

Expert public procurement consultancy for Buyers and Suppliers at your service



PASS CONSULTANCY

BiP's *Procurement Advice and Support Service (PASS)* provides organisations with access to experts in public procurement practices and procedures, thus helping you develop and deliver effective and efficient procurement. Our team offers a range of services to meet your specific needs. Whichever area you wish evaluated and improved, we have the experts to help.

The *PASS* consultancy's mission is to help you deliver the best in government procurement through:

- Practical solutions to improve procurement performance
- Innovative approaches to knowledge transfer within government
- Joined-up government
- Improved performance indicators
- Strategic direction and performance
- Opportunities offered by e-government
- Capacity to deliver change to meet identified needs
- Continuous improvement of services and challenging poor performance
- Sustainable development within decision-making processes and delivery of services
- EU-compliant processes
- Best practice procurement training

PASS HEALTH CHECK

The *PASS* service can help your organisation examine its current procurement organisational structures, strategies, processes, practices and related strengths and weaknesses. It delivers a detailed *PASS Mark Health Check Outcome Highlight Report (OHR)* that outlines areas of strength as well as those requiring further attention, and provides an outline *Project Initiation Document (PID)* designed to deliver a more effective and efficient tendering process that will help you achieve optimum performance and better value-for-money procurement.

PASS – HELPING YOU MEET KEY OBJECTIVES

The key objective of public procurement professionals is to ensure that the most suitable supplier is selected to provide goods and services on terms which are likely to offer the best value for money. The *PASS* service helps you meet this requirement and deliver contracts that offer best value-for-money terms with suppliers who will execute them efficiently.

PASS TRAINING

Our consultants can provide you with bespoke training packages to suit your needs. Consultancy and training is available for the following: environmental purchasing, partnering, evaluation, e-government, supplier debriefing, UK legal processes and precedents, contract management, EU-compliant tendering and much more.

PASS ONLINE GUIDANCE

The *PASS* service provides online guidances on all aspects of the public procurement process and legal requirements: www.bipsolutions.com/html/briefing.php

PASS – CAPS SERVICE

Introducing *CAPS* – the public sector's guardian through the EU public procurement process, helping you to quickly access in-depth, authoritative EU public procurement procedure assistance. We are now pleased to offer your organisation access to this vast knowledge base as and when required, through subscription to BiP's new *Contract Administration & Process Support (CAPS)* helpline service. The *CAPS* service level agreement aims to answer 99% of your enquiries within one working day and 85% of these within one working hour.

PASS IN-HOUSE PRESENTATIONS

PASS consultancy can provide you with in-house presentations directed to buyer or supplier. Each presentation will be bespoke to your requirements, whether they be with regards to improving your tendering practices or your procurement strategy or processes. Contact: pass@bipsolutions.com

MANDATORY STANDSTILL PERIODS

In its 'Alcatel' judgment (Case C-81/98), the European Court of Justice (ECJ) stipulated that Member States were required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be rectified.

This should allow an aggrieved tenderer to have a contracting authority's decision suspended by way of interim measures and set aside, notwithstanding the possibility once the contract has been concluded of obtaining an award of damages.

This guidance explains the background to the judgment and the outcome of the negotiations between the UK and the European Commission relating to the length and scope of the mandatory standstill period, the new requirements relating to the process of notifying the award decision and the new debriefing requirements during the standstill period.

BACKGROUND TO THE JUDGMENT

On 4 July 2002, the European Ombudsman informed the European Commission that he had decided to open an inquiry into the remedies available to unsuccessful bidders in tender procedures organised by the Commission.

The Commission sent its reply on 7 November 2002. On 10 December 2002, the Ombudsman asked the Commission to provide further information by 31 March 2003. After sending holding replies on 1 and 14 April 2003, the Commission finally sent the further information on 3 July 2003.

The reason for the inquiry was that, in the course of dealing with a complaint made by an unsuccessful bidder in a tender procedure organised by the Commission, the Ombudsman became concerned that the remedies available to such persons might not be adequate.

The Ombudsman was concerned that a possible failure by the Commission to provide bidders in its tender procedures with access to a review procedure of the kind foreseen in the Alcatel judgment could be an instance of maladministration. The Ombudsman therefore asked the Commission to inform him whether a review procedure exists and, if not, whether the Commission is prepared to introduce such a procedure rapidly.

THE COMMISSION'S OPINION IN SUMMARY

In the light of the Alcatel judgment the European Commission agreed that, prior to contract signature, authorising officers will have to inform without delay all bidders or candidates of the award decision in the public procurement procedures covered by Article 56 of the current Financial Regulation and by Article 105 of the new Financial Regulation, and that they should provide for a reasonable delay before contract signature in order to enable bidders and candidates to request the reasons for the award decision and, if deemed appropriate, file a judicial recourse against such a decision.

The Commission stated it will pay particular attention to the practical and organisational aspects of this procedure, in order to ensure a timely management of its activities, taking account of the high number of the Commission's public purchases every year (several hundreds) and the



duration of the public procurement procedures. In the light of this, the Commission agreed to work out practical arrangements so that the procedure could be in place from the beginning of 2003 and taken into account in the planning of the new public procurement procedures to be launched by then.

