of those two remedies, Member States could legislate for the availability of dissuasive penalty payments where an infringement is not corrected or prevented. The option of dissuasive penalty payments has only been taken up by 3 Member States: France, Denmark (as regards offshore oil and gas utilities only) and Luxembourg.

(Further details will be published in Guidance No 25.)

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