

EU PROCUREMENT RULES ON NON-DISCRIMINATION IN TECHNICAL SPECIFICATIONS

Purpose

To draw attention to the rules regarding non-discrimination that contracting authorities must adhere to when drafting technical specifications for contract documents. Contracting authorities failing to comply risk incurring domestic legal proceeding and/or EU infraction proceedings.

Background

There have been a number of recent EU infraction cases brought against contracting authorities who have placed adverts or issued ITT documents that make reference to a specific product and/or manufacturer, and/or have specified their requirements in a way that would discriminate against particular suppliers.

Technical Specifications

Contracting authorities are required by current (and forthcoming) procurement legislation to specify requirements in generic technical or performance terms. Contracting authorities must not draft technical specifications which refer to materials or goods of a specific make or source or to a particular process or trademark, patent, type, origin or means of production which has the effect of favouring or eliminating particular suppliers. There is an exception to this obligation where the subject of the contract makes the use of such references indispensable or the subject of the contract cannot otherwise be described by reference to technical specifications which are sufficiently precise and intelligible to all suppliers. However, where this exception applies, any such references in the technical specification must be accompanied by the words “or equivalent”.

Technical Standards

Where technical standards are referred to in the specification, contracting authorities must refer to national standards implementing European standards or other European specifications. If these do not exist, reference can be made to national standards, national technical approvals or national technical specifications and must be accompanied by the words “or equivalent”.

Tenders that do not conform to the standard specified in the technical specification must still be examined to establish whether they satisfy the contracting authority’s requirements in an equivalent manner. They cannot be rejected solely on the grounds that they are not based on

a specified standard or technology. The onus is on tenderers to prove equivalence to the satisfaction of the contracting authority by any appropriate means.

It is possible to include references in specifications to national standards or mandatory technical rules which go beyond the relevant EU standards, provided these are non-discriminatory, without prejudice to relevant European standards or specifications and otherwise compatible with EU community law.

IT-specific technical specifications

In investigating the infraction cases mentioned above, the European Commission has stated that contracting authorities must use common specifications, for example using the generic term “x86 processor”, when specify microprocessors for desktops, laptops, servers or workstations. The requirements for microprocessors must exclude any references to brands (e.g. Intel, AMD), manufacturer-specific processor architectures, trademarks, technology-types or other potentially discriminatory descriptors. Additionally, IT hardware specifications should exclude any reference to minimum processor clock-speeds, since this points to particular products and because performance of a microprocessor should take into account both clock-speed (MHz) and the number of executable instructions per clock (IPC). Likewise specifying, for example, a minimum Front Side Bus speed in MHz or a minimum cache memory in MB is prohibited as such specifications do not relate directly to performance.

Contracting authorities may refer to a minimum score on an independent benchmark test measuring microprocessor performance as one way of specifying performance in a non-discriminatory manner (typically, for a procurement of desktop PCs in an office environment, contracting authorities would use an application-based benchmark test). Contracting authorities should, however, ensure non-discriminatory scores are set on these tests.

Dissemination

Please bring this SPPN to the attention of all relevant staff, including those in Agencies, Non-Departmental Public Bodies and other sponsored public bodies within your field of responsibility.

Contact

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