The Ombudsman welcomed the Commission's positive response to the own-initiative inquiry and requested that the Commission provide details of the practical arrangements and procedure mentioned in its opinion.

The Ombudsman also invited the Commission to indicate whether it had any plans to provide a non-judicial remedy that tenderers could use, if they so wish, as an alternative to judicial recourse.

In response, after sending holding replies on 1 and 14 April 2003, the Commission sent a reply on 3 July 2003 stating it had adopted a Communication setting up a procedure to inform all bidders or candidates of the award decision in the public procurement procedures covered by Article 105 of the new Financial Regulation. This Communication provides for a reasonable delay before contract signature in order to enable tenderers to request the detailed grounds for the award decision and, where necessary, seek a judicial remedy against such decision. (The Commission enclosed a copy of the Communication with its opinion.)

The Commission stated it did not consider it necessary to provide a non-judicial remedy to tenderers, for the following reasons:

- The procedure laid down in the Communication allows tenderers to seek an effective judicial remedy against the contracting authority's award decision.
- In view of the low number of complaints presently lodged before the Court, the necessity of providing for a non-judicial remedy did not appear to be justified.
- The human and material resources needed for executing the non-judicial remedies tasks, which may in future have an inter-institutional dimension, were not available.

THE COMMISSION'S NOTIFICATION PROCESS

The Commission agreed that, in the light of the Alcatel judgment, it should provide for a reasonable delay before contract signature in order to enable bidders and candidates to request the reasons for the award decision and possibly challenge the decision judicially.

The following are the main elements of the Commission's procedure:

- 1 As soon as possible after the award decision and within the following week at the latest, the contracting authority notifies all unsuccessful tenderers or candidates simultaneously, by mail and fax or email, that their bid or application has not been accepted.
- 2 Each tenderer or candidate is notified individually and the reasons why the bid or application has not been accepted are specified in each case; for instance by taking up, in a concise but explicit form, details contained in the award decision.
- 3 The contracting authority also informs the unsuccessful tenderers or candidates that it will not sign the contract with the successful tenderer until two calendar weeks have elapsed from the day after the simultaneous dispatch of the notification messages. It will also be stated that additional information about the reasons for rejection of the bid or application can be obtained in response to a request sent in writing, by mail, fax or email. For all tenderers who have put in an admissible bid, this information could include the characteristics and relative advantages of the bid accepted and the name of the successful tenderer.
- 4 If the contract cannot be concluded with the successful tenderer or if the successful tenderer were to pull out, the contracting authority may review the award decision and could then award the contract to another tenderer; close the procedure or decide not to award the contract.
- 5 The contracting authority also informs the successful tenderer of the notification sent to the unsuccessful candidates or tenderers and that the contract cannot be signed until two calendar weeks have elapsed from the day after the date of dispatch of the notification.

It will also be pointed out that the contracting authority may:

- until the contract has been signed, either abandon the procurement or cancel the award procedure, without the candidates or tenderers being entitled to claim any compensation;
- suspend signing of the contract for additional examination, if justified by requests or comments made by unsuccessful tenderers during the two calendar weeks mentioned above, or by any other relevant information received during that period.

THE OMBUDSMAN'S OPINION

The Ombudsman takes the view that the procedure described appears to provide unsuccessful tenderers and candidates with the opportunity to bring judicial proceedings to challenge an award decision and to have that decision set aside before the relevant contract



is signed. The Ombudsman therefore considers that the Commission has taken steps to provide bidders in its tender procedures with access to a review procedure of the kind foreseen in the Alcatel judgment and so finds no maladministration by the Commission.

JUDICIAL PROCEEDINGS

The Ombudsman noted that the Commission's process does not expressly provide that unsuccessful tenderers and candidates shall be informed of the possibility to bring judicial proceedings to challenge an award decision and to have that decision set aside before the relevant contract is signed. The Ombudsman pointed out that, according to the Commission's Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public, decisions should, where appropriate, refer to the possibility of starting judicial proceedings in accordance with Article 230 EC. The Ombudsman considers that it would be in conformity with the principles of good administration to provide such information to unsuccessful tenderers and candidates.

UK ACTIONS

According to the Scottish Executive Procurement Policy Note *Mandatory standstill period before contract award*, negotiations between the UK Government and the European Commission on the detail of the mandatory standstill period required in order to comply with the ECJ's Alcatel judgment are now complete.

TIMING

A small number of legal challenges have already been brought against UK contracting authorities where a standstill period was not applied. Following agreement on the resolution to the proceedings brought against the UK by the Commission, contracting authorities should introduce the mandatory standstill period with immediate effect, ahead of its formal introduction into UK law.

MANDATORY STANDSTILL PERIOD

For all public sector and utilities procurements covered by the full regime of the EU Procurement Directives, the mandatory standstill period means that a period of not less than ten calendar days must elapse between the written communication of the award decision to all tenderers and contract commencement. The mandatory standstill period does not apply to below-threshold procurements, to procurements otherwise outside the full scope of the Directives (eg Part B services) or to procurements where there is only one tenderer, including those following the urgency provision under the negotiated procedure where single tendering takes place. The mandatory standstill period begins the day after the award decision is notified to all tenderers in writing by either fax or email. If the standstill period ends on a non-working day, it must be extended to the next working day. Although the minimum standstill period is ten calendar days, in many cases it may be necessary for the period to exceed this minimum duration in recognition of the implications of the obligations on contracting authorities.

CONTRACT AWARD NOTIFICATION

The notification to unsuccessful bidders of the contracting authority's award decision must contain:

- the contract award criteria;
- where appropriate, the score the tenderer obtained against those award criteria;
- where appropriate, the score the winning tenderer obtained; and
- the name of the winning tenderer.

DEBRIEFING DURING THE MANDATORY STANDSTILL PERIOD

Perhaps of greatest significance in terms of practical effect, is the obligation on the contracting authority to provide additional debriefing within the mandatory standstill period if an unsuccessful tenderer requests it by the end of the second working day following the commencement of the standstill period. Contracting authorities must allow for a minimum of three working days between providing the additional debriefing and the end of the standstill period.

In accordance with existing legislation, the additional debrief shall inform the tenderer of the reasons why he was unsuccessful and, if the tenderer submitted an admissible tender, shall inform him of the characteristics and relative advantages of the successful tender.

Where a request for additional debriefing is received within the standstill period but after the two working days deadline, contracting authorities are not bound to provide further debriefing within the standstill period but still need to provide it within 15 days of receiving a written request, as per existing legal obligations.

The obligation to provide additional debriefing within the mandatory standstill period has the potential to impact upon the precise duration of the standstill period. Scenarios can be envisaged where for a variety of reasons (not all within the control of the contracting authority) it will not be possible to provide additional debriefing and allow for the elapse of three working days within the minimum mandatory standstill period of ten calendar days.

Therefore, to avoid as much uncertainty as possible about the contract commencement date, contracting authorities may wish to consider adopting either of the following practices:

- 1 Ensure that the standstill period is calculated to make allowance for a reasonable period of time being set aside to conduct additional debriefing. In almost all cases, this will mean that it is likely to be in excess of the minimum ten calendar days.
- 2 Provide the additional debrief information to all unsuccessful tenderers at the time of contract award decision notification. This would obviously mean that the debrief would have to be in writing as opposed to the face-to-face debriefs that many contracting authorities may provide at present. Whilst it has the potential for generating nugatory work (in the sense of providing all unsuccessful tenderers with additional debriefing irrespective of whether they would have asked for it if not automatically provided), it means that contracting authorities need not be concerned about the prospect of the contract commencement date having to slip as a consequence of being asked to provide additional debrief information and not being able to do so at least three working days prior to the end of the mandatory standstill period.

Please note that the UK Regulations require a supplier to inform the contracting authority before approaching the court seeking any legal remedies, explaining the basis for its application to the court. Therefore the contracting authority should be aware of any legal challenge prior to the end of the mandatory standstill period.

TIMELINE

The timelines given below are the minimum (of at least ten days) under the Alcatel mandatory standstill period and show the days by which specific actions by

- the tenderer (ie a request for additional debriefing within the standstill period), and
- the contracting authority (ie notification to all tenderers of the award decision and the completion of any requested additional debriefing)




must be taken in order to comply with the minimum period before entering into a contract (assuming no legal challenges are made in Court).

NOTES

Depending on the day of the initial notification of the intention of the contract award decision, given the very tight timescales for the additional debriefing, it may be more practical to extend the end-date of the standstill period beyond the minimum of ten calendar days.

The 'traditional' debriefing requirement (within 15 days of receiving a written request) remains where a tenderer does not seek an additional debriefing within the first two working days of the standstill period. In any case, all tenderers can make formal complaints in court within the standstill period regardless of having requested or received debriefing within the standstill period and courts can agree to grant interim measures preventing contract award.

A standstill period may run as follows:

-  Two working days during which the tenderer must request additional debriefing to receive it within the standstill period. Requests may be by phone, email, fax or in writing.
-  Days available to contracting authority for additional debriefing, where requested.
-  Three working days required between additional debriefing and the end of the standstill period where debriefing was requested within the two working days above.

		Timeline beginning Monday
		Action
Monday	Day 0	Notify tenderers of decision and intention to award contract on or after 'date'
Tuesday	Day 1	
Wednesday	Day 2	Tenderers must request additional debriefing (by phone, email, fax) before end of day
Thursday	Day 3	
Friday	Day 4	
Saturday	Day 5	
Sunday	Day 6	
Monday	Day 7	Additional debriefings must be completed before end of day*
Tuesday	Day 8	
Wednesday	Day 9	
Thursday	Day 10	End of standstill period**
Friday		The contract may be concluded if no legal challenge

* If there is a delay in completing the requested additional debriefings, the end-date of the standstill period must be extended to ensure three full working days between the last debrief and the end of the standstill period, remembering that the last day must be a working day.

** The standstill period must not fall on a public holiday or a weekend.

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